

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F401810

MITCHELL D. SAPP, EMPLOYEE	CLAIMANT
TYSON FOODS & DISTRIBUTION, INC., EMPLOYER	RESPONDENT
TYNET CORPORATION, TPA, CARRIER	RESPONDENT

ORDER FILED OCTOBER 21, 2009

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

Claimant represented by HONORABLE LAURA J. MCKINNON, Attorney at Law, Fayetteville, Arkansas.

Respondent represented by HONORABLE E. DIANE GRAHAM, Attorney at Law, Fort Smith, Arkansas.

ORDER

This claim is presently before the Commission on claimant's Motion for Rehearing and Clarification for Appeal. After consideration of claimant's motion, respondents' response thereto, and all other matters properly before the Commission, we find that claimant's motion must be, and hereby is, denied.

The Full Commission issued and opinion on September 14, 2009, affirming and adopting the March 19, 2009, decision of Administrative Law Judge dismissing the claim. At the hearing on respondents' Motion to Dismiss held on March 11, 2009, claimant was represented by counsel. On page 5 of the hearing transcript, the following exchange

occurred:

JUDGE FINE: Let me ask you, you bring up the point of you may not be familiar with everything that has gone on in the case, because you haven't been the attorney of record the entire time. My practice on motions to dismiss - - just so I can explain for the Commission, in the event that this case goes to the full Commission, what has happened in the case, my practice is to blueback all the pertinent documents from the file that sketches out the legal history of the claim, from the filing of the AR-C or whatever the initiating act was and to where we are at the present time. Does either side object to me doing that?

MS. GRAHAM: I do not.

MS. STEWART: No, Your Honor.

JUDGE FINE: Okay.

MS. GRAHAM: I think that's an excellent idea.

JUDGE FINE: I will do that. Certainly, if there's any exhibits any side wishes to offer today, I'll entertain those, but I - - my intention is, and what I do on these is, the first thing I do on writing an opinion on a motion to dismiss, is I literally pull the file off the binder and start from the back and flip it over, and I go

through. If you've ever read any of my opinions, they may be just a bit too extensive, but I err on the side of caution in, kind of, setting out for the Commission, "Here's everything that has happened in the case," at least as pertains to how the case was moving forward. So I will do that since there is no objection.

Consequently, the Administrative Law Judge compiled a blue-backed record of "Exhibits made a part of the record subsequent to the full hearing conducted on March 11, 2000..." consisting of thirty (30) pertinent documents from the file that lays out the procedural history of the claim. This blue-backed record was relied upon by the Administrative Law Judge in rendering his opinion as noted in the Administrative Law Judge's opinion filed March 19, 2009. Although the blue-backed exhibits were not specifically identified by exhibit numbers, the Administrative Law Judge outlined the procedural history of this claim in his opinion from his review of the documents which he made exhibits to the record subsequent to the hearing. For completeness sake, the caption and table of contents of these blue-backed exhibits are set forth as follows:

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

WCC NO. F401810

MITCHELL D. SAPP,  
EMPLOYEE CLAIMANT

TYSON SALES & DISTRIBUTION, INC.,  
EMPLOYER RESPONDENT

TYNET CORPORATION,  
INSURANCE CARRIER RESPONDENT

Exhibits made a part of the record subsequent to the full hearing conducted on March 11, 2009, before Administrative Law O. Milton Fine, II, at Russellville, Pope County, Arkansas.

Notice of Hearing dated February 11, 2009 . . . . . 1

Letter to Ms. McKinnon and Ms. Graham from ALJ Fine  
dated February 5, 2009 . . . . . 2

Letter to Dorothy Jackson from Ms. McKinnon  
dated January 5, 2009 . . . . . 3

Letter to Ms. McKinnon from ALJ Fine dated  
January 15, 2009 . . . . . 4

Respondent's Motion to Dismiss filed January 9, 2009 . . . 5

Order Filed March 27, 2008 . . . . . 6

Letter to Ms. Lee from ALJ Fine dated March 10, 2008 . . . 7

Letter From Ms. Lee to ALJ Fine dated March 3, 2009 . . . 8

Letter to Ms. McKinnon and Ms. Lee frm ALJ Arey dated  
April 20, 2006 . . . . . 9

Letter to Ms. McKinnon and Ms. Lee from ALJ Arey  
dated February 14, 2006 . . . . . 10

Letter to Ms. McKinnon and Ms. Lee from ALJ Arey  
dated January 31, 2006 . . . . . 11

Letter to Ms. Jackson from Ms. McKinnon dated  
December 7, 2005 . . . . . 12

Claimant's First Amended Pre-Hearing Memorandum  
received December 12, 2005 . . . . . 13

Letter to Ms. McKinnon and Ms. Lee from ALJ Arey  
dated December 7, 2005 . . . . . 14

Respondent's Prehearing Questionnaire  
Dated December 6, 2009 . . . . . 15

Letter to Ms. McKinnon and Ms. Lee from ALJ Arey  
dated November 30, 2005 . . . . . 16

Prehearing Conference Notice dated November 9, 2005 . . . 17

Prehearing Notice and Questionnaire dated  
August 22, 2005. . . . . 18

Letter to Ms. Jackson from Ms. McKinnon dated  
August 18, 2005 . . . . . 19

Claimant's Prehearing Memorandum Filed August 18, 2005 . 20

Letter to Ms. Jackson from Ms. Lee dated August 5, 2005 . 21

AWCC Form AR-2 . . . . . 22

Letter Mr. Carl Bayne from Ms. Ball dated July 6, 2005	. 23
Letter to Mr. Bayne from Ms. McKinnon dated June 27, 2005	. . . . . 24
AWCC Form AR-C Dated 6-21-05	. . . . . 25
Letter to Mr. Bayne from Ms. McKinnon dated January 4, 2005	. . . . . 26
Letter to Mr. Bayne from Ms. Black dated April 9, 2004	. . . . . 27
AWCC First Report of Injury or Illness dated April 9, 2004	. . . . . 28
Letter to Mr. Bayne from Ms. McKinnon dated February 24, 2004	. . . . . 29
AWCC Form AR-C dated March 4, 2004	. . . . . 30

Claimant now asserts in his motion for rehearing and clarification that it was error for the Commission to rely upon this record as the parties were not provided a copy or knowledge of the blue-backed exhibits prior to the exhibits being made a "part of the appellate record." Claimant does not cite any authority for this argument. As set forth above in the discussion from the March 11, 2009, hearing the parties agreed that the Administrative Law Judge would make exhibits out of the pertinent documents contained in the Commission file outlining the procedural history of the claim. The procedural history was outlined by the

Administrative Law Judge in his opinion filed March 19, 2009. Accordingly, claimant cannot claim surprise or prejudice as he was advised of the documents relied upon by the Administrative Law Judge and the Full Commission since they were the basis for the procedural history set forth in the opinion, even if the Administrative Law Judge did not specifically list the documents by exhibit number.

Moreover, the Commission file is a public record created from the documents, forms, correspondence and exhibits submitted to the Commission by the parties on behalf of the claim. Thus, claimant and his attorney had access to, and knew or should have known of what the Commission file on this claim consisted. Furthermore, having knowledge that the Administrative Law Judge intended to blue-back documents from the file subsequent to the hearing but prior to the filing of an opinion, claimant's counsel had every right to submit a post-hearing letter brief highlighting those documents in the file which she wanted to bring to the Administrative Law Judge's attention.

It has never been a practice nor policy of the Commission that all exhibits must be "contained in the certified transcript prepared the court reporter." Many times exhibits are made a part of the record subsequent to the hearing either by motion of one of the parties, the

Administrative Law Judge or even the Full Commission. The Clerk of the Commission is charged with preparing the record for appeal to the Court of Appeals, thus, the clerk was not required to prepare the record or notify the parties of the record on appeal to the Full Commission. Nevertheless, the record on appeal to the Full Commission which consisted of the hearing transcript and the exhibits made a part of the record subsequent to the hearing by the Administrative Law Judge were at all times contained in the Commission file, and the parties were made aware of this record by virtue of history identified by the Administrative Law Judge in his opinion. As the parties knew or should have known that neither party discussed the detailed procedural history at the hearing or in the one and only exhibit to the hearing, thus the history relied upon by the Administrative Law Judge in his opinion had to come from the Commission file, which the Administrative Law Judge had previously advised he intended to review and make exhibits out of the pertinent documents.

Claimant's argument that the Administrative Law Judge and or the Full Commission failed to comply with Commission Rule 099.18 by "failing to serve upon all other known parties and shall bear an appropriate certificate of service" is misplaced. As stated above, the Commission

files are public records. The Commission is not a party to a claim nor does it file "brief, letters, and other papers or documents" with the Commission. This rule is in place to govern the actions of the parties not the Commission.

Accordingly, we find that Commission Rule 099.18 does not apply to the Commission itself, only those persons who file letters and documents with the Commission. Nevertheless, having found that Commission Rule 099.18 does not apply to the Commission, we find that the parties were provided with knowledge of the documents and exhibits relied upon by the Administrative Law Judge and the Full Commission as the documents were fully discussed in the Administrative Law Judge's opinion.

Claimant further argues that A.C.A. § 11-9-705(c)(1)(B) should apply to the Commission by extension and that the Administrative Law Judge should have "been prepared" for the hearing and had "his Commission exhibits ready to present as evidence" at the time of the hearing is, likewise, misplaced. Had the parties properly presented the necessary evidence at the hearing outlining the procedural history of the claim, there would have been no need for the Administrative Law Judge to create a record from the Commission file. By extension, claimant is arguing that the Administrative Law Judge should have advocated for one of

the parties prior to the hearing, clearly this not the intended purpose of A.C.A. § 11-9-705(c)(1)(B).

Finally, in her Motion for Clarification, counsel for claimant contends that the Administrative Law Judge did not take into account the fact that the parties had reached a joint petition settlement and that the parties had requested a joint petition hearing which was tentatively scheduled for March 11, 2008. Contrary to claimant's contention, the Administrative Law Judge acknowledged in his March 19, 2008, opinion that counsel for respondents wrote the Commission a letter which was received on March 10, 2008, advising that respondents were withdrawing from a proposed settlement in the case. Although the facts set forth in claimant's motion that settlement negotiations had taken place, a joint petition had been reached, and that a joint petition hearing had been requested are not set forth in the Administrative Law Judge's opinion, the letter from respondent's counsel which was received by the Commission on March 10, 2008, and relied upon by the Administrative Law Judge clearly advises that a Joint Petition hearing had been tentatively scheduled for March 12, 2008. Consequently, while not specifically set forth in the opinion, the exhibit relied upon by the Administrative Law Judge clearly establishes that a joint petition settlement hearing had

tentatively been scheduled, thus implying that settlement negotiations had taken place. However, absent from the Commission record are the lengthy details of these settlement negotiations so heavily relied upon by counsel for claimant in her brief on appeal which were not considered by the Full Commission on appeal as they were not a part of the record. Admittedly, the hearing on the joint petition settlement had to have been requested in order for a joint petition hearing to have been tentatively scheduled, however, this does not negate the fact that once the settlement offer was withdrawn by respondents, claimant failed to initiate any activity on this claim to move it towards a hearing. Respondents did not file a motion to dismiss while this claim was in settlement mode, nor is the Order of Dismissal which was affirmed and adopted on appeal based upon a failure to request a hearing while settlement possibilities were being explored. Claimant's Motion for Clarification must, therefore, be, and hereby is, denied.

Accordingly, for those reasons set forth herein, we find that the claimant's Motion for Rehearing and Clarification for Appeal is denied.

IT IS SO ORDERED.

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A. WATSON BELL, Chairman

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KAREN H. MCKINNEY, Commissioner

Commissioner Hood Dissents.