

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. G904463

KEYA TURNER, EMPLOYEE	CLAIMANT
CITY OF WEST MEMPHIS, SELF-INSURED EMPLOYER	RESPONDENT
ARK. MUNICIPAL LEAGUE, THIRD PARTY ADMINISTRATOR	RESPONDENT

AMENDED OPINION FILED JUNE 7, 2021

Hearing before Administrative Law Judge O. Milton Fine II on May 28, 2021, in Marion, Crittenden County, Arkansas.

Claimant, *pro se*.

Respondents represented by Ms. Mary K. Edwards, Attorney at Law, North 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 May 28, 2021, in Marion, Arkansas. Claimant, who is representing herself, appeared in person and testified. In addition to Claimant's testimony, the record consists of the Commission's file—which, without objection, has been incorporated herein in its entirety by reference.

The record reflects the following procedural history:

Per the First Report of Injury or Illness filed on July 16, 2019, Claimant purportedly injured her neck and throat on June 21, 2019, when a rear-end loader

TURNER – G904463

struck a truck in which she was sitting. According to the Form AR-2 that was filed that same date, Respondents accepted the claim as a medical-only one.

On July 11, 2019, Claimant filed a Form AR-C, requesting additional medical treatment. Therein, she alleged that her vehicle was struck by a bulldozer. She petitioned the Commission for a one-time change of physician. In an order entered on October 11, 2019, her authorized treating physician was changed to Laverne Lovell, M.D. An appointment with Lovell was scheduled for October 17, 2019. Email correspondence in the file reflects that Claimant thereafter attempted to obtain MRIs for her neck and back, but Respondents refused to authorize them. However, nothing before me indicates that Claimant asked for a hearing on this issue. The last contact she made with the Commission took place on January 13, 2020, when she made an email inquiry to the Medical Cost Containment Division about her claim.

The record reflects that no further action was taken on this case until April 12, 2021. On that date, Respondents filed the instant motion to dismiss. The file was assigned to me on April 13, 2021; and my office wrote Claimant the next day, asking for a response to the motion to dismiss within twenty (20) days. The correspondence was sent by certified and first-class mail to the address that Claimant listed in her Form AR-C. While the certified letter was returned to the Commission, undelivered, on May 19, 2021, the first-class letter was not returned. Regardless, no response from Claimant was forthcoming.

TURNER – G904463

On May 12, 2021, I scheduled a hearing on the motion to dismiss for May 28, 2021, at 10:30 a.m. at the Crittenden County Courthouse in Marion. The hearing notice was sent to Claimant via certified and first-class mail at the same address as before. The certified letter was signed for on May 14, 2021, and the first-class correspondence was not returned. The evidence thus preponderates that Claimant had notice of the hearing.

The hearing on the motion to dismiss proceeded as scheduled on May 28, 2021. Claimant appeared at the hearing and objected to dismissal of her claim. Respondents appeared through counsel (who entered her appearance on May 12, 2021) 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 claim.
2. All parties received notice of the motion to dismiss and the hearing thereon pursuant to AWCC R. 099.13.

TURNER – G904463

3. Respondents have not proven by a preponderance of the evidence that Claimant has failed to prosecute her claim under AWCC R. 099.13.
4. Respondents' motion to dismiss should be, and hereby is, denied.
5. Claimant has requested a hearing on her claim.
6. This matter will proceed to a hearing on the merits.

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 instant 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).

A claimant's testimony is never considered uncontroverted. *Nix v. Wilson World Hotel*, 46 Ark. App. 303, 879 S.W.2d 457 (1994). The determination of a

TURNER – G904463

witness' credibility and how much weight to accord to that person's testimony are solely up to the Commission. *White v. Gregg Agricultural Ent.*, 72 Ark. App. 309, 37 S.W.3d 649 (2001). The Commission must sort through conflicting evidence and determine the true facts. *Id.* In so doing, the Commission is not required to believe the testimony of the claimant or any other witness, but may accept and translate into findings of fact only those portions of the testimony that it deems worthy of belief. *Id.*

At the hearing, Claimant testified that the reason that she did not take any steps to prosecute the claim after she obtained her change of physician was that she did not understand how to do so. Shown the letter from my office dated April 14, 2021, Claimant stated that she thought—incorrectly—that it originated from Respondents. She has confused Respondents with the Commission. Claimant requested a hearing on her claim, in the event that it is not dismissed, to obtain additional treatment.

After consideration of the evidence, I find that while both Claimant and Respondents were given reasonable notice of the motion to dismiss hearing under Rule 13, the former has not yet abridged that rule. The motion to dismiss is thus denied.

Prehearing questionnaires will be immediately issued to the parties, and this matter will proceed to a full hearing on the merits.

TURNER – G904463

IV. CONCLUSION

Based on the findings of fact and conclusions of law set forth above, Respondents' motion to dismiss is hereby denied.

IT IS SO ORDERED.

O. MILTON FINE II
Chief Administrative Law Judge