

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. H102003

MICHELLE SEAMAN, EMPLOYEE	CLAIMANT
STAFFMARK INVESTMENTS LLC, EMPLOYER	RESPONDENT
ACE AMERICAN INS. CO., THIRD-PARTY ADMINISTRATOR	RESPONDENT

OPINION FILED OCTOBER 5, 2021

Hearing before Administrative Law Judge O. Milton Fine II on October 5, 2021, in Jonesboro, Craighead County, Arkansas.

Claimant, not appearing, represented by Ms. Laura Beth York, Attorney at Law, Little Rock, Arkansas.

Respondents represented by Mr. Jarrod S. Parrish, 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 October 5, 2021, in Jonesboro, Arkansas. No testimony was taken in the case. Claimant failed to appear at the hearing, but was represented there by counsel. Without objection, the Commission's file on the claim has been incorporated herein in its entirety by reference. Admitted into evidence was Respondents' Exhibit 1, forms, pleadings and correspondence related to the claim, consisting of one (1) index page and nine (9) numbered pages thereafter.

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The record reflects the following procedural history:

Per the First Report of Injury or Illness filed on February 24, 2021, Claimant purportedly injured her left knee at work on February 8, 2021, when she tripped and fell onto a concrete floor. According to the Form AR-2 that was filed on February 24, 2021, Respondents accepted the injury as compensable and paid medical and temporary total disability benefits pursuant thereto.

On March 1, 2021, Claimant through counsel filed a Form AR-C, requesting the full range of initial and additional benefits. No hearing request accompanied this filing. Respondents' counsel entered their appearance on March 5, 2021. On March 11, 2021, in response to the filing of the Form AR-C, Respondents notified the Commission by email that their position had not changed.

The record reflects that nothing further took place on this claim until September 7, 2021, when Respondents filed the instant Motion to Dismiss under Ark. Code Ann. § 11-9-702 (Repl. 2012) and AWCC R. 099.13. Therein, they alleged that more than six (6) months had passed without Claimant making a bona fide hearing request. The file was assigned to me on September 9, 2021; and on September 10, 2021, my office wrote Claimant's counsel, asking for a response to the motion within twenty (20) days. Claimant's counsel did so that same day, stating in her email: "I have no objection to a Motion to Dismiss WITHOUT prejudice." (Emphasis in original)

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On September 13, 2021, I scheduled a hearing on the Motion to Dismiss for October 1, 2021, at 12:30 p.m. at the Craighead County Courthouse, Annex Building, in Jonesboro. The notice was sent not only to the attorneys of record, but also to Claimant (via certified, return receipt requested) at the address listed for her in the file and on her Form AR-C. The letter was claimed, per United States Postal Service Records, on September 18, 2021. Moreover, Claimant's counsel related that while their investigation showed that Claimant has a new address, they emailed and texted her about the hearing's setting. The evidence thus preponderates that Claimant had notice of the hearing.

The hearing on the Motion to Dismiss proceeded as scheduled on October 1, 2021. Again, Claimant failed to appear at the hearing, although her counsel did so on her behalf and stated that her client does not object to a dismissal without prejudice. 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.

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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 this 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 under Ark. Code Ann. § 11-9-705(a)(3) (Repl. 2012) must prove their entitlement to the relief requested—dismissal of these matters—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)

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Claimant has failed to pursue the claim because she has taken no further action in pursuit of it since the filing of the Form AR-C on March 1, 2021. 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).

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 (through counsel) at the hearing asked for a dismissal without prejudice; and Claimant (through counsel) indicated that her client did not object to this. Based on the above authorities, I agree and find that the dismissal of the 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, this claim is hereby dismissed *without prejudice*.

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IT IS SO ORDERED.

O. MILTON FINE II
Chief Administrative Law Judge