

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. G505717

KEVIN HEUSEL, EMPLOYEE	CLAIMANT
WEST TREE SERVICE, INC., SELF-INSURED EMPLOYER	RESPONDENT
SENTRY INS., A MUTUAL CO., CARRIER	RESPONDENT

OPINION FILED FEBRUARY 25, 2021

Hearing before Administrative Law Judge O. Milton Fine II on February 24, 2021 in Little Rock, Pulaski County, Arkansas.

Claimant represented by Mr. Paul D. Love, Attorney at Law, Searcy, Arkansas.

Respondents represented by Mr. Patrick L. Spivey, Attorney at Law, Little Rock, Arkansas.

I. BACKGROUND

This matter comes before the Commission on a motion to dismiss by Respondents. A hearing on the motion was conducted on February 24, 2021, in Little Rock, Arkansas. No testimony was taken in the case. Claimant failed to appear at the hearing. Admitted into evidence was "Respondents' Exhibit 1", a printout of emails to and from the Commission dated September 5, 2019, consisting of two (2) pages. Without objection, the Commission's file on the claim has been incorporated herein in its entirety by reference.

The record reflects the following procedural history:

Per the First Report of Injury or Illness filed on August 14, 2015, Claimant purportedly injured his back on August 17, 2014, when he was lifting a log.

HEUSEL – G505717

According to the Form AR-2 that was filed that same date, Respondents initially accepted the claim as a medical-only one.

On August 5, 2015, Claimant filed a Form AR-C, requesting the full range of initial (not additional) benefits. Accompanying the form was an entry of appearance by his counsel. No hearing request was made at that time. Claimant requested a one-time change of physician from the Commission. In an Order entered on November 19, 2015, the Medical Cost Containment Division changed his authorized treating physician from Dr. Charles Holt to Dr. Shahid Shah.

On July 14, 2016, Claimant filed another Form AR-C. In this instance, he asked for a hearing on his entitlement to the full range of initial and additional benefits. The claim was assigned to me on August 3, 2016; and that same day, prehearing questionnaires were sent to the parties. Claimant filed a timely response on August 23, 2016; and Respondents followed suit on September 13, 2016. After a prehearing telephone conference on October 3, 2016, a hearing was scheduled for December 9, 2016, on the following issues:

1. Whether Claimant sustained a compensable injury to his back by specific incident.
2. Whether Claimant is entitled to reasonable and necessary medical treatment.
3. Whether Claimant is entitled to temporary total disability benefits.
4. Whether Claimant is entitled to a controverted attorney's fee.

HEUSEL – G505717

Both sides requested and were given subpoenas to obtain the appearances of their respective witnesses. Claimant's counsel on, December 2, 2016, asked that I allow his physician "to attend via telephone conference or video conference." This request was denied. On December 5, 2016, Claimant moved for a continuance to allow the parties time to pursue settlement. Respondents agreed. Thus, the hearing was cancelled, and the file was returned to the Commission's general files.

The next activity documented in the file occurred on April 14, 2017. Claimant wrote the Clerk of the Commission that he was requesting a hearing on his motion to compel discovery. But no such motion was on file. He was given seven (7) days to file one; but when that deadline came and went with no such filing, the file was again returned to the Commission's general files.

On October 20, 2017, Claimant filed a pleading that his counsel termed a "Motion for Factual Ruling." This was interpreted as another hearing request; and new prehearing questionnaires were issued to the parties on October 27, 2017. Claimant filed a timely response thereto on November 16, 2017, as did Respondents on November 27, 2017. Per a prehearing conference that took place on February 26, 2018, a hearing was scheduled for April 6, 2018, on the following issues:

1. Whether Claimant sustained a compensable injury to his lower back by specific incident on or about August 7 and 11, 2014.

HEUSEL – G505717

2. Whether Claimant is entitled to reasonable and necessary medical treatment.
3. Whether Claimant is entitled to temporary total disability benefits.
4. Whether Claimant is entitled to a controverted attorney's fee.

Claimant's counsel on March 15, 2018, moved for another continuance, citing a death in the family. This was granted; and the file was again returned to the Commission's general files for the time being.

In correspondence received by the Commission on May 22, 2018, Claimant again requested a hearing on his claim. Following a prehearing telephone conference that took place on June 4, 2018, a hearing was scheduled for August 9, 2018, on the same issues as set out above. Witness subpoenas were again obtained from the Commission. However, on August 3, 2018, the parties notified me that they had settled the case. Accordingly, the hearing was cancelled, and the file was returned to the Commission's general files pending filing of the Joint Petition.

Respondents' counsel wrote me on May 3, 2019, to let me know that they were ready to proceed, but informed me that Claimant now lived in California. I informed them that the Joint Petition could be heard via interrogatories. Executed copies of the Joint Petition documents were filed with the Commission on May 24, 2019. However, interrogatories were not among these documents, as the parties had been instructed earlier to submit. They were again informed to submit

interrogatories. The interrogatories were submitted on July 12, 2019; but I informed the parties on July 18, 2019, that an executed copy of the Joint Petition Questionnaire was still needed. This was filed on August 2, 2019. After reviewing this, I entered an Order on August 5, 2019 that reads:

This joint petition was submitted to the Commission via interrogatories pursuant to AWCC R. 099.19, as I permitted in a letter dated May 30, 2019. Earlier in this process, Claimant submitted a signed questionnaire. Because his signature thereon was not notarized, I directed him to submit one that was notarized. However, instead of merely resubmitting the earlier questionnaire response with a notarization, Claimant has submitted a new questionnaire response with multiple troubling answers and/or deficiencies. In response to Question 4 (“Are you currently under the influence of any substance that would affect your ability to understand this agreement or the effect of this settlement?”), Claimant has responded, “Yes.” He left blank the response to Question 5 (“Do you understand that this written document is the entire settlement agreement?”) He answered “Yes” to Question 9 (“Have you executed any documents which have not been provided to the Arkansas Workers’ Compensation Commission?”) Such documents have not been identified. Finally, in response to Question 21 (“Was coverage for this claim provided by any other group health care service plan, of any kind, and/or a group loss of income policy?”), he has answered “Yes.” Further, he has explained that it was QualChoice that has paid for these disputed charges. But there is no indication that a waiver of any group health lien has been sought, let alone obtained, pursuant to Ark. Code Ann. § 11-9-411 (Repl. 2012).

Again, the above answers are all different from the earlier questionnaire response. In the letter to the parties that allowed the joint petition to be submitted via interrogatories, I wrote: “However, if I determine that the interrogatories are insufficient to determine whether the settlement should be approved, I reserve the right to hold a hearing.” Under the circumstances, in order to determine whether the settlement is in the best interests of the parties, a joint petition hearing is clearly necessary. For that reason, this joint petition will not be considered on interrogatories.

My assistant began attempting to schedule hearing dates for the Joint Petition, without success. Claimant’s counsel sent an email to the Commission on September 5, 2019, that reads, in pertinent part: “Mr. Heusel has expressed his strong unwillingness to return to Arkansas for a hearing. He has expressed as well his fear, perhaps unfounded, of being put on the stand and cross-examined.” In response, I informed the parties that I would hold the case for only thirty (30) more days to get the Joint Petition scheduled for a hearing. When that deadline came and went, I returned the file to the Commission’s general files on October 10, 2019.

The record reflects that no further action was taken on this case until April 24, 2020.¹ On that date, Respondents filed the instant motion to dismiss under AWCC R. 099.13 and Ark. Code Ann. §11-9-702(a)(4) (Repl. 2012)², alleging that “[t]he claim has remained inactive since being returned to the Commission’s general files over six months ago.” The file was reassigned to me on September 3, 2020; and on September 4, 2020, I wrote Claimant’s counsel, asking for a response to the motion to dismiss by September 24, 2020. However, no response was forthcoming. Not until efforts were initiated to get a hearing

¹This took place while the Commission was shut down due to the COVID-19 pandemic, which explains the delay in following through on the motion.

²Because the instant claim is one for additional, not initial, benefits, the appropriate provision would be Ark. Code Ann. § 11-9-702(d) (Repl. 2012).

HEUSEL – G505717

scheduled on the motion to dismiss did Claimant's counsel respond. He did so by email on October 27, 2020, stating:

I have informed the [sic] Mr. Heusel of the potential dismissal of this case. He has indicated he does not want to appear on this matter again. He does not respond to my communications. I cannot continue to represent him. I will not appear on his behalf, and will file a withdrawal this week.

On November 3, 2020, Claimant's counsel moved to withdraw from this claim. However, the motion was denied on December 10, 2020, because it did not conform to AWCC Advisory 2003-2.

On January 15, 2021, I scheduled a hearing on the motion to dismiss for February 11, 2021, at the Commission. Because of inclement weather, the hearing was rescheduled for February 24, 2021. The hearing on the motion to dismiss proceeded as scheduled on that date. Again, both Claimant and Respondents appeared through counsel.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record as a whole, to include documents and other matters properly before the Commission, the following findings of fact and conclusions of law are hereby made in accordance with Ark. Code Ann. §11-9-704 (Repl. 2012):

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.

HEUSEL – G505717

2. The parties were provided reasonable notice of the motion to dismiss and of the hearing thereon.
3. The evidence preponderates that Claimant has failed to prosecute this claim under AWCC R. 099.13.
4. The motion to dismiss is hereby granted; the claim is hereby dismissed without prejudice under AWCC R. 099.13.

III. DISCUSSION

AWCC R. 099.13 reads:

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

See generally Johnson v. Triple T Foods, 55 Ark. App. 83, 85, 929 S.W.2d 730 (1996).

As the moving party, Respondents under Ark. Code Ann. §11-9-705(a)(3) (Repl. 2012) must prove their entitlement to the relief requested—dismissal of the instant claim—by a preponderance of the evidence. This standard means the evidence having greater weight or convincing force. *Barre v. Hoffman*, 2009 Ark. 373, 326 S.W.3d 415; *Smith v. Magnet Cove Barium Corp.*, 212 Ark. 491, 206 S.W.2d 442 (1947).

As shown by the evidence recounted above, (1) the parties were provided reasonable notice of the motion to dismiss and of the hearing thereon; and (2)

HEUSEL – G505717

Claimant has failed to pursue his claim because he has taken no further action in pursuit of it since I returned the file to the Commission's general files on August 5, 2019. Thus, the evidence preponderates that dismissal is warranted under Rule 099.13. Because of this finding, it is unnecessary to address the applicability of §11-9-702.

That leaves the question of whether the dismissal of the claim should be with or without prejudice. The Commission possesses the authority to dismiss claims with prejudice. *Loosey v. Osmose Wood Preserving Co.*, 23 Ark. App. 137, 744 S.W.2d 402 (1988). In *Abo v. Kawneer Co.*, 2005 AR Work. Comp. LEXIS 510, Claim No. F404774 (Full Commission Opinion filed November 15, 2005), the Commission wrote: "In numerous past decisions, this Commission and the Appellate Courts have expressed a preference for dismissals *without prejudice*." (emphasis added)(citing *Professional Adjustment Bureau v. Strong*, 75 Ark. 249, 629 S.W.2d 284 (1982)). Respondents at the hearing asked for a dismissal with prejudice. But based on the above authorities, I find that the dismissal of the claim should be and hereby is entered without prejudice.

IV. CONCLUSION

In accordance with the findings of fact and conclusions of law set forth above, this claim is hereby dismissed *without prejudice*.

HEUSEL – G505717

IT IS SO ORDERED.

O. MILTON FINE II
Chief Administrative Law Judge