

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. G804947

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| JACQUELINE L. JONES, EMPLOYEE | CLAIMANT |
| ROCK REGION METRO, SELF-INSURED EMPLOYER | RESPONDENT |
| ACE AMERICAN INS. CO., CARRIER | RESPONDENT |

OPINION FILED AUGUST 23, 2021

Hearing before Chief Administrative Law Judge O. Milton Fine II on August 19, 2021, in Little Rock, Pulaski 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 a motion to dismiss filed by Respondents. A hearing on the motion was conducted on August 19, 2021, 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, forms, pleadings and correspondence related to the claim, consisting of forty-one (41) numbered pages. 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 May 11, 2018, Claimant purportedly injured her right shoulder at work on May 10,

JONES – G804947

2018. According to the Form AR-2, filed on July 27, 2018, Respondents accepted the claim as compensable and paid medical and indemnity benefits pursuant thereto.

On December 6, 2018, Claimant (through then-counsel Andy Caldwell) filed a Form AR-C, asking for a full range of initial and additional benefits. In a letter accompanied the filing, Caldwell specified that no hearing was being requested at that time. Adjustor Charlotte Flanagin wrote the Commission on December 9, 2018, stating: “[t]his is a compensable lost time injury to the left [sic] shoulder and all reasonable and related benefits have been paid.” Respondents’ counsel made an entry of appearance on January 3, 2019. On March 1, 2019, Claimant requested a change of physician. In an order entered on August 15, 2019, the Medical Cost Containment Division entered an order that switched Claimant’s authorized treating physician from Dr. Charles Pearce to Dr. Eric Gordon.

Claimant wrote the Commission on June 11, 2019, stating that she no longer wanted Caldwell to represent her. The Clerk of the Commission responded that same day, writing that the “file has been noted to reflect that attorney Andy Caldwell will no longer represent you in the above reference[d] matter.”

The record reflects on January 21, 2020, Respondents filed their first 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 no

JONES – G804947

hearing had been requested since the filing of the Form AR-C. On January 30, 2020, I wrote Claimant, giving her fourteen (14) days to respond to the motion to dismiss. She did so on January 29, 2020, stating that she did not want the claim dismissed and that she was desiring additional treatment for the shoulder. Based on this, Respondents on January 31, 2020, withdrew the Motion to Dismiss. I returned the file to the Commission's general files on February 3, 2020. Claimant saw Dr. Gordon on January 29, 2020.

However, no more activity took place on the case. Consequently, on August 13, 2020, Respondents filed a Second Motion to Dismiss and alleged that the claim was subject to dismissal because no hearing request had been made. I wrote Claimant on August 18, 2020, giving her until September 8, 2020, to respond to the motion. She did so via email to my assistant dated September 11, 2020. Therein, she represented that due to a change of address, she did not receive the certified letter until September 10, 2020. In addition, Claimant asked that her claim not be dismissed because she is “[w]orking on pursuing [it]” and “seeking legal advice as to how to handle this matter.” On September 15, 2020, I scheduled a hearing on the motion for October 22, 2020, at the Commission in Little Rock. Because Claimant contacted the adjustor to obtain more treatment, Respondents asked that the hearing be canceled, and the file returned to the Commission's general files for the time being. This request was granted on September 15, 2020. Dr. Gordon saw Claimant on September 21, 2020, and did

JONES – G804947

not recommend any additional treatment. He released her to work without restrictions.

But activity once again waned on this case. Thus, on May 17, 2021, Respondents filed what they termed a Renewed Motion to Dismiss. On May 19, 2021, I wrote Claimant, giving her twenty (20) days to respond. She did so on or about June 14, 2021, writing: “Do Not Dismiss My Case.” In this instance, I elected to hold the motion in abeyance and proceed to a hearing on Claimant’s entitlement to additional benefits. Prehearing questionnaires were issued to the parties on June 14, 2021. However, no response to the questionnaire was forthcoming by Claimant. Therefore, on July 12, 2021, I scheduled a hearing on the Renewed Motion to Dismiss for August 19, 2021, at 9:30 a.m. at the Commission. Claimant was sent the notice via certified, first-class, and electronic mail, using the physical and email addresses supplied by her to the Commission and used successfully in the past. The certified letter was returned unclaimed on August 2, 2021; but the letter that was sent via first-class mail was never returned. The evidence thus preponderates that Claimant received notice of the hearing.

The hearing on the motion to dismiss proceeded as scheduled on August 19, 2021. 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. The evidence preponderates that Claimant has failed to prosecute this 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 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) 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 evidence” means the evidence having greater weight or convincing force. *Barre v. Hoffman*, 2009 Ark.

JONES – G804947

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 her claim because she has taken no further action in pursuit of it (including appearing at the August 19, 2021, hearing to argue against its dismissal) since her return visit to Dr. Gordon on September 21, 2020. Thus, the evidence preponderates that dismissal is warranted under Rule 099.13. Because of this finding, it is unnecessary to address the applicability of Ark. Code Ann. § 11-9-702(a)(4) & (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 the claim should be and hereby is entered *without prejudice.*

CONCLUSION

In accordance with the findings of fact and conclusions of law set forth above, this claim is hereby dismissed *without prejudice*.¹

IT IS SO ORDERED.

O. MILTON FINE II
Chief Administrative Law Judge

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).