

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. H007175

DARRIN BOGGS, EMPLOYEE

CLAIMANT

**TENNECO AUTOMOTIVE OPER. CO.,
EMPLOYER**

RESPONDENT

**INDEMNITY INS. CO. OF NO. AM.,
CARRIER**

RESPONDENT

OPINION FILED JUNE 20, 2022

Hearing before Administrative Law Judge O. Milton Fine II on June 17, 2022, in Jonesboro, Craighead County, Arkansas.

Claimant, *pro se*, not appearing.

Respondents represented by Mr. Rick Behring, Jr., 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 June 17, 2022, 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. At Respondents' request, the Commission's file on the claim has been incorporated herein in its entirety by reference. Admitted into evidence was Respondents' Exhibit 1, a compilation of pleadings, forms and correspondence related to the claim, consisting of 20 numbered pages.

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The record reveals the following procedural history:

The Form AR-1, filed on October 2, 2020, reflects that Claimant purportedly injured his back when he was pushed/struck by a co-worker. Per the Form AR-2 filed on that same day, Respondents initially accepted the claim as a medical-only one.

Claimant, through then-counsel Laura Beth York, filed a Form AR-C on September 29, 2020, asking for the full range of initial and additional benefits and alleging that he injured “his back and other whole body” when he “was pushed down by another employee[.]” Respondents’ counsel entered his appearance before the Commission on October 26, 2020; and in that same correspondence, he reiterated that his clients had accepted Claimant’s injury as compensable and had paid “all appropriate benefits” pursuant thereto. Nothing further occurred on this matter until Respondents filed the first Motion to Dismiss on November 18, 2021. After the file was assigned to me on November 19, 2021, my office wrote York, asking for a response to the motion within 20 days. When no response was forthcoming, my office sent emails to the parties on December 15, 2021, to schedule the motion for a hearing. In a reply to this email that day, York wrote: “I missed this somehow. I object. Dr. Calhoun retired and the respondents are supposed to be finding [Claimant] a new doctor.” In response to this, Respondents’ counsel notified my office by email that same day: “We can hold off on a hearing and return the claim to general files for now.” Based on this, the file was returned to the Commission’s general files on December 15, 2021.

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On March 30, 2022, York moved to withdraw from the case. In an order entered on April 8, 2022, the Full Commission granted the motion.

On April 12, 2022, Respondents filed the instant Motion to Dismiss, stating that dismissal of the claim was warranted under Ark. Code Ann. § 11-9-702(a)(4) & (d) (Repl. 2012) and AWCC R. 099.13, and alleging that all benefits had been paid to the claimant; that he had never made a bona fide hearing request to the Commission within the past year; and that he “has made no effort to prosecute this claim.” On April 15, 2022, my office wrote Claimant, asking for a response to the motion within 20 days. Claimant signed for the certified letter on April 29, 2022; and the first-class letter containing the same correspondence, sent to the address supplied to the Commission by Claimant, was not returned. Nonetheless, no response from him was forthcoming. On May 11, 2022, a hearing on Respondents’ motion was scheduled for June 17, 2022, at 10:30 a.m. at the Commission. The notice was sent to Claimant by certified and first-class mail to the same address as before. As before, Claimant signed for the certified letter, on May 14, 2022; and the first-class letter was never returned. Thus, the evidence preponderates that the notice reached its proper destination.

The hearing proceeded as scheduled on June 17, 2022. Again, Claimant failed to appear at the hearing. But Respondents appeared through counsel and argued for dismissal under the aforementioned authorities.

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. Respondents have proven by a preponderance of the evidence that Claimant has failed to prosecute his claim.
4. Respondents have proven by a preponderance of the evidence that this claim should be dismissed under AWCC R. 099.13.
5. The claim is hereby dismissed *without prejudice*.

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)(discussing, *inter alia*, Rule 13).

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Under Ark. Code Ann. § 11-9-705(a)(3) (Repl. 2012), Respondents must prove by a preponderance of the evidence that this claim should be dismissed. 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 June 17, 2022, hearing to argue against its dismissal) since the filing of his Form AR-C on September 29, 2020. Thus, dismissal is warranted under Rule 13. Respondents have met their burden of proof in this matter. Because of this finding, it is unnecessary to address the application of § 11-9-702 here.

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)). At the hearing, Respondents requested a dismissal

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without prejudice. Based on the foregoing, I agree and 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).