

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**WCC NO. H002427**

<b>MONTOLLIE WARREN, EMPLOYEE</b>	<b>CLAIMANT</b>
<b>KIMBERLY CLARK CORP., EMPLOYER</b>	<b>RESPONDENT</b>
<b>SENTRY INS., A MUTUAL CO., CARRIER</b>	<b>RESPONDENT</b>

**OPINION FILED JANUARY 14, 2021**

Hearing before Administrative Law Judge O. Milton Fine II on January 12, 2021 in Little Rock, Pulaski County, Arkansas.

Claimant, represented by Mr. Philip M. Wilson, Attorney at Law, Little Rock, Arkansas, not appearing.

Respondents represented by Mr. Jarrod S. Parrish, 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 12, 2021 in Little Rock, Arkansas. No testimony was taken in the case. Claimant failed to appear at the hearing. As discussed more fully *infra*, her counsel waived his appearance as well. Admitted into evidence was Respondents' Exhibit 2, forms pleadings and correspondence, consisting of two index pages and 19 numbered pages thereafter. Without objection, the Commission's file on the claim has been incorporated herein in its entirety by reference.

The record reflects the following procedural history:

WARREN – H002427

Per the First Report of Injury or Illness filed on May 21, 2020, Claimant purportedly injured multiple body parts on April 16, 2020 when she ran into a metal rod that was sticking out of a dumpster at work. According to the Form AR-2 that was filed that same date, Respondents accepted a right arm contusion as compensable but controverted any other alleged injuries.

On May 4, 2020, Claimant filed a Form AR-C, requesting medical and temporary total disability benefits, along with rehabilitation. Therein, she alleged that her striking the rod caused, inter alia, severe pain in [her] shoulder, neck, and head area.” In a handwritten note that was filed with the Commission the same day as this form, Claimant requested an “appeal.” On July 9, 2020, Respondents’ counsel entered his appearance before the Commission.

On July 14, 2020, the Clerk of the Commission assigned me this case in order to conduct a full hearing. Prehearing questionnaires were sent to the parties on July 15, 2020. Claimant’s counsel entered his appearance on July 23, 2020. In his letter, counsel asked that the file be returned to the Commission’s general files pending completion of discovery. This action occurred.

The record reflects that no further action was taken on this case until November 24, 2020. On that date, Respondents filed the instant motion to dismiss under AWCC R. 099.13 and Ark. Code Ann. § 11-9-702 (Repl. 2012), alleging that “Claimant has not sought any type of bona fide hearing before the Workers’ Compensation Commission over the last six months.” The file was

WARREN – H002427

assigned to me on November 25, 2020; and on I wrote Claimant's counsel on November 30, 2020, asking for a response to the motion to dismiss by December 21, 2020. Counsel did so on by letter on December 23, 2020, stating: "We do not object to the Motion to Dismiss and we wa[i]ve our right to appear."

On December 28, 2020, I scheduled a hearing on the motion to dismiss for January 12, 2021 at 1:00 p.m. at the Commission. The notice was sent to the attorneys of record via first class mail. The correspondence to Claimant's counsel 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 January 12, 2021. Again, Claimant failed to appear at the hearing, either in person or through counsel. But Respondents appeared through counsel and argued for dismissal under the aforementioned authority.

## **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. 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 this 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:

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).

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)

WARREN – H002427

Claimant has failed to pursue the claim because she has taken no further action in pursuit of it since the filing of the Form AR-C on May 4, 2020, including appearing at the January 12, 2021 hearing to argue against its dismissal. 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 (Repl. 2012).

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 Work. 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 without prejudice. Based on the above authorities, I agree and find that the dismissal of the claim should be and hereby is entered without prejudice.<sup>1</sup>

#### **IV. CONCLUSION**

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

WARREN – H002427

**IT IS SO ORDERED.**

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O. MILTON FINE II  
Chief Administrative Law Judge

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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).