

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
WCC NO. H109030**

RICHARD CARPENTER, EMPLOYEE	CLAIMANT
NIBCO, INC., EMPLOYER	RESPONDENT
LIBERTY INS. CORP., CARRIER	RESPONDENT

OPINION FILED FEBRUARY 23, 2024

Hearing before Administrative Law Judge O. Milton Fine II on February 16, 2024, in Jonesboro, Craighead County, Arkansas.

Claimant, *pro se*, not appearing.

Respondents represented by Mr. Michael C. Stiles, Attorney at Law, Little Rock, Arkansas.

I. BACKGROUND

This matter comes before the Commission on the Motion to Dismiss by Respondents. A hearing on the motion was conducted on February 16, 2024, 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. Admitted into evidence was Respondents' Exhibit 1, pleadings, correspondence and forms related to this claim, consisting of 39 numbered pages. Also, in order to address adequately this matter under Ark. Code Ann. § 11-9-705(a)(1) (Repl. 2012)(Commission must "conduct the hearing . . . in a manner which best ascertains the rights of the parties"), and without objection, I have blue-backed to the record documents from the Commission's file on the claim, consisting of two

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pages. In accordance with *Sapp v. Tyson Foods, Inc.*, 2010 Ark. App. 517, ___ S.W.3d ___, these documents have been served on the parties in conjunction with this opinion.

The record reflects the following procedural history:

Per the First Report of Injury or Illness filed on November 12, 2021, Claimant purportedly suffered an injury to his upper extremity, clavicle, or scapula at work on April 29, 2021, when he was pushing a heavy pallet with a co-worker. According to the Form AR-2 that was filed on November 16, 2021, Respondents accepted the claim and paid medical and indemnity benefits pursuant thereto.

On April 2, 2023, through then-counsel Daniel Wren, Claimant filed a Form AR-C. Therein, he alleged that he was entitled to the full range of initial and additional benefits as a result of a compensable injury that he sustained to his shoulder. No hearing request accompanied this filing. Respondents propounded discovery to Claimant on April 21, 2023. But responses thereto remain outstanding.

On August 25, 2023, Wren moved to withdraw from the case. In an Order entered on September 6, 2023, the Full Commission granted the motion under AWCC Advisory 2003-2.

The record reflects that nothing further took place on the claim until December 12, 2023. On that date, Respondents filed the instant motion, asking for dismissal of the claim under AWCC R. 099.13 and Ark. Code Ann. § 11-9-702

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(Repl. 2012). My office wrote Claimant on December 13, 2023, asking for a response to the motion within 20 days. The letter was sent by first class and certified mail to the Blytheville address of Claimant listed in the file and his Form AR-C. While the United States Postal Service was unable to verify whether Claimant claimed the certified letter, the first-class letter was not returned. Regardless, no response from Claimant to the motion was forthcoming. On January 10, 2024, a hearing on the Motion to Dismiss was scheduled for February 16, 2023, at 1:30 p.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. Once again, it could not be verified whether Claimant signed for the certified letter; but the first-class letter was not returned to the Commission.

The hearing on the Motion to Dismiss proceeded as scheduled on February 16, 2024. 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; this claim for initial benefits 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 his claim because he has taken no further action in pursuit of it (including appearing at the February 16, 2024, hearing to argue against its dismissal) since the filing of his Form AR-C on April 2, 2023. 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). The Commission and the appellate courts have expressed a preference for dismissals *without prejudice*. See *Professional Adjustment Bureau v. Strong*, 75 Ark. 249, 629 S.W.2d 284 (1982)). Respondents at the hearing asked for a dismissal without prejudice. I agree and find that the dismissal of this claim should be and hereby is entered *without prejudice*.¹

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).

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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