

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. H007806

CHRIS BERNARD, EMPLOYEE	CLAIMANT
MEADOWS CONST. TWO LLC, EMPLOYER	RESPONDENT
UNION INS. CO., CARRIER	RESPONDENT

OPINION FILED JUNE 17, 2021

Hearing before Administrative Law Judge O. Milton Fine II on June 17, 2021, in Little Rock, Pulaski County, Arkansas.

Claimant, *pro se*, not appearing.

Respondents represented by Ms. Melissa Wood, 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 17, 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'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 nine (9) numbered pages thereafter.

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The record reflects the following procedural history:

Per the First Report of Injury or Illness filed November 2, 2020, Claimant purportedly suffered an injury to his back on June 9, 2020, when he was moving a crate onto a forklift. According to the Form AR-2 filed on October 27, 2020, Respondents controverted the claim in its entirety. Their counsel made an entry of appearance on October 30, 2020; and on November 2, 2020, reiterated their position that the claim is not compensable.

On or about¹ October 13, 2020—through then-attorney Whitney James, Claimant filed a Form AR-C, alleging that he injured his back “and other whole body” when a pallet broke as he was moving a 120-pound ground box onto a forklift. However, no hearing request accompanied the form. On March 17, 2021, James 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 16, 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 since Claimant filed his Form AR-C without making a bona fide hearing request.

¹The form was obviously filed with the Commission, because it is in the file. But it bears no file mark. It was signed by James on October 13, 2020.

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On April 21, 2021, my office wrote Claimant, asking for a response to the motion within twenty (20) days. The letter was sent by first class and certified mail to the Conway, Arkansas address of Claimant listed in the file and on his Form AR-C. Someone with an illegible signature signed for the certified letter on April 27, 2021; and the first-class letter was not returned. However, no response from Claimant to the motion was forthcoming. On May 17, 2021, a hearing on the motion to dismiss was scheduled for June 17, 2021, at 10:00 a.m. at the Commission in Little Rock, Arkansas. 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 21, 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 17, 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 conclusions of law are hereby made in accordance with Ark. Code Ann. § 11-9-704 (Repl. 2012):

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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

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

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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 June 17, 2021, hearing to argue against its dismissal) since the filing of the Form AR-C on or about October 13, 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 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*.²

²“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).

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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