

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION  
CLAIM NO. H108753**

**HAROLD L. JAMES, EMPLOYEE**

**CLAIMANT**

**EUTAW CONSTRUCTION INC.,  
EMPLOYER**

**RESPONDENT**

**ZURICH AMERICAN INSURANCE CO.  
INSURANCE COMPANY/TPA**

**RESPONDENT**

**OPINION FILED OCTOBER 10, 2023**

Hearing before Administrative Law Judge Steven Porch on October 6, 2023 in Marion, Crittenden County, Arkansas.

Claimant was represented by Mr. Scott Hunter, Jr., Attorney at Law, Jonesboro, Arkansas.

The Respondents were represented by Mr. Michael Ryburn, Attorney at Law, Little Rock, Arkansas.

**I. BACKGROUND**

This matter comes before the Commission on a Motion to Dismiss filed by Respondents. A hearing on the motion was conducted on October 6, 2023, in Marion, Arkansas. Claimant, was represented by Mr. Scott Hunter, Jr., Attorney at Law, Jonesboro, Arkansas. However, neither Claimant nor his attorney were present at the hearing. Respondents were represented at the hearing by Mr. Michael Ryburn, Attorney at Law, of Little Rock, Arkansas. In addition to Respondent's argument, the record consists of all exhibits properly admitted before the Commission including the Commission's file—which has been incorporated herein in its entirety by reference.

The evidence reflects that Claimant's injury occurred on July 20, 2020, where he purportedly fractured his L4 vertebrae while pulling rebar. This incident allegedly occurred during the course and scope of his employment. Since filing his Form C on October 17,

2022, this case has been inactive until Respondents filed a Motion to Dismiss due to the lack of prosecution. A hearing was held on October 6, 2023, in Marion, Arkansas on the Motion to Dismiss. As previously stated, neither the Claimant's attorney nor the Claimant were present for the hearing. The Claimant's attorney waived his appearance.

## **II. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record as a whole and other matters properly before the Commission, 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 claim.
2. All parties received reasonable and timely notice of the Motion to Dismiss and the hearing thereon pursuant to AWCC R. 099.13.
3. Respondents did prove by a preponderance of the evidence that Claimant has failed to prosecute his claim under AWCC R. 099.13.
4. The Motion to Dismiss should be, and hereby is, granted without prejudice.

## **III. DISCUSSION**

AWCC 099.13 provides:

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).

Under Ark. Code Ann. § 11-9-705(a)(3) (Repl. 2012), Respondents must prove by a preponderance of the evidence that dismissal should be granted. The standard

“preponderance of the evidence” 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).

A claimant’s testimony is never considered uncontroverted. *Nix v. Wilson World Hotel*, 46 Ark. App. 303, 879 S.W.2d 457 (1994). The determination of a witness’ credibility and how much weight to accord to that person’s testimony are solely up to the Commission. *White v. Gregg Agricultural Ent.*, 72 Ark. App. 309, 37 S.W.3d 649 (2001). The Commission must sort through conflicting evidence and determine the true facts. *Id.* In so doing, the Commission is not required to believe the testimony of the claimant or any other witness, but may accept and translate into findings of fact only those portions of the testimony that it deems worthy of belief. *Id.*

After consideration of all the evidence, I find that Claimant and Respondents were given reasonable notice for the Motion to Dismiss hearing under Rule 13. I further find that Claimant has abridged this rule. Thus I find Respondent’s Motion to Dismiss should be granted.

**CONCLUSION**

Based on the findings of fact and conclusions of law set forth above, Respondents’ Motion to Dismiss is hereby granted *without prejudice*.

**IT IS SO ORDERED.**

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STEVEN PORCH  
Administrative Law Judge