

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. H005260

BRENDA ARNOLD, EMPLOYEE	CLAIMANT
FOCUS, INC., SELF-INSURED EMPLOYER	RESPONDENT
RISK MANAGEMENT RESOURCES, THIRD-PARTY ADMINISTRATOR	RESPONDENT

OPINION FILED JUNE 7, 2021

Hearing before Administrative Law Judge O. Milton Fine II on June 4, 2021, in Jonesboro, Craighead 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 a motion to dismiss by Respondents. A hearing on the motion was conducted on June 4, 2021 in Jonesboro, 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's file on the claim has been incorporated herein in its entirety by reference. Also admitted into evidence was Respondents' Exhibit 1, pleadings, correspondence and forms related to this claim, consisting of one index page and six numbered pages thereafter.

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The record reflects the following procedural history:

Per the First Report of Injury or Illness filed August 10, 2020, Claimant purportedly suffered an injury to her left upper arm on June 17, 2020, when she fell out of a chair at work. According to the Form AR-2 filed on August 12, 2020, Respondents accepted the claim as a medical-only one.

On July 31, 2020, Claimant filed a Form AR-C, alleging that she injured her left shoulder when she fell out of a chair at work while testing a child. However, no hearing request accompanied the form. On August 31, 2020, the Medical Cost Containment Division of the Commission entered an order changing Claimant's authorized treating physician from Dr. Ronald Angelo Sismondo to Dr. Michael Hood. An appointment with Dr. Hood was scheduled for September 15, 2020.

On September 17, 2020, attorney Daniel E. Wren entered his appearance before the Commission on Claimant's behalf. However, on March 20, 2021, he moved to withdraw from the case. In an order entered on March 31, 2021, the Full Commission granted Wren's motion under AWCC Advisory 2003-2.

The record reflects that nothing further took place on the claim until April 7, 2021. On that date, Respondents' counsel entered their appearance and filed the instant motion, asking for dismissal of the claim under Ark. Code Ann. § 11-9-702 (Repl. 2012) and AWCC R. 099.13 because more than six months had elapsed

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since Claimant filed her Form AR-C without her making a bona fide hearing request.

On April 13, 2021, my office wrote Claimant, asking for a response to the motion within 20 days. The letter was sent by first class and certified mail to the Cardwell, Missouri address of Claimant listed in the file and on her Form AR-C. It is unknown at present whether Claimant signed for the certified letter. However, the first-class letter was not returned. However, no response from Claimant to the motion was forthcoming. On May 10, 2021, a hearing on the motion to dismiss was scheduled for June 4, 2021, at 10:00 a.m. at the Craighead County Courthouse in Jonesboro. The notice was sent to Claimant via first-class and certified mail to the same address as before. Claimant signed for the certified letter on May 13, 2021; and the first-class letter was not returned to the Commission. Thus, the evidence preponderates that Claimant received notice of the hearing.

The hearing on the motion to dismiss proceeded as scheduled on June 4, 2021. Again, Claimant failed to appear at the hearing. But Respondents appeared through counsel and argued for dismissal under the aforementioned 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

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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 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 R. 099.13 reads:

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).

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 the claim—by a preponderance of the evidence. This standard means the evidence having greater weight or convincing force. *Barre v. Hoffman*, 2009 Ark. 373, 326

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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 her claim because she has taken no further action in pursuit of it (including appearing at the June 4, 2021, hearing to argue against its dismissal) since the receipt of her change-of-physician order on August 31, 2020. Thus, the 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 (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

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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).