

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F404774

ABNER ABO, EMPLOYEE	CLAIMANT
KAWNEER COMPANY, EMPLOYER	RESPONDENT
SPECIALTY RISK SERVICES, CARRIER	RESPONDENT

OPINION FILED NOVEMBER 15, 2005

Upon review before the FULL COMMISSION, Little Rock, Pulaski County, Arkansas.

Claimant appears *pro se*.

Respondent represented by HONORABLE MICHAEL E. RYBURN, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed as modified.

OPINION AND ORDER

The claimant appeals a decision of the Administrative Law Judge filed on March 14, 2005, dismissing this claim with prejudice. Based upon our de novo review of the record, the Administrative Law Judge's decision should be modified to reflect a dismissal without prejudice and an award of costs in an amount equal to their expenses in appearing at the aborted hearing should be awarded to the respondent.

The claimant failed to appear at the March 2, 2005 hearing and, upon a motion by the respondent, the Administrative Law Judge dismissed the claim with prejudice.

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The claimant has never articulated a clear reason for not appearing at the hearing other than the statement in his Notice of Appeal which was that he was "scared, confused, and frustrated." Obviously, the claimant has not provided an adequate reason for not appearing at this hearing. We find that while the Administrative Law Judge's decision to dismiss the claim is appropriate, he should not have dismissed it with prejudice. In numerous past decisions, this Commission and the Appellate Courts have expressed a preference for dismissals without prejudice. Hutchinson v. North Arkansas Foundry, Full Commission Opinion, Filed October 23, 1991 (Claim No. D902143); Professional Adjustment Bureau v. Strong, 75 Ark. 249, 629 S.W. 2d 284 (1982).

We also note that in at least two prior opinions, this Commission has specifically held that a failure to appear at a hearing, providing there is no past history of such failures, is not a basis for dismissing a claim with prejudice. In Bice v. Braumley Auto Parts, Full Commission Opinion, Filed August 7, 1997 (Claim No. E60073), the claimant and his attorney failed to appear for a scheduled hearing. As is the case here, neither the claimant nor his

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attorney, who had been previously advised of the hearing time and date, provided an adequate reason for not appearing at the hearing and did not follow the correct procedures in requesting a continuance. The Commission held that a dismissal with prejudice was not warranted and modified the Judge's decision and altered the dismissal to one without prejudice.

In Paskell v. S & C Operating, Full Commission Opinion, Filed July 28, 1999 (Claim No. E702685), a Pro Se claimant failed to appear at a hearing prompting a dismissal with prejudice. The claimant appealed the denial and stated that he did not appear at the hearing because he was unable to arrange transportation to El Dorado. The Commission, in noting that this was not an adequate excuse to miss the hearing, once again cited numerous cases indicating a preference for dismissals without prejudice and, after commenting that there was no past history of an appearance problem in this case, held that a dismissal with prejudice was unwarranted and modified the Judge's decision so that the dismissal was without prejudice. Accordingly, we find in this instance the claim should be dismissed without prejudice.

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We also note that the respondent has requested an Order of Costs. We agree that the respondent should be awarded costs in an amount equal to their expenses in appearing at the aborted hearing.

After consideration of the claimant's brief on appeal, the respondent's response thereto and all other matters properly before the Commission, we find that the claim should be dismissed without prejudice and the respondent should be awarded the costs in an amount equal to their expenses for appearing at the aborted hearing. Therefore, we affirm the Administrative Law Judge's decision as modified.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

SHELBY W. TURNER, Commissioner

KAREN H. MCKINNEY, Commissioner