

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NOS. F012139 & F301886

FREEDA EVANS, EMPLOYEE	CLAIMANT
BAXTER INTERNATIONAL, INC., EMPLOYER	RESPONDENT
AMERICAN MFG. MUTUAL INSURANCE CO., CARRIER	RESPONDENT

OPINION FILED JUNE 27, 2008

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

Claimant represented by HONORABLE FREDERICK SPENCER, Attorney at Law, Mountain Home, Arkansas.

Respondent represented by HONORABLE TOM HARPER, JR., Attorney at Law, Fort Smith, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

The claimant appeals from a decision of the Administrative Law Judge filed November 13, 2007.

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

1. The Arkansas Workers' Compensation Commission has jurisdiction over these claims.
2. The stipulations set forth above are reasonable and are hereby accepted.

3. The claims should be and are hereby dismissed without prejudice pursuant to AWCC R. 099.13 for want of prosecution.

4. Respondents did not present evidence or argument in support of their request for sanctions under Ark. Code Ann. §§ 11-9-714 and 11-9-717; hence, this is summarily denied.

5. The substantive issues litigated in the hearing are moot in light of the above finding and will not be addressed.

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.

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IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

DISSENTING OPINION

I must respectfully dissent from the majority opinion. The majority, by affirming and adopting the Administrative Law Judge, has dismissed claims F102139 & F301886 under AWCC Rule 099.13 for "want of prosecution." After a de novo review of the record, I find that these claims cannot properly be dismissed under AWCC Rule 099.13, and therefore, the majority has clearly erred.

AWCC Rule 099.13 states:

Upon meritorious application to the Commission from either party in an action pending before the Commission, requesting that the claim be dismissed for want of prosecution, the Commission

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may, upon reasonable notice to all parties, enter an order dismissing the claim for want of prosecution.

Here, there is simply no evidence indicating a "want of prosecution" on the part of the claimant. The Administrative Law Judge stated:

The evidence shows that Claimant has made three separate requests for a hearing on these claims. Twice, the files were returned to the Commission's general files. The first time, the 11-month period of inactivity led to the filing of the first motion to dismiss. Only Respondents' reluctance to appear at a hearing on their own motion kept it from being litigated in 2004. When the claims were to be heard on March 2, 2005, the parties appeared to be heading for a hearing on the merits. Claimant even procured subpoenas for her witnesses from the Commission. But another continuance was requested, and the file returned to general files once again. This time, some reports were filed on Claim No. F012139, which concerns the 1999 wrist injury, during the period that file was in general files. But by all accounts there is no issue in that claim; it was accepted and all benefits, including the impairment rating assigned by Dr. Heinzelmann, was paid. The hearing has always to have been only on Claim No. F301886, concerning the 2001 forklift accident. But that file languished again in

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general files from February 18, 2005 to October 9, 2006, when Claimant once again requested a hearing in response to a motion to dismiss.

The majority, by affirming and adopting the Administrative Law Judge apparently finds that a "lack of activity" equates to a "want of prosecution." I disagree. Here, the Administrative Law Judge stated:

Claimant's only explanation for the 19-month gap in activity on the file was only that his client could not afford to depose her physicians and that it took that long to procure letters regarding their opinions. But neither Claimant nor Respondents has offered any such letters into evidence. In fact, there is a 20-month-plus gap in the record in evidence; from Claimant's last visit at the Mountain Home Medical Group on December 1, 2004 until her operative report by Dr. Charles Varela on August 10, 2006. Claimant has never indicated that the reason for the delay in prosecution was caused by her surgery. Since the surgery did not occur until a little over a month prior to the filing of the most recent motion to dismiss, such an argument would not be persuasive anyway.

However, there is simply no requirement that a claimant's file have activity within any given six month

period, ten month, or any number of month period, or else the claim will be dismissed for "want of prosecution." File activity is simply not a requirement contained in the plain language of AWCC Rule 099.13. And despite the majority's apparent frustration over the time periods involved in this claim, the claimant requested a hearing, participated in the hearing process, and in fact, proceeded to a hearing on the merits. It simply cannot reasonably be said that the claimant failed to prosecute her claim.

Furthermore, I find that the effect of a dismissal without prejudice solely under AWCC Rule 099.13, without prejudice, has no practical effect other than creating delay. These claims are still viable. A dismissal under AWCC Rule 099.13, unlike a dismissal under Ark. Code Ann. §11-9-702, which contains specific provisions allowing for the "untolling" of the statute of limitations if six months passes between the filing of a claim and a bona-fide request for a hearing, does not "untoll" the statute of limitations. Here, as noted by the Administrative Law Judge, the evidence shows that claimant has made three separate requests for a

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hearing on these claims. These claims cannot properly be dismissed under Ark. Code Ann. §11-9-702, and were not properly dismissed under AWCC Rule 099.13

In conclusion, I find that the majority has erred. The preponderance of the evidence of record clearly shows that these claims cannot properly be dismissed under Ark. Code Ann. §11-9-702, and were not properly dismissed under AWCC Rule 099.13.

For the aforementioned reasons I must respectfully dissent.

PHILIP A. HOOD, Commissioner