BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F209049

RICHARD K. WHITE, EMPLOYEE	CLAIMANT
AMERICAN FUEL CELL & COATED FABRICS, EMPLOYER	RESPONDENT
ZENITH INSURANCE COMPANY, CARRIER	RESPONDENT

OPINION FILED APRIL 1, 2008

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 MATTHEW MAULDIN, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed.

OPINION AND ORDER

Claimant appeals a decision of the Administrative Law Judge filed on September 17, 2007, dismissing this claim with prejudice. Based upon our de novo review of the record, we find that the Administrative Law Judge's decision should be affirmed.

The Commission and the courts have expressed a preference for dismissals without prejudice, although the Commission has inherent authority to dismiss appropriate cases with prejudice. Johnson v. Triple T Foods, 55 Ark App. 83, 929 S.W.2d 730 (1996); Paskell v. S & C Operating, Full Commission Opinion filed July 28, 1999 (E702685); Huchinson v. North

Arkansas Foundry, Full Commission Opinion filed October 23, 1999 (D902143); Professional Adjustment Bureau v. Strong, 275 Ark. 249, 629 S.W.2d 284 (1982). This claim has been previously disposed of following a hearing on it merits in which the claimant failed to prevail by a preponderance of the evidence. An appeal of that decision was untimely filed with the Commission and ultimately dismissed, as was an appeal to the Arkansas Court of Appeals. The claimant requested a new hearing on his claim contending that the previous dismissal of his claim on the merits should be reversed. The Administrative Law Judge attempted to conduct no less than five prehearing conferences on this "new" claim. The claimant has refused to participate in discovery. He displayed a lack of concern over the possibility that this claim may be dismissed for his refusal to reschedule his deposition. Finally, despite the Administrative Law Judge's efforts to work with the parties and allow the claimant sufficient time to prepare his claim, the claimant has continuously prolonged this claim by seeking multiple delays. A telephone conference was held on July 11, 2007, confirming the July 12, 2007, hearing on the respondents' Motion to Dismiss. Respondents appeared for the July

12, 2007, hearing. The claimant did not. In an Order filed September 17, 2007, the Administrative Law Judge found that pursuant to Commission Rule 099.13 this claim should be dismissed for want of prosecution.

After consideration of claimant's appeal, we find that the decision of the Administrative Law Judge to dismiss this claim with prejudice was the appropriate remedy. Therefore, we affirm the Administrative Law Judge's Order of Dismissal with Prejudice.

IT IS SO ORDERED.

_____
OLAN W. REEVES, Chairman

_____
KAREN H. McKINNEY, Commissioner

Commissioner Hood dissents.

DISSENTING OPINION

I must respectfully dissent from the majority's opinion. Based on a de novo review of the record, I find that the harsh remedy of dismissal with prejudice is not warranted. While

the Commission does have the authority to dismiss a claim with prejudice without violating the claimant's due process right, Loosey v. Osmose Wood Preserving Co., 23 Ark. App. 137, 744 S.W.2d 402 (1988), the Commission has previously held that, with respect to dismissals under Commission Rule 13, it prefers dismissals without prejudice. See, Richard Bice v. Bromley Auto Parts, Full Commission Opinion filed August 7, 1997 (E600073); Terry Holman v. Form-All, Full Commission Opinion filed April 17, 1997 (E214277); Terri Francis v. EOA Washington County Headstart, Full Commission Opinion filed November 18, 1996 (E217992); Laura Hutcheson v. North Arkansas Poultry, Full Commission Opinion filed October 23, 1991 (D902143); and James Woods v. Arkansas Waste Disposal, Full Commission Opinion filed May 2, 1990 (D015483).

Furthermore, the Arkansas Supreme Court has also consistently indicated a preference for dismissal without prejudice. See, Professional Adjustment Bureau v. Strong, 275 Ark. 249, 629 S.W.2d 284 (1982); Cory v. Mark Twain Life Insurance Company, 286 Ark. 20, 688 S.W.2d 934 (1985).

The Administrative Law Judge cited Johnson v. Triple T

Foods, 55 Ark. App. 83, 929 S.W.2d 730 (1996) and Loosey v. Osmose Wood Preserving Co., 23 Ark. App. 137, 744 S.W.2d 402 (1988) as the basis for his determination that dismissal with prejudice is appropriate in the instant claim. However, both cases present very different fact situations. In Johnson, the court found that no justiciable issue was present, as the claimant's attorney specifically stated that the claimant was not seeking additional benefits, and in Loosey, the claimant was repeatedly warned by the Administrative Law Judge that failure to comply with discovery could result in sanctions. Here, the *pro se* claimant has specifically requested additional benefits, which have been controverted by the respondent. The evidence of record does not show that the Administrative Law Judge ever warned the claimant that failure to submit to a deposition might result in his claim being dismissed with prejudice, or, that the Administrative Law Judge ever warned the claimant that a dismissal with prejudice would prevent the claimant from re-filing his claim. The record shows that the claimant articulated legitimate reasons for the delays in the hearing process. The claimant was suffering from health problems and was seeking the

assistance of counsel. This claimant was not represented by counsel, and furthermore, unlike the claimant's in Johnson and Loosey, this claimant was not warned that his behaviors could result in sanctions.

In conclusion, I find that the evidence of record does not support the harsh remedy of dismissal with prejudice.

For the aforementioned reasons, I must respectfully dissent.

_____

PHILIP A. HOOD, Commissioner