

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
WCC NO. G508595**

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| TINA WEBB, EMPLOYEE | CLAIMANT |
| WAL-MART, INC., SELF-INSURED EMPLOYER | RESPONDENT NO. 1 |
| WAL-MART CLAIMS SVCS., INC., THIRD-PARTY ADMINISTRATOR | RESPONDENT NO. 1 |
| DEATH & PERMANENT TOTAL DISABILITY TRUST FUND | RESPONDENT NO. 2 |

OPINION FILED FEBRUARY 8, 2023

Hearing before Administrative Law Judge O. Milton Fine II on January 20, 2023, in Jonesboro, Craighead County, Arkansas

Claimant represented by Mr. Phillip J. Wells, Attorney at Law, Jonesboro, Arkansas.

Respondents No. 1 represented by Mr. R. Scott Zuerker, Attorney at Law, Fort Smith, Arkansas.

Respondent No. 2 represented by Ms. Christy L. King, Attorney at Law, Little Rock, Arkansas, excused from participation.

I. BACKGROUND

This matter comes before the Commission on a Motion to Dismiss by Respondents. No testimony was taken. The evidentiary record consists of Claimant's Exhibit 1, a compilation of her medical records, consisting of one index page and 36 numbered pages thereafter; Claimant's Exhibit 2, her response to the Motion to Dismiss, consisting of two pages; and Respondents No. 1 Exhibit 1, their Motion to Dismiss and exhibits thereto, consisting of four pages. Without

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objection, the Commission's file on this claim has been incorporated herein by reference in its entirety.

The record reflects the following procedural history: On March 16, 2017, Claimant (through counsel) filed a Form AR-C with the Commission. Therein, she contended that she injured her head, lower back, and left leg at work on November 9, 2015. Respondents accepted the leg injury as compensable. However, they controverted the back injury in its entirety. Following a hearing on August 4, 2017, in Jonesboro, Judge Blood issued an opinion on October 10, 2017, that contained the following findings of fact and conclusions of law:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The employment relationship existed at all times pertinent, to include November 9, 2015, during which time the claimant earned an average weekly wage of \$458.92, generating weekly compensation benefit rates of \$306.00/\$230.00, for temporary total/permanent partial disability.
3. On November 9, 2015, the claimant sustained an injury to her lumbar spine arising out of and in the course of her employment with respondent, which caused internal harm to the body requiring medical services and resulting in disability, with medical evidence supported by objective findings establishing the injury, and the injury was caused by

a specific incident and identifiable by time and place of occurrence.

4. The November 9, 2015, compensable lumbar injury of the claimant rendered her temporarily totally disabled for the period commencing October 18, 2016, and continuing to a date to be determined.
5. Respondent¹ shall pay all reasonable hospital and medical expenses arising out of the claimant's November 9, 2015, compensable lumbar injury, to include that provided by and at the directions of Dr. Robert E. Abraham.
6. Respondent has controverted the compensability of the claimant's November 9, 2015, compensable lumbar injury in its entirety.

Respondents No. 1 appealed this decision. On April 24, 2018, the Full Commission reversed the above decision, finding that Claimant did not prove by a preponderance of the evidence that she sustained a compensable lumbar injury. *Webb v. Wal-Mart Assocs., Inc.*, 2018 AR Wrk. Comp. LEXIS 216. Claimant, in turn, appealed this decision. The Arkansas Court of Appeals affirmed the Full Commission on December 12, 2018. *Webb v. Wal-Mart Assocs.*, 2018 Ark. App. 627, 567 S.W.3d 86.

¹Unless otherwise indicated, the use of "Respondent" herein refers to Respondents No. 1.

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On April 2, 2019, Claimant (again through counsel) filed another Form AR-C. In this instance, she requested the full range of initial and additional benefits.

However, in a letter accompanying this filing, her counsel wrote in pertinent part:

Ms. Webb sustained an injury to her lower extremity when she fell during the course of her employment. The claim has been accepted as compensable and benefits are currently being paid. An issue has arisen as to the Claimant's entitlement to temporary partial disability benefits.

No hearing request was made.

The record reflects that no further action took place on the claim until August 31, 2022, when Respondents No. 1 filed the instant Motion to Dismiss with the Commission. Therein, they contended that it should be dismissed pursuant to Ark. Code Ann. § 11-9-702(a)(4) (Repl. 2012)² because more than six months had transpired since the filing of the claim without Claimant making a hearing request, and AWCC R. 099.13 because of a lack of prosecution. My office wrote Claimant's counsel on September 8, 2022, asking for a response to the motion within 20 days. Counsel did so that same day. The responsive pleading reads:

1. The Claimant sustained a compensable injury to her leg. The Claimant has received the payment of indemnity benefits and medical payments for continued treatment.
2. The Claimant has not requested a hearing since the Respondent has accepted the claim as compensable and is currently paying for authorized medical treatment.
3. The Claimant will continue into the future receiving medical treatment that should be paid for by the Respondent.

²Because this was an accepted claim, the applicable provision is Ark. Code Ann. § 11-9-702(d) (Repl. 2012).

4. The Claimant requests that the matter be kept open and that there has not been a controverted issue requiring a hearing request.
5. The Claimant requests that the Motion to Dismiss be denied and that the matter continue in an active status.

I interpreted the above communication as a request for a hearing on the Claimant's entitlement to additional benefits, and issued prehearing questionnaires to the parties on September 15, 2022. I notified them that because of this action, I was holding the Motion to Dismiss in abeyance. The parties filed timely questionnaire responses. In Claimant's response, her counsel listed the issues for determination as follows:

Whether the claim should be dismissed without prejudice. The Claimant contends that since the Respondent has paid all reasonable and necessary medical expenses there has not been the need for a hearing. This is the reason the Claimant has not requested a hearing within the past six months.

While a prehearing telephone conference was set for November 7, 2022, this was postponed on November 4, 2022, due to a scheduling conflict. In light of the above response, which makes it clear that no issues were ripe for a full hearing, a hearing was instead scheduled on the Motion to Dismiss. The hearing was scheduled for January 20, 2023, at 2:00 p.m. at the Craighead County Courthouse in Jonesboro. The parties were notified of this by letter sent via certified mail on November 22, 2022. On January 12, 2023, I notified the parties that, by agreement, the hearing was rescheduled for 12:00 p.m. that day. At the hearing, Claimant appeared in person, as did the respective counsels. Again, no

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testimony was taken, but the parties argued their respective positions. Respondents asked for dismissal of the claim without prejudice under Ark. Code Ann. § 11-9-702 (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 following stipulations are reasonable and are hereby accepted:
 - a. The previous decisions in this matter by Administrative Law Judge Andrew Blood, the Full Commission, and the Arkansas Court of Appeals are binding on this proceeding under the Law of the Case Doctrine.
 - b. Claimant sustained a compensable injury to her lower extremity on November 9, 2015; and Respondents No. 1 continue to provide authorized medical care for that injury.
3. 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

Arkansas Code Annotated § 11-9-702(d) (Repl. 2012) provides as follows:

If within six (6) months after the filing of a claim for additional compensation, no bona fide request for a hearing has been made with respect to the claim, the claim may, upon motion and after hearing, if necessary, be dismissed without prejudice to the refiling of the claim within the limitation period specified in subsection (b) of this section.

In addition, 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 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

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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 conceded through counsel there are no justiciable issues at present regarding this claim. Under *Johnson, supra*, this claim should thus be dismissed under Rule 13. Because of this finding, it is unnecessary to address the application of § 11-9-702(d).

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 *without prejudice*.

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IV. 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