

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
WCC NO. H201641**

CHARLES W. JACKSON, EMPLOYEE	CLAIMANT
FRIEDMAN INDUS., INC., EMPLOYER	RESPONDENT
ARGONAUT MIDWEST INS. CO., CARRIER	RESPONDENT

OPINION FILED OCTOBER 10, 2023

Hearing before Administrative Law Judge O. Milton Fine II on October 6, 2023, in Jonesboro, Craighead County, Arkansas.

Claimant represented by Mr. Bill E. Bracey, Jr., Attorney at Law, Blytheville, Arkansas (neither appearing).

Respondents represented by Mr. William C. Frye, Attorney at Law, North 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 October 6, 2023, in Jonesboro, Arkansas. No testimony was taken in the case. Claimant and his counsel waived their appearance at the hearing. Without objection, the Commission's file on the claim has been incorporated herein in its entirety by reference.

The record reflects the following procedural history:

Per the First Report of Injury or Illness filed on February 23, 2022, Claimant purportedly suffered a contusion to his head when he was struck by a steel coil at work. According to the Form AR-2 that was filed on February 28, 2022,

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Respondents accepted the claim and paid medical and indemnity benefits pursuant thereto.

On August 10, 2022, Claimant filed a Form AR-C, requesting certain initial benefits in connection with his alleged injury. Therein, he claimed that being struck by the coil resulted in his suffering from headaches, vertigo, and loss of sense of smell. Respondents' counsel made his entry of appearance on August 17, 2022; and on August 26, 2022, he notified the Commission that his clients had paid all appropriate benefits in connection with the claim, including permanent partial disability benefits in accordance with a three percent (3%) impairment rating to the body as a whole that Claimant had been assigned.

Claimant requested a hearing. The file was assigned to me on August 31, 2022; and on September 2, 2022, my office issued prehearing questionnaires to the parties. However, on September 22, 2022, Claimant's counsel withdrew the hearing request because he was being scheduled for emergency back surgery. For that reason, that file was returned to the Commission's general files.

On November 14, 2022, he made another hearing request. The file was re-assigned to me on November 16, 2022; and my office issued prehearing questionnaires on November 17, 2022. Claimant filed a timely response thereto on December 13, 2022; and Respondents followed suit on December 27, 2022. A prehearing telephone conference was scheduled for February 13, 2023. During that conference, Claimant's counsel stated that his client was going to request a

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one-time change of physician from the Commission. For that reason, by agreement of the parties, the file was returned to the Commission's general files on that day. However, review of the file reflects that Claimant did not follow through by making a change-of-physician request.

The record reflects that no further activity occurred until August 10, 2023, when Respondents filed the instant motion. Therein, they requested dismissal of the claim under AWCC R. 099.13 “[b]ased on the fact that no action has been taken in this matter since the Claimant filed the AR-C” On August 10, 2023, my office wrote Claimant and his attorney, requesting a response to the motion within 20 days. However, no response to the Motion to Dismiss was forthcoming.

On September 5, 2023, I scheduled a hearing on the motion for October 6, 2023, at 11:00 a.m. at the Craighead County Courthouse in Jonesboro. The Notice of Hearing was sent to the parties by certified and first-class mail. The United States Postal Service cannot confirm whether Claimant claimed the certified letter; but the first-class mail was not returned. Moreover, his attorney received it, writing me on September 28, 2023:

Dear Judge:

As per our recent conversation, Mr. Jackson has received payment for his rating, is employed at a higher wage and does not wish to continue to pursue this claim, so that it may be dismissed.

The evidence thus preponderates that Claimant received notice of the hearing.

The hearing on the Motion to Dismiss proceeded as scheduled on October 6, 2023. Both Claimant and his counsel 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 authority.

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. 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

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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 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 this claim because he has taken no further action in pursuit of it—including appearing at the October 6, 2023, hearing on the Motion to Dismiss—since the prehearing telephone conference on February 13, 2023. 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

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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 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*.

IT IS SO ORDERED.

O. MILTON FINE II
Chief Administrative Law Judge