

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. H004435

JAMIE W. LUTE, EMPLOYEE	CLAIMANT
UNIV. OF CENTRAL ARK., EMPLOYER	RESPONDENT
PUBLIC EMPLOYEE CLAIMS, CARRIER/TPA	RESPONDENT

OPINION FILED OCTOBER 21, 2021

Hearing before Administrative Law Judge O. Milton Fine II on October 20, 2021, in Little Rock, Pulaski County, Arkansas.

Claimant, *pro se*, failed to appear.

Respondents represented by Mr. Charles McLemore, 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 October 20, 2021, in Little Rock, Arkansas. Claimant, who is *pro se*, failed to appear at the hearing. 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 the claim, consisting of one (1) index page and eight (8) numbered pages thereafter.

The record reflects the following procedural history:

Claimant, per the First Report of Injury or Illness filed July 8, 2020, purportedly suffered an injury to his neck and lower back on January 8, 2020,

LUTE – H004435

when he was helping move a large gym pad. According to the Form AR-2 that was also filed on July 8, 2020, Respondents controverted the claim in its entirety because Claimant was allegedly not performing employment services at the time of the incident in question. Through then-counsel Kolton Jones on July 28, 2020, Claimant filed a Form AR-C. Therein, he requested the full range of initial and additional benefits. No hearing request accompanied this filing. In an email to the Commission on July 29, 2020, Respondents reaffirmed the position they took in the Form AR-2. Their counsel entered his appearance on August 28, 2019.

On March 31, 2021, Jones's co-counsel Whitney James filed a motion with the Commission, asking that their firm be allowed to withdraw from representation of Claimant. In an order entered on April 19, 2021, the Full Commission granted the motion under AWCC Advisory 2003-2.

The record reflects that nothing further took place on the claim until August 23, 2021. On that date, Respondents filed the instant motion, asking for dismissal of the claim under AWCC R. 099.13 and Ark. Code Ann. § 11-9-702 (Repl. 2012) because Claimant had not made a hearing request or otherwise pursued his claim. On August 23, 2021, the office of Administrative Law Judge Katie Anderson (to whom this matter was originally assigned) wrote Claimant, asking for a response to the motion within twenty (20) days. This correspondence was sent to him by first-class and certified mail to the address for him listed in the file and

LUTE – H004435

on his Form AR-C. While the certified letter was returned to the Commission, undelivered, on September 14, 2021, the first-class letter was not returned.

A Notice of Hearing was sent to the parties on September 14, 2021, scheduling a hearing on the motion for October 20, 2021, at 11:00 a.m. at the Commission. As before, the correspondence was sent to Claimant by first-class and certified mail; and the former was not returned but the latter was returned, unclaimed, on October 5, 2021. The evidence thus preponderates that Claimant received this notice.

The hearing on the motion to dismiss proceeded as scheduled. Again, Claimant failed to appear. Respondents, however, 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 matter.
2. The parties were provided reasonable notice of the Motion to Dismiss and of the hearing thereon.

LUTE – H004435

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 claims—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—including appearing at the October 20, 2021, hearing to argue

LUTE – H004435

against its dismissal--since the filing of his Form AR-C on July 28, 2020. Thus, the evidence preponderates that dismissal is warranted under Rule 13. Because of this finding, it is unnecessary to address 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 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*.

IV. CONCLUSION

In accordance with the findings of fact and conclusions of law set forth above, the Motion to Dismiss is hereby granted. This claim is hereby dismissed *without prejudice*.

LUTE – H004435

IT IS SO ORDERED.

O. MILTON FINE II
Chief Administrative Law Judge