

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. G903597

MELISSA A. McCLINIC, EMPLOYEE	CLAIMANT
ARK. DEPT. OF HUMAN SVCS., EMPLOYER	RESPONDENT NO. 1
PUBLIC EMPLOYEE CLAIMS, CARRIER/TPA	RESPONDENT NO. 1
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT NO. 2

OPINION FILED OCTOBER 1, 2021

Hearing before Administrative Law Judge O. Milton Fine II on September 30, 2021, in Little Rock, Pulaski County, Arkansas.

Claimant represented by Mr. Mark Alan Peoples, Attorney at Law, Little Rock, Arkansas (neither appearing).

Respondents No. 1 represented by Mr. Charles McLemore, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by Ms. Christy L. King, Attorney at Law, Little Rock, Arkansas (excused from participation).

I. BACKGROUND

This matter comes before the Commission on a Motion to Dismiss by Respondents No. 1. A hearing on the motion was conducted on September 30, 2021, in Little Rock, Arkansas. Claimant, who is represented by counsel, failed to appear at the hearing; and her counsel waived his 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 No. 1 Exhibit

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1, pleadings, correspondence and forms related to the claim, consisting of one (1) index page and eleven (11) numbered pages thereafter.

The record reflects the following procedural history:

Claimant, per the First Report of Injury or Illness filed June 5, 2019, purportedly suffered an injury to her neck, back and skull on April 11, 2019, when she attempted to break up a fight between two individuals and was struck by a chair. While the Form AR-4 reflects that some medical benefits were paid, according to the Form AR-2 that was also filed on June 5, 2019, Respondents No. 1 controverted the claim in its entirety due to an alleged lack of objective medical findings. Through counsel on June 10, 2019, Claimant filed a Form AR-C. Therein, she requested additional medical and medical and temporary total disability benefits, along with a controverted attorney's fee. In an email accompanying the form, counsel wrote: "I am NOT asking for a hearing at this time." (Emphasis in original) Respondents No. 1 wrote the Commission on June 13, 2019, reaffirming the position they took in the Form AR-2. Their counsel entered his appearance on June 19, 2019.

On October 23, 2019, Claimant's counsel emailed the Commission that his client was requesting a change-of-physician order. In response, the Medical Cost Containment Division notified him by letter on November 8, 2019, that the request could not be accommodated due to the controversion of the claim by Respondents No. 1.

The record reflects that nothing further took place on the claim until August 18, 2021. On that date, Respondents No. 1 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 “the claimant has not requested a hearing” and she “has not pursued her claim for any benefits.” On August 20, 2021, my office wrote Claimant’s counsel, asking for a response to the motion within twenty (20) days. He did so by email that same day, writing: “I do not oppose the motion to dismiss and assume the claimant does not either. However, my efforts to reach her by telephone have been unsuccessful.”

When my office emailed the parties to obtain acceptable dates to schedule a hearing on the motion, Claimant’s counsel inquired regarding whether his attendance was required. In response to my office informing him that he would not be required to appear if he indicated no objection to the motion and waived his appearance, he responded:

Well, that’s sort of the problem. I don’t have any objection. And [Claimant] initially told me that she didn’t have any objection, but then called me back to tell me that she might object and to wait until the following Monday. She was supposed to call me back the following Monday and let me know if she had an objection. She never called me back and I have since been unable to communicate with her. If she wants a hearing, I will move to withdraw.

A Notice of Hearing was sent to the parties on September 10, 2021, scheduling a hearing on the motion for September 30, 2021, at 11:30 a.m. at the Commission. The evidence preponderates that Claimant and her attorney received this notice.

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Counsel was sent it by email on September 10, 2021; while his client received hers by certified mail on September 14, 2021.

The hearing on the motion to dismiss proceeded as scheduled. Again, Claimant's counsel waived his appearance at the hearing, and his client failed to appear. Respondents No. 1 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.
3. The evidence preponderates that Claimant has failed to prosecute her 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 No. 1 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 her claim because she has taken no further action in pursuit of it since the filing of her Form AR-C on June 10, 2019. 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).

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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 No. 1 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*.

IT IS SO ORDERED.

O. MILTON FINE II
Chief Administrative Law Judge