

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
CLAIM NO. H005401**

**ZACHARY J. KIST,
EMPLOYEE**

CLAIMANT

**KIRBY SPECIALTIES CORP.,
EMPLOYER**

RESPONDENT

**AMERISURE MUTUAL INS. CO.,
INSURANCE CARRIER/TPA**

RESPONDENT

**OPINION AND ORDER TO DISMISS WITHOUT PREJUDICE
FILED APRIL 13, 2021**

Hearing conducted on Tuesday, April 13, 2021, before the Arkansas Workers' Compensation Commission (the Commission), Administrative Law Judge (ALJ) Mike Pickens, in Little Rock, Pulaski County, Arkansas.

The claimant is represented by the Honorable Whitney James, Rainwater, Holt & Sexton, Little Rock, Pulaski County, Arkansas, who waived appearance at the hearing.

The respondents were represented by the Honorable Karen H. McKinney, Barber Law Firm, Little Rock, Pulaski County, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted on Tuesday, April 13, 2021, to determine whether this claim should be dismissed for lack of prosecution pursuant to *Ark. Code Ann.* § 11-9-702(a)(4) (2020 Lexis Supplement) and Commission Rule 099.13 (2020 Lexis Supp.).

The respondents filed a motion to dismiss with the Commission on February 26, 2021, requesting this claim be dismissed for lack of prosecution. In accordance with applicable Arkansas law, both the claimant and his attorney were mailed due and proper legal notice of the respondents' motion to dismiss, as well as a copy of the hearing notice at their respective addresses of record. The claimant received his copy of the motion and hearing notice via the United States Postal Service (USPS), First Class Certified Mail, Return Receipt Requested, on March 4, 2021.

(Commission Exhibit 1). The claimant's attorney waived appearance at the hearing, and did not object to this claim's dismissal so long as the dismissal was without prejudice.

The record herein consists of the hearing transcript and any and all exhibits contained therein and attached thereto, as well as the Commission's entire file in this matter.

DISCUSSION

Consistent with *Ark. Code Ann.* § 11-9-702(a)(4), as well as our court of appeals' ruling in *Dillard vs. Benton County Sheriff's Office*, 87 Ark. App. 379, 192 S.W.3d 287 (Ark. App. 2004), the Commission scheduled and conducted a hearing on the respondents' motion to dismiss. Rather than recite a detailed analysis of the record, suffice it to say the preponderance of the evidence introduced at the hearing and contained in the record conclusively reveals the claimant has failed and/or refused to prosecute his claim at this time.

Therefore, after a thorough consideration of the facts, issues, the applicable law, and other relevant matters of record, I hereby make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Commission has jurisdiction of this claim.
2. The claimant's attorney waived appearance at the hearing, and does not object to this claim's dismissal without prejudice.
3. The claimant has to date failed and/or refused to prosecute his claim, nor has he requested a hearing within the last six (6) months.
4. Therefore, the respondents' motion to dismiss without prejudice filed with the Commission on February 26, 2021, should be and hereby is GRANTED; and this claim is dismissed without prejudice to its refiling pursuant to the deadlines prescribed by *Ark. Code Ann.* § 11-9-702(a) and (b), and Commission Rule 099.13.

This opinion and order shall not be construed to prohibit the claimant, his attorney, any attorney he may retain in the future, or anyone acting legally and on his behalf from refiling the claim *if* it is refiled within the applicable time periods prescribed by *Ark. Code Ann.* § 11-9-702(a) and (b).

The respondents shall pay the court reporter's invoice within twenty (20) days of their receipt thereof.

IT IS SO ORDERED.

Mike Pickens
Administrative Law Judge

MP/mp