

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NOS. H000518 & H000519

FREDERICK D. GILMORE, EMPLOYEE	CLAIMANT
NORTH LITTLE ROCK SCHOOL DIST., SELF-INSURED EMPLOYER	RESPONDENT
ARK. SCHOOL BOARDS ASSN., THIRD-PARTY ADMINISTRATOR	RESPONDENT

OPINION FILED AUGUST 19, 2021

Hearing before Administrative Law Judge O. Milton Fine II on August 18, 2021, in Little Rock, Pulaski County, Arkansas.

Claimant represented by Ms. Laura Beth York, Attorney at Law, Little Rock, Arkansas (neither appearing).

Respondents represented by Mr. Daniel L. Herrington, 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 August 18, 2021, in Little Rock, Arkansas. Claimant, who is represented by counsel, failed to appear at the hearing; and his counsel waived her appearance. Without objection, the Commission's files on the claims have been incorporated herein in their entirety by reference. Also admitted into evidence was Respondents' Exhibit 1, pleadings, correspondence and forms related to the claims, consisting of nineteen (19) numbered pages.

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The record reflects the following procedural history:

Claim No. H000518. Claimant, per the First Report of Injury or Illness filed January 27, 2020, purportedly suffered an injury to multiple body parts on November 13, 2019, when he attempted to break up a fight between students. According to the Form AR-2 filed on January 27, 2020, Respondents accepted the claim as a medical-only one. Through counsel that same day, Claimant filed a Form AR-C, alleging that he injured “his back, left knee, left hip, left shoulder, and other whole body” in the fight. However, no hearing request accompanied the form. Respondents’ co-counsel, Hon. Guy Alton Wade, entered his appearance on February 27, 2020. Discovery that was propounded to Claimant on February 26, 2020, went unanswered. On July 29, 2020, the Medical Cost Containment Division entered an order, changing his authorized treating physician from Dr. Miriam Lawrence to Dr. Amir Qureshi.

Claim No. H000519. Claimant, per the First Report of Injury or Illness filed January 30, 2020, purportedly suffered an injury to multiple body parts on December 12, 2019, when he again attempted to break up a fight between students. According to the Form AR-2 filed on January 30, 2020, Respondents accepted the claim as a medical-only one as well. Through counsel on January 27, 2020, Claimant filed a Form AR-C, alleging that he injured “his back, both shoulders, left hip, and other whole body” in the fight. However, no hearing request accompanied the form. Respondents’ co-counsel entered his appearance

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on February 27, 2020. Discovery that was propounded to Claimant on February 26, 2020, again went unanswered. On July 29, 2020, the Medical Cost Containment Division entered an order, changing his authorized treating physician from Dr. Lawrence to Dr. Qureshi.

The record reflects that nothing further took place on these claims until June 15, 2021. On that date, Respondents filed the instant motion, asking for dismissal of the claims. On June 21, 2021, my office wrote Claimant's counsel, asking for a response to the motion within twenty (20) days. The record reflects that no response was initially forthcoming. However, on the morning of the hearing, counsel was contacted and responded that same day, writing:

Judge Fine,

I know about the Motion to Dismiss today, and I waive my appearance. I do not object to the Motion to Dismiss on the grounds that I am not yet ready to file for a hearing. It appears that I am still waiting on medical records.

The above confirms that Claimant had notice of the hearing, which was sent to the parties on July 13, 2021.

The hearing on the motion to dismiss proceeded as scheduled on August 18, 2021. Again, Claimant waived his appearance at the hearing. Respondents appeared through counsel and argued for dismissal under AWCC R. 099.13 and Ark. Code Ann. § 11-9-702(d) (Repl. 2012).

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.
3. The evidence preponderates that Claimant has failed to prosecute his claims under AWCC R. 099.13.
4. The motion to dismiss is hereby granted; the claims are 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 claims—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 claims because he has taken no further action in pursuit of them since the filing of his Forms AR-C on January 27, 2020. 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).

That leaves the question of whether the dismissal of the claims 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 AWCC 226, 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,

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629 S.W.2d 284 (1982)). Respondents at the hearing asked for a dismissal without prejudice. Based on the above authorities, I agree and find that the dismissal of these claims should be and hereby is entered *without prejudice*.

IV. CONCLUSION

In accordance with the findings of fact and conclusions of law set forth above, these claims are hereby dismissed *without prejudice*.

IT IS SO ORDERED.

O. MILTON FINE II
Chief Administrative Law Judge