

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F605888

LEO HOWELL, EMPLOYEE	CLAIMANT
CONTINENTAL EXPRESS, INC., EMPLOYER	RESPONDENT NO. 1
GIBRALTAR NATIONAL INSURANCE CO., CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2

OPINION FILED APRIL 20, 2009

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

Claimant represented by HONORABLE H. OSCAR HIRBY, Attorney at Law, Little Rock, Arkansas.

Respondent No. 1 represented by HONORABLE JARROD PARRISH, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by HONORABLE DAVID PAKE, 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 April 22, 2008.

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 failed to prosecute his claim.

3) The claimant failed to appear at the initial hearing pursuant to Rule 13.

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.

A. WATSON BELL, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

DISSENTING OPINION

After a de novo review of the record, I must respectfully dissent from the majority opinion. I find that dismissal of this claim is not warranted. The claimant's attorney failed to respond to the respondents' motion to dismiss for failure to prosecute and failed to appear at the hearing on the motion. The majority has dismissed this claim, without prejudice, pursuant to Ark. Code Ann. Sec. 11-9-702(a)(4) and AWCC Rule 99.13, finding that the claimant failed to prosecute his claim and failed to appear at the hearing.

Ark. Code Ann. Sec. 11-9-702(a)(4) states:

If within six (6) months after the filing of a claim for compensation, no bona fide request for a hearing has been made with respect to the claim, the claim may, upon motion and after hearing, be dismissed without prejudice to the refiling of the claim within limitations periods specified in subdivisions (a)(1)-(3) of this section.

The claimant made a bona fide request for a hearing on July 18, 2006, within two months of the injury even, satisfying this statute. Therefore, dismissal under this section is inappropriate.

The Commission's Rule 13 states, in part, that "[i]n the event neither party appears at the hearing, the case may be dismissed by the Commission or Administrative Law Judge." Since this paragraph requires that "neither party appears at the hearing," it does not apply to the current facts, and dismissal is inappropriate.

The Commission's Rule 13 also provides that the Commission may dismiss a claim for want of prosecution. I find that a three-month span between a request for continuance to gather medical records and a motion to dismiss, during which a hearing was not requested, does not constitute "want of prosecution." I also find that a dismissal without prejudice in this claim amounts to a dismissal with prejudice due to the statute of limitations' apparent expiration within weeks of the filing of the judge's order. To punish the claimant for the failings of his attorney, without the opportunity to re-file the claim, is unconscionable. Nothing in the record reflects communication with the claimant regarding the hearing on the motion to dismiss.

After reviewing the record, I would allow the claimant to proceed with his claim, and for the

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aforementioned reasons, I must respectfully dissent.

PHILIP A. HOOD, Commissioner