

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
WCC NO. F809588**

JOSEPH W. PERMENTER, EMPLOYEE	CLAIMANT
DOLLAR GENERAL STORE, SELF-INSURED EMPLOYER	RESPONDENT
YORK RISK SVCS. GROUP, INC., THIRD-PARTY ADMINISTRATOR	RESPONDENT

OPINION FILED SEPTEMBER 25, 2023

Hearing before Administrative Law Judge O. Milton Fine II on August 31, 2023, in Little Rock, Pulaski County, Arkansas.

Claimant *pro se*.

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. Claimant gave testimony at the hearing. The evidentiary record consists not only of that testimony, but also of Respondents' Exhibit 1, forms, pleadings, and correspondence related to this claim, consisting of one index page and ten numbered pages thereafter. Also, without objection, the Commission's file on this claim has been incorporated herein by reference in its entirety.

The record reflects the following procedural history: Per the First Report of Injury or Illness filed on September 25, 2008, Claimant purportedly suffered injuries to his head, neck, and upper back on March 9, 2006, when rollers that had been stacked against a wall fell and struck him. As they acknowledged at the

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hearing, Respondents accepted the claim as compensable and paid medical and indemnity benefits pursuant thereto. Claimant has filed a series of Forms AR-C in connection with this matter: on December 8, 2010, June 24, 2011, on or around January 20, 2013, on September 3, 2014, and December 15, 2014. In each instance, he requested additional benefits.

He first sought a hearing—for additional medical treatment—on July 5, 2013. Respondents' counsel informed the Commission on August 1, 2013, that no benefits were in dispute. Because the matter had been resolved, then-Legal Advisor Charles McLemore returned the file to the Commission's general files.

Respondents on November 27, 2013, moved for a dismissal of the claim without prejudice under AWCC R. 099.13 and Ark. Code Ann. § 11-9-702 (Repl. 2012) because of Claimant's alleged failure to make a bona fide hearing request within the previous six months. Then-Administrative Law Judge Scotty Dale Douthit gave Claimant 15 days to respond to the motion. Claimant did so on December 3, 2013, writing:

I do not wish to have claim number **F809588** dismissed. I would like to request a hearing on the merits of my claim. In addition to the request, I would like to make a claim for additional benefits, also to include additional medical treatment. I did make a request for a hearing on July 1, 2013, because I was in need of treatment. The matter was resolved and I was provided the needed treatment.

(Emphasis in original) Based on this filing, Judge Douthit took the motion under advisement and issued prehearing questionnaires to the parties. Respondents filed a timely response thereto on December 11, 2013. Claimant followed suit on

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December 26, 2013. Therein, he gave two reasons for requesting a hearing on his claim:

1. I will need ongoing medical treatment
2. To ask that [the] claim not be dismissed

As part of his prehearing filing, he included a signed medical release. Judge Douthit scheduled a prehearing telephone conference for January 30, 2014. The day before the conference, on January 29, 2014, Attorney Tona DeMers entered an appearance before the Commission on Claimant's behalf. Following that conference, and hearing a presentation by each side, Judge Douthit entered an order in which he denied Respondents' dismissal motion and returned the file to the Commission's general files.

Respondents filed another motion to dismiss on March 17, 2014. It repeated the allegations from the earlier pleading. As before, Judge Douthit requested a response thereto from Claimant within 15 days. DeMers did so on April 1, 2014, writing:

1. Claimant was injured on 3/9/2006. The nature of his injury will require treatment for the rest of his life. His claim was not controverted by the Respondents and Respondents have paid for his medical treatment each time he has filed a claim for additional compensation.
2. The last time Claimant made a claim for additional compensation was in August, 2013. Claimant received medical treatment in September, 2013. Claimant will be filing another claim for additional compensation within a few months.
3. Claimant has continued to prosecute his claim since 2006 by filing claims for additional compensation within the statutory

time period. A hearing has not been necessary because Respondents have always approved his claims for additional compensation.

4. Claimant receives treatment annually. If Claimant received treatment every month or even every 3 or 4 months, we would not be entertaining motions to dismiss every year. Because the treatments do not occur less than 6 months apart, it brings about a motion to dismiss because a hearing is not requested by claimant within 6 months from the last additional compensation claim, then Claimant has to respond and then a hearing has to be held. By this time, it's time for Claimant to file another claim for additional compensation.
5. Claimant respectfully requests that Respondents' Motion to Dismiss be denied or, in the alternative, be postponed until such time as settlement has been considered.

Respondents replied to the response on April 2, 2014, representing that settlement talks had been unfruitful and that dismissal was proper in light of the fact that “[t]here is nothing outstanding from a litigation perspective.” Judge Douthit, however, repeated his earlier ruling in an order entered on April 7, 2014, denying Respondents' motion and returning the file to the Commission's general files.

On September 3, 2014, Claimant informed the Commission by letter that he had terminated DeMers's representation of him. In that same correspondence, he asked McLemore to contact him because “I need to get in to see my doctor, it's been almost a year since I last saw him and I am having a few problems.” Accompanying this communication was the September 3, 2014, Form AR-C filing.

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However, on September 26, 2014, the file was again returned to the Commission's general files.

After this return, there ensued a seven-year period of silence in the file. The next activity took place on September 21, 2021, when Claimant wrote the Commission:

To whom it may concern,

I am requesting a hearing for approval of medical expenses needed. I have reached out to Dollar General over the last 3 months starting in July of 2021 for approval of doctor visits and have not had a response from them as of today, September 19, 2021.

The file was initially assigned to the Legal Advisor Division. But once Claimant represented that the amount in dispute was greater than \$2,500.00 and that he was not willing to mediate the matter, a request was made to reassign the file to an administrative law judge. The Clerk of the Commission did so, assigning the file to me on October 15, 2021. I issued prehearing questionnaires to the parties on October 18, 2021. Claimant filed a timely response thereto on November 1, 2021, asking for hearing because "I am in need of doctor visits, prescriptions, and further neck treatment." Respondents followed suit on November 2, 2021, asserting that no treatment had been denied. During the December 6, 2021, prehearing telephone conference, Respondents repeated that they had agreed to furnish Claimant with requested treatment. For that reason, by agreement of the parties, the file was again returned to the Commission's general files.

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The record reflects that no further action took place on the claim until July 18, 2023, when Respondents filed the instant Motion to Dismiss with the Commission. Therein, they contended that the claim should be dismissed pursuant to Ark. Code Ann. § 11-9-702 (Repl. 2012) because more than six months had transpired since its filing without Claimant making a hearing request; and under AWCC R. 099.13 because of a lack of prosecution. My office wrote Claimant on July 19, 2023, asking for a response to the motion within 20 days. Claimant did so on July 24, 2023, stating:

In response to Dollar General's motion to dismiss, I object to dismissal.

I have continued treatment and will require future treatments. My most recent treatments were:

January 17, 2023 Cervical radio frequency ablation; left side, 3 levels

February 14, 2023 Cervical radio frequency ablation; right side, 3 levels

March 1, 2023 Office visit

I ask that you deny Dollar General's request for motion to dismiss. Please review the attached letter as respondents agreed to provide requested medical treatment.

On July 25, 2023, I scheduled a hearing on the Motion to Dismiss for August 31, 2023, at 10:00 a.m. at the Commission in Little Rock. The Notice of Hearing was sent to the parties by first-class and certified mail; and as alluded to above, both appeared before me at the appointed time. Respondents asked for

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dismissal of the claim without prejudice under Ark. Code Ann. § 11-9-702(d) (Repl. 2012) and AWCC R. 099.13.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record as a whole, I hereby make the 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. The parties were provided reasonable notice of the motion to dismiss and of the hearing thereon under AWCC R. 099.13.
3. The Commission is authorized to dismiss claims lacking a justiciable issue pursuant to AWCC R. 099.13.
4. This claim should be, and hereby is, dismissed *without prejudice* pursuant to AWCC R. 099.13 because of the lack of a justiciable issue.
5. Because of the above finding, Ark. Code Ann. § 11-9-702(d) (Repl. 2012) will not be addressed.

III. DISCUSSION

Arkansas Code Annotated § 11-9-702(d) (Repl. 2012) provides as follows:

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

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of the claim within the limitation period specified in subsection (b) of this section.

In addition, AWCC R. 099.13 provides in relevant part:

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).

The Arkansas Court of Appeals in *Johnson* held that a claim could be dismissed for lack of prosecution based on the fact that there is no justiciable issue. The authority for doing so comes under Rule 13, which the Commission promulgated under Ark. Code Ann. § 11-9-205(a)(1)(A) (Repl. 2012). This provision authorizes it “[t]o make such rules and regulations as may be found necessary[.]” *See Dura Craft Boats, Inc. v. Daugherty*, 247 Ark. 125, 444 S.W.2d 562 (1969); *Johnson, supra*. *Contra Dillard v. Benton Cty. Sheriff’s Off.*, 87 Ark. App. 379, 192 S.W.3d 287 (2004)(“Rule 13 . . . allows a dismissal . . . pursuant to Ark. Code Ann. § 11-9-702(b)(4), the portion of the statute relating to additional benefits”). Certainly, such a claim could be re-filed if a justiciable issue arises, provided that all other prerequisites for a cognizable claim are met.

At the hearing, Claimant during his testimony conceded that there are no justiciable issues at present regarding this claim. While he has placed some of his prescription medications on his group health plan that he has through his

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current employer, Lowe's, he explained that he did this only because of the hassle involved in getting them paid through workers' compensation—not because Respondents had denied coverage. Under questioning by me, the following exchange took place:

Q. Is there any benefits that you want on your claim right now that Ms. Wood's clients are denying you of any kind that you've asked for and they've denied?

A. No, sir. They provided the last treatments that I asked for.

Q. Okay.

A. And I haven't asked for anything since.

Q. Okay. This—I'm going to swing around and ask you this because this is basically what Ms. Wood was trying to ask you and I'm going to try to ask you again. In light of that and the fact that they're not—it doesn't sound like they're denying you anything—are you—can you think of any reason why you're asking me for a hearing right now? The last time you did it was because there was some treatment you were wanting that there was some kind of dispute or at least there appeared to be a dispute, and it got resolved. Is there any reason right now that you feel like you need a hearing in front of me?

A. It sounds like the answer to that is no.

I credit Claimant's testimony. Under *Johnson, supra*, this claim should thus be dismissed under Rule 13 due to the lack of ripeness. Because of this finding, it is unnecessary to address the application of § 11-9-702(d).

That, however, leaves the question of whether the dismissal 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

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S.W.2d 402 (1988). This includes claims dismissed under Rule 13. *Johnson, supra*. In *Abo v. Kawneer Co.*, 2005 AR Wrk. Comp. LEXIS 510, the Commission wrote: “In numerous past decisions, this Commission and the Appellate Courts have expressed a preference for dismissals without prejudice.” (citing *Professional Adjustment Bureau v. Strong*, 75 Ark. 249, 629 S.W.2d 284 (1982); *Hutchinson v. North Arkansas Foundry*, Claim No. D902143 (Full Commission Opinion filed October 23, 1991)). In light of this preference, along with facts of this case and Respondents’ agreement that dismissal should be without prejudice, the dismissal of this claim is hereby *without prejudice*.¹

IV. CONCLUSION

In accordance with the findings of fact and conclusions of law set forth above, this claim² 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).

²The term “claim” encompasses all five Forms AR-C, described above, that have been filed in connection with this matter. With this dismissal, no active Forms AR-C remain.