

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION  
WCC NO. H010322**

<b>DWAYNE P. ARMSTRONG, EMPLOYEE</b>	<b>CLAIMANT</b>
<b>SHEARERS FOODS LLC, EMPLOYER</b>	<b>RESPONDENT</b>
<b>TRAVELERS INDEMN. CO., CARRIER</b>	<b>RESPONDENT</b>

**OPINION FILED MARCH 22, 2023**

Hearing before Administrative Law Judge O. Milton Fine II on March 17, 2023, in Jonesboro, Craighead County, Arkansas.

Claimant, *pro se*, not appearing.

Respondents represented by Mr. Guy Alton Wade, 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 March 17, 2023, in Jonesboro, Arkansas. No testimony was taken in the case. Claimant, who according to Commission records is *pro se*, failed to appear at the hearing. Without objection, the Commission file on this claim has been incorporated herein in its entirety by reference. Admitted into evidence was Respondents' Exhibit 1, forms, pleadings, and correspondence related to the claim, consisting of 48 numbered pages.

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The record reflects the following procedural history:

On December 19, 2020, a Form AR-1 was filed in this case, reflecting that Claimant purportedly sustained a strain injury while lifting pallets at work on February 14, 2020. Per the Form AR-2 that was filed on December 21, 2020, Respondents controverted the claim in its entirety. On December 14, 2020, Claimant filed a Form AR-C, requesting a full range of initial and additional benefits. No hearing request accompanied this filing. Respondents' counsel made an entry of appearance on February 22, 2021. The evidence indicates that discovery was propounded to Claimant, but went unanswered.

On June 4, 2021, Respondents filed their first Motion to Dismiss. Therein, they alleged that dismissal of the claim was warranted under AWCC R. 099.13 for "lack of prosecution." On June 8, 2021, a letter from the Commission was sent to Claimant, asking for a response to the motion within 20 days. This letter was sent by both first-class and certified mail to the address for Claimant listed on his Form AR-C. While the certified letter was returned to the Commission, unclaimed, on July 6, 2021, the first-class letter was never returned. Regardless, no response was forthcoming from him.

On June 30, 2021, a hearing was scheduled on Respondents' motion for July 29, 2021, at 9:30 a.m. at the Commission in Little Rock. The hearing notice was sent to Claimant by certified and first-class mail to the same address as before. As before, the certified letter was returned to the Commission, unclaimed,

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on July 20, 2021, while the first-class letter was never returned. The evidence thus preponderates that Claimant received notice of the hearing.

The hearing proceeded as scheduled on July 29, 2021. Again, Claimant failed to appear at the hearing. But Respondents appeared through counsel and argued for dismissal under § 11-9-702(a)(4) and Rule 13. Thereafter, on July 29, 2021, I issued an opinion in which I dismissed the claim under Rule 13.

Subsequently, Sheila F. Campbell, Esq., entered an appearance before the Commission on behalf of Claimant. She made a hearing request on his behalf on March 10, 2022. The file was reassigned to me on March 11, 2022; and on March 14, 2022, I sent prehearing questionnaires to the parties. Claimant filed a timely response thereto on April 5, 2022; and Respondents followed suit on April 7, 2022. A prehearing telephone conference took place on June 20, 2022. Following the conference, the file was returned to the Commission's general files by agreement of the parties in order to allow for the completion of discovery.

The next action to be taken in connection with this claim took place on October 14, 2022, when Respondents filed another Motion to Dismiss. Therein, they alleged that "Claimant has taken no action proceed with this matter and has failed to provide full and complete responses to the interrogatories originally sent [i]n February 2021." The file was reassigned to me on October 18, 2022; and on October 20, 2022, my office sent a letter to Claimant's counsel, asking for a response to the Motion to Dismiss within 20 days. However, when no response to the motion was forthcoming, on December 29, 2022, I scheduled a hearing

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thereon for February 17, 2022. In addition to the notices provided to the attorneys, I sent a copy of the hearing notice by both certified and first-class mail to Claimant at the Newport, Arkansas address listed for him on his Form AR-C. However, the certified letter was returned, unclaimed, on January 23, 2023. The first-class letter was not returned. But Campbell on January 26, 2023, gave a new address for him in Rochester, New York. Coupled with that were motions to withdraw from her representation of him, and to continue the February 17, hearing. In an order entered on February 9, 2023, I granted the Motion to Withdraw under AWCC Advisory 2003-2, and continued the hearing until March 17, 2023, at 11:30 a.m. This order was sent to Claimant at an incorrectly-spelled address in Rochester. Unsurprisingly, both the certified and first-class letters were returned to the Commission. This was corrected; and they were re-sent on March 3, 2023. Per the United States Postal Service, Claimant did not claim the certified letter by the time of the hearing. However, the first-class letter was not returned. Moreover, Claimant (having apparently gotten the notice) sent a letter to the Commission from the same Rochester address on March 6, 2023, stating:

To Whom It May Concern:

I am the Claimant in the above referenced case. I am submitting this letter to inform you that I no longer want to pursue this case and want to dismiss my claim for Worker's [sic] Compensation benefits.

/s/ Dwayne Armstrong

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The hearing took place as scheduled on March 17, 2023. Unsurprisingly, Claimant failed to appear. But Respondents appeared through counsel and moved 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 matter.
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 his 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**

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 this matter—by a preponderance of the evidence. This standard means the evidence having greater weight or convincing force. *Barre v. Hoffman*, 2009 Ark. 373, 326

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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) Claimant has failed to pursue his claim because he has taken no further action in pursuit of it (including appearing at the March 17, 2023, hearing to argue against its dismissal) since the June 20, 2022, prehearing conference. Thus, the evidence preponderates that dismissal is warranted under Rule 13.

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 Wrk. 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 this claim should be and hereby is entered *without prejudice*.<sup>1</sup>

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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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**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.**

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O. MILTON FINE II  
Chief Administrative Law Judge