

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
WCC NO. H008499**

RHETTA BURRELL, EMPLOYEE	CLAIMANT
McDONALD'S STORE, EMPLOYER	RESPONDENT
SENTRY CASUALTY CO., CARRIER	RESPONDENT

OPINION FILED MAY 17, 2023

Hearing before Chief Administrative Law Judge O. Milton Fine II on May 10, 2023, in Little Rock, Pulaski County, Arkansas.

Claimant, *pro se*, not appearing.

Respondents represented by Mr. Jarrod S. Parrish, Attorney at Law, Little Rock, Arkansas.

I. BACKGROUND

This matter comes before the Commission on Respondents' Motion to Dismiss. A hearing on the motion was conducted on May 10, 2023, in Little Rock, Arkansas. Claimant, who is *pro se*, failed to appear. Respondents were represented at the hearing by Mr. Jarrod S. Parrish, Attorney at Law, of Little Rock, Arkansas. The record consists of (1) Respondents' Exhibit 1—forms, pleadings, and correspondence related to the matter—consisting of one index page and seven numbered pages thereafter; and (2) the Commission's file, which, without objection, has been incorporated herein in its entirety by reference.

The evidence reflects that per the First Report of Injury or Illness filed on October 30, 2020, Claimant purportedly sustained injuries to several body parts

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at work on September 16, 2020, when a door fell and struck her. According to the Form AR-2 that was filed on December 11, 2020, Respondents controverted the matter in its entirety. The file does not reflect that Claimant filed a Form AR-C.

She wrote the Commission on January 20, 2021: “I need a hearing!” The matter was at that point turned over to the Legal Advisor Division. But as a result of Claimant’s failure to complete a Legal Advisor Questionnaire, her file was returned to the Commission’s general files on March 1, 2021.

On September 20, 2021, Claimant wrote the Commission, stating the following:

Rhettta Burrell
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I want to appeal my workmans comp.

This was interpreted as another hearing request. The Legal Advisor Division attempted, without success, to set up a conference. That division on October 5, 2021, asked the Clerk of the Commission to assign the matter to an administrative law judge so that a hearing could be conducted.

The matter was assigned to then-Administrative Law Judge Katie Anderson on October 6, 2021. Prehearing questionnaires were sent to the parties on October 7, 2021. Respondents’ counsel entered his appearance on October 18, 2021. Because Claimant failed to respond to the questionnaire, the file was returned to the Commission’s general files on November 1, 2021.

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Nothing further occurred on this matter until September 19, 2022. On that date, the Commission received correspondence from Claimant that reads:

09/13/2022
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My name is Rhetta Burrell and I want a hearing to appeal my worker comp case: #H008499.

/s/ Rhetta Burrell

Interpreting this as yet another hearing request, the Clerk of the Commission reassigned the file to Judge Anderson on September 20, 2022. She re-issued questionnaires to the parties on September 21, 2022. Once more, Claimant did not comply by filing a response. Thus, on October 17, 2022, her file was returned to general files once again.

Claimant began a new cycle in this process on November 1, 2022, writing the Clerk of the Commission and yet again “asking for an appeal.” The file went back to Judge Anderson’s office¹ on November 2, 2022; and questionnaires were sent out on November 10, 2022. In this instance, Claimant complied, filing her questionnaire response on December 12, 2022. Respondents filed theirs on December 8, 2022. A prehearing telephone conference was scheduled for January 17, 2023. At the end of that conference, the parties agreed to set another conference for February 7, 2023. Later, on February 13, 2023, it was reset for February 21, 2023, and then March 14, 2023. At the appointed time on March 14, Claimant did not appear on the call. Before hanging up, Respondents

indicated that they were going to file a motion to dismiss the claim. For that reason, the file was not returned to the Commission's general files at that time, but was retained to receive the motion.

On March 14, 2023, Respondents filed the instant Motion to Dismiss. Therein, they argued that dismissal was warranted under AWCC R. 099.13 and Ark. Code Ann. § 11-9-702 (Repl. 2012) because Claimant failed to appear on the prehearing telephone conference and had not made a bona fide hearing request within the requisite period. On March 16, 2023, Judge Howe's office wrote Claimant, giving her 20 days to respond to the Motion to Dismiss. The correspondence was sent to Claimant by first-class and certified mail to an address for her that was furnished by Respondents in the motion: 477 Valley Dale Drive SW, Lilburn, Georgia 30047. However, this address appears to be incorrect: both items of correspondence were returned to the Commission, undeliverable. The notation from the United States Postal Service ("USPS") on the returned certified letter was "NO SUCH NUMBER." (Emphasis in original) Unfortunately, the Commission, although it had Claimant's email address, did not send this communication to her by that route as well. Thus, Claimant did not receive this letter.

When the 20-day deadline came and went (unsurprisingly) without a response from Claimant, a hearing was scheduled on the Motion to Dismiss on April 10, 2023, for May 10, 2023, at 9:30 a.m. at the Commission in Little Rock.

¹Judge Anderson was replaced by Judge JayO. Howe.

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The Notice of Hearing was sent via first-class and certified mail to a different address than before: 921 Church Street, Apartment 145, Decatur, Georgia 30030. The apartment number was supplied by Respondents, per the file; but Claimant in her prehearing questionnaire response had previously confirmed the street address. As before, both items of correspondence were returned to the Commission. The first-class letter bore the USPS notation “NOT DELIVERABLE AS ADDRESSED.”

Fortunately, the notice was also emailed to Claimant. This was the saving grace, for it reached her. On April 13, 2023, she emailed Judge Howe’s office:

Good morning. I sincerely apologize for not being able to make the date given [for the hearing on the Motion to Dismiss] due to me having a child in school full-time. School ends the last of May. I am asking if you will please consider a date after May. Thank you kindly.

Respondents objected to the continuance request, and Judge Howe denied the continuance, stating:

Ms. Burrell:

You are not required to attend the hearing on the Motion to Dismiss. I will note your wish to attend as an objection to the dismissal. If you have any documents you would like to submit for the record, please provide a copy of these to my office and [Respondents’ counsel] at least 10 days before the date of the hearing.

You may contact our Legal Advisors should you have any questions.

The hearing on the Motion to Dismiss proceeded as scheduled on May 10, 2023. Again, Claimant failed to appear. But Respondents appeared through

counsel and argued for dismissal of the action under the aforementioned authorities.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record as a whole, including medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of Claimant, I hereby make the following findings of fact and conclusions of law in accordance with Ark. Code Ann. § 11-9-704 (Repl. 2012):

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
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 her 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 099.13 provides:

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.

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

(1996). In turn, Ark. Code Ann. § 11-9-702(a)(4) (Repl. 2012) reads:

If within six (6) months after the filing of a claim for compensation no bona fide request for a hearing has been made with respect to the claim, the claim may, upon motion and after hearing, be dismissed without prejudice to the refiling of the claim within limitation periods specified in subdivisions (a)(1)-(3) of this section.

Under Ark. Code Ann. § 11-9-705(a)(3) (Repl. 2012), Respondents must prove by a preponderance of the evidence that dismissal should be granted. The standard “preponderance of the evidence” 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 noted above, no Form AR-C has been filed in this case. That is the means for filing a “formal claim.” *See Yearwood v. Wal-Mart Stores, Inc.*, 2003 AR Wrk. Comp. LEXIS 739, Claim No. F201311 (Full Commission Opinion filed June 17, 2003). *See also Sinclair v. Magnolia Hospital*, 1998 AR Wrk. Comp. LEXIS 786, Claim No. E703502 (Full Commission Opinion filed December 22, 1998)(a claim is “typically” filed *via* a Form AR-C). While a Form AR-1 was filed in this case, that does not suffice to instigate a claim. *Id.*

I recognize, however, that other means exist to file a claim for initial benefits other than a Form AR-C. In *Downing v. Univ. of Ark.*, 1999 AR Work. Comp. LEXIS 979, Claim No. E209360 (Full Commission Opinion filed March 16, 1999), the Commission stated:

While it appears that no court has addressed the minimum requirements under Arkansas law to state an adequate “petition for review”, in *Cook v. Southwestern Bell Telephone Company*, 21 Ark. App. 29, 727 S.W.2d 862 (1987) the Arkansas Court of Appeals discussed the minimum requirements necessary for correspondence to the Commission to constitute a claim for additional compensation for the purposes of tolling the applicable Statute of Limitations. In that case, the Court held that an attorney's correspondence notifying the Commission that he has been employed to assist a claimant in connection with unpaid benefits is sufficient to state a claim for additional compensation where the correspondence also lists the claimant's name, the employer's name and the WCC file number. *Id.*, *See also, Garrett v. Sears Roebuck and Company*, 43 Ark. App. 37, 858 S.W.2d 146 (1993). Moreover, we have interpreted *Cook* as requiring that correspondence intended as a claim for additional benefits (1) identify the claimant, (2) indicate that a compensable injury has occurred, and (3) convey the idea that compensation is expected.

(Citations omitted)

My review of the Commission's file discloses a document sufficient to constitute a filing of a claim for initial benefits under the factors cited above. That document is Claimant's prehearing questionnaire response, filed with the Commission on December 12, 2022.

The evidence adduced at the hearing shows that Claimant has taken no action in pursuit of her claim since appearing at the prehearing telephone conference on January 17, 2023. Again, she failed to appear on the one scheduled for March 14, 2023. That marked the fourth time Claimant had requested a hearing on her claim, but had failed to follow through. Moreover, the evidence clearly shows that both she and Respondents were provided reasonable notice of the Motion to Dismiss and of the hearing thereon. Thus, the

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evidence preponderates that dismissal is warranted under Rule 13. Because of this finding, it is unnecessary to address the applicability of Ark. Code Ann. § 11-9-702(a)(4) (Repl. 2012).

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 Wrk. 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 without prejudice. Based on the above authorities, I agree and find that the dismissal of this claim should be and hereby is entered *without prejudice*.²

CONCLUSION

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

IT IS SO ORDERED.

O. MILTON FINE II
Chief Administrative Law Judge

²“A dismissal ‘without prejudice’ allows a new [claim] to be brought on the same cause of action.” BLACK’S LAW DICTIONARY 825 (abridged 5th ed. 1983).