

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
WCC NO. H201453**

ERIC SETTLES, EMPLOYEE	CLAIMANT
PERFORMANCE FOOD GROUP, INC., EMPLOYER	RESPONDENT
INDEMN. INS. CO. OF NO. AMER., CARRIER	RESPONDENT

OPINION FILED DECEMBER 15, 2023

Hearing before Chief Administrative Law Judge O. Milton Fine II on December 14, 2023, in Little Rock, Pulaski County, Arkansas.

Claimant, *pro se*, not appearing.

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 by Respondents. A hearing on the motion was conducted on December 14, 2023, in Little Rock, 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 without objection were Commission Exhibit 1 and Respondents' Exhibit 1, forms, pleadings, and correspondence related to this claim, consisting of 6 and 42 numbered pages, respectively.

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The record reveals the following procedural history:

The First Report of Injury or Illness, filed on February 16, 2022, reflects that Claimant purportedly suffered an injury to his left shoulder on October 21, 2021, when he tripped and fell at work. Per the Form AR-2 filed on February 23, 2022, Respondents accepted the claim as a medical-only one. Respondents' counsel entered his appearance on February 17, 2022.

Through then-counsel Laura Beth York, Claimant filed a Form AR-C on March 28, 2022. Therein, he requested the full range of initial and additional benefits in connection with his alleged left shoulder injury. No hearing request accompanied this filing. In an amended Form AR-2 filed on May 11, 2022, Respondents informed the Commission that they were now paying indemnity benefits as well as medical benefits in connection with the claim. On November 16, 2022, York moved to withdraw from her representation of Claimant. In an order entered on November 29, 2022, the Full Commission granted the motion under AWCC Advisory 2003-2.

The record reflects that no further action was taken on the case until October 5, 2023, when Respondents filed the instant Motion to Dismiss under Ark. Code Ann. § 11-9-702 (Repl. 2012) and AWCC R. 099.13, along with a brief in support thereof. Therein, they alleged that Claimant had failed to prosecute his claim, and more particularly, that he had failed to make a bona fide hearing request for additional benefits within six months of the filing of the Form AR-C, per § 11-9-702(d). On October 10, 2023, my office wrote Claimant, requesting a

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response to the motion within 20 days. This correspondence was sent by both certified and first-class mail to the address for Claimant listed in the file and on his Form AR-C. While the certified letter was returned to the Commission, unclaimed, the first-class mailing was not returned. Regardless, no response from Claimant to the motion was forthcoming.

On November 14, 2023, a hearing on Respondents' motion was scheduled for December 14, 2023, at 12:00 p.m. at the Commission. The Notice of Hearing was sent to Claimant by certified and first-class mail to the same address as before. In this instance, both items were returned¹ to the Commission. On each, the United States Postal Service wrote that Claimant had moved from that address without having in place a forwarding order.

The hearing proceeded as scheduled on December 14, 2023. Claimant failed to appear at the hearing. But Respondents appeared through counsel and argued for dismissal under, inter alia, Rule 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):

¹Although page six of Commission Exhibit 1 contains a photocopy of a signed certified mail receipt, it is apparent that the slip (bearing the signature of "Matthew Taylor" and not Claimant) pertains to an unrelated case.

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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. Claimant has failed to prosecute his claim.
4. Dismissal of this claim is warranted under AWCC R. 099.13.
5. The claim is hereby dismissed *without prejudice*.

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)(discussing, *inter alia*, Rule 13).

The evidence adduced at the hearing shows that Claimant has taken no action in pursuit of his claim since the filing of his Form AR-C on March 28, 2022. Moreover, he failed to appear on the hearing to argue against dismissal of the claim, despite being given reasonable notice of the Motion to Dismiss and of the hearing thereon. 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(d) (Repl. 2012).

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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 this claim should be and hereby is entered *without prejudice*.²

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

²“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).