

O R D E R

Injury No.: 11-092386

Employee: James Bayless
Employer: Energy Resources, Inc. (Settled)
Insurer: Commerce & Industry Insurance Company (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. We have considered the application for review and the record. We find that the Order of Dismissal of the administrative law judge was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, we affirm the Order of Dismissal of the administrative law judge, as supplemented herein.

Introduction

We take administrative notice of the records of the Division of Workers' Compensation (Division) in this matter.

On April 9, 2012, employee filed a claim for compensation against employer/insurer and the Second Injury Fund, alleging he suffered a work injury affecting his right ankle on November 11, 2011.

On March 18, 2013, employee settled his claim against employer/insurer, while leaving his claim against the Second Injury Fund open.

On May 31, 2018, the Division issued a Notice to Show Cause Why Claim Should Not Be Dismissed (Notice). The Notice advised that employee's claim was set for a hearing before an administrative law judge on July 18, 2018, at 1:30 p.m., and that employee's claim would be dismissed unless good cause was shown as to why an Order of Dismissal should not be entered.

Employee did not appear at the hearing on July 18, 2018.

On July 26, 2018, the administrative law judge issued an Order of Dismissal. Therein, the administrative law judge found that the Notice was properly sent to all parties in accordance with the relevant statutory provisions, that employee did not show good cause why the claim should not be dismissed, and that employee's claim for compensation against the Second Injury Fund was therefore dismissed, with prejudice.

On August 15, 2018, employee filed an application for review with the Labor and Industrial Relations Commission alleging, in relevant part, that: (1) employee's counsel does not know why employee has not responded or appeared for the show cause hearing, but suspects that the address used for employee is no longer accurate; (2) that employee's counsel has not been contacted by employee in any fashion, and has not been able to contact employee to date; and (3) that employee's counsel did not appear

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before the Division because of an innocent mistake involving the Division having sent him two notices, one of which was sent to him in error and involved a claim in which he is not involved, and employee's counsel's failure to recognize employee's name on the other notice until after the Order of Dismissal was issued.

Discussion

Section 287.655 RSMo grants authority to administrative law judges to dismiss claims for failure to prosecute:

Any claim before the division may be dismissed for failure to prosecute in accordance with rules and regulations promulgated by the commission. Such notice shall be made in a manner determined by the division, except that for the employee such notice shall be by certified or registered mail unless the employee to whom notice is directed is represented by counsel and counsel is also given such notice. To dismiss a claim the administrative law judge shall enter an order of dismissal which shall be deemed an award and subject to review and appeal in the same manner as provided for other awards in this chapter.

The Division's rule 8 CSR 50-2.010(12) sets forth specific guidelines for the manner of notice the Division is required to send prior to dismissing a claim:

(12) A Claim for Compensation may be dismissed or a default award issued, upon proper notice by the division. ...

(C) Notice to the party or parties shall be sent by certified mail according to the provisions of Chapter 287, RSMo. Notice of hearing or dismissal to a party's attorney, at the attorney's last known address, which shall be sent by ordinary mail and need not be certified, shall meet the requirement of this section. All other notices, unless required by this rule or determined by the division, shall be sent by ordinary mail. The records of the division shall constitute prima facie evidence of the date of mailing of any notice, determination, award or other paper mailed pursuant to Chapter 287, RSMo.

(emphasis added).

We take administrative notice of the records of the Division. We find that the Division sent its May 31, 2018, Notice to Show Cause Why Claim Should Not Be Dismissed to employee at his last known address, and to employee's counsel of record. We conclude that the Division thereby complied with the foregoing statutory and regulatory notice requirements. Having provided the requisite notice, we further conclude that the Division was authorized to take up and consider the issue whether employee's claim should be dismissed for failure to prosecute. We turn now to the issue whether employee's application for review has alleged a prima facie claim for relief.

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In the context of these cases, the courts have declared that “a claimant who pleads facts which, if proven, would warrant setting aside a dismissal is entitled to an evidentiary hearing to determine whether the statements are true or false.” *Robinson v. Missouri Dep’t of Corrections, Bd. of Probation & Parole*, 805 S.W.2d 688, 690 (Mo. App. 1991). On the other hand, the *Robinson* court held that where the employee does not allege a good cause for setting aside an order of dismissal, the Commission is authorized to affirm the dismissal. *Id.* Accordingly, we examine whether employee’s application for review alleges facts that, if proven true, would support findings by the Commission that (1) employee had a good cause for his failure to participate in the show cause hearing of July 18, 2018, and (2) employee has prosecuted his claim, or has a good cause for failure to do so.

Here, even if we were inclined to find that employee’s counsel had a good cause for failing to participate in the show cause hearing, we are not convinced that the application for review sufficiently alleges that employee has prosecuted his claim, or has good cause for failure to do so. This is because employee’s application for review does not describe any steps employee has taken to prosecute this claim in the more than five years that have elapsed since the March 2013 settlement with employer/insurer. The application does reference, in passing, the past insolvency of the Second Injury Fund as having some general bearing on the ability of parties to settle claims—but fails to connect this circumstance to what appears to be years of inaction here.

Meanwhile, employee’s attorney concedes that he is unaware why employee did not respond to the Notice; that he is unaware whether the address utilized by the Division for sending employee’s Notice is employee’s correct address anymore (although he suspects it probably is not); and that he has not been in contact with employee. Rather than a prima facie claim that employee is entitled to relief, these circumstances appear to us to constitute a prima facie showing that employee has failed to prosecute this claim by failing to keep in contact with his attorney, and possibly by failing to keep his address updated with the Division as well. See *Johnston v. P & K Mfg.*, 898 S.W.2d 658 (Mo. App. 1995), wherein the court affirmed an order of dismissal after the employee failed to appear for a hearing, and the employee’s attorney conceded he hadn’t been able to locate the employee.

We conclude the application for review fails to make a prima facie claim for setting aside the Order of Dismissal. We conclude, therefore, that no purpose would be served by remanding this matter to the Division for a hearing. See *Ross v. Safeway Stores, Inc.*, 738 S.W.2d 611 (Mo. App. 1987). Accordingly, we will affirm the Order of Dismissal.

Order

We affirm the administrative law judge’s Order of Dismissal dated July 26, 2018, as supplemented herein.

We attach the administrative law judge’s Order hereto and incorporate it herein by this reference.

Employee: James Bayless

Given at Jefferson City, State of Missouri, this 16th day of October 2018.



LABOR AND INDUSTRIAL RELATIONS COMMISSION

Robert W. Cornejo

Robert W. Cornejo, Chairman

Reid K. Forrester

Reid K. Forrester, Member

DISSENTING OPINION FILED

Curtis E. Chick, Jr., Member

Attest:

Pamela M. Hoffman
Secretary

Employee: James Bayless

DISSENTING OPINION

Based upon my review of the record, the application for review, and the relevant and controlling legal authorities, I am convinced that the Commission majority errs in affirming this Order of Dismissal.

Section 287.655 RSMo governs dismissal of claims for failure to prosecute, and states, in relevant part, that “[t]o dismiss a claim the administrative law judge shall enter an order of dismissal which shall be deemed an award and subject to review and appeal in the same manner as provided for other awards in this chapter.” The role of the Commission regarding dismissal of claims for failure to prosecute is to review them in the same manner as the Commission reviews awards; in other words, we are to “review the evidence” on the question. See § 287.480.1 RSMo.

Notably absent from the analysis by the Commission majority is any discussion of the actual evidence in this matter. The extent of the evidence before the Commission with regard to whether this claim should be dismissed is a single statement from counsel for the Second Injury Fund that, “I have an empty file.” *Transcript*, page 1. Apparently, we are asked to presume from this circumstance, standing alone, that employee has failed to undertake any meaningful effort to move his claim toward a resolution.

I am not prepared to make that presumption, especially where § 287.808 RSMo states that “[i]n asserting any claim or defense based on a factual proposition, the party asserting such claim or defense must establish that such proposition is more likely to be true than not true.” As the party seeking to have employee’s claim dismissed on a technicality, rather than via a hearing on the merits, the Second Injury Fund bears the burden of proving the factual proposition that employee has failed to prosecute this claim, such that we are authorized to dismiss it pursuant to § 287.655. Especially given the well-publicized insolvency of the Second Injury Fund during the pendency of this matter, a circumstance which caused the Second Injury Fund to adopt a policy of refusing to negotiate or settle any claim filed against it, I deem this record wholly insufficient to justify a finding that employee failed to prosecute his claim.

Let us imagine ourselves in the shoes of an injured worker, circa 2012, with a claim pending against the Second Injury Fund. Our attorney advises us that, sadly, the Missouri legislature has imposed an arbitrary cap on the Second Injury Fund’s ability to collect revenue; that as a result, the Second Injury Fund has no money with which to settle or pay our claim or the claims of the thousands of others like us; and that consequently, we should suspend our expectation of ever seeing a dime from our claim, regardless of its merits. At first, we continue to call our attorney periodically, and inquire whether the State of Missouri has reversed course and decided to do right by disabled workers by allowing the Second Injury Fund to pay its obligations. Each time, our attorney informs us that the answer is no, that we must continue to wait, and defer our hope of ever being made whole. Eventually, as the years wear on, even the most diligent among us will effectively give up, or at the very least, suspend our own efforts to move the claim forward.

To be clear, I share in the Commission majority’s concern that, generally speaking, litigants ought to keep in contact with the Division and their attorneys, and that the

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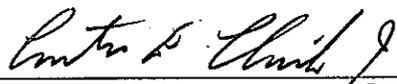
insolvency of the Second Injury Fund, standing alone, is no reason to permit claims to languish indefinitely on the Division's dockets. But the question we are asked to consider in this case is whether the record before us is **sufficient** to justify a step so drastic as dismissal of employee's claim, forever foreclosing his right to an adjudication on the merits:

The ends of justice will be better served by allowing the case to proceed on its merits rather than to be determined without the parties having an opportunity to present evidence and to otherwise be heard. These cases must be decided on a case by case basis, but, in Missouri the law disfavors dismissal of cases because of failure to prosecute.

Burkett v. Kan. City State Sch. Dist., 955 S.W.2d 567, 568 (Mo. App. 1997).

The answer is simple. Because there is virtually **no** evidence presently before this Commission on the issue whether employee failed to prosecute his claim, the Commission should decline to undertake the review under § 287.480.1. Instead, the appropriate action is to set aside the Order of Dismissal, reinstate the claim, and give employee and his attorney a chance to prove what appears to me to be a good cause, honest mistake resulting in the failure of anyone on behalf of employee to attend the show cause hearing. Employee should also have a chance to provide his evidence on the failure to prosecute issue. If the record on remand shows that the Second Injury Fund has refused, for years, to cooperate in negotiating or moving this claim toward a resolution, the employee should, at the very least, be granted some lenience when we are asked to consider a result as harsh as dismissal.

I would remand this matter for further proceedings. Because the Commission majority has decided otherwise, I respectfully dissent.


Curtis E. Chick, Jr., Member



**DIVISION OF
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COMPENSATION**

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JULY 26, 2018

11-092386

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Injury No : 11-092386
Injury Date : 11-11-2011
Insurance No. : 710798986

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ORDER OF DISMISSAL

The above parties are hereby notified that the Claim for Compensation (WC-21) against the Second Injury Fund for the above-referenced injury is ordered dismissed with prejudice for failure to prosecute.

The undersigned Administrative Law Judge makes the following *Findings of Fact and Conclusions of Law*.

1. Notice to Show Cause Why Claim Should Not Be Dismissed and of the hearing date was properly sent to all parties according to the provisions of Sections 287.520 and 287.655, RSMo, and 8 CSR 50-2.010; and
2. Claimant did not show good cause why the claim should not be dismissed.

Under the provisions of the Missouri Workers' Compensation Law, an Application for Review (MOIC-2567) may be made to the Labor and Industrial Relations Commission within twenty (20) calendar days of the date of the Order of Dismissal. If such request is made, the Application for Review should be sent directly to the Labor and Industrial Relations Commission, PO Box 599, Jefferson City MO 65102-0599, in triplicate.

If the request for review is not made within the time prescribed by law, the Order of Dismissal becomes final and no appeal lies to the courts.


CHIEF JUDGE KOHNER

**MISSOURI
DEPARTMENT OF LABOR
& INDUSTRIAL RELATIONS**

Missouri Division of Workers' Compensation is an equal opportunity employer/program.

WC-168 (06-15)
ORDER OF DISMISSAL-SIF-FTP
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