

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
WCC NO. H208936**

RALPH JOHNSON, EMPLOYEE	CLAIMANT
THOMPSON CONSTR. GRP., INC. EMPLOYER	RESPONDENT
ZURICH AMER. INS. CO., CARRIER	RESPONDENT

OPINION FILED AUGUST 10, 2023

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

Claimant, *pro se*, not appearing.

Respondents represented by Ms. Carol Lockard Worley, Attorney at Law, Little Rock, Arkansas.

I. BACKGROUND

This matter comes before the Commission on the Motion to Dismiss filed by Respondents. A hearing on the motion was conducted on August 10, 2023, in Little Rock, Arkansas. Claimant, who is *pro se*, failed to appear. Respondents were represented at the hearing by Ms. Carol Lockard Worley, Attorney at Law, of Little Rock, Arkansas. The record consists of Respondents' Exhibit 1, pleadings, forms and correspondence related to the claim, consisting of one index page and nine numbered pages thereafter. In addition, without objection, the Commission's file has been incorporated herein in its entirety by reference.

The evidence reflects that per the First Report of Injury or Illness filed on December 23, 2022, Claimant purportedly injured his neck on December 16,

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2022, when he was riding a UTV at work and struck some iron beams. According to the Form AR-2 that was filed on December 30, 2022, Respondents denied the claim due to an alleged lack of objective findings.

On December 28, 2022, Claimant (through then-counsel Jim R. Burton) filed a Form AR-C, requesting various initial benefits. No hearing request accompanied the filing. In an email to the Operations & Compliance Division of the Commission on January 4, 2023, Respondents reiterated that they were controverting the claim on the basis cited above. Their attorney entered her appearance before the Commission on January 5, 2023.

The record further reflects that on May 1, 2023, Respondents filed the instant Motion to Dismiss. Therein, they argued that dismissal was warranted under AWCC R. 099.13 because “Claimant has not sought any type of bona fide hearing before the Workers’ Compensation Commission . . . nor has he cooperated in discovery efforts regarding his claim.” On May 19, 2023, my office wrote Mr. Burton, asking for a response to the motion within twenty (20) days. A copy was sent to Claimant at the address listed for him in his Forms AR-1 and AR-C; however, it was returned to the Commission, unclaimed, on May 31, 2023.

However, Mr. Burton by this point had already filed with the Clerk of the Commission a Motion to Withdraw from the case. Therein, he stated that he “has made several attempts to contact claimant with no response” therefrom. On May 23, 2023, the Full Commission granted the Motion to Withdraw under AWCC Advisory 2003-2. Upon learning of this, my office re-sent the 20-day letter to

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Claimant, now *pro se*, on June 13, 2023. This correspondence was sent by first-class and certified mail to the same address as before. The certified letter was returned to the Commission, unclaimed, on June 26, 2023; however the first-class letter was not returned. Nonetheless, no response was forthcoming from him.

On July 11, 2023, a hearing on the Motion to Dismiss was scheduled for August 10, 2023, at 9:30 a.m. at the Commission in Little Rock. The notice was sent to Claimant by first-class mail to the same address as before. The letter was returned; the envelope bears the handwritten notations “MY SON NOT ME” and “Return to Sender.” Again, this was the only address furnished to the Commission in connection with this claim.

The hearing on the Motion to Dismiss proceeded as scheduled on August 10, 2023. Again, Claimant failed to appear. But Respondents appeared through counsel and argued for dismissal of the action under Rule 13 along with Ark. Code Ann. § 11-9-702(a)(4) (Repl. 2012).

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record as a whole, 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. Respondents have proven by a preponderance of the evidence that this claim should be dismissed under AWCC R. 099.13.
4. The Motion to Dismiss is hereby granted.
5. This claim is hereby dismissed without prejudice.

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.

See generally Johnson v. Triple T Foods, 55 Ark. App. 83, 85, 929 S.W.2d 730 (1996). (Emphasis added) 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).

The evidence shows that (1) the parties were provided with reasonable notice of the Motion to Dismiss and the hearing thereon, and (2) Claimant has taken no action in pursuit of his claim since the filing of his Form AR-C on December 28, 2022. Thus, the evidence preponderates that dismissal is warranted under Rule 13. This motion is hereby granted under that provision. Because of this finding, the status of the claim under § 11-9-702(a)(4) is moot and will not be addressed.

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)). At the hearing, Respondents requested a dismissal with prejudice. But based on the foregoing, I find that the dismissal of this claim should be and hereby is entered *without prejudice*.¹

¹“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).

CONCLUSION

In accordance with the Findings of Fact and Conclusions of Law set forth above, the Motion to Dismiss is hereby granted. This claim is hereby dismissed without prejudice.

IT IS SO ORDERED.

O. MILTON FINE II
Chief Administrative Law Judge