

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
WCC NO. H203191**

BRIAN S. JOHNS, EMPLOYEE	CLAIMANT
KROGER LIMITED PARTNERSHIP I, SELF-INSURED EMPLOYER	RESPONDENT
SEDGWICK CLAIMS MGMT. SVCS., THIRD PARTY ADMINISTRATOR	RESPONDENT

OPINION FILED APRIL 11, 2023

Hearing before Administrative Law Judge O. Milton Fine II on April 7, 2023, in Jonesboro, Craighead County, Arkansas.

Claimant, represented by Mr. Jim R. Burton, Attorney at Law, Jonesboro, Arkansas, not appearing.

Respondents represented by Ms. Karen H. McKinney, 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 April 7, 2023, in Jonesboro, Arkansas. Neither Claimant nor his counsel appeared at the hearing. Without objection, the Commission file on this claim has been incorporated herein in its entirety by reference. Admitted into evidence was Respondents' Exhibit 1, forms, pleadings, and correspondence related to the claim, consisting of 15 pages.

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The record reflects the following procedural history:

On April 27, 2022, a Form AR-1 was filed in this case, reflecting that Claimant purportedly suffered a fractured foot while operating a pallet jack at work on June 22, 2021. Per the Form AR-2 that was filed on May 10, 2022, Respondents first denied, but later accepted, the claim as a medical-only one. On May 9, 2022, Claimant—through counsel—filed a Form AR-C, requesting a full range of initial benefits in connection with the alleged June 22, 2021, incident. No hearing request accompanied this filing. Respondents' counsel made her entry of appearance on May 13, 2022.

Claimant's counsel on May 17, 2022, wrote the Commission:

This is to advise you I have been in contact with the respondents' attorney; it appears that the issues raised in the above ARC filing, WCC No. H203191, are already encompassed in and relate back to an earlier filing by the claimant, specifically a crush/fracture injury, left foot/ankle dated June 30, 2021, in WCC No. H105672. Respondents have accepted this claim as compensable and have paid temporary total disability and medical expenses up to the present.

As such, this is to request that our AR-C filing in WCC No. H203191 be withdrawn, and that the file reflect us as attorney of record for the claimant in all future proceedings regarding WCC No. H105672.

Respondents' counsel by letter on May 17, 2022, echoed the above correspondence, representing that they had no objection to Claimant being allowed to withdraw his Form AR-C in the instant claim.

But the Commission has not found that claims are subject to non-suit—which a withdrawal of the Form AR-C would essentially constitute—under Ark. R.

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Civ. P. 41. *See Hooker v. E.C. Rowlett Const. Co. et al.*, 2005 AR Wrk. Comp. LEXIS 38, AWCC No. F012906 (Full Commission Opinion filed February 8, 2005). Regardless, no withdrawal of the claim form ever took place.

On November 29, 2022, Respondents filed their Motion to Dismiss. Therein, they alleged that dismissal of the claim was warranted under AWCC R. 099.13 and Ark. Code Ann. § 11-9-702(a)(4) & (d) (Repl. 2012) because Claimant has not requested a hearing on this claim (which, of course, stands to reason since the injury alleged herein is the subject of a separate claim). On December 8, 2022, my office wrote Claimant's counsel, asking for a response to the motion within 20 days. No response thereto was forthcoming, however.

On February 3, 2023, a hearing was scheduled on the Motion to Dismiss for April 7, 2023, at 10:30 a.m. at the Craighead County Courthouse in Jonesboro. The hearing notice was sent to Claimant by certified and first-class mail to the address listed for him in his Form AR-C and in the Commission's file. His counsel was notified by first-class mail as well. The certified letter was returned to the Commission, unclaimed, on March 21, 2023, while the first-class letter to Claimant was never returned. The letter to his attorney was not returned, either. The evidence thus preponderates that Claimant received notice of the hearing.

The hearing proceeded as scheduled on April 7, 2023. Again, Claimant and his counsel failed to appear at the hearing. But Respondents appeared through their attorney and argued for dismissal under the foregoing authorities.

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 matter.
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 his 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

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 this matter—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)

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Claimant has failed to pursue his claim because he has taken no further action in pursuit of it (including appearing at the April 7, 2023, hearing to argue against its dismissal) since the May 9, 2022, filing of the Form AR-C. Thus, the evidence preponderates that dismissal is warranted under Rule 13.

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 with prejudice. But based on the above authorities, I find that the dismissal of this 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*.

IT IS SO ORDERED.

O. MILTON FINE II
Chief Administrative Law Judge