

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION  
WCC NO. H300727**

<b>LELA KEY, EMPLOYEE</b>	<b>CLAIMANT</b>
<b>KEDRION BIOPHARMA, INC., EMPLOYER</b>	<b>RESPONDENT</b>
<b>BANKERS STD. INS. CO., CARRIER</b>	<b>RESPONDENT</b>

**OPINION FILED JULY 8, 2024**

Hearing before Administrative Law Judge O. Milton Fine II on July 5, 2024, in Jonesboro, Craighead County, Arkansas.

Claimant, *pro se*, not appearing.

Respondents represented by Mr. Eric Newkirk, 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 July 5, 2024, in Jonesboro, 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 were Commission Exhibit 1, correspondence and United States Postal Service ("USPS") responses, consisting of three pages; and Respondents' Exhibit 1, pleadings, correspondence and forms related to this claim, consisting of 58 numbered pages.

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The record reflects the following procedural history:

Per the First Report of Injury or Illness filed on February 2, 2023, Claimant purportedly suffered an injury to her left foot while walking to work on January 18, 2023. She related that she stepped in a pipe, causing her to twist her foot and fall. According to the Form AR-2 that was filed on February 2, 2023, Respondents controverted the claim in its entirety, claiming that the Going and Coming Rule made the alleged injury not compensable.

On March 15, 2023, through then-counsel Andy Caldwell, Claimant filed a Form AR-C. Therein, he alleged that his client was entitled to the full range of initial benefits not only as a result of her alleged foot injury, but due to alleged injuries to her right hand and “other body parts.” A hearing request accompanied this filing. Respondents’ co-counsel entered his appearance on March 16, 2023; and in a letter to the Commission on March 24, 2023, he reiterated their position expressed in the Form AR-2.

The file was assigned to me on March 29, 2023. On April 4, 2023, I issued prehearing questionnaires to the parties. Claimant filed a timely response thereto on April 24, 2023, and Respondents followed suit on May 2, 2023. Following a prehearing telephone conference on June 19, 2023, I issued a prehearing order that scheduled a hearing for September 1, 2023, on the following issues:

1. Whether Claimant sustained a compensable injury to her right hand and left foot by specific incident.

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2. Whether Claimant is entitled to reasonable and necessary medical treatment.
3. Whether Claimant is entitled to temporary total disability benefits.
4. Whether Claimant is entitled to a controverted attorney's fee.

However, on August 17, 2023, Claimant requested that the hearing be cancelled and that the file be returned to the Commission's general files. In support of this request, he related that his client failed to appear for her August 14, 2023, deposition, and that he had been unable to reach her by phone. The request was granted.

On October 6, 2023, Caldwell moved to withdraw from the case. His motion includes the following allegation:

The undersigned has lost contact with the Claimant. The undersigned has sent letters, emails and attempted to contact the Claimant at all known telephone numbers to no avail.

In an Order entered on October 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 March 19, 2024. On that date, Respondents filed the instant motion and brief in support thereof, asking for dismissal of the claim under AWCC R. 099.13 and Ark. Code Ann. § 11-9-702 (Repl. 2012). My office wrote Claimant on March 21, 2024, asking for a response to the motion within 20 days. The letter was sent by first class and certified mail to the Jonesboro address of Claimant listed in the file and

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on her Form AR-C. The certified letter was returned to the Commission, unclaimed, on May 28, 2024; but the first-class letter was not returned. Regardless, no response from Claimant to the motion was forthcoming. On May 17, 2024, a hearing on the Motion to Dismiss was scheduled for July 5, 2024, at 1:30 p.m. at the Craighead County Courthouse in Jonesboro. 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 could not confirm that Claimant claimed the certified letter; but the one sent by first-class mail was not returned to the Commission.

The hearing on the Motion to Dismiss proceeded as scheduled on July 5, 2024. Again, Claimant failed to appear at the hearing. But 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 matter.

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2. The parties were provided reasonable notice of the Motion to Dismiss and of the hearing thereon.
3. Respondents have proven by a preponderance of the evidence that Claimant has failed to prosecute her 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).

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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 her claim because she has taken no further action in pursuit of it (including appearing at the July 5, 2024, hearing to argue against its dismissal) since the cancellation of the hearing on the claim on August 17, 2023. Thus, the evidence preponderates that dismissal is warranted under Rule 13. Because of this finding, it is unnecessary to address the application of § 11-9-702.

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 find that the dismissal of this claim should be and hereby is entered *without prejudice*.<sup>1</sup>

#### **IV. CONCLUSION**

In accordance with the Findings of Fact and Conclusions of Law set forth above, this claim for initial benefits is hereby dismissed *without prejudice*.

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<sup>1</sup>“A dismissal ‘without prejudice’ allows a new [claim] to be brought on the same cause of action.” BLACK’S LAW DICTIONARY 825 (abridged 5<sup>th</sup> ed. 1983).

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**IT IS SO ORDERED.**

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O. MILTON FINE II  
Chief Administrative Law Judge