

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. H103342

LINDA STRAW, EMPLOYEE

CLAIMANT

**SC REALTY SVCS., INC.,
EMPLOYER**

RESPONDENT

**TRAVELERS CASUALTY & SURETY CO.,
CARRIER**

RESPONDENT

OPINION FILED JANUARY 13, 2022

Hearing before Administrative Law Judge O. Milton Fine II on January 13, 2022, in Little Rock, Pulaski County, Arkansas.

Claimant represented by Ms. Laura Beth York, Attorney at Law, Little Rock, Arkansas (neither appearing).

Respondents represented by Mr. Guy Alton Wade, 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 January 13, 2022, in Little Rock, Arkansas. Claimant, who is represented by counsel, failed to appear at the hearing; and her counsel waived her appearance. Without objection, the Commission's file on the claim has been incorporated herein in its entirety by reference. Also admitted into evidence was Respondents' Exhibit 1, documents related to the claim, consisting of three numbered pages.

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The record reflects the following procedural history:

Claimant, per the First Report of Injury or Illness filed April 14, 2021, purportedly suffered an injury to her right knee sometime in early February 2021, when she slipped and fell on a freshly-mopped floor. According to the Form AR-2 filed on April 13, 2021, Respondents controverted the claim. Through counsel on April 9, 2021, Claimant filed a Form AR-C, alleging that she injured “her right arm, right knee, back, and other whole body” in the alleged fall at work. Claimant therein indicated that she was seeking the full range of initial and additional benefits. However, no hearing request accompanied the form.

The record reflects that nothing further took place on the claim until November 15, 2021. On that date, Respondents filed the instant motion, asking for dismissal of the claim “for lack of prosecution,” contending that no responses had been received to the discovery that they had propounded to Claimant on April 15, 2021. On November 16, 2021, my office wrote Claimant’s counsel, asking for a response to the motion within twenty (20) days. However, no response was forthcoming.

On December 15, 2021, I scheduled a hearing on the Motion to Dismiss for January 13, 2021, at the Commission in Little Rock. My office sent an email to the respective counsels regarding the prospective dates for the hearing. Claimant’s counsel replied, stating: “I do not object to a Motion to Dismiss WITHOUT prejudice and waive my appearance at the hearing.”

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The hearing notice was sent not only to the respective attorneys, but to Claimant via certified mail. She signed for the certified letter on December 17, 2021. Thus, the evidence preponderates that the parties received notice of the hearing. Again, Claimant through counsel waived her appearance at the hearing. 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):

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 R. 099.13 reads:

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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).

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 since the filing of her Form AR-C on April 9, 2021. 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,

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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 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*.

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