

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. G904092

FARRAH MENIFEE, EMPLOYEE	CLAIMANT
ANCHOR PACKAGING, LLC., SELF-INSURED EMPLOYER	RESPONDENT
CCMSI, THIRD-PARTY ADMINISTRATOR	RESPONDENT

OPINION FILED JANUARY 24, 2022

Hearing before Administrative Law Judge O. Milton Fine II on January 21, 2022, in Jonesboro, Craighead County, Arkansas.

Claimant represented by Mr. Mark Alan Peoples, Attorney at Law, Little Rock, Arkansas.

Respondents represented by Mr. Eric Newkirk, Attorney at Law, Little Rock, Arkansas.

I. BACKGROUND

This matter comes before the Commission on Respondents' Motion to Dismiss. A hearing on the motion was conducted on January 21, 2022, in Jonesboro, Arkansas. Both parties appeared at the hearing through counsel. The record consists of the Commission's file—which, without objection, has been incorporated herein in its entirety by reference—and Respondents' Exhibit 1, a collection of documents related to this matter, including the Motion to Dismiss, the brief in support thereof, a medical report, and the hearing notice, consisting of 14 numbered pages. Claimant gave testimony at the proceeding.

The evidence reflects that on July 23, 2019, Claimant—through then-counsel Rainwater, Holt & Sexton (“Rainwater”)—filed a Form AR-C in this matter. Therein, she alleged that she injured her right hand “and other whole body” on June 12, 2019, at Respondent Anchor Packaging when her “hand was pulled into a machine.” Claimant in that form asked for the full range of initial and additional benefits. Per the Form AR-2 filed on June 25, 2019, and an email to the Commission from Respondents dated July 25, 2019, they accepted the claim as compensable and paid medical and temporary total disability benefits pursuant thereto.

The parties exchanged discovery. Claimant underwent two surgical procedures to her right hand. On January 22, 2020, Dr. Mark Tait found that Claimant had reached maximum medical improvement and assigned her an impairment rating of thirty-four percent (34%) to the hand. Respondents accepted this rating and paid her permanent partial disability benefits pursuant thereto. As of April 13, 2021, the rating had been fully paid out.

On October 30, 2020, Rainwater filed a motion to withdraw from representation of Claimant. In an order entered on November 20, 2020, the Full Commission granted the motion under AWCC Advisory 2003-2.

The record reflects that no further action took place on the case until October 25, 2021, when Respondents filed the instant motion. Therein, they

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argued that dismissal of this claim is justified under Ark. Code Ann. § 11-9-702(a)(4) (Repl. 2012),¹ along with AWCC R. 099.13:

Due to the Claimant's lack of action or efforts to prosecute her claim since April 13, 2021, a dismissal of the claim is warranted . . . [i]t has been over six (6) months without any action taken by the Claimant to pursue benefits or in any way prosecute her claim. She continues to work for the Respondent Employer in a Full Duty capacity and seems to have abandoned her claim, in all likelihood because all appropriate medical benefits were paid on her behalf by the Respondents.

The file was assigned to me on October 22, 2021; and that same day, my office wrote Claimant (who at that time was *pro se*), asking her to respond to the motion within 20 days. This letter was sent to her by certified and first-class mail. However, the U.S. Postal Service returned both items of correspondence to the Commission, stating that Claimant's forwarding order had expired. It was re-sent by both routes to the new address on November 1, 2021.

But before the response was due, Claimant obtained new counsel. The Alexander Shunnarah Law Firm entered their appearance before the Commission on November 4, 2021. Thereafter, on November 22, 2021, her present counsel moved to be substituted as her attorney. This motion was granted that same day. In an email dated November 18, 2021, current counsel wrote that his client "opposes the motion [to dismiss]." Interpreting this as a hearing request, on November 22, 2021, I informed the parties that I was holding the motion to dismiss in abeyance and was issuing prehearing questionnaires to

¹Because this claim was accepted, the appropriate provision is Ark. Code

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them. But on December 9, 2021, Claimant's counsel emailed my office and stated that no hearing request had been made. He added that because he had yet to received responses to discovery that he had propounded to Respondents, he did not know whether or not a hearing should be requested.

Based on that communication, I informed the parties that I was no longer holding the Motion to Dismiss in abeyance. On December 16, 2022, I scheduled a hearing thereon for January 21, 2022, at 12:30 p.m. at the Craighead County Courthouse in Jonesboro. In addition to sending the hearing notice to the respective counsels, it was sent via certified mail to Claimant. It was claimed on December 18, 2021. All parties appeared at the hearing through counsel.

Claimant testified that as a result of the June 12, 2019, accident, a portion of all five digits on her right hand were severed. She would like what she termed "cosmetic tips" to wear on these digits. However, according to her, Respondents have denied them. Claimant stated that in the event the Motion to Dismiss is denied, she is requesting a hearing on the issues of her entitlement to these prostheses, plus any unreimbursed medical mileage.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record as a whole, including documents and other matters properly before the Commission, and having had an opportunity to hear the testimony of Claimant and to observe her demeanor, I hereby make the

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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. All parties received notice of the motion to dismiss and the hearing thereon pursuant to AWCC R. 099.13.
3. Respondents have not proven by a preponderance of the evidence that Claimant has failed to prosecute her claim under AWCC R. 099.13.
4. Respondents have not proven by a preponderance of the evidence that dismissal of this claim is warranted under Ark. Code Ann. § 11-9-702(d) (Repl. 2012).
5. Respondents' motion to dismiss should be, and hereby is, denied.
6. Claimant has requested a hearing on her claim.
7. This matter will proceed to a hearing on the merits.

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). In turn, Ark. Code Ann. § 11-9-702(d) (Repl. 2012) states:

If within six (6) months after the filing of a claim for additional compensation no bona fide request for a hearing has been made

with respect to the claim, the claim **may**, upon motion and after hearing, if necessary, be dismissed without prejudice to the refiling of the claim within the limitation period specified in subsection (b) of the section.

(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. 373, 326 S.W.3d 415; *Smith v. Magnet Cove Barium Corp.*, 212 Ark. 491, 206 S.W.2d 442 (1947).

A claimant’s testimony is never considered uncontroverted. *Nix v. Wilson World Hotel*, 46 Ark. App. 303, 879 S.W.2d 457 (1994). The determination of a witness’ credibility and how much weight to accord to that person’s testimony are solely up to the Commission. *White v. Gregg Agricultural Ent.*, 72 Ark. App. 309, 37 S.W.3d 649 (2001). The Commission must sort through conflicting evidence and determine the true facts. *Id.* In so doing, the Commission is not required to believe the testimony of the claimant or any other witness, but may accept and translate into findings of fact only those portions of the testimony that it deems worthy of belief. *Id.*

After consideration of the evidence, I find that both Claimant and Respondents were given reasonable notice of the Motion to Dismiss hearing under Rule 13, and that Claimant has not yet violated this rule. I credit her testimony that she wants to litigate whether she is entitled to the above-described prostheses, along with any unreimbursed medical mileage. Respondents have

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not proven by a preponderance of the evidence that she has failed to prosecute her claim.

As for § 11-9-702(d), I note that even if the provision has been abridged—a bona fide hearing request was not made within six months of the filing of the claim for additional benefits—the provision states that the administrative law judge “may” (not “shall”) dismiss the claim. Dismissal is not mandatory. Under the circumstances outlined above, I do not believe that dismissal is warranted here. Consequently, the motion to dismiss is hereby denied.

Prehearing questionnaires will immediately be issued to the parties; and this matter will proceed to a full hearing on the merits.

CONCLUSION

In accordance with the findings of fact and conclusions of law set forth above, Respondents’ Motion to Dismiss is hereby denied.

IT IS SO ORDERED.

O. MILTON FINE II
Chief Administrative Law Judge