

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
WCC NO. G307750**

JULIE DUNEVANT, EMPLOYEE	CLAIMANT
ST. BERNARD MED. CTR., SELF-INSURED EMPLOYER	RESPONDENT NO. 1
RISK MGMT. RESOURCES, THIRD-PARTY ADM'R	RESPONDENT NO. 1
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT NO. 2

OPINION FILED OCTOBER 26, 2023

Hearing before Chief Administrative Law Judge O. Milton Fine II on October 20, 2023, in Jonesboro, Craighead County, Arkansas.

Claimant, *pro se*, not appearing.

Respondents No. 1 represented by Mr. S. Shane Baker, Attorney at Law, Jonesboro, Arkansas.

Respondent No. 2, represented by Ms. Christy L. King, Attorney at Law, Little Rock, Arkansas, excused from participation.

I. BACKGROUND

This matter comes before the Commission on the Motion to Dismiss filed by Respondents No. 1. A hearing on the motion was conducted on October 20, 2023, in Jonesboro, Arkansas. Claimant, who is *pro se*, failed to appear. Respondents No. 1 were represented at the hearing by Mr. S. Shane Baker, Attorney at Law, of Jonesboro, Arkansas. Respondent No. 2, represented by Ms. Christy L. King, Attorney-at-Law, Little Rock, Arkansas, was excused from

DUNEVANT – G307750

participation. 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 September 30, 2013, Claimant purportedly suffered an injury to her back at work on September 22, 2013, when she was helping a patient out of bed. According to the Form AR-2 that was filed on October 4, 2013, Respondents No. 1 accepted the claim and paid medical and indemnity benefits pursuant thereto.

On January 16, 2014, through then-counsel M. Scott Willhite, Claimant filed a Form AR-C, requesting initial benefits. He followed this up on February 20, 2014, with a hearing request. The file was assigned to then-Administrative Law Judge Andrew L. Blood. The parties stipulated that Claimant's lumbar injury was compensable, that she was assigned an impairment rating of ten percent (10%) to the body as a whole, and that she reached maximum medical improvement on February 14, 2014. In a prehearing order entered on March 31, 2014, Judge Blood scheduled a hearing for June 6, 2014, on the issues of Claimant's entitlement to wage loss disability benefits and a controverted attorney's fee. In the meantime, Claimant requested a change of physician. Judge Blood had the file temporarily reassigned to the Medical Cost Containment Division to process the request, but kept the hearing on his docket. However, he later granted Claimant's continuance motion on May 29, 2014, returning the file to the Commission's general files. Thereafter, on June 19, 2014, a change-of-

DUNEVANT – G307750

physician order was entered, changing Claimant's authorized treating physician to Dr. William Ackerman.

Through her then-attorney, Claimant made a new hearing request on December 2, 2014. Following another prehearing telephone conference, Judge Blood on December 15, 2014, reset the hearing for March 6, 2015, and added an issue concerning whether Claimant was entitled to additional temporary total disability benefits. But on February 25, 2015, Claimant again requested a continuance from Judge Blood, representing that a tentative settlement had been reached. Based on this, the judge canceled the hearing.

The file, however, reflects that the settlement did not proceed to a joint petition. On June 19, 2015, her then-attorney made a third hearing request to the Commission. Judge Blood conducted a prehearing telephone conference with the parties on July 6, 2015; and thereafter, he reset the hearing for August 21, 2015. But on August 12, 2015, based on a change in Claimant's physical condition that necessitated a surgical consult, she again sought a continuance of her hearing. This was granted, and the file was again returned to the Commission's general files.

On February 28, 2017, Claimant through her counsel made another hearing request. Judge Blood, following another prehearing telephone conference on March 13, 2017, issued a prehearing order that scheduled a hearing (on the same issues as raised previously) for June 2, 2017. The copy of the order that was sent to Claimant by certified mail was returned, unclaimed.

DUNEVANT – G307750

Shortly thereafter, on March 20, 2017, Respondent No. 2 accepted joinder to the claim. But the Fund informed Judge Blood on May 19, 2017, that they were deferring to the outcome of litigation and were waiving their appearance at the hearing. On May 26, 2017, Respondents No. 1 requested a continuance, based on new medical evidence and the probability that the matter could be settled. Judge Blood, however, denied the continuance request. Despite this, he reversed course on May 30, 2017, and continued the hearing for two weeks so that the parties could pursue an amicable resolution. After being informed on June 15, 2017, that the parties had reached a compromise on Claimant's entitlement to additional indemnity benefits and would be preparing an agreed order for his approval, Judge Blood again canceled the hearing. On June 30, 2017, he entered an agreed order that provided for the payment to Claimant of \$70,000.00 in wage loss disability benefits and a controverted fee to her counsel.

No further action on the claim took place until July 21, 2023. On that date, current counsel for Respondents No. 1 entered his appearance and filed the instant Motion to Dismiss. Therein, it was argued that dismissal was warranted under AWCC R. 099.13 and Ark. Code Ann. § 11-9-702 (Repl. 2012) because there has been no activity on the file "in quite some time." On July 31, 2023, my office wrote Claimant, asking for a response to the motion within 20 days. This correspondence was sent to her by first-class and certified mail to the address for her listed in the file and on her Form AR-C. However, both of these items were returned to the Commission, unclaimed/undelivered.

DUNEVANT – G307750

A hearing on the Motion to Dismiss was scheduled on August 24, 2023, for October 20, 2023, at 1:00 p.m. at the Craighead County Courthouse in Jonesboro. The Notice of Hearing was sent to Claimant (using the same address as before) by certified and first-class mail. As before, both items were returned, unclaimed/undelivered.

The hearing on the Motion to Dismiss proceeded as scheduled on October 20, 2023. Again, Claimant failed to appear. Respondents No. 1 appeared through counsel and argued for dismissal of the action under the aforementioned authorities.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record as a whole, 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 No. 1 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.

See generally Johnson v. Triple T Foods, 55 Ark. App. 83, 85, 929 S.W.2d 730 (1996). (Emphasis added)

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 this 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 has failed to pursue her claim because she has taken no further action in pursuit of it—including appearing at the October 20, 2023, hearing to argue against its dismissal—since the July 3, 2017, entry of the agreed order. 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).

DUNEVANT – G307750

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, 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 No. 1 at the hearing asked for a dismissal with prejudice. But based on the above authorities, I find that the dismissal of the claim should be and hereby is entered *without prejudice*.¹

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

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).