

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION  
WCC NO. H109435**

<b>LINDA K. CLARK, EMPLOYEE</b>	<b>CLAIMANT</b>
<b>PULASKI COUNTY SPEC. SCH. DIST., SELF-INSURED EMPLOYER</b>	<b>RESPONDENT</b>
<b>ARK. SCH. BOARDS ASSN., THIRD PARTY ADMINISTRATOR</b>	<b>RESPONDENT</b>

**OPINION FILED DECEMBER 13, 2022**

Hearing before Chief Administrative Law Judge O. Milton Fine II on December 6, 2022, in Little Rock, Pulaski County, Arkansas.

Claimant, *pro se*.

Respondents represented by Mr. Jarrod S. Parrish, Attorney at Law, Little Rock, Arkansas.

**I. BACKGROUND**

This matter comes before the Commission on Respondents' Motion to Dismiss. A hearing on the motion was conducted on December 6, 2022, in Little Rock, Arkansas. Claimant, who is *pro se*, appeared in person and testified. Respondents were represented at the hearing by Mr. Jarrod S. Parrish, Attorney at Law, of Little Rock, Arkansas. In addition to Claimant's testimony and Respondents' Exhibit 1, forms, pleadings and correspondence related to this claim and consisting of one index page and five numbered pages thereafter, the record consists of the Commission's file—which, without objection, has been incorporated herein in its entirety by reference.

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The evidence reflects that on December 1, 2021, Claimant filed a Form AR-C with the Commission. Therein, she requested only temporary total disability benefits and alleged:

During my daily routine which consist[s] of dumping trash[,] sweeping, cleaning etc[.] of the boys['] locker room there were shoes, bottles and other debris cluttering the floor[.] [A]s I was on my way to clean to clean another area of the locker room I stumbled over a large piece of debris causing me to lose my balance. In [sic] result my left ankle being damaged and being left with no income.

According to the Form AR-2 that was also on July 30, 2019, Respondents controverted the claim “pending further investigation.”

The record reflects that no further action took place on the case until October 12, 2022, when Respondents filed the instant Motion to Dismiss—via a letter by Adjustor Melody Tipton that was copied to Claimant at the address listed on her Form AR-C. Therein, they argued that dismissal was warranted due to “lack of prosecution by Ms. Clark.” The claim was assigned to Judge Terry Don Lucy on October 12, 2022; and on October 14, 2022, he wrote Claimant, giving her 20 days to respond to the motion. The letter was sent to Claimant by both first-class and certified mail to the address given by her on her Form AR-C. She claimed the certified letter on October 19, 2022; and the first-class letter was not returned.

Despite the clear evidence that Claimant received this letter, and her admission that it was correctly addressed, she adamantly denied getting it in her

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initial testimony at the hearing. Prior to the following exchange, she was shown the letter:

JUDGE FINE: Did you get this letter?

MS. CLARK: I did not.

JUDGE FINE: You did not?

MS. CLARK: I never—I never seen that letter.

...

JUDGE FINE: You're telling me not only that you didn't receive a green card, or whatever notification of a certified letter—

MS. CLARK: Yes.

...

JUDGE FINE: That you didn't get the certified letter [or] notice and you didn't get just a regular letter to your address and this form?

MS. CLARK: I've never seen that letter.

...

JUDGE FINE: But again, your testimony is you've never seen this letter?

MS. CLARK: Not that letter.

She testified that she has had problems with her mail delivery due to a discrepancy in her address. Asked to produce her hearing notice—which she agreed that she received—she pulled it out of her purse, along with two copies of the Judge Lucy letter that she repeatedly denied getting in the mail. Asked to explain this, Claimant responded that she had “just put everything [i.e., all of the

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correspondence and other paperwork] together,” and had “overlooked it.” Shortly thereafter, however, Claimant gave testimony that was inconsistent with this:

JUDGE FINE: [Reading her the letter] And it says [as read], “If you wish to respond to this motion or to request a hearing, contact Judge Lucy’s office in writing within twenty (20) days.” Did you understand that?

MS. CLARK: I did, and when I seen it, it was past the time.

JUDGE FINE: What do you mean when you saw it?

MS. CLARK: It was outside the twenty (20) days, which was past November—I think when I got this letter or actually seen it, it may have been November 22<sup>nd</sup>.

JUDGE FINE: Did you get the letter and not open it?

MS. CLARK: Yes.

JUDGE FINE: And that’s your testimony?

MS. CLARK: Yes.

In other words, Claimant’s accounts not only conflict with the evidence, but with other.

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 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

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translate into findings of fact only those portions of the testimony that it deems worthy of belief. *Id.* Based on the foregoing, I do not find Claimant to be a credible witness.

On November 4, 2022, a hearing on the Motion to Dismiss was scheduled for December 6, 2022, at 10:00 a.m. at the Commission in Little Rock. The hearing notice was sent to Claimant by first-class and certified mail to the same address as before. In this instance, Claimant acknowledged receiving this correspondence—and by both routes. The following exchange took place:

MR. PARRISH: And when we're looking at these letters [indicating], you have both copies, meaning you got the regular mail copy and the certified mail copy that you signed for, right?

MS. CLARK: Yes.

MR. PARRISH: Okay. So you had two (2)—

MS. CLARK: No, I didn't sign for anything.

MR. PARRISH: How did you get two (2) copies of the letter?

MS. CLARK: It was in my box.

MR. PARRISH: Okay.

MS. CLARK: Everything I got today, nothin' was signed for.

MR. PARRISH: But you had these two (2) letters [indicating] folded up together, not in an envelope, in your purse, correct?

MS. CLARK: Right.

MR. PARRISH: Okay.

MS. CLARK: I got certified letters and both came to my mailbox.

During the hearing. Respondents argued for dismissal under both § 11-9-702 (Repl. 2012) and AWCC 099.13.

## **II. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record as a whole, including medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the claimant/witness, 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. All parties received notice of the motion to dismiss and the hearing thereon pursuant to AWCC R. 099.13.
3. Respondents have proven by a preponderance of the evidence that Claimant has failed to prosecute her claim under AWCC R. 099.13.
4. Respondents' Motion to Dismiss should be, and hereby is, 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.

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*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) (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.

(Emphasis added) 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).

At the hearing, Claimant testified that the reason that she had not taken any steps to prosecute the claim after the filing of her Form AR-C on December 1, 2021, was that Tipton wrote her in December 2021 to inform her that the claim was being denied pending further investigation. She testified: “I was told they were investigatin’, and they would get back to me after they’d gotten medical records and everything they needed to go forward.” This does not adequately explain her failure to prosecute her claim for nearly one year. As was pointed out in the hearing, once she unquestionably was informed of the filing for the Motion to Dismiss on October 12, 2022, that any such investigation had come to an end that that her only recourse would be to press forward with her claim, she still did nothing. Her testimony at the hearing was that she did not get a copy of the

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motion from Respondents; she got it “from the Court [presumably, referring to the Commission]. This is curious in light of the fact that the motion was not served on her by the Commission; only Respondents sent it to her. She testified that she “was actually lookin’ for a number to call to let someone know that I would be here [to object to the motion].” The motion has the number for the Arkansas School Boards Association at the top; and Judge Lucy’s October 14, 2022, correspondence has the number for the Commission on it. Again, the evidence conclusively shows Claimant received both of these. Claimant’s explanation is not only inadequate; it is untrue. Claimant also attributed her failure to proceed with her claim to her preoccupation with her daughter’s cancer treatment. This situation, certainly deserving of sympathy, does not explain her well-documented failure to take any action in furtherance of her claim prior to December 6, 2022.

A preponderance of the evidence establishes that Claimant has failed to pursue her claim because she has taken no further action in pursuit of it since the filing of her Form AR-C. Thus, the evidence preponderates that dismissal is warranted under Rule 13. Because of this finding, it is unnecessary to address the application of § 11-9-702.

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,



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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*.<sup>1</sup>

#### **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.**

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O. MILTON FINE II  
Chief Administrative Law Judge

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<sup>1</sup>“A dismissal ‘without prejudice’ allows a new [claim] to be brought on the same cause of action.” BLACK’S LAW DICTIONARY 825 (abridged 5<sup>th</sup> ed. 1983).