

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**WCC NO. H005091**

<b>SHAWN LUBERT, EMPLOYEE</b>	<b>CLAIMANT</b>
<b>SOUTHERN MISSOURI CONTAINERS, INC., EMPLOYER</b>	<b>RESPONDENT</b>
<b>TRAVELERS INS. CO., CARRIER</b>	<b>RESPONDENT</b>

**OPINION FILED JUNE 18, 2021**

Hearing before Administrative Law Judge O. Milton Fine II on June 17, 2021, in Little Rock, Pulaski County, Arkansas.

Claimant (appearing *pro se*) represented by Ms. Laura Beth York, Attorney at Law, Little Rock, Arkansas (not appearing).

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 June 17, 2021, in Little Rock, Arkansas. Claimant, who is represented by counsel, appeared at the hearing unrepresented and testified; York waived her appearance. Without objection, the Commission's file on the claim has been incorporated herein in its entirety by reference. Also admitted into evidence was Respondents' Exhibit 1, pleadings, correspondence and forms related to this claim, consisting of nine (9) pages.

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The record reflects the following procedural history:

Per the First Report of Injury or Illness filed July 25, 2020, Claimant purportedly suffered an injury to his lumbosacral spine on February 4, 2020, when he tripped over a cord and fell. According to the Form AR-2 filed, Respondents controverted the claim in its entirety, asserting that the fall was idiopathic. Their counsel made an entry of appearance on October 30, 2020; and on November 2, 2020, reiterated their position that the claim is not compensable.

Through counsel on August 19, 2020, Claimant filed a Form AR-C, alleging that he injured his back “and other whole body” when he tripped over an automatic shutoff cord at work and fell backwards. However, no hearing request accompanied the form. Respondents’ counsel made an entry of appearance on August 24, 2020. On November 5, 2020, Respondents’ counsel obtained from the Commission a subpoena for Claimant’s records from the Department of Workforce Services.

The record reflects that nothing further took place on the claim until April 16, 2021. On that date, Respondents’ counsel filed the instant motion, asking for dismissal of the claim “for lack of prosecution.”

On April 20, 2021, my office wrote Claimant’s counsel, asking for a response to the motion within twenty (20) days. Counsel responded by email on April 22, 2021, writing: “Claimant is not going to object to the Motion to Dismiss. Please go ahead and set it for a Hearing, and I will waive my appearance. We will

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inform the claimant of the hearing date and time, but it is my understanding that he will not attend.” On May 14, 2021, a hearing on the motion to dismiss was scheduled for June 17, 2021, at 10:30 a.m. at the Commission in Little Rock, Arkansas. The evidence preponderates that Claimant received this notice; he appeared at the hearing.

The hearing on the motion to dismiss proceeded as scheduled on June 17, 2021. Again, Claimant appeared at the hearing, albeit without counsel. He took the stand and testified that he does not object to dismissal of the claim. Respondents appeared through counsel and argued for dismissal under AWCC R. 099.13 and Ark. Code Ann. § 11-9-702(a)(4) (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):

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.

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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 August 19, 2020. Thus, the evidence preponderates that dismissal is warranted under Rule 13. Because of

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this finding, it is unnecessary to address the applicability of Ark. Code Ann. § 11-9-702(a)(4) (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 AWCC 226, 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>1</sup>

#### **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

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<sup>1</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).