

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
WCC NO. H005743**

JOE C. KELL, EMPLOYEE

CLAIMANT

**NASHVILLE SCH. DIST.,
SELF-INSURED EMPLOYER**

RESPONDENT

**ARK. SCH. BDS. ASSN.,
THIRD-PARTY ADMR.**

RESPONDENT

OPINION FILED MARCH 13, 2024

Hearing before Chief Administrative Law Judge O. Milton Fine II on January 10, 2024, in Little Rock, Pulaski County, Arkansas.

Claimant represented by Mr. Gary Davis, Attorney at Law, Little Rock, Arkansas.

Respondents represented by Mr. Jarrod S. Parrish, Attorney at Law, Little Rock, Arkansas.

I. BACKGROUND

This matter comes before the Commission on Respondents' Motion to Dismiss. A hearing on the motion was conducted on January 10, 2024, in Little Rock, Arkansas. Claimant appeared in person and testified. Respondents were represented at the hearing by Mr. Jarrod S. Parrish, Attorney at Law, of Little Rock, Arkansas. In addition to Claimant's testimony, the record consists of the following exhibits: Claimant's Exhibit 1, medical records, consisting of one index page and eight numbered pages thereafter; Claimant's Exhibit 2, a handwritten list of dates of service, providers, and charges therefor, consisting of one page; Respondents' Exhibit 1, forms, pleadings, and correspondence related to this claim, consisting of two index pages and 46 numbered pages; Respondents' Exhibit 2, the brief in support of their Motion to Dismiss, consisting of nine

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numbered 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 correspondence from the Commission’s file on the claim, along with the post-hearing briefs of the parties, totaling ten 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.

Moreover, I have blue-backed to the record the post-hearing briefs of the parties, both filed on January 24, 2024, consisting of three and four numbered pages, respectively. Finally, and without objection, the transcript of the September 7, 2021, hearing on this claim has been incorporated herein in its entirety by reference.

The evidence reflects that on August 27, 2020, 2020, Claimant through counsel filed a Form AR-C, alleging that he was entitled to the full range of initial and additional benefits for his alleged injury in the form of his work-related contraction of a case of COVID-19. Accompanying this form was a letter from his attorney to the Commission, “request[ing that] this claim be referred to an administrative law judge for a hearing on the issues of compensability, temporary total disability benefits, medical expenses, thirty-six percent (36%) penalty pursuant to [Ark. Code Ann.] § 11-9-802(e), and controversion.” Following the submission of prehearing questionnaire responses by the parties and a

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prehearing telephone conference with them on April 20, 2021, Administrative Law Judge Chandra Black scheduled a hearing for July 13, 2021, at 10:00 a.m. in Texarkana on the following issues:

1. Whether Claimant's COVID-19 diagnosis is compensable.
2. Whether Claimant is entitled to temporary total disability benefits from June 11, 2020, to a date yet to be determined.
3. Whether Claimant is entitled to medical benefits.
4. Whether Claimant's attorney is entitled to a controverted attorney's fee.

All other issues were reserved. The hearing was later continued to September 7, 2021. Following that hearing, on November 5, 2021, Judge Black entered an opinion that contains the following Findings of Fact and Conclusions of Law:

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. [The following] stipulations [are hereby accepted] as fact[:]
 - (a) The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
 - (b) The employee-employer-insurance carrier relationship existed at all relevant times, including on or about June 10, 2020.
 - (c) Claimant is entitled to the maximum compensation rates for a 2020 injury.
 - (d) All issues not litigated are reserved under the Arkansas Workers' Compensation Act.
 - (e) Respondents have controverted this claim in its entirety.

- (f) Respondents are entitled to a credit for a period of 90 days if Claimant is awarded temporary total disability compensation.
- 3. Claimant proved by a preponderance of the evidence that on or about June 10, 2020, he contracted COVID-19 during and in the course of his employment while attending a mandatory meeting with Nashville School District administrators.
- 4. Claimant proved by a preponderance of the evidence that all of the medical treatment of record (including Dr. Ferguson’s recommendations on August 25, 2020) is reasonably necessary in connection with the injury received by him. However, there is no documented recommendation by any physician or medical personnel for any further treatment for Claimant’s compensable injury. Therefore . . . Claimant failed to prove his entitlement to any further medical treatment due to his COVID-19 injury of June 10, 2020.
- 5. Claimant proved his entitlement to temporary total disability [benefits] from June 13, 2020, until November 25, 2020.
- 6. Claimant’s attorney is entitled to a controverted attorney’s fee on the indemnity [benefits] awarded pursuant to this opinion.

On November 17, 2021, Judge Black entered an order that changed Stipulation No. 6 to read: “Claimant’s entitlement to temporary total disability [benefits], if any, prior to the cessation of his pay on February 28, 2021, is limited to an award of 90 days.” This decision was not appealed. The earlier opinion is thus binding on this proceeding under the Law of the Case Doctrine; and it is *res judicata*. See *Thurman v. Clarke Industries, Inc.*, 45 Ark. App. 87, 872 S.W.2d 418 (1994).

The record reflects that no further activity occurred on this claim until September 22, 2023, when Respondents filed the instant Motion to Dismiss under AWCC R. 099.13 and Ark. Code Ann. § 11-9-702 (Repl. 2012). Therein,

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they alleged that: (1) more than six months had elapsed since the filing the Form AR-C; and (2) Claimant had “not sought any type of bona fide hearing” before the Commission over the previous six-month period. The file was reassigned to Judge Black on September 25, 2023; and that same date, she wrote Claimant and his attorney, requesting a response to the motion within 20 days. His counsel responded by way of a prehearing questionnaire response on October 11, 2023, contending that Claimant’s “claims [sic] should not be dismissed.” The only issue listed in the response concerned the motion; no benefits were requested or listed as being in dispute. Respondents, in turn, filed their prehearing questionnaire response on November 28, 2023; likewise, they did not identify any benefits as being at issue in the claim. Following a prehearing telephone conference on November 29, 2023, Judge Black sent an email to the parties that reads:

At the time of the [prehearing telephone conference] today in the above claim, Mr. Davis asked Mr. Parrish to provide him with confirmation that the Respondents have paid to or on behalf of the Claimant all appropriate benefits/payments due him under the Arkansas Workers' Compensation Act. Should Mr. Parrish accomplish this task to Mr. Davis's satisfaction[,] then he will withdraw his objection to the [Motion to Dismiss].

On November 30, 2023, Respondents filed an amended prehearing questionnaire response. Yet again, no issues were identified for adjudication other than whether the instant claim should be dismissed. On December 1, 2023, a hearing on the motion was scheduled for December 1, 2023, at 12:00 p.m. at the Commission in Little Rock.

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I advised the parties by email that I would be presiding over the hearing in place of Judge Black. On the day before the hearing, Respondents' counsel wrote me:

It is my understanding that you are handling the dismissal hearing tomorrow. Per the discussion at the [prehearing telephone conference] reflected in [Judge Black's November 29, 2023, email], Mr. Davis wanted confirmation that all bills had been paid associated with Judge Black's award of benefits before withdrawing the objection to the Motion to Dismiss. As part of his exhibit packet, Mr. Davis introduced a report from a diagnostic study done at Baptist [Health] that did not match any of the payments on the payment ledger. My client has agreed to pay that bill. I have attached the "Explanation of Benefits" reflecting application of the fee schedule. The check will be issued tomorrow. By copy of this correspondence, I am providing Mr. Davis with confirmation that the bill is being paid.

Claimant's counsel replied to this communication in short order, stating:

Judge Fine, please be advised of the following: First, I object to the introduction of any evidence at this late hour. Second, I never¹ made any agreement not to oppose the motion. Third, we plan to be present for the hearing 1/10/24.

The hearing took place as scheduled. Both parties appeared, and Claimant testified. Respondents argued for dismissal under both § 11-9-702(a)(4) & (d) (Repl. 2012) and Rule 13. The following exchange took place:

JUDGE FINE: Since you're on the stand, in the event that I do not dismiss your claim, are you asking for a hearing on your claim? And I understand you're not an attorney, sir, but are you asking for a hearing at this point on your claim?

¹This statement notwithstanding, nothing in the evidentiary record reflects that Claimant replied to Judge Black's November 29, 2023, email that purportedly summarized the substance of the prehearing telephone conference, to take issue with her characterization of the understanding reached at the conference.

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THE WITNESS: If that’s what it takes to get reimbursed for these expenses, yes.

Claimant’s reference to “these expenses” is a list of medical expenses detailed in his Exhibit 2. His testimony was that these six items pertain to treatment he has allegedly undergone and billed to his health insurance; the amount listed, totaling \$1,692.19, is the portion for which he is responsible. The items are:

July 13, 2022.....	St. Vincent Heart.....	\$121.77
November 29, 2022.....	St. Vincent Heart.....	\$403.48
June 21, 2023.....	Howard Memorial.....	\$119.99
August 22, 2023.....	St. Vincent Heart.....	\$262.60
September 8, 2023.....	Howard Memorial.....	\$89.35
November 28, 2023.....	Irhythm Technologies.....	\$695.00

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record as a whole, including medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of Claimant, 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 notice of the Motion to Dismiss and the hearing thereon pursuant to AWCC R. 099.13.

3. Respondents have not proven by a preponderance of the evidence that Claimant has failed to prosecute this claim under AWCC R. 099.13.
4. Respondents have not proven by a preponderance of the evidence that this claim should be dismissed under Ark. Code Ann. § 11-9-702(a)(4) or (d) (Repl. 2012).
5. Claimant has requested a hearing on the issue of his entitlement to additional medical benefits.
6. This claim will proceed to a hearing.

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). In turn, Ark. Code Ann. § 11-9-702(a)(4) & (d) (Repl. 2012) read:

(4) If within six (6) months after the filing of a claim for compensation no bona fide request for a hearing has been made with respect to the claim, the claim may, upon motion and after hearing, be dismissed without prejudice to the refiling of the claim within limitation periods specified in subdivisions (a)(1)-(3) of this section.

...

(d) If within six (6) months after the filing of a claim for additional compensation no bona fide request for a hearing has been made

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with respect to the claim, the claim may, upon motion and after hearing, if necessary, be dismissed without prejudice to the refiling of the claim within limitation periods specified in subsection (b) of this section.

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.*

Dismissal under either § 11-9-702(a)(4) or (d)—regardless of which provision applies—is not called for because Claimant clearly complied with the above-quoted language in these provisions by making a bona fide hearing request—a request that ultimately led to a hearing on the merits on September 7, 2021. This statute must be strictly construed, in accordance with Ark. Code Ann. § 11-9-704(c)(3) (Repl. 2012). *See Duke v. Regis Hairstylists*, 55 Ark. App. 327,

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935 S.W.2d 600 (1996). “Strict construction means narrow construction and requires that nothing be taken as intended that is not clearly expressed.” *Hapney v. Rheem Mfg. Co.*, 341 Ark. 548, 26 S.W.3d 771 (2000).

The Arkansas Court of Appeals in *Johnson, supra*, held that a claim could be dismissed for lack of prosecution based on the fact that there is no justiciable issue. The authority for doing so comes under Rule 13, which the Commission promulgated under Ark. Code Ann. § 11-9-205(a)(1)(A) (Repl. 2012). This provision authorizes it “[t]o make such rules and regulations as may be found necessary[.]” See *Dura Craft Boats, Inc. v. Daugherty*, 247 Ark. 125, 444 S.W.2d 562 (1969); *Johnson, supra*. *Contra Dillard v. Benton Cty. Sheriff’s Off.*, 87 Ark. App. 379, 192 S.W.3d 287 (2004)(“Rule 13 . . . allows a dismissal . . . pursuant to Ark. Code Ann. § 11-9-702(b)(4), the portion of the statute relating to additional benefits”). Certainly, such a claim could be re-filed if a justiciable issue arises, provided that all other prerequisites for a cognizable claim are met. As shown above, Claimant testified that he would like a hearing on his entitlement to reimbursement for the expenses itemized above. I credit this. Consequently, dismissal is not called for under *Johnson, supra*, since there are justiciable issues present.

After consideration of the evidence, I find that while both Claimant and Respondents were given reasonable notice of the Motion to Dismiss hearing under Rule 13, he has not yet abridged that rule. Based on his hearing request,

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prehearing questionnaires will be immediately issued to the parties, and this matter will again proceed to a full hearing on the merits.

CONCLUSION

Based on the Findings of Fact and Conclusions of Law set forth above, Respondents' Motion to Dismiss is hereby respectfully denied.

IT IS SO ORDERED.

O. MILTON FINE II
Chief Administrative Law Judge