

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
WCC NO. H007524**

WALTER B. GEORGE, EMPLOYEE	CLAIMANT
MATERIALS TESTING OF ARK., INC., EMPLOYER	RESPONDENT
PHOENIX INS. CO., CARRIER	RESPONDENT

OPINION FILED DECEMBER 20, 2021

Hearing before Administrative Law Judge O. Milton Fine II on December 17, 2021, in Jonesboro, Craighead County, Arkansas.

Claimant, *pro se*, not appearing.

Respondents represented by Ms. Amy C. Markham, Attorney at Law, Little Rock, Arkansas.

I. BACKGROUND

This matter comes before the Commission on a motion to dismiss by Respondents. A hearing on the motion was conducted on December 17, 2021, in Little Rock, Arkansas. No testimony was taken in the case. Claimant, who according to Commission records is *pro se*, failed to appear at the hearing. Without objection, the Commission file on this claim has been incorporated herein in its entirety by reference.

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The record reflects the following procedural history:

On October 7, 2020, a Form AR-1 was filed in this case, reflecting that Claimant purportedly injured his knee on September 24, 2020, while exiting a truck at work. Per the Form AR-2 that was filed on October 9, 2020, Respondents accepted the claim as compensable and paid medical and temporary total disability benefits pursuant thereto. On October 30, 2020, through then-counsel Kolton Jones, Claimant filed a Form AR-C. Therein, he requested the full range of initial and additional benefits. No hearing request was made, however. Respondents' counsel entered her appearance on November 13, 2020.

On May 3, 2021, Claimant's successor counsel, Laura Beth York, moved to withdraw from the case. In an order entered on May 26, 2021, the Full Commission granted the motion.

The record reflects that nothing further occurred on this claim until July 19, 2021, when Respondents filed the instant motion under AWCC R. 099.13 and Ark. Code Ann. § 11-9-702 (Repl. 2012). Therein, they alleged that dismissal of the claim was warranted because "[t]here has been no bona fide request for a hearing within the past six months." The file was assigned to me on July 20, 2021; and on that same day, my office wrote Claimant, asking for a response to the motion within 20 days. This letter was sent by both first-class and certified mail to the address for Claimant listed on his Form AR-C. The certified letter was returned to the Commission, undelivered, on August 18, 2021. However, the first-

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class letter was not returned. Regardless, no response to the motion was forthcoming from Claimant.

Following a series of settings and cancellations of the hearing, on November 15, 2021, I scheduled a hearing on Respondents' motion for December 17, 2021, at 1:00 p.m. in Jonesboro. The hearing notice was sent to Claimant by certified and first-class mail to the same address as before. In this instance, the United States Postal Service had no record that the certified letter was delivered. However, neither it nor the first-class letter was returned to the Commission. The evidence thus preponderates that Claimant received notice of the hearing.

The hearing proceeded as scheduled on December 17, 2021. Again, Claimant failed to appear at the hearing. Moreover, he was contacted by telephone shortly before the hearing was to begin; and he informed my office that he was out-of-state and would not be in attendance. Respondents appeared through counsel and argued for dismissal under Ark. Code Ann. § 11-9-702(d) (Repl. 2012) and Rule AWCC R. 099.13.

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.

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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; the claim is hereby dismissed *without prejudice* under AWCC R. 099.13.

III. DISCUSSION

AWCC 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.

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 this matter—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 his claim because he has taken no further action in pursuit of it (including appearing at the December 17, 2021, hearing to argue

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against its dismissal) since the filing of his Form AR-C on October 30, 2020. Thus, the evidence preponderates that dismissal is warranted under Rule 13. Because of this finding, it is unnecessary to address the application of Ark. Code Ann. § 11-9-702(d) (Repl. 2012).

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 at the hearing asked for a dismissal with prejudice. But based on the above authorities, I find that the dismissal of this 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*.

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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IT IS SO ORDERED.

O. MILTON FINE II
Chief Administrative Law Judge