

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. G904871

ROBERT CRENSHAW, EMPLOYEE	CLAIMANT
TYSON POULTRY, INC., SELF-INSURED EMPLOYER	RESPONDENT
TYNET CORP., SELF-INSURED EMPLOYER	RESPONDENT

OPINION FILED JANUARY 22, 2021

Hearing before Administrative Law Judge O. Milton Fine II on January 19, 2021 in Little Rock, Pulaski County, Arkansas.

Claimant, *pro se*.

Respondents represented by Mr. Jeremy Swearingen, 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 January 19, 2021 in Little Rock, Arkansas. Claimant, who is *pro se*, appeared in person and testified. Respondents were represented at the hearing by Mr. Jeremy Swearingen, Attorney at Law, of Little Rock, Arkansas. In addition to Claimant's testimony, the record consists of the Commission's file—which, without objection, has been incorporated herein in its entirety by reference.

The evidence reflects that per the First Report of Injury or Illness filed on July 30, 2019, Claimant purportedly struck his head at work on March 22, 2019 while walking under a catwalk. According to the Form AR-2 that was also on July 30, 2019, Respondents controverted the claim in its entirety. On October 7,

2019, Claimant (through then-counsel Whitney James) filed a Form AR-C, alleging that the following occurred on April 3, 2019: “Claimant hit his head on the bar of the catwalk. He sustained injuries to his head, had a seizure and sustained injuries to other whole body.” Respondents responded on October 14, 2019, reiterating their earlier response in the Form AR-2. On October 17, 2019, Respondents’ counsel made his entry of appearance.

On August 5, 2020, James moved to withdraw from her representation of Claimant. Claimant wrote Governor Asa Hutchinson on August 13, 2020, objecting to the motion. However, because the Commission was not the original addressee, it did not receive the forwarded correspondence until August 24, 2020. In the meantime, in an order entered on August 20, 2020, the Full Commission granted the motion to withdraw under AWCC Advisory 2003-2.

The record reflects that no further action took place on the case until August 31, 2020, when Respondents filed the instant motion to dismiss. Therein, they argued that dismissal was warranted under both Ark. Code Ann. § 11-9-702(a)(4) (Repl. 2012) and AWCC R. 099.13 because “Claimant has not requested a hearing or given any indication at all of an intent to prosecute his claim for benefits. The claim has been dormant and inactive for months.” On September 4, 2020, Administrative Law Judge James Kennedy wrote Claimant, giving him 20 days to respond to the motion to dismiss. Claimant answered promptly on September 9, 2020, writing: “I am interested in continuing to pursue my workers’ comp claim and would like to request a reasonable amount of time

to seek legal representation.” Honoring that request, Judge Kennedy scheduled the hearing for November 17, 2020, giving the claimant the requested time to obtain a new attorney. On November 9, 2020, Claimant wrote the judge, asking for additional time and requesting that he appoint him an attorney. Judge Kennedy honored this request as well, resetting the hearing for December 18, 2020. The hearing was rescheduled yet again on December 15, 2020 for January 19, 2021. At the hearing, Claimant testified that he received this revised hearing notice and that was why he appeared at the hearing.

During the hearing. Respondents argued for dismissal under both § 11-9-704(a)(4) (Repl. 2012) and Rule 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 not proven by a preponderance of the evidence that Claimant has failed to prosecute his claim under AWCC R. 099.13.

4. Respondents have not proven by a preponderance of the evidence that the claim should be dismissed under Ark. Code Ann. § 11-9-702(a)(4) (Repl. 2012).
5. Respondents' motion to dismiss should be, and hereby is, denied.
6. Claimant has requested a hearing on his claim.
7. This matter will proceed to a hearing on the merits.

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.

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).

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 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 reason that he had not taken any steps to prosecute the claim after James's withdrawal was because he had been seeking another attorney. Claimant requested a hearing on his claim, in the event that it is not dismissed.

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, he has not yet abridged that rule. By the same token, I find that while § 11-9-702(a)(4) provides that a claim "may" (clearly intending that the administrative law judge has discretion in the matter) be dismissed for failure to request a hearing within six months of the filing of the claim, dismissal is not yet warranted here. 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.

CONCLUSION

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

IT IS SO ORDERED.

O. MILTON FINE II
Administrative Law Judge