



# In the Missouri Court of Appeals Eastern District

## DIVISION FOUR

██████████	)	No. ED108950
	)	
Appellant,	)	Appeal from the Labor and
	)	Industrial Relations Commission
vs.	)	
	)	
TREASURER OF MISSOURI AS	)	
CUSTODIAN OF THE SECOND	)	
INJURY FUND,	)	
	)	
Respondent.	)	FILED: November 24, 2020

██████████ appeals from an order of the Labor and Industrial Relations Commission (the “Commission”) affirming the dismissal of his claim against the Second Injury Fund for failure to prosecute. We affirm.

### **Factual and Procedural Background**

██████████ was injured at work in September 1997 and filed a claim for compensation. He settled the case with his employer in February 2002, but his claim against the Second Injury Fund remained pending. In January 2005, he began pursuing a claim against the Second Injury Fund. Over the next several years, the case was set, continued and reset numerous times, often pursuant to agreements between the attorneys for ██████████ and the Second Injury Fund.

In 2009, the administrative law judge (“ALJ”) issued an order of dismissal with prejudice for failure to prosecute. ██████████ filed an application for review, and the Commission set aside the

order of dismissal. The case was again repeatedly reset and continued from May 2010 to May 2018, usually with neither party appearing at the proceedings.

On March 18, 2019, the Division of Workers' Compensation (the "Division") sent ██████ and his attorney notice that a pre-hearing conference was set for May 15, 2019. The notice was mailed to ██████ address on file, but was returned by the postal service with the notations "Attempted - Not Known" and "Unable to Forward." On June 11, 2019, the Division sent ██████ attorney a letter informing him that ██████ notice was not deliverable and advising it was imperative the Division have ██████ updated contact information. The letter indicated that if the Division did not receive a response its records would continue to reflect ██████ last known address.

On October 8, 2019, the Division mailed a "Notice to Show Cause Why Claim Should Not Be Dismissed" to ██████ attorney and to ██████ last known address. It notified the parties that the Division had set the matter for an appearance on November 6, 2019 and warned the matter would be dismissed for failure to prosecute "unless good cause [was] shown as to why an Order of Dismissal should not be entered." Counsel for the Second Injury Fund appeared at that setting, but ██████ and his attorney did not. The ALJ later issued an order of dismissal with prejudice for failure to prosecute, concluding that ██████ did not show good cause as to why his case should not be dismissed.

██████ attorney filed an application for review with the Commission on ██████ behalf, asserting (1) he had faxed a letter to the ALJ seeking a continuance of the November 6, 2019 setting because he had "been unable to reach" ██████<sup>1</sup> (2) the ALJ erred in finding no good cause

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<sup>1</sup> The Division's file does not include the letter from ██████ attorney and the fax confirmation sheet, and there is no indication the ALJ was aware of the letter at the time of dismissal. ██████ attorney attached those documents to the application for review, and the Commission considered them in making its decision.

was shown because the judge did not hear evidence and did not review any of [REDACTED] medical records, (3) he did not believe [REDACTED] received the notice to show cause because the address used did not appear to be a good one, and (4) he had retained a professional investigator to make efforts to locate [REDACTED]

The Commission affirmed the ALJ's order of dismissal, concluding the application for review failed to make a prima facie claim for setting aside the dismissal. The Commission stated that even if it were inclined to find that [REDACTED] attorney had good cause for failing to appear at the hearing, it was still not convinced the application for review sufficiently alleged [REDACTED] had prosecuted his claim or had good cause for failing to do so, noting that it did not describe any steps he had taken to prosecute his claim since he settled with his employer in 2002. The Commission acknowledged that [REDACTED] counsel indicated his belief that the address used by the Division for sending [REDACTED] notice was no longer his correct address and that he had been unable to reach him, but concluded that, rather than making a prima facie claim for relief, those circumstances appeared to constitute "a prima facie showing that [REDACTED] had] 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." The Commission also noted that, although [REDACTED] counsel indicated in the application for review that he had hired an investigator to locate [REDACTED] he did not advise of any results suggesting further efforts could be fruitful. This appeal follows.

### **Standard of Review**

Under Section 287.495.1,<sup>2</sup> we may modify, reverse, remand or set aside the Commission's award if: (1) the Commission acted without or in excess of its powers; (2) the Commission's award

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<sup>2</sup> All statutory references are to RSMo (2016).

was procured by fraud; (3) the facts found by the Commission do not support the award; or (4) there was not sufficient competent evidence in the record to warrant the making of the award.

“On review, this Court examines the record as a whole to determine if the award is supported by sufficient competent and substantial evidence, or whether the award is contrary to the overwhelming weight of the evidence.” *Breckle v. Treasurer of the State of Mo.*, 516 S.W.3d 899, 901 (Mo. App. E.D. 2017). “While we review questions of law *de novo*, we defer to the Commission on issues of fact.” *Id.*

### Discussion

In his first point, █████ contends the Commission’s decision “was unauthorized by law because it was predicated on the incorrect requirement that an application for review . . . must plead a prima facie case for setting aside the order of dismissal.” This argument has no merit. A claimant seeking to set aside a dismissal in an application for review is entitled to an evidentiary hearing only if he or she pleads facts that if taken as true would make a prima facie case showing good cause. *Robinson v. Mo. Dept. of Corr., Bd. of Prob. & Parole*, 805 S.W.2d 688, 689 (Mo. App. E.D. 1991). The Commission is not required “to hold an evidentiary hearing on every motion to set aside a dismissal in order to determine if a claimant has made a prima facie case of good cause for nonappearance.” *Id.* In *Robinson*, the claimant’s allegation of good cause was simply that her failure “to appear after certified notice was due to a docketing error by her counsel and not by an action of the claimant.” *Id.* at 690. The court affirmed the Commission’s decision that the “claimant’s stated reasons did not give rise to a prima facie case for good cause.” *Id.* █████ is incorrect that he was not required to make a prima facie case for setting aside the dismissal in his application for review. Because he failed to do so, the Commission did not err in affirming the dismissal of his claim. Point I is denied.

██████ second point argues the Commission’s decision was “not supported by sufficient competent evidence because [his] application for review established evidence of good cause for failure to participate in the show cause hearing on November 6, 2019.” ██████ claims the Commission “had evidence of a faxed continuance request that it recognized but ignored.” He argues the Commission did not “consider this evidence and never held an evidentiary hearing to determine its validity.”

██████ focuses entirely on his supposed good cause for failing to appear at the November 6, 2019 setting. But the Commission affirmed the order of dismissal on the basis that ██████ application for review failed to sufficiently allege he had prosecuted his claim or had good cause for failing to do so. And contrary to ██████ assertion, the Commission did consider the evidence; it took notice of the Division’s file and reviewed the allegations in his application for review and the letter from his attorney seeking a continuance. Nowhere in the application for review or in the letter did ██████ or his attorney allege facts that would make a prima facie case of good cause to avoid dismissal for his failure to prosecute his claim over the many years it had been pending.

██████ asserts he is entitled to an evidentiary hearing because “the Commission should have made a finding as to the truthfulness of his claims.” He relies on *Breckle*, where the court reversed the Commission’s denial of the claimant’s motion seeking relief following her failure to respond to a show cause order. 516 S.W.3d at 902-03. In that case, the claimant did not contest that the Commission properly mailed the order but made various allegations to show she did not actually receive it. *Id.* at 902. The court held it was necessary for the Commission to conduct an evidentiary hearing to determine the facts surrounding the claimant’s failure to respond. *Id.* at 902-03.

Here, however, an evidentiary hearing would have served no purpose because the allegations in ██████ application for review and in his attorney’s letter—even if taken as true—

failed to make a prima facie showing of good cause. The Commission's decision was based on sufficient competent and substantial evidence. Point II is denied.

In his third point, ██████ claims the Commission erred because it "cited and relied upon" *Johnston v. P & K Mfg., Inc.*, 898 S.W.2d 658 (Mo. App. W.D. 1995), which "was later overruled and contains facts which are substantially different than the case at hand." In that case, the Commission affirmed the ALJ's dismissal of a claim for failure to prosecute after the claimant's attorney appeared at a hearing but was unable to locate his client. *Johnston*, 898 S.W.2d at 661. Here, the Commission did not cite *Johnston* for the standard of review, which was the basis on which it was overruled in *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 223 (Mo. banc 2003), but rather in support of its conclusion that ██████ failure to keep in contact with either his attorney or the Division constituted evidence of failure to prosecute. The fact that the Commission cited *Johnston* does not undermine its conclusion that ██████ failed to make a prima facie claim for setting aside the dismissal.

██████ also stresses that "Missouri law disfavors dismissals for failure to prosecute and requires such dismissals to be decided on a case by case basis." But the Division and the Commission certainly followed that standard in this case. By setting the matter for a show cause hearing, the Division gave ██████ a chance to be heard on the issue of whether he was taking adequate steps to prosecute his claim. And the Commission considered the allegations in the application for review and the letter from ██████ attorney in which he explained why he was seeking a continuance of the hearing.

Finally, ██████ contends "the Commission relied on several cases that are predicated on a regulation that has been repealed." In its order, the Commission cited cases that referenced a rule that was previously part of 8 C.S.R. 50-2.010, which gave an ALJ the power to dismiss a case for

failure to prosecute if the claimant missed two prehearing conferences. But the Commission did not rely on that repealed regulation in concluding that [REDACTED] application for review failed to make a prima facie claim of good cause to set aside the dismissal of his claim. Point III is denied.

### **Conclusion**

For the foregoing reasons, we affirm the decision of the Commission.



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MICHAEL E. GARDNER, Judge

Gary M. Gaertner, Jr., P.J., concurs.

Philip M. Hess, J., concurs.