

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION  
WCC NO. H109157**

<b>JAMES HAMILTON, EMPLOYEE</b>	<b>CLAIMANT</b>
<b>MAXUS PROPERTIES, INC., EMPLOYER</b>	<b>RESPONDENT</b>
<b>ACCIDENT FUND INS. CO. AMER., CARRIER</b>	<b>RESPONDENT</b>

**OPINION FILED APRIL 14, 2023**

Hearing before Chief Administrative Law Judge O. Milton Fine II on April 12, 2023, in Little Rock, Pulaski County, Arkansas.

Claimant *pro se*.

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

**I. BACKGROUND**

This matter comes before the Commission on a Motion to Dismiss filed by Respondents. A hearing on the motion was conducted on April 12, 2023, in Little Rock, Arkansas. Claimant, who is *pro se*, appeared at the hearing and testified. Without objection, the Commission's file on the claim has been incorporated herein in its entirety by reference. Also admitted into evidence was Claimant's Exhibit 1, a one-page handwritten, undated letter<sup>1</sup> by Claimant addressed to the Commission; and Respondents' Exhibit 1, pleadings, correspondence and forms related to this claim, consisting of nine pages.

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<sup>1</sup>This is the October 28, 2022, letter discussed *infra*.

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The record reflects the following procedural history:

Per the First Report of Injury or Illness filed November 17, 2021, Claimant purportedly suffered an injury to his shoulder on March 3, 2021, while shoveling snow at work. According to the Form AR-2 filed on November 17, 2021, Respondents accepted the claim and paid medical and indemnity benefits pursuant thereto.

Through then-counsel Laura Beth York on April 22, 2022, Claimant filed a Form AR-C, alleging that he injured his right shoulder “and other whole body” at work on February 15, 2021. However, no hearing request accompanied the form. York moved to withdraw on October 18, 2022. In an order entered on October 28, 2022, the Full Commission granted the motion under AWCC Advisory 2003-2.

In a handwritten letter to the Commission received by it on October 28, 2022, Claimant wrote:

I James Hamilton agreed with Laura Beth York’s assistant on a phone call I receive[d] from the Law Firm that they resigned from representing me that the other company settled [the] issue. No other action is required from me.

The record reflects that nothing further took place on the claim until January 24, 2023. On that date, Respondents’ counsel filed the instant motion, asking for dismissal of the claim because Claimant has not requested a hearing within six months of the filing of his claim, as required by Ark. Code Ann. § 11-9-702(d) (Repl. 2012). On January 25, 2023, my office wrote Claimant counsel, asking for a response to the motion within twenty (20) days. The letter was sent

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via first-class and certified mail to the address for Claimant listed on his Form AR-C. “Melody DeLong” signed for the certified letter on January 27, 2023; and the first-class letter was not returned. Regardless, no response to the motion was forthcoming. On March 2, 2023, a hearing on the Motion to Dismiss was scheduled for April 12, 2023, at 11:30 a.m. at the Commission in Little Rock, Arkansas. The Notice of Hearing was sent by certified and first-class mail to the same address as before. Someone with the surname of “Hamilton” signed for the certified letter on March 6, 2023; and the first-class letter was not returned. Claimant testified that he received this notice.

The hearing on the Motion to Dismiss proceeded as scheduled on April 12, 2023. Again, Claimant appeared at the hearing. He took the stand and testified that he does not object to dismissal of the claim, that Respondents have paid all of his benefits, and that there is nothing to address in a 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):

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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 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 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 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 his claim because he has taken no further action in pursuit of it since the filing of the Form AR-C on April 22, 2022. 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(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 without prejudice. Based on the above authorities, I agree and find that the dismissal of this claim should be and hereby is entered *without prejudice*.<sup>2</sup>

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<sup>2</sup>“A dismissal ‘without prejudice’ allows a new [claim] to be brought on the same cause of action.” BLACK’S LAW DICTIONARY 825 (abridged 5<sup>th</sup> ed. 1983).

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**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.**

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O. MILTON FINE II  
Chief Administrative Law Judge