

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**WCC NO. H006588**

**YVONNE SMITH, EMPLOYEE**

**CLAIMANT**

**ADVANCE SVCS., INC.,  
EMPLOYER**

**RESPONDENT**

**ACE AMERICAN INS. CO.,  
CARRIER**

**RESPONDENT**

**OPINION FILED JULY 20, 2021**

Hearing before Chief Administrative Law Judge O. Milton Fine II on July 16, 2021, in Jonesboro, Craighead County, Arkansas.

Claimant, *pro se*.

Respondents represented by Mr. David C. Jones, Attorney at Law, Little Rock, Arkansas.

**I. BACKGROUND**

This matter comes before the Commission on a motion to dismiss filed by Respondents. A hearing on the motion was conducted on July 16, 2021, in Jonesboro, Arkansas. Claimant, who is *pro se*, failed to appear. Respondents were represented at the hearing by Mr. David C. Jones, Attorney at Law, of Little Rock, Arkansas. The record consists of Respondents' Exhibit 1, forms, pleadings and correspondence related to the claim, consisting of forty (40) numbered pages. In addition, the Commission's file has been incorporated herein in its entirety by reference.

The evidence reflects that per the First Report of Injury or Illness filed on September 11, 2020, Claimant purportedly injured her lower leg at work on

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August 26, 2020. According to the Form AR-2 that was also filed on September 11, 2020, Respondents controverted the claim in its entirety.

On September 25, 2020, Claimant (through then-counsel Kolton Jones) filed a Form AR-C, asking for a full range of initial and additional benefits. She alleged that her left leg was injured when it was struck by a cart at work. No hearing request accompanied this form. In response, Respondents wrote the Commission on October 16, 2020, stating: “Our previous position has not changed.” Respondents’ counsel made an entry of appearance on October 26, 2020.

Claimant’s successor counsel Whitney James on May 11, 2021, filed a motion to withdraw from her representation of Claimant. Attached to the motion were copies of correspondence documenting that Claimant had failed to maintain contact with counsel. In an order entered on April 30, 2021, the Full Commission granted the motion under AWCC Advisory 2003-2.

The record reflects on April 16, 2021, Respondents filed the instant motion to dismiss. Therein, they argued that dismissal was warranted under Ark. Code Ann. § 11-9-702(a)(4) & (d) (Repl. 2012) and AWCC R. 099.13 because “[n]o hearing or further action has been taken in regard to this claim in over six (6) months.” On May 13, 2021, the Commission wrote Claimant, giving her twenty (20) days to respond to the motion to dismiss. The letter was sent via first-class and certified mail to the address for Claimant contained in the file and on her Form AR-C. The certified letter was claimed on May 15, 2021; and the letter that

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was sent via first-class mail was never returned. Nonetheless, no response by Claimant was forthcoming. On June 11, 2021, a hearing on the motion was scheduled for July 16, 2021, at the Craighead County Courthouse in Jonesboro. The notice was sent to Claimant by first-class and certified mail. As before, the certified letter was claimed, this time on June 14, 2021; and the first-class letter was not returned. The evidence thus preponderates that Claimant received notice of the hearing.

The hearing on the motion to dismiss proceeded as scheduled on July 16, 2021. Again, Claimant failed to appear. But Respondents appeared through counsel and argued for dismissal of the action under the aforementioned authorities.

## **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.
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 099.13 provides:

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). (Emphasis added) Under Ark. Code Ann. § 11-9-705(a)(3) (Repl. 2012), Respondents must prove by a preponderance of the evidence that dismissal should be granted. The standard “preponderance of the evidence” 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 July 16, 2021, hearing to argue against its dismissal) since the filing of her Form AR-C on September 25, 2020. Thus, the evidence preponderates that dismissal is warranted under Rule 099.13. Because of this finding, it is unnecessary to address the applicability of Ark. Code Ann. § 11-9-702(a)(4) & (d) (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 at the hearing asked for a dismissal with prejudice. But based on the above authorities, I find that the dismissal of the claim should be and hereby is entered *without prejudice.*

### **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.**

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O. MILTON FINE II  
Chief Administrative Law Judge