

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**WCC NO. G806585**

<b>TONY BENNETT, EMPLOYEE</b>	<b>CLAIMANT</b>
<b>GERALD E. PRINCE CONSTRUCTION, INC., EMPLOYER</b>	<b>RESPONDENT</b>
<b>OHIO CASUALTY INS. CO., CARRIER</b>	<b>RESPONDENT</b>

**OPINION FILED JUNE 7, 2021**

Hearing before Administrative Law Judge O. Milton Fine II on May 12, 2021, in Little Rock, Pulaski County, Arkansas.

Claimant, *pro se*.

Respondents represented by Mr. David C. Jones, 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 May 12, 2021, in Little Rock, Arkansas. Claimant, who is representing herself, appeared in person and testified. In addition to Claimant's testimony, the record consists of Respondents' Exhibit 1, forms, pleadings and correspondence, consisting of 35 numbered pages; and the Commission's file, which—without objection—has been incorporated herein in its entirety by reference.

The record reflects the following procedural history:

Per the First Report of Injury or Illness filed on October 1, 2018, Claimant purportedly injured her right wrist on September 7, 2018, when she struck it on the

BENNETT – G806585

edge of a desk at work. According to the Form AR-2 that was filed on October 2, 2018, Respondents controverted the claim.

On December 27, 2019, Claimant—through then-counsel Laura Beth York—filed a Form AR-C, requesting the full range of initial and additional benefits. Therein, she alleged that Claimant not only injured her right wrist, but her neck, right shoulder, right hip, and “other whole body.” However, no hearing request was made. In response to this filing, the respondent carrier emailed the Compliance Division of the Commission on December 30, 2019, stating that they were accepting the right wrist injury but controverting any other alleged injuries. Respondents’ counsel entered his appearance on January 6, 2020. Inexplicably, York filed another Form AR-C (simply a photocopy of the earlier one) on August 17, 2020. As before, no hearing request accompanied this filing.

Thereafter, on September 28, 2020, York moved to withdraw from her representation of Claimant. In her hearing testimony, Claimant denied being served with this motion. The first-class letter the Commission sent to her on October 3, 2020, asking for a response to this motion, was returned undelivered for “no such street.” In an order entered on October 13, 2020, the Full Commission granted the motion pursuant to AWCC Advisory 2003-2. Claimant admitted receiving a copy of the order, but denied getting the enclosure letter that accompanied it.

BENNETT – G806585

The record reflects that no further action was taken on this case until March 15, 2021. On that date, Respondents filed the instant motion to dismiss and brief in support thereof. The file was assigned to me on March 16, 2021; and my office wrote Claimant that same day, asking for a response to the motion to dismiss within twenty (20) days. The correspondence was sent by certified and first-class mail to the address that Claimant listed in her Form AR-C. It was emailed to her as well. She signed for the certified letter on March 19, 2021; and the first-class letter was not returned. Regardless, no response from Claimant was forthcoming. Her hearing testimony was that in response to this, she simply called the Commission and visited with an unidentified staff member. No memorandum of that alleged telephone conversation is in the file.

On April 6, 2021, I scheduled a hearing on the motion to dismiss for May 12, 2021, at 10:00 a.m. at the Commission. The hearing notice was sent to Claimant via certified and first-class mail at the same address as before. The certified letter was signed for on April 8, 2021; and the first-class correspondence was not returned. Claimant admitted that she received the notice.

The hearing on the motion to dismiss proceeded as scheduled on May 12, 2021. Claimant appeared at the hearing, albeit belatedly. Respondents appeared through counsel and argued for dismissal under Ark. Code Ann. § 11-9-702 (Repl. 2012) and AWCC R. 099.13.

**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 claim.
2. All parties received notice of the motion to dismiss and the hearing thereon pursuant to AWCC R. 099.13.
3. Respondents have not proven by a preponderance of the evidence that Claimant has failed to prosecute her claim under AWCC R. 099.13.
4. Respondents have not proven by a preponderance of the evidence that dismissal of this claim is warranted under Ark. Code Ann. § 11-9-702 (Repl. 2012).
5. Respondents' motion to dismiss should be, and hereby is, denied.
6. Claimant has requested a hearing on her claim.
7. This matter will proceed to a hearing on the merits.

**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

BENNETT – G806585

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). In turn, Ark. Code Ann. § 11-9-702(a)(4) & (d) (Repl. 2012) read:

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 limitations periods specified in subdivisions (a)(1)-(3) of this section.

...

If within six (6) months after the filing of a claim for additional compensation no bona fide request for a hearing has been made with respect to the claim, the claim **may**, upon motion and after hearing, if necessary, be dismissed without prejudice to the refiling of the claim within limitations periods specified in subsection (b) of this section.

(Emphasis added)

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 instant 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 S.W.3d 415; *Smith v. Magnet Cove Barium Corp.*, 212 Ark. 491, 206 S.W.2d 442 (1947).

A claimant's testimony is never considered uncontroverted. *Nix v. Wilson World Hotel*, 46 Ark. App. 303, 879 S.W.2d 457 (1994). The determination of a witness' credibility and how much weight to accord to that person's testimony are

BENNETT – G806585

solely up to the Commission. *White v. Gregg Agricultural Ent.*, 72 Ark. App. 309, 37 S.W.3d 649 (2001). The Commission must sort through conflicting evidence and determine the true facts. *Id.* In so doing, the Commission is not required to believe the testimony of the claimant or any other witness, but may accept and translate into findings of fact only those portions of the testimony that it deems worthy of belief. *Id.*

At the hearing, Claimant testified that the reasons that she did not take any steps to prosecute the claim after York withdrew from the case was that she was attempting to obtain new counsel and had tried numerous times, without success, to get a copy of her file from York's office. Claimant requested a hearing on her claim, in the event that it is not dismissed, in order to obtain benefits.

After consideration of the evidence, I find that while both Claimant and Respondents were given reasonable notice of the motion to dismiss hearing under Rule 13, the former has not yet abridged that rule. Likewise, dismissal is not yet warranted under § 11-9-702(a)(4) & (d). The motion to dismiss is thus denied.

Prehearing questionnaires will be immediately issued to the parties, and this matter will proceed to a full hearing on the merits.

#### **IV. CONCLUSION**

Based on the findings of fact and conclusions of law set forth above, Respondents' motion to dismiss is hereby denied.

BENNETT – G806585

**IT IS SO ORDERED.**

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O. MILTON FINE II  
Chief Administrative Law Judge