

ORDER

Injury No.: 15-052638

Employee: James Rohrbach
Employer: Six Flags Entertainment Corporation
Insurer: Trumbull Insurance

Introduction

On December 17, 2015, employee filed a claim for compensation alleging he suffered a work injury on May 28, 2015.

On April 25, 2018, the Division of Workers' Compensation (Division) issued a Notice to Show Cause Why Claim Should Not Be Dismissed (Notice), advising that employee's claim would be dismissed for failure to prosecute if he did not show cause, at a hearing on June 20, 2018, why an order of dismissal should not be entered.

Employee did not appear or participate in the hearing of June 20, 2018.

On July 5, 2018, the administrative law judge issued an Order of Dismissal finding that employee had failed to show good cause why his claim should not be dismissed, and that employee's claim against employer/insurer is dismissed with prejudice for failure to prosecute.

On July 19, 2018, the Labor and Industrial Relations Commission (Commission) received an application for review from employee. Therein, employee alleges as follows:

1) I do not have legal counsel. 2) I did not receive notice of a hearing to show cause why my claim should not be dismissed. 3) I did not know there was a hearing scheduled. 4) I would have gone to the hearing and explain that I was trying to get a lawyer. 5) I was under 18 when I was injured. 6) I am now handling my case – not my mom. 7) I am still in pain and in need of treatment from my back and neck injuries at Six Flags while moving four 50LB bags out of the roller coaster. 8) Six Flags admitted I was hurt on the job. 9) I got 1 certified letter on July 16, 2018, which said my claim was dismissed on July 5, 2018. 10) I want my case reinstated so I can get a lawyer and finish my case. I am faxing this form today and mailing the original and two copies. I was not provided a proper notice per RSMo 287.250.2.

On August 3, 2018, employer/insurer filed its answer to employee's application for review. Therein, employer/insurer argues that the Commission should affirm the Order of Dismissal, because competent and substantial evidence exists in the record to support it, and because employee has not alleged a good cause for setting aside the Order of Dismissal.

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Discussion

The legislature has seen fit to empower administrative law judges with the following statutory authority whereby they may dismiss claims for failure to comply with a lawful order from the Division, or for failure to prosecute:

The division shall have power to strike pleadings and enter awards against any party or parties who fail or refuse to comply with its lawful orders.

Section 287.650.1 RSMo.

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.

Section 287.655 RSMo.

Where, as here, an applicant for review alleges that an administrative law judge erred in dismissing their claim following their own non-appearance at a show cause hearing, we first examine whether the application for review has alleged a prima facie claim for relief. This is because the courts have instructed 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). In other words, we must give the applicant a chance to prove the factual allegations set forth in an application for review, if those facts would entitle the applicant to relief.

Here, employee's application for review states, in relevant part: (1) that the Division failed to provide him appropriate notice of the proceedings leading up to the Order of Dismissal; (2) that he was not aware of the show cause hearing scheduled for June 20, 2018; and (3) allegations bearing upon the issue of failure to prosecute, including his apparent difficulty finding legal counsel, and the fact that he, rather than his mother as before, is now handling the claim. Employee further alleges facts suggesting (albeit vaguely) that his medical condition referable to the claimed work injury has not stabilized, such that any hearing on the issue of the nature and extent of his injuries may be premature, in any event.

The question presently before us is whether employee's allegations constitute (1) a prima facie good cause for failure to appear at the show cause hearing, and (2) a prima facie allegation that employee has prosecuted his claim, or has good cause for any

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failure to do so. The relevant Missouri case law has not defined "good cause" in this context. Nor is there a statutory or regulatory definition for "good cause" applicable here. Accordingly, we will apply the well-established common law definition of "good cause":

[A]ny definition of good cause must devolve on the simple elements of good faith and reasonableness under all the circumstances.

King v. Div. of Emp't Sec., 964 S.W.2d 832, 836 (Mo. App. 1997).

Employee's allegations, if proven true, do not suggest any unreasonableness or bad faith on his part. If employee was legitimately unaware of the show cause hearing (provided he can prove this lack of awareness did not result from any unreasonable or bad faith action on his part, such as disregarding notices from the Division) we conclude this may be a good cause for failing to participate in the hearing. Taking administrative notice of the Division's records, we note that they suggest some difficulty in getting the Notice to employee, in that it appears the Division's mailing containing the Notice was twice returned to the Division.

Additionally, if employee has experienced difficulty finding an attorney to represent him, especially given the context of this claim having previously been handled by his mother while he was a minor, we conclude that this may, depending on the circumstances, be a good cause for failure to prosecute his claim. Alternatively, the courts have suggested that an employee's efforts to find an attorney may, in themselves, be considered an attempt to prosecute a claim. See *Burkett v. Kan. City State Sch. Dist.*, 955 S.W.2d 567 (Mo. App. 1997), wherein the court reversed a dismissal for failure to prosecute, where the employee demonstrated he had put forth significant effort to find and retain an attorney.

We acknowledge the argument from employer/insurer that employee has failed to allege a good cause for setting aside the Order of Dismissal, because the Division's records suggest that the Division sent notice of the show cause hearing to employee via certified mail. Essentially, employer/insurer asks us to find that employee's allegation that he was unaware of the show cause hearing lacks credibility, where the Division's records would suggest to the contrary. However, the courts have specifically rejected the proposition that the Commission is entitled to make credibility determinations from the bare pleadings set forth in an application for review or answer. See *Ross v. Safeway Stores, Inc.*, 738 S.W.2d 611 (Mo. App. 1987).

In sum, although employee's allegations could certainly be more specific or detailed, we conclude that employee's application for review sufficiently alleges a prima facie claim for relief. Because employee has pled a prima facie claim for relief, we conclude that employee must be given an opportunity to prove the allegations set forth in his application for review. We turn now to the appropriate procedure for accomplishing this.

We recognize that past orders of the Commission on this topic have remanded cases to the Division for the sole purpose of taking evidence on the applicant's claim for relief,

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with the record thereafter forwarded to the Commission for a decision whether to reinstate the claim or affirm the dismissal. We believe, however, that administrative law judges ought to have the first say in issues affecting the Division's own claims handling process, such as whether an applicant has proven a good cause for missing a hearing before an administrative law judge. As the dissenting judge in the *Burkett* case recognized, the public policy of our state strongly favors that administrative law judges be empowered to exercise their own discretion, in the first instance, whether a claim should be dismissed:

As the first line of decision makers for workers' compensation claims, an ALJ has a very full docket. ALJs are analogous to trial courts in the sense that they must be able to control their dockets within reason. If control over an ALJ's power to dismiss cases is restricted beyond that authorized by the legislature, ... an ALJ may become reluctant to eliminate those cases where dismissal is warranted.

Burkett v. Kan. City State Sch. Dist., 955 S.W.2d at 570 (Ulrich, J., dissenting).

Accordingly, we deem it most appropriate to remand this matter to the Division to assign an administrative law judge to both take evidence as to the claim for relief set forth in employee's application for review, and also thereafter to determine, based upon the whole record and in the sound discretion of the administrative law judge, whether this claim should be dismissed.

Order

We set aside the Order of Dismissal of July 5, 2018. We reinstate employee's claim for the purpose of remanding this matter to the Division for a hearing before an administrative law judge to take evidence as to the facts alleged in employee's application for review and employer/insurer's answer.

Specifically, the parties shall be afforded an opportunity to present evidence as to (1) the circumstances surrounding employee's failure to participate in the show cause hearing, including whether employee had good cause for such failure; and (2) employee's efforts, if any, to prosecute this claim, including whether employee had good cause for any failure to prosecute.

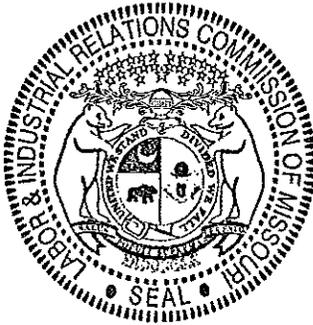
In providing notice to the parties of the hearing, the Division shall comply with the requirements under § 287.655 RSMo and 8 CSR 50-2.010(12) pertaining to dismissals.

At the close of the hearing, the administrative law judge shall issue an order and decision setting forth findings of fact and conclusions of law resolving the issue whether this claim should be dismissed. Specifically, the administrative law judge shall determine whether employee had good cause for missing the show cause hearing, and whether employee has failed, without good cause, to prosecute this claim.

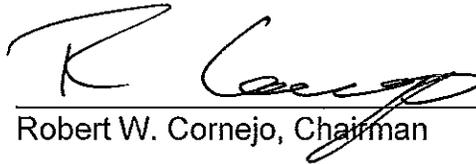
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If the administrative law judge determines that this claim should be dismissed pursuant to §§ 287.650.1 and/or 287.655 RSMo, the administrative law judge may enter an order dismissing the claim. Alternatively, if the administrative law judge determines that the claim should not be dismissed, upon issuance of the administrative law judge's order and decision so concluding, the claim shall remain pending before the Division for further proceedings.

Given at Jefferson City, State of Missouri, this 12th day of October 2018.

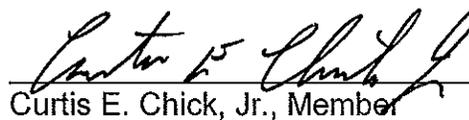


LABOR AND INDUSTRIAL RELATIONS COMMISSION


Robert W. Cornejo, Chairman

DISSENTING OPINION FILED

Reid K. Forrester, Member


Curtis E. Chick, Jr., Member

Attest:


Secretary

Employee: James Rohrbach

DISSENTING OPINION

Based on my review of this matter in conjunction with the relevant legal authorities, I disagree with the Commission majority's decision to remand this matter for an evidentiary hearing, because I believe employee's application for review does not contain factual allegations that, if proven true, would support a finding that he had good cause for his failure to attend the show cause hearing and for his failure to prosecute his claim. I believe a remand hearing thus serves no purpose in this case.

It is well-settled in Missouri that, upon the Commission's receipt of an application for review over an order of dismissal where the applicant failed to appear at the show cause hearing, the Commission is entitled to accept the applicant's stated reason for such failure, and to affirm the dismissal where such reason falls short of a good cause. See *Robinson v. Missouri Dep't of Corrections, Bd. of Probation & Parole*, 805 S.W.2d 688, 690 (Mo. App. 1991).

Here, employee's sole explanation for missing the hearing of June 20, 2018, was that he was "unaware" of the hearing because the Division failed to notify him of it. I take administrative notice of the Division's records in this matter. Those records demonstrate that the Division sent its April 25, 2018, Notice to Show Cause Why Claim Should Not Be Dismissed to employee, via certified mail, at what appears to have been his last known address. On May 1, 2018, the Notice returned to the Division bearing the following notation:

FORWARD TIME EXP RTN TO SEND
ROHRBACH JAMES WALTER
3 ANDREW ST.
SAINT CLAIR MO 63077-2624

Apparently, employee moved but failed to update the Division with his current mailing address. So, on May 3, 2018, the Division re-mailed the notice, again via certified mail, to the 3 Andrew St. address. On May 29, 2018, the notice again returned to the Division bearing the following notation:

RETURN TO SENDER
UNCLAIMED
UNABLE TO FORWARD

In other words, it appears employee's second notice was returned to the Division because he never went down to the post office to pick up his certified mail. I so find. I further find that employee's action in failing to pick up his certified mail was unreasonable. I conclude, therefore, that employee lacks good cause for failing to participate in the show cause hearing of June 20, 2018, *even if* he could prove, as he alleges, that he was "unaware" of the show cause hearing. The dismissal should be affirmed.

Although the failure to prosecute issue is effectively moot where employee lacks a good cause for failing to attend the show cause hearing, I would additionally find that

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employee's application for review is insufficient to demonstrate a prima facie showing that employee has prosecuted his claim. Employee complains that his mother was handling this matter for him previously, but fails to explain the significance of this circumstance, or what bearing (if any) it has on the fact that this claim appears to have languished before the Division with no meaningful action for several years, even though employer/insurer has had a doctor's rating, and has been requesting a final hearing, since at least February 2016.

The courts of this state have long recognized that administrative law judges must be empowered to dismiss claims where appropriate, in order to avoid harm to those other litigants who are diligently prosecuting their claims:

The Division of Workmen's Compensation has no more immunity from the devastating effect of a highly accelerated caseload than the courts of this state -- both are racked with a common problem. The last sentence of Sec. 287.650.1, supra, "[the] division shall have power to strike pleadings and enter awards against any party or parties who fails or refuses to comply with its lawful orders," is cast in language which clearly and unequivocally empowers the referee to invoke the sanction of dismissal in order to minimize the congestion of claims in these days of crowded dockets, to utilize decisional manpower to the maximum extent, and to prevent undue delay in the orderly disposition of other pending claims. ... Tangentially, and of cardinal importance, failure of the legislature to have empowered referees with statutory authority to dismiss claims for want of prosecution would have rendered them helpless, regardless of the harmful reverberations to prepared and compliant claimants, to thwart intentional, indifferent, or selfish delaying tactics on the part of a few claimants impeding the timely and orderly dispatch of the great bulk of compensation claims. Such an incongruous result was wisely avoided by the legislature[.]

Cade v. Bendix Corp., 564 S.W.2d 608, 610 (Mo. App. 1978).

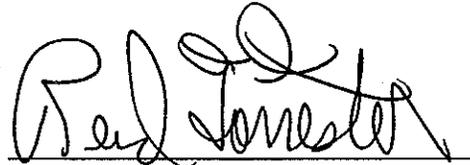
It is my desire and aim that we preserve, to the extent possible, an administrative law judge's discretion to dismiss those claims that warrant it. It is further my desire and aim that the parties to workers' compensation claims begin to take more seriously their obligation to appear for mandatory settings, comply with the lawful orders of the Division, and move claims diligently toward a resolution. For this reason, I will undertake an exacting look at any application for review where the applicant has failed to appear for a show cause hearing.

Here, I am not convinced that employee has diligently prosecuted his claim, nor am I convinced that he has alleged a prima facie good cause for setting aside the Order of Dismissal. In my view, a remand for yet another attempt at a hearing accomplishes little but an imposition upon the Division, and a needless diversion of our state's limited administrative resources.

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I would affirm the Order of Dismissal. Because the majority of the Commission has determined otherwise, I respectfully dissent.

A handwritten signature in black ink, appearing to read "Reid K. Forrester". The signature is written in a cursive style with a horizontal line underneath it.

Reid K. Forrester, Member