

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. H010322

DWAYNE P. ARMSTRONG, EMPLOYEE	CLAIMANT
SHEARERS FOODS LLC, EMPLOYER	RESPONDENT
TRAVELERS INDEMN. CO., CARRIER	RESPONDENT

OPINION FILED JULY 29, 2021

Hearing before Administrative Law Judge O. Milton Fine II on July 29, 2021, in Little Rock, Pulaski County, Arkansas.

Claimant, *pro se*, not appearing.

Respondents represented by Mr. Guy Alton Wade, 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 July 29, 2021, in Little Rock, Arkansas. No testimony was taken in the case. Claimant, who according to Commission records is *pro se*, failed to appear 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, documents related to the claim, consisting of nine (9) numbered pages.

ARMSTRONG – H010322

The record reflects the following procedural history:

On December 19, 2020, a Form AR-1 was filed in this case, reflecting that Claimant purportedly sustained a strain injury while lifting pallets at work on February 14, 2020. Per the Form AR-2 that was filed on December 21, 2020, Respondents controverted the claim in its entirety. On December 14, 2020, Claimant filed a Form AR-C, requesting a full range of initial and additional benefits. No hearing request accompanied this filing. Respondents' counsel made an entry of appearance on February 22, 2021. The evidence indicates that discovery was propounded to Claimant, but went unanswered.

On June 4, 2021, Respondents filed the instant motion. Therein, they alleged that dismissal of the claim was warranted under AWCC R. 099.13 for "lack of prosecution." On June 8, 2021, a letter from the Commission was sent to Claimant, asking for a response to the motion within twenty (20) days. This letter was sent by both first-class and certified mail to the address for Claimant listed on his Form AR-C. While the certified letter was returned to the Commission, unclaimed, on July 6, 2021, the first-class letter was never returned. Regardless, no response was forthcoming from him.

On June 30, 2021, a hearing was scheduled on Respondents' motion for July 29, 2021, at 9:30 a.m. at the Commission in Little Rock. The hearing notice was sent to Claimant by certified and first-class mail to the same address as before. As before, the certified letter was returned to the Commission, unclaimed,

ARMSTRONG – H010322

on July 20, 2021, while the first-class letter was never returned. The evidence thus preponderates that Claimant received notice of the hearing.

The hearing proceeded as scheduled on July 29, 2021. Again, Claimant failed to appear at the hearing. But Respondents appeared through counsel and argued for dismissal under § 11-9-702(a)(4) and Rule 13.

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

ARMSTRONG – H010322

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) Claimant has failed to pursue his claim because he has taken no further action in pursuit of it (including appearing at the July 29, 2021, hearing to argue against its dismissal) since the filing of his Form AR-C on December 14, 2020. Thus, the evidence preponderates that dismissal is warranted under Rule 13. Because of this finding, it is unnecessary to address the application 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 AWCC 226, 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

ARMSTRONG – H010322

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*.¹

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

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).