

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. H102286

VANESSA F. ROBERTSON, EMPLOYEE	CLAIMANT
ROCK REGION METRO, SELF-INSURED EMPLOYER	RESPONDENT
RISK MGMT. RESOURCES, SELF-INSURED CARRIER	RESPONDENT

OPINION FILED NOVEMBER 19, 2021

Hearing before Administrative Law Judge O. Milton Fine II on November 18, 2021, in Little Rock, Pulaski County, Arkansas.

Claimant, *pro se*, not appearing.

Respondents represented by Ms. Carol Lockard Worley, 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 November 18, 2021, in Little Rock, Arkansas. No testimony was taken in the case. Claimant, who according to Commission records is *pro se*, failed to appear at the hearing. Without objection, the Commission file on this claim has been incorporated herein in its entirety by reference. Also admitted into evidence was Respondents' Exhibit 1, correspondence, forms and pleadings related to the claim, consisting of one index page and six numbered pages thereafter.

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The record reflects the following procedural history:

On March 5, 2021, a Form AR-1 was filed in this case, reflecting that Claimant purportedly sustained gradual-onset injuries to her arms and shoulders by turning the steering wheel and opening the partition door on the bus she drive at work. Per the Form AR-2 that was also filed on March 5, 2021, Respondents controverted the claim because the injuries in question were allegedly not work-related. On March 4, 2021, Claimant filed a Form AR-C, requesting only a change of physician to Dr. Eric Gordon. On March 5, 2021, the Clerk of the Commission assigned the claim file to the Medical Cost Containment Division (“MCCD”). However, in a letter to Claimant dated March 8, 2021, the MCCD informed her that because the claim had been controverted in its entirety, she was not eligible for a change of physician. Claimant wrote the Commission on March 12, 2021, “to apply for an appeal” (obviously a hearing request). Respondents’ counsel entered her appearance on March 29, 2021.

Because attempts by the Legal Advisor Division of the Commission to set up legal advisor and mediation conferences failed, the file was returned to the Clerk of the Commission for reassignment to an administrative law judge. The file was assigned to me on March 31, 2021; and that same day, I issued prehearing questionnaires to the parties. Claimant returned the preliminary notice and medical release in a timely fashion, on April 14, 2021. But on April 23, 2021, she wrote the Commission: “I ‘Vanessa Foster Robertson’ is writing this letter

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because I am dropping the appeal, please accept this letter.” Based on this, the file was returned to the Commission’s general files on April 23, 2021.

The record reflects that nothing further occurred on this claim until September 17, 2021, when Respondents filed the instant motion. Therein, they alleged that dismissal of the claim was warranted because “[m]ore than six months have passed since Claimant filed an AR-C with the Commission [and] Claimant has not sought any type of bona fide hearing before the Workers’ Compensation Commission over the last six months.” The file was assigned to me on September 20, 2021; and on September 21, 2021, my office wrote Claimant, asking for a response to the motion within 20 days. This letter was sent by both first-class and certified mail to the address for Claimant listed on her Form AR-C. The United States Postal Service has no record that the certified letter was delivered. However, neither it nor the first-class letter was returned to the Commission. Regardless, no response to the motion was forthcoming from Claimant.

On October 15, 2021, I scheduled a hearing on Respondents’ motion for November 18, 2021, at 10:00 a.m. at the Commission in Little Rock. The hearing notice was sent to Claimant by certified and first-class mail to the same address as before. In this instance, someone with an illegible signature signed for the certified letter on October 16, 2021. Again, the first-class letter was not returned. The evidence thus preponderates that Claimant received notice of the hearing.

The hearing proceeded as scheduled on November 18, 2021. Again, Claimant failed to appear at the hearing. But Respondents appeared through counsel and argued for dismissal under § 11-9-702(a)(4) (Repl. 2012) and Rule AWCC R. 099.13.

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 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.

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 this matter—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 (including appearing at the November 18, 2021, hearing to argue against its dismissal) since she filed the preliminary notice and medical release on April 14, 2021. Thus, the evidence preponderates that dismissal is warranted under Rule 13. Because of this finding, it is unnecessary to address the application of Ark. Code Ann. § 11-9-702(a)(4) (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

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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.*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).