

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**WCC NO. H000977**

<b>CHARLES LISCOMB, EMPLOYEE</b>	<b>CLAIMANT</b>
<b>CITY OF BLYTHEVILLE, SELF-INSURED EMPLOYER</b>	<b>RESPONDENT</b>
<b>ARK. MUNICIPAL LEAGUE, THIRD-PARTY ADMINISTRATOR</b>	<b>RESPONDENT</b>

**OPINION FILED JULY 16, 2021**

Hearing before Administrative Law Judge O. Milton Fine II on July 15, 2021, in Little Rock, Pulaski County, Arkansas.

Claimant, not appearing, represented by Mr. Lucien Gillham, Attorney at Law, Benton, Arkansas.

Respondents represented by Ms. Melissa Wood, 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 July 15, 2021, in Little Rock, Arkansas. No testimony was taken in the case. Claimant failed to appear at the hearing, but was represented there by counsel. Without objection, the Commission's file on the claim has been incorporated herein in its entirety by reference. Admitted into evidence was Respondents' Exhibit 1, forms, pleadings and correspondence related to the claim, consisting of one (1) index page and eight (8) numbered pages thereafter.

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The record reflects the following procedural history:

Per the First Report of Injury or Illness filed on February 18, 2020, Claimant purportedly injured himself on February 8, 2020, when he was involved in a motor vehicle accident. According to the Form AR-2 that was filed on February 21, 2020, Respondents accepted Claimant's head and left knee injuries as compensable and paid medical and temporary total disability benefits pursuant thereto.

On May 27, 2020, Claimant's co-counsel, Luther Sutter, entered his appearance. Claimant filed a Form AR-C on July 6, 2020, requesting the full range of initial benefits. The file was assigned to Chief Administrative Law Judge Barbara Webb on July 7, 2020; and on July 10, 2020, she sent prehearing questionnaires to the parties. In the meantime, a request for a one-time change of physician was made. The file was transferred to the Medical Cost Containment Division of the Commission. However, Claimant elected not to proceed with the request, so the file was transferred back to Chief Judge Webb on July 16, 2020.

Respondents filed a timely response to the prehearing questionnaire on July 24, 2020. But Claimant failed to respond. Accordingly, on August 6, 2020, his file was returned to the Commission's general files. On August 11, 2020, Claimant's counsel filed with the Commission a pleading captioned "Motion to Withdraw Request for Hearing," stating that Respondents had paid him permanent partial disability benefits in connection with his impairment rating and

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were planning to have him assessed for rehabilitation, and that the parties were engaged in negotiations. While the file had already been returned to the Commission's general files, Chief Judge Webb reiterated this on August 28, 2020, notifying the parties that this action had been taken at the request of Claimant.

The record reflects that nothing further took place on this claim until June 7, 2021, when Respondents filed a motion to dismiss the claim under Ark. Code Ann. § 11-9-702 (Repl. 2012) and AWCC R. 099.13. Therein, they alleged that more than six (6) months had passed without Claimant making a bona fide hearing request. The file was assigned to me on June 10, 2021, following a recusal therefrom from Administrative Law Judge Terry Don Lucy; and on June 11, 2021, I wrote Claimant's counsel, asking for a response to the motion within 20 days. Claimant's counsel did so on June 28, 2020, stating: "Complainant states that any such dismissal should be without prejudice."

On July 1, 2021, I scheduled a hearing on the motion to dismiss for July 15, 2021, at 11:30 a.m. at the Commission. The notice was sent not only to the attorneys of record, but also to Claimant (via certified, return receipt requested and first-class mail) at the address listed for him in the file and on his Form AR-C. While the certified letter went unclaimed; the first-class letter was not returned to the Commission. The evidence thus preponderates that Claimant had notice of the hearing.

The hearing on the motion to dismiss proceeded as scheduled on July 15, 2021. Again, Claimant failed to appear at the hearing, although his counsel did so

on his behalf and stated that his client does not object to a dismissal without prejudice. Respondents appeared through counsel and argued for dismissal under the aforementioned authorities.

## **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 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 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.

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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 these matters—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 the claim because he has taken no further action in pursuit of it since the filing of the Form AR-C on July 6, 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 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 Work. Comp. LEXIS 510, Claim No. F404774 (Full Commission Opinion filed November 15, 2005), the Commission wrote: “In numerous past decisions, this Commission and

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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 (through counsel) at the hearing asked for a dismissal without prejudice; and Claimant (through counsel) indicated that his client did not object to this. Based on the above authorities, I agree and find that the dismissal of the claim should be and hereby is entered without prejudice.

#### **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