

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
WCC NO. H202461**

GERALD BECK, EMPLOYEE	CLAIMANT
MALLARD READY MIX, EMPLOYER	RESPONDENT
TECHNOLOGY INS. CO., CARRIER	RESPONDENT

OPINION FILED DECEMBER 7, 2022

Hearing before Chief Administrative Law Judge O. Milton Fine II on December 6, 2022, in Little Rock, Pulaski County, Arkansas.

Claimant, *pro se*, not appearing.

Respondents represented by Mr. William C. Frye, Attorney at Law, North Little Rock, Arkansas.

I. BACKGROUND

This matter comes before the Commission on the Motion to Dismiss that was filed by Respondents. A hearing on the motion was conducted on December 6, 2022, in Little Rock, Arkansas. Claimant, who is *pro se*, failed to appear. Respondents were represented at the hearing by Mr. William C. Frye, Attorney at Law, of Little Rock, Arkansas. 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 April 14, 2022, Claimant purportedly fell and fractured his hip at work on January 10, 2018. According to the Form AR-2 that was also filed on April 14, 2022,

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Respondents controverted the matter. Claimant filed a Form AR-C on March 28, 2022. Therein, he alleged:

I was putting water in the truck. The yard was all ice. I slipped & fell, breaking my hip. Put rods in because of age. Very painful and can hardly walk—I was told after about 10 years it would need to be replaced.

In a letter to the Commission dated April 13, 2022, Respondents' counsel confirmed that his clients were controverting the claim in its entirety.

On September 28, 2022, Respondents filed the instant Motion to Dismiss. Therein, they argued that dismissal was warranted under AWCC R. 099.13 because “no action has been taken in this matter since the [filing of the Form AR-C].” The case was assigned to then-Administrative Law Judge Terry Don Lucy on October 3, 2022; and on October 5, 2022, his office wrote Claimant, requested a response to the motion within 20 days. The letter was sent by first-class and certified mail to the address listed by Claimant on his Form AR-C. While the United States Postal Service was unable to verify whether Claimant signed for the certified letter, the first-class correspondence was not returned. Nonetheless, no response to the motion was forthcoming.

On November 1, 2022, a hearing on the motion was scheduled for December 6, 2022, at 10:30 a.m. at the Commission in Little Rock. The notice was sent to Claimant by first-class and certified mail at the same address as before. In this instance, the certified letter was returned to the Commission,

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unclaimed, on November 21, 2022. But the first-class letter was not returned. The evidence thus preponderates that Claimant received notice of the hearing.

The hearing on the Motion to Dismiss proceeded as scheduled on December 6, 2022, before the undersigned administrative law judge. Again, Claimant failed to appear. Respondents, however, appeared through counsel at the hearing and argued for dismissal of the action under the aforementioned authority.

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 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

AWCC 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.

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 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 December 6, 2022, hearing to argue against its dismissal) since the filing of his Form AR-C on March 28, 2022. 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 with prejudice. But based on the above authorities, I find that the dismissal of this claim should be and hereby is entered *without prejudice*.¹

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

¹“A dismissal ‘without prejudice’ allows a new [claim] to be brought on the same cause of action.” BLACK’S LAW DICTIONARY 825 (abridged 5th ed. 1983).