

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
WCC NO. H104716**

DENNIS B. BREWER, DEC'D, EMPLOYEE	CLAIMANT
CITY OF WEST MEMPHIS, SELF-INSURED EMPLOYER	RESPONDENT
ARK. MUN. LEAGUE, THIRD-PARTY ADMINISTRATOR	RESPONDENT

OPINION FILED MAY 3, 2023

Hearing before Administrative Law Judge O. Milton Fine II on April 28, 2022, in Marion, Crittenden County, Arkansas.

Claimant (through his widow Dorothy Brewer) represented by Mr. Kenneth A. Olsen, Attorney at Law, Bryant, Arkansas (neither appearing).

Respondents represented by Mr. Jarrod S. Parrish, 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 April 28, 2023, in Marion, Arkansas. No testimony was taken in the case. Claimant's estate (through his widow Dorothy Brewer) failed to appear at the hearing; and his counsel waived his appearance. Without objection, the Commission's file on the 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 one (1) index page and twelve (12) numbered pages thereafter.

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The record reflects the following procedural history:

Per the First Report of Injury or Illness filed on June 2, 2021, Claimant purportedly contracted cancer as a result of exposure to certain chemicals at work, resulting in his death on May 31, 2020. According to the Form AR-2 that was filed on June 4, 2021, Respondents controverted the claim in its entirety.

On September 27, 2021, Claimant's estate (through counsel) filed a Form AR-C, requesting initial benefits in connection with his alleged injury. No hearing request accompanied this filing. In response, Respondent Arkansas Municipal League wrote the Commission on September 28, 2021, reiterating that they were controverting the claim. Respondents' counsel entered their appearance thereon.

On August 10, 2022, Claimant's counsel emailed the Commission, requesting a hearing on this claim. The file was assigned to me that same day. On August 11, 2022, I sent prehearing questionnaires to the parties. When Claimant's response was not timely filed, Respondents on September 12, 2022, filed the instant Motion to Dismiss. Therein, they alleged that dismissal of the claim was called for under AWCC R. 099.13 and Ark. Code Ann. § 11-9-702 because "Claimant ha[d] not sought any type of bona fide hearing before the Workers' Compensation Commission over the last six months." That day, I emailed Claimant's counsel, informing him that he had until September 16, 2022, to respond to the questionnaire in order for me to hold the Motion to Dismiss in abeyance. Claimant complied; on September 16, 2022, Claimant's response to

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the prehearing questionnaire was belatedly filed. Respondents followed suit that same day. A prehearing telephone conference was scheduled for October 24, 2022. At that conference, the parties agreed that the file should be returned to the Commission's general files for the time being to allow for the completion of discovery. However, Respondents reserved the right to renew their Motion to Dismiss at the appropriate time if the case did not proceed.

Respondents did just that on December 2, 2022, informing the Commission by letter that they were renewing their motion. On December 15, 2022, I emailed the parties, stating:

Respectfully, I think this renewal is a bit premature. For that reason, I am going to continue to hold the motion in abeyance and diary this for 60 days. If no appreciable progress has been made on this by then, my office will schedule a hearing on the motion.

However, after the 60-day deadline came and went without further action by Claimant's counsel, on February 17, 2023, I scheduled a hearing on the Motion to Dismiss for April 28, 2023, at 10:30 a.m. at the Crittenden County Courthouse in Marion. The hearing notice was sent not only to the attorneys of record, but to Ms. Brewer at the address for her listed in the file and on the Form AR-C. She signed for the certified mail on February 23, 2023; and the first-class mail was not returned.

On April 24, 2023, Claimant's counsel wrote the Commission, stating:

While I agree that I have not been diligent in following up on whether medical records were requested and received, please

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accept this letter as Objection to dismissal, and request for a full hearing.

Respondents' co-counsel objected to this in an email sent on April 26, 2023, pointing out, inter alia, that the objection was very late in coming. Agreeing with their position, I informed the parties that day that the hearing would remain as scheduled. The next day, on April 27, 2023, Claimant's counsel emailed Respondents' co-counsel and myself, advising that he was withdrawing his objection to the Motion to Dismiss. In a follow-up email, Claimant's counsel advised that he would not be attending the hearing.

The hearing on the Motion to Dismiss proceeded as scheduled on April 28, 2023. Both Claimant's estate (through Ms. Brewer) and counsel therefor waived their appearance; but, again, counsel has indicated no objection to a dismissal of this claim. 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.

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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 this 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 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 these matters—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)

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Claimant has failed to pursue the claim because his estate has taken no further action in pursuit of it—including appearing at the April 28, 2023, hearing on the Motion to Dismiss—since the prehearing telephone conference on October 24, 2022. Thus, the evidence preponderates that dismissal is warranted under Rule 13. Because of this finding, it is unnecessary to address the applicability of Ark. Code Ann. § 11-9-702(a)(4) (Repl. 2012).

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 (through counsel) at the hearing asked for a dismissal without prejudice. Based on the above authorities, I agree and find that the dismissal of the claim should be and hereby is entered without prejudice.

IV. CONCLUSION

In accordance with the findings of fact and conclusions of law set forth above, this claim is hereby dismissed *without prejudice*.

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IT IS SO ORDERED.

O. MILTON FINE II
Chief Administrative Law Judge