

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO.: G706520

TOSHA FLOYD,
EMPLOYEE

CLAIMANT

BURGER KING 470,
EMPLOYER

RESPONDENT NO. 1

CENTRAL ADJUSTMENT COMPANY,
CARRIER/TPA

RESPONDENT NO. 1

DEATH & PERMANENT TOTAL DISABILITY
TRUST FUND

RESPONDENT NO. 2

OPINION FILED AUGUST 13, 2021

Hearing before Administrative Law Judge Chandra L. Black on August 11, 2021, in Little Rock, Pulaski County, Arkansas.

Claimant, pro se, failed to appear.

Respondents No. 1 represented by Mr. Zachary F. Ryburn, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by David L. Pake, Attorney at Law, Little Rock, Arkansas. Mr. Pake waived his appearance at the hearing.

STATEMENT OF THE CASE

A hearing was held on August 11, 2021, in the present matter pursuant to Dillard v. Benton County Sheriff's Office, 87 Ark. App. 379, 192 S.W. 3d 287 (2004), to determine whether the above-referenced matter should be dismissed for failure to prosecute under the provisions of Arkansas Code Annotated §11-9-702(Repl. 2012), and Arkansas Workers' Compensation Commission Rule 099.13.

The Commission attempted appropriate notice of the hearing on all parties to their last known address, in the manner prescribed by law.

The record consists of the transcript of the August 11, 2021, hearing and the documents contained therein. The remainder of the Commission’s file has also been made a part of the record. It is hereby incorporated herein by reference.

DISCUSSION

On September 25, 2017, the Claimant’s former attorney filed with the Commission, a claim for workers’ compensation benefits by way of a Form AR-C. Per this document, the Claimant alleged an injury date of September 13, 2017. Specifically, counsel asserted that “Claimant was attacked breaking up a domestic dispute on the property. Claimant sustained injuries to both knees, right hip and a laceration to her lip and other whole body.” Counsel for the Claimant checked off all the boxes for both initial and additional benefits.

The respondent-insurance-carrier filed a Form AR-2, with the Commission on September 19, 2017 controverting the claim. Specifically, the carrier wrote: “Injury did not arise out of and in the course of employment.”

Subsequently, the Claimant failed to prosecute her claim. On June 18, 2018, Respondents No. 1 filed a Motion to Dismiss, with the Commission. They asserted, among other things, that the Claimant has taken no action to prosecute the within claim. On that same date, the Claimant’s former attorney wrote the following letter to the Clerk of the Commission: “I do not object to a Motion to Dismiss WITHOUT prejudice.” An order was entered on July 2, 2018, dismissing the claim without prejudice.

Ultimately, a hearing was held on the merits of this claim on October 29, 2019. In an Opinion dated January 22, 2020, I made 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 of the within claim.
2. I hereby accept the aforementioned stipulations as fact.
3. The Claimant proved by a preponderance of the evidence that she sustained compensable soft-tissue injuries on September 13, 2017, to her knees and back after being assaulted, while performing employment duties.
4. The Claimant proved her entitlement to temporary total disability from September 14, 2017 through until the date she returned to work in October of 2017.
5. The Claimant has established by a preponderance of the evidence that all the medical treatment of record until October of 2017, was reasonably necessary to treat her compensable injuries of September 13, 2017. However, she failed to prove her entitlement to any additional medical treatment for her injuries of September 13, 2017.
6. The Claimant's attorney is entitled to a controverted attorney's fee on the indemnity benefits awarded herein.

On August 10, 2020, the Claimant's former attorney filed another Form AR-C with the Commission in this matter. Per this document, the Claimant alleged the same injury date of September 13, 2017. Again, counsel alleged "Claimant was attacked breaking up a domestic dispute on the property. Claimant sustained injures to both knees, right hip and a laceration to her lip and other whole body." Both initial and additional benefits were requested per this document.

Ms. Judy Bourne, the Senior Claims Examiner, on this claim, wrote the following letter to Commission: "In response to the AR-C filed on August 10th, 2020, the Administrative Law Judge ruled in favor of Ms. Floyd. Our position is that claim has been accepted and all benefits awarded have been paid...."

There was no action taken by the Claimant to prosecute her claim. However, on February 4, 2021, the Claimant's former attorney filed a third Form AR-C with the Commission for the exact same claim.

On March 12, 2021, Respondents No. 1 filed a Motion to Dismiss, with the Commission. Said motion was accompanied by a Certificate of Service to the Claimant's attorney. The Commission sent a Notice to the Claimant and her attorney, on March 15, 2021, informing them of the motion, and a deadline of April 5, 2021, for filing a written response.

On or about March 19, 2021, the Claimant's attorney filed with the Commission a motion to be relieved as counsel of record. This motion complied with Arkansas Workers' Compensation Commission (AWCC) Advisory 2003-2. Therefore, I entered an order April 7, 2021 relieving the Claimant's attorney as counsel of record in this claim.

Respondents No. 1 wrote a letter to the Commission on March 29, 2021 stating the parties had reached a settlement agreement and the proposed Joint Petition for Final Settlement was enclosed. Therefore, a hearing was scheduled on the proposed settlement for April 28, 2021, in Little Rock. The Claimant failed to appear at the hearing. As a result, on May 3, 2021, the claim was returned to the Commission's general files.

Since this time, there has been no action on the part of the Claimant to prosecute this claim, or otherwise pursue benefits.

On June 10, 2021, Respondents No. 1 filed yet another Motion to Dismiss, with the Commission. Said motion was accompanied by a Certificate of Service to the Claimant. The Commission sent a Notice to the Claimant on June 14, 2021, informing her of the motion, and a deadline of July 6, 2021, for filing a written response. There was no response from the Claimant.

Pursuant to a Hearing Notice dated July 7, 2021, the Commission notified the parties that the matter had been set for a hearing on the Motion to Dismiss. Said hearing was scheduled for on August 11, 2021, at 11:30 a.m., at the Arkansas Workers' Compensation Commission, in Little Rock, Arkansas.

Information from the United States Postal Service regarding the delivery information for Certified Mail shows that the afore notices were mailed to the Claimant's last known address. However, both these items have been returned to the Commission by the Postal Service, marked as "Unclaimed."

A hearing was in fact conducted on the Respondents No. 1's motion as scheduled. The Claimant failed to appear at the hearing. The Trust Fund waived its appearance at the hearing. However, the Respondents No.1 appeared through their attorney. Counsel essentially noted that the Claimant has failed to timely prosecute her claim for workers' compensation benefits. As such, he moved that the claim be dismissed due to a lack of prosecution.

As shown by the evidence described above, (1) reasonable notice of the Motion to Dismiss was attempted on the parties of the hearing; and (2) Claimant has failed to pursue her claim because she has taken no bona fide action in pursuit of it (including appearing at the August 11, 2021 hearing to argue against its dismissal) since the filing of the most recent Form AR-Cs with the Commission. In fact, the Claimant even failed to appear at the Joint Petition Hearing. Thus, the evidence preponderates that dismissal of this claim for workers' compensation benefits is warranted under Rule 099.13.

Because of this finding, it is unnecessary to address the application of Ark. Code Ann. § 11-9- 702 (Repl. 2012). But based on the above reasons, I find that the dismissal of this claim should be and hereby is entered without prejudice.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On the basis of the record as a whole, I hereby make the following findings of fact and conclusions of law in accordance with Arkansas Code Annotated. §11-9-704 (Repl. 2012).

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. Since the filing of the Form AR-Cs, the Claimant has failed to prosecute, or otherwise advance her claim. She failed to appear at the Joint Petition Hearing.
3. On June 10, 2021, Respondents No. 1 filed with the Commission, a Motion to Dismiss.
4. The evidence preponderates that Claimant has failed to prosecute this Claimant under Arkansas Workers' Compensation Commission Rule 099.13.
5. Appropriate Notice of this hearing was attempted on all parties to their last known address, in the manner prescribed by law.
6. The Motion to Dismiss is granted; the claim is hereby dismissed without prejudice Commission Rule 099.13.

ORDER

In accordance with the findings of fact and conclusions of law set forth above, this claim is hereby dismissed pursuant to Arkansas Workers' Compensation Commission Rule Commission Rule 099.13, without prejudice to the refileing of this claim within the limitation period specified under Arkansas Workers' Compensation Act.

IT IS SO ORDERED.

CHANDRA L. BLACK
Administrative Law Judge

