

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
WCC NO. F008638**

GEORGE J. CLICK, DEC'D, EMPLOYEE	CLAIMANT
ARK. WHOLESALE LUMBER CO., INC., EMPLOYER	RESPONDENT NO. 1
LUMBERMEN'S UNDERWRITING ALLIANCE, CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT NO. 3

OPINION FILED NOVEMBER 12, 2024

Hearing before Administrative Law Judge O. Milton Fine II on November 7, 2024, in Little Rock, Pulaski County, Arkansas.

Claimant *pro se* (through widow Shirley Turney), not appearing.

Respondents No. 1 represented by Mr. Guy Alton Wade, Attorney at Law, Little Rock, Arkansas.

Respondents Nos. 2 and 3, represented by Mr. David L. Pake, Attorney at Law, Little Rock, Arkansas, excused from participation.

I. BACKGROUND

This matter comes before the Commission on the Motion to Dismiss by Respondents No. 1. A hearing on the motion was conducted on November 7, 2024, in Little Rock, Arkansas. No testimony was taken in the case. Claimant's estate, who according to Commission records is *pro se* but is represented by his widow Ms. Shirley Turney, failed to appear at the hearing. Admitted into evidence was Respondents' Exhibit 1, pleadings, correspondence and forms related to this

CLICK – F008638

claim, consisting of one index page and eight numbered pages thereafter. 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 33 pages. In accordance with *Sapp v. Tyson Foods, Inc.*, 2010 Ark. App. 517, 2010 Ark. App. LEXIS 549, 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 August 4, 2000, Claimant purportedly suffered injuries to multiple body parts on June 16, 2023, when he was involved in a work-related motor vehicle accident. According to the original and amended Forms AR-2 that were filed on August 4 and 21, 2000, respectively, Respondents accepted the claim and paid medical and indemnity benefits pursuant thereto, including permanent partial disability benefits in accordance with impairment ratings of seven percent (7%) to the body as a whole and thirty percent (30%) to the lower extremity that he was assigned. Respondent No. 2 accepted Claimant as permanently and totally disabled

This claim was litigated previously on August 12, 2022. Then-Chief Administrative Law Judge David Greenbaum issued an opinion on September 12, 2002, in which he found, inter alia, that Claimant was not entitled to additional

CLICK – F008638

treatment of his stipulated compensable back injury, and that he did not prove that he had sustained a compensable injury under Ark. Code Ann. § 11-9-113 in the accident. This decision was not appealed.

Per his death certificate that was filed with the Arkansas Department of Health on February 8, 2022, Claimant died on January 26, 2022, of cardio-respiratory failure and COVID-19 pneumonia.

On February 17, 2022, through Ms. Turney, Claimant's estate filed a Form AR-C. No hearing request accompanied this filing. In correspondence dated June 10, 2022, Respondents No. 1 denied that Claimant's death was related to his 2000 injuries. Ms. Turney failed to respond to discovery propounded to her by Respondents No. 1.

The record reflects that nothing further took place on the claim until July 22, 2024. On that date, Respondents No. 1 filed the instant motion, asking for dismissal of the claim under AWCC R. 099.13. Claimant's attorney in the 2002 proceeding, Keith Wren, moved on July 26, 2024, to withdraw from his representation of Claimant. In his motion, Wren represented that he had last communicated with Claimant in 2003, and that he had long since destroyed his file. In an Order entered on September 4, 2024, I granted the motion under AWCC Advisory 2003-2. That same day, my office wrote Ms. Turney, asking for a response to the Motion to Dismiss within 20 days. The letter was sent by first class and certified mail to her Searcy address listed in the file and on the Form

CLICK – F008638

AR-C that she had signed. She claimed the certified letter on September 9, 2024; and the first-class letter was not returned. Regardless, no response from her to the motion was forthcoming. On September 30, 2024, a hearing on the Motion to Dismiss was scheduled for November 7, 2024, at 9:30 a.m. at the Commission in Little Rock. The notice was sent to Ms. Turney via first-class and certified mail to the same Searcy address as before. In this instance, while delivery of the certified letter was unsuccessful, the first-class letter was not returned to the Commission.

The hearing on the Motion to Dismiss proceeded as scheduled on November 7, 2024. Again, Ms. Turney failed to appear at the hearing. But Respondents No. 1 appeared through counsel and argued for dismissal under the aforementioned authority.

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 matter.
2. The parties were provided reasonable notice of the Motion to Dismiss and of the hearing thereon.

CLICK – F008638

3. The evidence preponderates that Claimant's estate has failed to prosecute this claim under AWCC R. 099.13.
4. The Motion to Dismiss is hereby granted; this claim for additional 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 No. 1 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).

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's estate has failed to pursue this claim because it has taken no further

CLICK – F008638

action in pursuit of it (including appearing at the November 7, 2024, hearing to argue against its dismissal) since the filing of the Form AR-C on February 17, 2022. Thus, the evidence preponderates that dismissal is warranted under Rule 13.

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 No. 1 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*.

IV. CONCLUSION

In accordance with the Findings of Fact and Conclusions of Law set forth above, this claim for additional benefits is hereby dismissed *without prejudice*.

IT IS SO ORDERED.

O. MILTON FINE II
Chief Administrative Law Judge