

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
WCC NO. H200603**

BRIAN BOZZA, EMPLOYEE	CLAIMANT
HOME DEPOT USA, INC., EMPLOYER	RESPONDENT
INDEMNITY INS. CO. OF NO. AMER., CARRIER	RESPONDENT

OPINION FILED MARCH 1, 2024

Hearing before Administrative Law Judge O. Milton Fine II on March 1, 2024, in Little Rock, Pulaski County, Arkansas.

Claimant, *pro se*, not appearing.

Respondents represented by Mr. Zachary F. Ryburn, Attorney at Law, Little Rock, Arkansas.

I. BACKGROUND

This matter comes before the Commission on the Motion to Dismiss by Respondents. A hearing on the motion was conducted on March 1, 2024, in Little Rock, Arkansas. No testimony was taken in the case. Claimant, who according to Commission records is *pro se*, failed to appear at the hearing. Admitted into evidence was Respondents' Exhibit 1, pleadings, correspondence, reports, and forms related to this claim, consisting of 11 pages. Also, in order to address adequately this matter under Ark. Code Ann. § 11-9-705(a)(1) (Repl. 2012)(Commission must "conduct the hearing . . . in a manner which best ascertains the rights of the parties"), and without objection, I have blue-backed to the record forms, pleadings, and correspondence from the Commission's file on

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the claim, consisting of 19 pages. In accordance with *Sapp v. Tyson Foods, Inc.*, 2010 Ark. App. 517, ___ S.W.3d ___, these documents have been served on the parties in conjunction with this opinion.

The record reflects the following procedural history:

On January 20, 2022, through then-counsel Laura Beth York, Claimant filed a Form AR-C, alleging that he injured his left shoulder on August 19, 2021, while lifting a box at work. The full range of initial and additional benefits was requested. Accompanying this filing was a request for a hearing on the claim. Respondents' counsel entered an appearance on January 24, 2022. Following a March 21, 2022, prehearing telephone conference, where the parties agreed that all outstanding issues had been resolved, the file was returned to the Commission's general files.

Later, another hearing request was made. The parties filed timely prehearing questionnaire responses. On September 19, 2022, following the conference, I issued a prehearing order that scheduled a full hearing for October 27, 2022, on the issue of whether Claimant is entitled to additional medical treatment of his stipulated compensable left shoulder injury. The parties notified me on October 18, 2022, that all outstanding issues had once again been resolved. For that reason, the hearing was cancelled that day, and the file was once more returned to the Commission's general files.

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On February 14, 2023, York moved to withdraw from her representation of Claimant. In an Order entered on February 24, 2023, the Full Commission granted the motion under AWCC Advisory 2003-2.

The record reflects that nothing further took place on the claim until January 2, 2024. On that date, Respondents filed the instant motion, asking for dismissal of the claim because “[t]he claimant has failed to prosecute his claim for workers’ compensation benefits.” My office wrote Claimant on January 2, 2024, asking for a response to the motion within 20 days. The letter was sent by first class and certified mail to the Hensley, Arkansas address of Claimant listed in the file and on the Form AR-C. Claimant claimed the certified letter on January 6, 2024, and the first-class letter was not returned. However, no response from him to the motion was forthcoming. On January 24, 2024, a hearing on the Motion to Dismiss was scheduled for February 29, 2024, at 11:30 a.m. at the Commission in Little Rock. The notice was sent to Claimant via first-class and certified mail to the same address as before. In this instance, the United States Postal Service was unable to verify whether Claimant received the certified letter. But the first-class letter was not returned to the Commission.

The hearing on the Motion to Dismiss proceeded as scheduled on February 29, 2024. Again, Claimant failed to appear at the hearing. But Respondents appeared through counsel and argued 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; this claim for initial benefits is hereby dismissed without prejudice under AWCC R. 099.13.

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).

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 the claim—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 February 29, 2024, hearing to argue against its dismissal) since the cancellation of the full hearing on October 18, 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). The Commission and the appellate courts have expressed a preference for dismissals *without prejudice*. See *Professional Adjustment Bureau v. Strong*, 75 Ark. 249, 629 S.W.2d 284 (1982)). Respondents at the hearing asked for a dismissal without prejudice. I agree and

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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 for additional benefits 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).