

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION  
WCC NO. G003461**

**SPENCER J. TAPP, EMPLOYEE**

**CLAIMANT**

**WILLIAM HARRIS, INC.,  
EMPLOYER**

**RESPONDENT**

**ACADIA INS. CO.,  
CARRIER**

**RESPONDENT**

**OPINION FILED JANUARY 12, 2024**

Hearing before Administrative Law Judge O. Milton Fine II on January 11, 2024, in Little Rock, Pulaski County, Arkansas.

Claimant *pro se*.

Respondents represented by Ms. Melissa Wood, Attorney at Law, Little Rock, Arkansas.

**I. BACKGROUND**

This matter comes before the Commission on a Motion to Dismiss by Respondents. Claimant gave testimony at the hearing. The evidentiary record consists not only of that testimony, but also of Commission's Exhibit 1, forms, pleadings, and correspondence related to this claim, consisting of 13 numbered pages; and Respondents' Exhibit 1, forms, pleadings, and correspondence related to this claim, consisting of one index page and 11 numbered pages thereafter. 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"), I have blue-backed to the record certain documents from the Commission's file on the claim, consisting of 21

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pages. In accordance with *Sapp v. Tyson Foods, Inc.*, 2010 Ark. App. 517, \_\_\_ S.W.3d \_\_\_, this blue-backed exhibit has been served on the parties in conjunction with this opinion.

The record reflects the following procedural history: On September 13, 2011, Claimant filed his first Form AR-C in connection with this matter. Therein, he alleged that he injured his shoulder at work on April 22, 2010. All he sought was additional treatment in the form of a CT scan, along with reimbursement of medical expenses. This was also the case in the second Form AR-C that he filed on March 5, 2012. However, in the third Form AR-C, which Claimant filed on August 17, 2012, he requested the full range of initial and additional benefits.

On October 3, 2012, a hearing on the claim was held before Administrative Law Judge Andrew Blood. In an opinion issued on October 4, 2012, Judge Blood made the following findings of fact and conclusions of law:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On April 22, 2010, the employment relationship existed during which time the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$562.00/\$422.00, for temporary total/permanent partial disability.
3. On April 22, 2010, the claimant sustained an injury to his left shoulder arising out of and in the course of his employment.

4. The bilateral CT scan of the glenohumeral joint with 3-D and surface reconstruction, recommended by Dr. David N. Collins, the claimant's treating physician, is reasonably necessary medical treatment in connection with the treatment of the claimant's April 22, 2010, compensable injury, pursuant to Ark. Code Ann. § 11-9-508(a).
5. The respondents shall pay all reasonable hospital and medical expenses arising out of the claimant's April 22, 2010, compensable left shoulder injury.
6. The respondents have controverted the claimant's entitlement to medical treatment as recommended by his treating physician, Dr. David N. Collins, to include the bilateral CT [s]can of the glenohumeral joint with 3-D and surface reconstruction.

This decision was not appealed.

Mark Martin, Claimant's counsel in that 2012 hearing, moved to withdraw on August 21, 2015. Claimant notified the Commission by letter on August 31, 2015, that he did not object to the withdrawal. In an Order entered on September 9, 2015, the Full Commission granted the motion pursuant to AWCC Advisory 2003-2. In the ensuing years thereafter, as documented by records in evidence, Respondents continued to furnish medical and indemnity benefits to Claimant.

Respondents on September 22, 2023, moved for a dismissal of the claim without prejudice under AWCC R. 099.13 and Ark. Code Ann. § 11-9-702 (Repl. 2012) because of, inter alia, Claimant's alleged failure to make a bona fide

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hearing request within the previous six months. My office wrote Claimant on September 25, 2023, asking for a response to the motion within 20 days. The letter was sent via first-class and certified mail to the address for Claimant listed in the file. He responded on September 29, 2023, writing:

I am responding to a Motion to Dismiss dated 9-25-2023, sent to me via certified mail.

I disagree with this motion to dismiss due to the nature of my injury. My surgeons have stated the need for follow-up care and the potential for additional medical interventions in the future. I am currently scheduled for a follow-up visit with my surgeon on 10-5-2023 due to increasing pain. This appointment has been approved by the insurance company that has filed the Motion to Dismiss. I find it interesting that the Motion to Dismiss was requested on 9-22-2023, the day that my wife communicated with the insurance adjuster requesting the appointment. **I request a hearing if that is necessary to proceed with my opposition to this motion.**

(Emphasis added) Based on this, I informed the parties on October 9, 2023, that I am taking the Motion to Dismiss under advisement and would be issuing prehearing questionnaires. However, Claimant notified me by email on October 20, 2023, that he was “not requesting benefits to be paid, but will have the need for additional medical care in the future . . . .” I interpreted this as a withdrawal of the hearing request, and informed the parties of this that same day.

On October 24, 2023, I scheduled a hearing on the Motion to Dismiss for December 7, 2023, at 9:30 a.m. at the Commission in Little Rock. Later, on November 13, 2023, this was re-set for January 11, 2024, at 9:30 a.m. The Notice of Hearing was sent to the parties by first-class and certified mail; and as alluded to above, both appeared before me at the appointed time. As the certified

mail receipt reflects, and Claimant confirmed in his testimony, he received the notice. Respondents asked for dismissal of the claim without prejudice under Ark. Code Ann. § 11-9-702(d) (Repl. 2012) and AWCC R. 099.13.

## **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 under AWCC R. 099.13.
3. The Commission is authorized to dismiss claims lacking a justiciable issue pursuant to AWCC R. 099.13.
4. This claim should be, and hereby is, dismissed *without prejudice* pursuant to AWCC R. 099.13 because of the lack of a justiciable issue.
5. Because of the above finding, Ark. Code Ann. § 11-9-702(d) (Repl. 2012) will not be addressed.

## **III. DISCUSSION**

AWCC R. 099.13 provides in relevant part:

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

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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).

The Arkansas Court of Appeals in *Johnson* held that a claim could be dismissed for lack of prosecution based on the fact that there is no justiciable issue. The authority for doing so comes under Rule 13, which the Commission promulgated under Ark. Code Ann. § 11-9-205(a)(1)(A) (Repl. 2012). This provision authorizes it “[t]o make such rules and regulations as may be found necessary[.]” *See Dura Craft Boats, Inc. v. Daugherty*, 247 Ark. 125, 444 S.W.2d 562 (1969); *Johnson, supra. Contra Dillard v. Benton Cty. Sheriff’s Off.*, 87 Ark. App. 379, 192 S.W.3d 287 (2004)(“Rule 13 . . . allows a dismissal . . . pursuant to Ark. Code Ann. § 11-9-702(b)(4), the portion of the statute relating to additional benefits”). Certainly, such a claim could be re-filed if a justiciable issue arises, provided that all other prerequisites for a cognizable claim are met.

At the hearing, Claimant during his testimony conceded that there are no justiciable issues at present regarding this claim. Any treatment that he has been seeking has been covered by Respondents. Their counsel assured Claimant on the record that this would continue to be the case. Claimant also testified that based on the foregoing, he does not object to the dismissal of the claim.

I credit Claimant's testimony. Under *Johnson, supra*, this claim should thus be dismissed under Rule 13 due to the lack of ripeness. Because of this finding, it is unnecessary to address the application of § 11-9-702.

That, however, leaves the question of whether the dismissal 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). This includes claims dismissed under Rule 13. *Johnson, supra*. In *Abo v. Kawneer Co.*, 2005 AR Wrk. Comp. LEXIS 510, the Commission wrote: "In numerous past decisions, this Commission and the Appellate Courts have expressed a preference for dismissals without prejudice." (citing *Professional Adjustment Bureau v. Strong*, 75 Ark. 249, 629 S.W.2d 284 (1982); *Hutchinson v. North Arkansas Foundry*, Claim No. D902143 (Full Commission Opinion filed October 23, 1991)). In light of this preference, along with facts of this case and Respondents' agreement that dismissal should be without prejudice, the dismissal of this claim is hereby entered *without prejudice*.<sup>1</sup>

#### **IV. CONCLUSION**

In accordance with the findings of fact and conclusions of law set forth above, the Motion to Dismiss is hereby granted, and this claim is hereby dismissed *without prejudice*.

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<sup>1</sup>"A dismissal 'without prejudice' allows a new [claim] to be brought on the same cause of action." BLACK'S LAW DICTIONARY 825 (abridged 5<sup>th</sup> ed. 1983).

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**IT IS SO ORDERED.**

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O. MILTON FINE II  
Chief Administrative Law Judge