

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. H002580

TOMMY G. YOUNG, EMPLOYEE

CLAIMANT

GIN HOUSE LLC, EMPLOYER

RESPONDENT

**WELLFLEET NEW YORK INS.,
CARRIER**

RESPONDENT

OPINION FILED MARCH 11, 2022

Hearing before Chief Administrative Law Judge O. Milton Fine II on March 9, 2022, in McGehee, Desha County, Arkansas.

Claimant, *pro se*.

Respondents represented by Mr. Randy P. Murphy, Attorney at Law, Little Rock, Arkansas.

I. BACKGROUND

This matter comes before the Commission on Respondents' Motion to Dismiss. A hearing on the motion was conducted on March 9, 2022, in McGehee, Arkansas. Claimant, who is *pro se*, appeared in person and testified. Respondents were represented at the hearing by Mr. Randy P. Murphy, Attorney at Law, of Little Rock, Arkansas. 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 evidence reflects that per the First Report of Injury or Illness filed on May 20, 2020, Claimant purportedly sustained injuries to several body parts at work on November 12, 2019, when a bale of cotton fell and struck him. According to the Form AR-2 that was filed on May 26, 2020, Respondents initially

YOUNG – H002580

accepted the claim as a medical-only one. On May 11, 2020, Claimant (through then-counsel Kolton Jones) filed a Form AR-C, alleging the following: “Claimant was in the course and scope of employment when a bale of cotton fell on him. Claimant sustained injuries to his head, neck, left shoulder, right shoulder, right arm, back, right hip, and other whole body.” No hearing request accompanied this filing. Respondents filed an amended Form AR-2 on June 2, 2020, stating that the claim was now being controverted “for late reporting and no employer notification of any alleged injury by accident.” On May 26, 2020, Respondents’ counsel made his entry of appearance.

On September 29, 2020, Jones moved to withdraw from his representation of Claimant. In an order entered on October 13, 2020, the Full Commission granted the Motion to Withdraw under AWCC Advisory 2003-2.

On October 23, 2020, Claimant wrote the Commission:

To Whom This May Concern
I Tommy Young Is [sic] filing for hearing for work compensation
settlement

Because attempts to set up a legal advisor or mediation conference failed, the Clerk of the Commission assigned the claim file to Judge Katie Anderson on November 3, 2020. Judge Anderson issued prehearing questionnaires to the parties on November 4, 2020. While Claimant returned the Preliminary Notice on November 9, 2020, he did not file a prehearing questionnaire response within the allotted time. For that reason, Judge Anderson returned the file to the Commission’s general files on December 3, 2020.

On January 27, 2021, Claimant again requested a hearing from the Commission. The file was reassigned to Judge Anderson on February 1, 2021; and on February 2, 2021, she sent prehearing questionnaires to the parties. Yet again, Claimant failed to respond. Thus, Judge Anderson again returned the file to the Commission's general files on March 1, 2021.

Belatedly, on March 17, 2021, Claimant filed his prehearing questionnaire response. Upon receipt of it, the Clerk of the Commission once again assigned the file to Judge Anderson. The judge wrote Claimant on March 23, 2021, instructing him to return a signed medical release. He did so on April 6, 2021. Respondents filed their prehearing questionnaire response on April 13, 2021. A prehearing telephone conference was scheduled for May 4, 2021. However, at the appointed date and time, Claimant failed to answer his phone for the conference. At the hearing, he testified that while the number that Respondents used that day was correct, he was not able to answer because he was in Texas due to an emergency concerning his daughter and did not have his phone with him. The conference was rescheduled for May 25, 2021. But because Claimant again failed to answer, Judge Anderson returned his file to the Commission's general files.

The record reflects that no further action took place on the case until December 22, 2021, when Respondents filed the instant Motion to Dismiss. Therein, they argued that dismissal was warranted under AWCC R. 099.13 because Claimant had not responded to propounded discovery and had not

appeared on scheduled prehearing telephone conference calls. On December 30, 2021, Judge Anderson wrote Claimant, giving him until January 20, 2022, to respond to the Motion to Dismiss. Claimant testified that he while he received this letter, he did not respond to it in writing. Instead, he called the Commission regarding this but did not receive a return call. He was not sure of the identity of the female with whom he spoke.

On February 9, 2022, Judge Anderson scheduled this hearing for March 9, 2022, at 1:15 p.m. in McGehee. Claimant testified that he received a copy of the Notice of Hearing. During the hearing, Respondents argued for dismissal under Rule 13.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record as a whole, including medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of Claimant, 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. All parties received notice of the Motion to Dismiss and the hearing thereon pursuant to AWCC R. 099.13.
3. Respondents have not proven by a preponderance of the evidence that Claimant has failed to prosecute his claim under AWCC R. 099.13.

4. The Motion to Dismiss should be, and hereby is, denied without prejudice.
5. Claimant has requested a hearing on his claim.
6. This matter will proceed to a hearing on the merits.

III. DISCUSSION

AWCC 099.13 provides:

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). In turn, Ark. Code Ann. § 11-9-702(a)(4) (Repl. 2012) reads:

If within six (6) months after the filing of a claim for compensation no bona fide request for a hearing has been made with respect to the claim, the claim **may**, upon motion and after hearing, be dismissed without prejudice to the refiling of the claim within limitation periods specified in subdivisions (a)(1)-(3) of this section.

(Emphasis added) Under Ark. Code Ann. § 11-9-705(a)(3) (Repl. 2012), Respondents must prove by a preponderance of the evidence that dismissal should be granted. The standard “preponderance of the evidence” 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 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 he had not taken any steps to prosecute the claim after Jones's withdrawal was because he had been seeking another attorney. His former counsel failed to furnish him with a copy of his litigation file pursuant to AWCC Advisory 2003-2. Claimant requested a hearing on his claim, in the event that it is not dismissed.

After consideration of the evidence, I find that while both Claimant and Respondents were given reasonable notice of the hearing on the Motion to Dismiss under Rule 13, Claimant has not yet abridged that rule. The Motion to Dismiss is thus denied without prejudice. Prehearing questionnaires will be immediately issued to the parties, and this matter will proceed to a full hearing on the merits.

CONCLUSION

Based on the findings of fact and conclusions of law set forth above, Respondents' Motion to Dismiss is hereby denied without prejudice.

YOUNG – H002580

IT IS SO ORDERED.

O. MILTON FINE II
Chief Administrative Law Judge