

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. G803731

DANNY L. MONTGOMERY, EMPLOYEE	CLAIMANT
CITY OF WEST MEMPHIS, SELF-INSURED EMPLOYER	RESPONDENT
ARK. MUN. LEAGUE, THIRD PARTY ADMINISTRATOR	RESPONDENT

OPINION FILED JULY 25, 2022

Hearing before Chief Administrative Law Judge O. Milton Fine II on July 22, 2022, in Marion, Crittenden County, Arkansas.

Claimant, *pro se*, not appearing.

Respondents represented by Ms. Mary K. Edwards, Attorney at Law, North 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 22, 2022, in Marion, Arkansas. No testimony was taken in the case. Claimant, who, according to Commission records, is *pro se*, failed to appear at the hearing. At Respondents' request, the Commission's file on the claim has been incorporated herein in its entirety by reference. Admitted into evidence was Respondents' Exhibit 1, a compilation of pleadings, forms and correspondence related to the claim, consisting of one index page and nine pages thereafter.

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The record reveals the following procedural history:

The Form AR-1, filed on June 8, 2018, reflects that Claimant purportedly injured his left shoulder while trying to open a truck door at work. Per the Form AR-2 filed on June 11, 2018, and amended forms filed on June 27, 2018, and July 31, 2018, respectively, Respondents accepted the claim as a compensable and paid medical and indemnity benefits pursuant thereto.

Then-counsel Neal Hart filed a Form AR-C on July 31, 2018, asking for the full range of initial and additional benefits and alleging that Claimant injured “[m]ultiple body parts including [his] arm and shoulder.” In a letter accompanying the form, Hart stated that he was “not requesting a hearing at this juncture.” Respondents, in a letter to the Commission on August 1, 2018, reiterated that they accepted the claim and were paying benefits. Claimant requested a change of physician to Dr. Apurva Dalal on November 28, 2018. On December 6, 2018, the Medical Cost Containment Division of the Commission entered an order, changing Claimant’s authorized treating physician to Dr. Shahryar Ahmadi.

On December 18, 2019, Hart moved to withdraw from the case. In an order entered on January 7, 2020, the Full Commission granted the motion.

Respondents filed the instant Motion to Dismiss on May 23, 2022, asking for a dismissal under AWCC R. 099.13 and/or Ark. Code Ann. § 11-9-702(d) (Repl. 2012) because no action had been taken on the claim since Hart’s withdrawal. The file was assigned to me that same day; and on May 27, 2022, my office wrote Claimant, asking for a response to the motion within 20 days. The

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letter was sent via first-class and certified mail to the address listed for Claimant on the Form AR-C. Someone with an illegible signature signed for the certified letter on May 31, 2022; and the first-class letter was not returned. Nonetheless, no response to the motion was forthcoming. On June 22, 2022, a hearing on the motion was scheduled for July 22, 2022, at 10:30 a.m. at the Crittenden County Courthouse in Marion. As with the previous correspondence, this notice was sent to Claimant by both certified and first-class mail. In this instance, someone with an illegible signature signed for the certified letter on June 23, 2022; and the first-class letter was not returned. Thus, the evidence preponderates that Claimant received the hearing notice.

The hearing proceeded as scheduled on July 22, 2022. Again, Claimant failed to appear at the hearing. But 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.

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3. Respondents have proven by a preponderance of the evidence that Claimant has failed to prosecute his claim.
4. Respondents have proven by a preponderance of the evidence that this claim should be dismissed under AWCC R. 099.13.
5. The claim is hereby dismissed *without prejudice*.

III. DISCUSSION

Rule 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).

Under Ark. Code Ann. § 11-9-705(a)(3) (Repl. 2012), Respondents must prove by a preponderance of the evidence that this claim should be dismissed. 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 July 22, 2022, hearing to argue against its dismissal) since the granting of the change-of-physician request on December 6,

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2018. Thus, dismissal is warranted under Rule 13. Because of this finding, it is unnecessary to address the application of § 11-9-702(d).

This 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)). At the hearing, Respondents requested a dismissal without prejudice. Based on the foregoing, I agree and find that the dismissal of this claim should be and hereby is entered *without prejudice*.¹

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.

O. MILTON FINE II
Chief Administrative Law Judge

¹“A dismissal ‘without prejudice’ allows a new [claim] to be brought on the same cause of action.” BLACK’S LAW DICTIONARY 825 (abridged 5th ed. 1983).