

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F110789

BOBBY LAMB, EMPLOYEE	CLAIMANT
DOLLARWAY SCHOOL DISTRICT, EMPLOYER	RESPONDENT
RISK MANAGEMENT RESOURCES, CARRIER	RESPONDENT

OPINION FILED NOVEMBER 1, 2007

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

Claimant is not represented by counsel, but appears *pro se*.

Respondent represented by HONORABLE CAROL L. WORLEY, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

The claimant appeals from a decision of the Administrative Law Judge filed February 23, 2007.

The Administrative Law Judge entered the following findings of fact and conclusions of law:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The claimant has not requested a hearing within the last six months pursuant to Ark. Code Ann. §11-9-702.

We have carefully conducted a de novo review of the entire record herein and it is our opinion that the Administrative Law Judge's decision is supported by a preponderance of the credible evidence, correctly applies the law, and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings of fact made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

Thus, we affirm and adopt the decision of the Administrative Law Judge, including all findings and conclusions therein, as the decision of the Full Commission on appeal.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

DISSENTING OPINION

This matter is currently before the Commission to consider a motion to dismiss filed by the respondent. The motion, which was filed on November 14, 2006, alleges that a claim concerning an injury which occurred on September 5, 2001, should be dismissed pursuant to Rule 13 of the Commission Rules because more than six months had passed since the claim was filed and the claimant had not sought a hearing. Because the claimant objected to the dismissal, a hearing was held on February 16, 2007. The Majority, by affirming the Administrative Law Judge's opinion, found that the motion should be granted and that the claim was dismissed with prejudice for failure to prosecute pursuant to Ark. Code Ann. §11-9-702(a)(4).

In my opinion, the Majority committed procedural error in not only dismissing the claim, but doing so with prejudice. Therefore, I must respectfully dissent from the Majority's decision

The motion to dismiss should have been denied because there is no claim to dismiss. The claim which the respondent is referring to in their motion was, according to Commission records, filed on November 19, 2001. That claim resulted in litigation which was concluded by an Opinion from the Full Commission dated March 14, 2006. That decision reversed an award of benefits by an Administrative Law Judge and denied the claim. The claimant has not filed any other claims in regard to his injury of September 5, 2001, the date of injury specifically referenced in the respondent's motion. In fact, I am somewhat confused about what the respondent is trying to accomplish with this motion. Interestingly enough, the claimant filed another claim in regard to an injury which allegedly occurred on January 19, 2001. However, that claim was dismissed by a different Administrative Law Judge in an Order dated October 3, 2006. I simply do not see any other claim which could be the subject for a motion to dismiss.

Had the claimant filed another claim, following the Commission's decision of March 14, 2006, and had not

made any attempt to litigate that claim, then a motion to dismiss might be appropriate. However, that is not the case. The respondent is apparently asking this Commission to dismiss a claim which has already been dismissed.

The only purpose I can see that the respondent could have in filing the motion to dismiss is to attempt to foreclose the claimant from filing a future claim for additional benefits. In this regard, I note that the February 16, 2007 hearing consisted mainly of the claimant outlining his present physical problem and suggesting that they were the result of a hitherto unknown back injury which he sustained in the fall of September 5, 2001. In response, the respondents's counsel suggests that the statute of limitations might be a defense to any such claim, and further asserts that an independent intervening cause might account for the claimant's back condition. However, a discussion about the claimant's possible entitlement to additional benefits and the respondent's defenses thereto are simply that: a discussion. Before a determination can be made on those issues, the claimant must file a claim with

the Commission so that a hearing can be held in which the respondent can assert those defenses, or any other they wish. After such a hearing, a decision on the merits of the claim can be reached. Any attempts to do so in the guise of a motion to dismiss is obviously premature and is improper procedure under either Rule 13 or Ark. Code Ann. §11-9-702.

I also note that the claim was dismissed "with prejudice." However, we have held on numerous occasions that procedural dismissals should be without prejudice. See **Abo v. Kawneer Company, Full Commission Opinion, November 15, 2005 (F404774)**. Even if there had been a claim to dismiss, I do not see any basis for dismissing it with prejudice. Regardless as to the merits of the respondent's asserted defenses, a dismissal with prejudice would only be warranted after a full hearing in regard to a claim formally filed by the claimant. I do not believe that it is appropriate procedure to attempt to conduct such a hearing based upon a motion to dismiss for lack of prosecution.

I believe that the Majority erred in affirming the Administrative Law Judge's decision, and the respondent's

motion to dismiss should be denied. If the claimant wishes to file a claim for any additional benefits he may do so and the respondent may, at that time, raise any defenses they deem appropriate. However, until such actions are taken, there are no claims to dismiss and no benefits to be awarded.

For the aforementioned reasons, I respectfully dissent.

PHILIP A. HOOD, Commissioner