

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
WCC NO. H208422**

MARLIS M. SCOTT, EMPLOYEE	CLAIMANT
CORE MARK HOLDING CO., INC., EMPLOYER	RESPONDENT
INDEMNITY INS. CO. OF NO. AMER., CARRIER	RESPONDENT

OPINION FILED FEBRUARY 12, 2024

Hearing before Administrative Law Judge O. Milton Fine II on February 9, 2024, in Forrest City, St. Francis County, Arkansas.

Claimant, *pro se*, not appearing.

Respondents represented by Mr. Rick Behring, Jr., 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 February 9, 2024, in Forrest City, 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 33 numbered 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 documents from the Commission's file on the claim, consisting of two

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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 December 14, 2022, Claimant purportedly suffered an injury to his lower extremity at work on October 21, 2022, when a stack of pallets fell over and struck him. According to the Form AR-2 that was filed on March 14, 2023, Respondents denied the claim due to, inter alia, the lack of medical evidence.

On December 1, 2022, through then-counsel Laura Beth York, Claimant filed a Form AR-C. Therein, he alleged that he was entitled to the full range of initial and additional benefits as a result of compensable injuries that he had sustained to his lower back, right leg, right ankle, left foot, and “other whole body.” No hearing request accompanied this filing. Respondents propounded discovery to Claimant on May 11, 2023. But responses thereto remained outstanding.

On October 10, 2023, York moved to withdraw from the case. In an Order ended on October 24, 2023, the Full Commission granted the motion under AWCC Advisory 2003-2.

The record reflects that nothing further took place on the claim until November 28, 2023. On that date, Respondents filed the instant motion, asking for dismissal of the claim under AWCC R. 099.13 and Ark. Code Ann. § 11-9-702

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(Repl. 2012). My office wrote Claimant on November 28, 2023, asking for a response to the motion within 20 days. The letter was sent by first class and certified mail to the Marianna address of Claimant listed in the file and his Form AR-C. Claimant signed for the certified letter on December 2, 2023; and the first-class letter was not returned. Regardless, no response from Claimant to the motion was forthcoming. On December 21, 2023, a hearing on the Motion to Dismiss was scheduled for February 9, 2023, at 10:30 a.m. at the St. Francis County Courthouse in Forrest City. The notice was sent to Claimant via first-class and certified mail to the same address as before. As before, Claimant signed for the certified letter, on December 26, 2023; and the first-class letter was not returned to the Commission.

The hearing on the Motion to Dismiss proceeded as scheduled on February 9, 2023. Again, Claimant failed to appear at the hearing. But 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):

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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).

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 February 9, 2023, hearing to argue against its dismissal) since the filing of his Form AR-C on December 1, 2022. Thus, the evidence preponderates that dismissal is warranted under Rule 13. Because of this finding, it is unnecessary to address the application of § 11-9-702.

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). The Commission and the appellate courts have expressed a preference for dismissals *without prejudice*. See *Professional Adjustment Bureau v. Strong*, 75 Ark. 249, 629 S.W.2d 284 (1982)). Respondents at the hearing asked for a dismissal without prejudice. 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 for initial benefits is hereby dismissed *without prejudice*.

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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IT IS SO ORDERED.

O. MILTON FINE II
Chief Administrative Law Judge