

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. H006675

VANESSA R. GOLDSMITH, EMPLOYEE	CLAIMANT
LIFE STRATEGIES COUNSELING, INC., EMPLOYER	RESPONDENT
TRANSPORTATION INS. CO., CARRIER	RESPONDENT

OPINION FILED JANUARY 10, 2022

Hearing before Chief Administrative Law Judge O. Milton Fine II on January 7, 2022, in Jonesboro, Craighead County, Arkansas.

Claimant, *pro se*, not appearing.

Respondents represented by Ms. Karen H. McKinney, Attorney at Law, Little Rock, Arkansas.

I. BACKGROUND

This matter comes before the Commission on the Motion to Dismiss filed by Respondents. A hearing on the motion was conducted on January 7, 2022, in Jonesboro, Arkansas. Claimant, who is *pro se*, failed to appear. Respondents were represented at the hearing by Ms. Karen H. McKinney, Attorney at Law, of Little Rock, Arkansas. The record consists of Respondents' Exhibit 1, the Motion to Dismiss and exhibits thereto, consisting of 15 pages; and Respondents' Exhibit 2, the transcript¹ of the deposition of Claimant taken March 15, 2021, consisting of 82 transcribed pages plus a 30-page word index. In addition, the Commission's file has been incorporated herein in its entirety by reference.

The evidence reflects that per the First Report of Injury or Illness filed on September 16, 2020, Claimant purportedly injured her knee on March 24, 2020, when she tripped over a box at work and fell. According to the Form AR-2 that was filed on September 18, 2020, Respondents accepted the claim as a medical-only one.

On September 14, 2020, Claimant (who at that time was *pro se*), filed a Form AR-C, requesting the full range of initial and additional benefits. She alleged therein that she tripped over a stack of boxes outside of her office, hurting her right knee in the process. Claimant requested a one-time change of physician from the Commission. In an order entered on October 30, 2020, the Medical Cost Containment Division granted that request, switching her authorized treating physician from Dr. Spencer Guinn to Dr. Apurva Dalal.

Claimant retained the services of Rainwater, Holt & Sexton. On January 11, 2021, Whitney James, Esq., of that firm entered her appearance on her client's behalf and filed a Form AR-C, alleging that the box incident caused Claimant to suffer injuries "to her right knee, right arm, and other whole body." In an amendment to the form that was filed on March 16, 2021, Claimant through counsel added her right shoulder to the list of her alleged injuries. Respondents communicated with the Commission via email on March 23, 2020, stating that their position "ha[d] not changed since the last AR-2 was filed." This, however,

¹Per Commission policy, this exhibit, separately bound, was retained in the file and was not bound into the hearing transcript.

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changed on March 31, 2021, when Respondents filed an amended Form AR-2 in which they represented that they were now controverting the claim in its entirety because Claimant was allegedly not performing employment services at the time she fell.

Gary Davis, Esq., became Claimant's new attorney; and on May 12, 2021, he entered his appearance before the Commission and requested a hearing on her entitlement to medical and temporary total disability benefits. In so doing, he asserted that she only suffered injuries to her right knee and arm—not to her shoulder. The file was assigned to me on May 14, 2021. That same day, prehearing questionnaires were sent to the parties. Claimant filed her response thereto on June 9, 2021, while Respondents followed suit on June 14, 2021. Following a prehearing telephone conference on July 9, 2021, I issued a Prehearing Order that scheduled a hearing for September 3, 2021, on the following issues:

1. Whether Claimant sustained a compensable injury to her right knee.
2. Whether Claimant is entitled to reasonable and necessary medical treatment, including surgery.

However, Davis on August 31, 2021, emailed the Commission, stating:

I am requesting that the hearing presently scheduled for Friday, September 3 in Jonesboro be cancelled and that the case be returned to general files. It has just come to my attention (yesterday) that the Rainwater Law Firm is pursuing a case on

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premises liability which I believe is in conflict with the workers' compensation theory of the case.

Based on this, I cancelled the hearing and returned the file to the Commission's general files.

On October 14, 2021, Davis filed a motion to withdraw from his representation of Claimant. In an order entered on October 29, 2021, the Full Commission granted the motion under AWCC Advisory 2003-2.

The record reflects that on November 1, 2021, Respondents filed the instant Motion to Dismiss. Therein, they argued that dismissal was warranted under Ark. Code Ann. § 11-9-702(a)(4) & (d) (Repl. 2012) and AWCC R. 099.13 because "the claimant has not requested a hearing on this claim in the past 6 months." On November 2, 2021, my office wrote Claimant, asking for a response to the motion within twenty (20) days. This correspondence was sent by first-class and certified mail to the address for her listed in the file and on her Forms AR-C. Claimant signed for the certified letter on November 12, 2021, and the first-class letter was not returned. Nonetheless, no response was forthcoming from her.

On November 24, 2021, a hearing on the motion was scheduled for January 7, 2022, at 10:30 a.m. at the Craighead County Courthouse in Jonesboro. The notice was sent to Claimant by first-class and certified mail. The certified letter was claimed on November 26, 2021, by someone with an illegible

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signature; and the first-class letter was not returned. The evidence thus preponderates that Claimant received notice of the hearing.

The hearing on the motion to dismiss proceeded as scheduled on January 7, 2022. Again, Claimant failed to appear. But Respondents 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. The parties were provided reasonable notice of the motion to dismiss and of the hearing thereon.
3. Respondents have not proven by a preponderance of the evidence that this claim should be dismissed under Ark. Code. Ann. § 11-9-702 (Repl. 2012).
4. Respondents have proven by a preponderance of the evidence that this claim should be dismissed under AWCC R. 099.13.
5. The Motion to Dismiss is hereby granted.
6. 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) In turn, Ark. Code Ann. § 11-9-702(a)(4) & (d) (Repl. 2012) reads:

(4) If within six (6) months after the filing of a claim for compensation no bona fide request for a hearing has been made with respect to the claim, the claim may, upon motion and after hearing, be dismissed without prejudice to the refiling of the claim within limitation periods specified in subdivisions (a)(1)-(3) of this section.

...

(d) If within six (6) months after the filing of a claim for additional compensation no bona fide request for a hearing has been made with respect to the claim, the claim may, upon motion and after hearing, if necessary, be dismissed without prejudice to the refiling of the claim within the limitation period specified in subsection (b) of this section.

The term “bona fide” is not defined in the Arkansas Workers’ Compensation Act, Ark. Code Ann. §§ 11-9-101 et seq. (Repl. 2012). But BLACK’S LAW DICTIONARY 92 (abridged 5th ed. 1983) defines it as follows: “In or with good faith; honestly, openly, and sincerely; without deceit or fraud.” Under Ark. Code Ann. § 11-9-705(a)(3) (Repl. 2012), Respondents must prove by a preponderance of the evidence that dismissal should be granted. The standard “preponderance of the

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evidence” 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).

This claim was initially accepted as compensable. Therefore, § 11-9-702(a)(4) does not apply here. As for § 11-9-702(d), the preponderance of the evidence establishes that the May 12, 2021, hearing request was bona fide; i.e., it was made in “good faith; honestly, openly, and sincerely[,] without deceit or fraud.” This is best illustrated by the preparations that Davis made on his client’s behalf to bring the matter to a hearing, including filing his proffered medical exhibit with the Commission on August 13, 2021. Moreover, that hearing request was made well within six months of the March 31, 2021, filing of the claim (via the amended Form AR-C).

At the hearing on the Motion to Dismiss, Respondents argued that Claimant’s purportedly pursuing a tort action for the tripping incident through different counsel should be imputed to her and make the hearing request not bona fide. This argument is without merit. In *Reynolds Metal Company v. Circuit Court of Clark County*, 2013 Ark. 287, 428 S.W.3d 506, the Arkansas Supreme Court explained the Exclusivity Doctrine:

Beginning with the decision in *VanWagoner v. Beverly Enterprises*, 334 Ark. 12, 16, 970 S.W.2d 810, 812 (1998), this court has consistently followed the rule that the Arkansas Workers’ Compensation Commission “has exclusive, original jurisdiction to determine the facts that establish jurisdiction, unless the facts are so one-sided that the issue is no longer one of fact but one of law, such as an intentional tort.” *See, e.g., Int’l Paper Co., [v. Clark*

Cnty. Cir. Ct., 375 Ark. 127, 289 S.W.3d 103 (2008)]; *Erin, Inc. v. White Cnty. Cir. Ct.*, 369 Ark. 265, 253 S.W.3d 444 (2007); *Coonrod v. Seay*, 367 Ark. 437, 241 S.W.3d 252 (2006); *Moses v. Hanna's Candle Co.*, 366 Ark. 233, 234 S.W.3d 872 (2006); *Stocks v. Affiliated Foods SW, Inc.*, 363 Ark. 235, 213 S.W.3d 3 (2005); *Merez v. Squire Court Ltd. P'ship*, 353 Ark. 174, 114 S.W.3d 184 (2003); *WENCO Franchise Mgmt., Inc. v. Chamness*, 341 Ark. 86, 13 S.W.3d 903 (2000) (*per curiam*). Thus, when a party to a lawsuit raises a question of whether a person enjoys immunity as an employer under the Arkansas Workers' Compensation Act, the Commission must first decide the issue. *Miller v. Enders*, 2010 Ark. 92; *McCarthy v. Pulaski Cnty. Cir. Ct.*, 366 Ark. 316, 235 S.W.3d 497 (2006). In adopting this rule, we have explained that the Commission has vast expertise in this area and that the goals of uniformity, speed, and simplicity would best be achieved by granting the Commission the exclusive, original jurisdiction to determine the applicability of the Workers' Compensation Act. *Carter v. Ga.-Pac. Resins, Inc.*, 368 Ark. 19, 242 S.W.3d 616 (2006) (citing *Johnson v. Union Pac. R.R.*, 352 Ark. 534, 541, 104 S.W.3d 745, 748 (2003)).

There was nothing in and of itself improper about Claimant pursuing her workers' compensation claim while also maintaining a tort action, since the Commission would have to decide whether the exclusive remedy provision found in Ark. Code Ann. § 11-9-105(a) (Repl. 2012) applied. Consequently, dismissal of this claim is not proper under § 11-9-702.

With regard to Rule 13, the evidence again shows that until Davis withdrew the hearing request on August 31, 2021, Claimant was prosecuting her claim. The Motion to Dismiss was filed just 62 days later. However, Claimant has done nothing since that withdrawal to pursue her claim, including making an appearance at the hearing to argue against its dismissal. Thus, the evidence preponderates that dismissal is warranted under Rule 13. This motion is hereby granted under that provision.

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)). Based on the above authorities, I find that the dismissal of this claim should be and hereby is entered *without prejudice*.²

CONCLUSION

In accordance with the findings of fact and conclusions of law set forth above, the Motion to Dismiss is hereby granted, and this claim is hereby dismissed without prejudice.

IT IS SO ORDERED.

O. MILTON FINE II
Chief Administrative Law Judge

²“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).