

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
WCC NO. H103741**

TAVARES D. RICHARDSON, EMPLOYEE	CLAIMANT
HINO MOTORS MFG. USA, INC., EMPLOYER	RESPONDENT
FIRST LIBERTY INS. CORP., CARRIER	RESPONDENT

OPINION FILED JANUARY 3, 2024

Hearing before Administrative Law Judge O. Milton Fine II on December 22, 2023, in Marion, Crittenden County, Arkansas.

Claimant, *pro se*, not appearing.

Respondents represented by Mr. Zachary F. Ryburn, Attorney at Law, Little Rock, Arkansas.

I. BACKGROUND

This matter comes before the Commission on the Motion to Dismiss by Respondents. A hearing on the motion was conducted on December 22, 2023, 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. Admitted into evidence was Respondents' Exhibit 1, pleadings, correspondence and forms related to this claim, consisting of six pages. Also, in order to address adequately this matter under Ark. Code Ann. § 11-9-705(a)(1) (Repl. 2012)(Commission must "conduct the hearing . . . in a manner which best ascertains the rights of the parties"), and without objection, I have blue-backed to the record forms, pleadings, and correspondence from the Commission's file on the claim,

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consisting of 58 pages. In accordance with *Sapp v. Tyson Foods, Inc.*, 2010 Ark. App. 517, ___ S.W.3d ___, these documents have been served on the parties in conjunction with this opinion.

The record reflects the following procedural history:

Per the First Report of Injury or Illness filed on May 7, 2021, Claimant purportedly suffered, inter alia, a fractured nose at work on April 8, 2021, when he was assaulted by a co-worker. According to the Form AR-2 that was also filed on May 19, 2021, Respondents denied the claim on the basis that the altercation was allegedly unrelated to Claimant's employment. He filed a form on April 26, 2021, in which he represented that he suffered injuries to his head and brain as well. Claimant added: "Without continued employment and without health care coverage, I cannot receive the vital medical attention needed."

On April 26, 2021, Claimant filed a Form AR-C, alleging that he was entitled to medical expenses and lost wages due to his alleged work-related injuries. No hearing request accompanied this filing. Later, on June 1, 2021, Attorney Matthew Ketcham entered an appearance on his behalf before the Commission and filed another Form AR-C. In this instance, the full range of initial and additional benefits was requested. As before, no hearing was sought.

On February 22, 2022, Respondents moved to dismiss the claim. In response to a February 25, 2022, letter from my office, Ketcham on February 28, 2022, objected to dismissal and requested a hearing. I took the motion under

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advisement and issued prehearing questionnaires to the parties on March 2, 2022. Claimant filed a timely response thereto on March 23, 2022, and Respondents followed suit on March 25, 2022. During the May 9, 2022, prehearing telephone conference, the parties agreed that the file should be returned to the Commission's general files. It was returned that same day.

On February 6, 2023, Respondents filed another Motion to Dismiss. My office wrote Ketcham on February 15, 2023, requesting a response thereto within 20 days. He did so on March 7, 2023, again asking for a hearing on the merits of the claim. As before, I held the motion in abeyance and scheduled a prehearing telephone conference. In the meantime, on March 27, 2023, Ketcham moved to withdraw from his representation of Claimant. In an Order entered on May 17, 2023, I granted the motion under AWCC Advisory 2003-2 and scheduled a prehearing telephone conference for June 5, 2023. Due to a miscommunication on that date, the conference was re-set for June 12, 2023.

The prehearing conference took place as scheduled, with Claimant appearing *pro se*. Following the conference, I issued a Prehearing Order that set a hearing for August 25, 2023, on the following issues:

1. Whether Claimant sustained a compensable injury to his face and head by specific incident.
2. Whether Claimant is entitled to reasonable and necessary medical treatment.

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3. Whether Claimant is entitled to temporary total disability benefits. However, on August 23, 2023, Claimant contacted my office and stated that he wanted to cancel the hearing. I granted the request and returned the file to the Commission's general files.

The record reflects that nothing further took place on the claim until September 19, 2023. On that date, Respondents filed the instant motion, again asking for dismissal of the claim. My office wrote Claimant on September 20, 2023, asking for a response to the motion within 20 days. The letter was sent by first class and certified mail to the West Memphis address of Claimant listed in the file, the accuracy of which was confirmed during the June 12, 2023, prehearing telephone conference. It is unknown at present whether Claimant signed for the certified letter. However, the first-class letter was not returned. Regardless, no response from Claimant to the motion was forthcoming. On October 13, 2023, a hearing on the Motion to Dismiss was scheduled for December 22, 2023, at 10:30 a.m. at the Crittenden County Courthouse in Marion. The notice was sent to Claimant via first-class and certified mail to the same address as before. A person with an illegible signature signed for the certified letter on October 17, 2023; and the first-class letter was not returned to the Commission.

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Claimant wrote my office on November 20, 2023:

RE: WCC File NO: H103741

To Whom It May Concern:

I Tavares Richardson acknowledge that this letter is a request to cancel/closed [sic] my upcoming court hearing on Friday, December 22, 2023 at the Crittenden County Courthouse in Marion, Arkansas. Due to personal matters, I will be out of town during that time. I will no longer pursue this case matter further. I apologize for any inconvenience this may have cause[d] and I hope that you can process this cancellation of this hearing and closed [sic] this case as soon as possible. Thank you for your time and understanding regarding this matter.

However, I notified the parties by letter on November 20, 2023, that, notwithstanding the above request, the hearing would remain as scheduled. While it could not be confirmed that Claimant signed for the certified letter, the first-class one was not returned.

The hearing on the Motion to Dismiss proceeded as scheduled on December 22, 2023. Again, Claimant failed to appear at the hearing. But Respondents appeared through counsel and argued for dismissal under 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):

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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 his claim under AWCC R. 099.13.
4. The Motion to Dismiss is hereby granted; this claim for initial benefits 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 under Ark. Code Ann. § 11-9-705(a)(3) (Repl. 2012) must prove their entitlement to the relief requested—dismissal of the claim—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).

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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 December 22, 2023, hearing to argue against its dismissal) since the cancellation of the full hearing on August 23, 2023. As his November 20, 2023, letter makes clear, he has no intention of pursuing this claim any further. Thus, the evidence preponderates that dismissal is warranted under Rule 13.

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)). At the hearing, Respondents 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

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).

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IV. CONCLUSION

In accordance with the Findings of Fact and Conclusions of Law set forth above, this claim for initial benefits is hereby dismissed *without prejudice*.

IT IS SO ORDERED.

O. MILTON FINE II
Chief Administrative Law Judge