

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
WCC NO. H208220**

GREGORY P. KRICHER, EMPLOYEE	CLAIMANT
ALLIED UNIVERSAL, EMPLOYER	RESPONDENT
XL INS. AMERICA, CARRIER	RESPONDENT

OPINION FILED JANUARY 12, 2024

Hearing before Administrative Law Judge O. Milton Fine II on January 10, 2024, in Little Rock, Pulaski 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 January 10, 2024, in Little Rock, 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, certified mail receipts, consisting of two pages; and Respondents' Exhibit 1, pleadings, correspondence and forms related to this claim, consisting of 20 numbered pages.

The record reflects the following procedural history:

Per the First Report of Injury or Illness filed November 21, 2022, Claimant purportedly suffered an injury to his right knee on October 17, 2022, when he

KRICHER – H208220

stepped into a pothole while coming off the loading dock at work. According to the Form AR-2 that was also filed on November 21, 2022, Respondents accepted the injury as compensable and paid medical and indemnity benefits pursuant thereto.

On December 19, 2022, through then-counsel Laura Beth York, Claimant filed a Form AR-C, alleging that he was entitled to the full range of initial and additional benefits concerning his alleged knee injury. No hearing request accompanied this filing. Later, on April 5, 2023, York moved to withdraw from her representation of Claimant. In an Order entered on April 18, 2023, the Full Commission granted the motion under AWCC Advisory 2003-2.

The record reflects that nothing further took place on the claim until November 2, 2023. On that date, Respondents filed the instant motion, asking for dismissal of the claim under Ark. Code Ann. § 11-9-702(a)(4)¹ (Repl. 2012) and AWCC R. 099.13 because more than six months had elapsed since Claimant took any action to prosecute his claim. The Clerk of the Commission on November 2, 2023, assigned the motion to Administrative Law Judge Chandra Black.

¹Since Respondents have acknowledge in their motion, and the evidentiary record establishes, that Respondents accepted this claim and paid benefits pursuant thereto (*see supra*), the appropriate provision would instead be § 11-9-702(d).

KRICHER – H208220

On November 3, 2023, Judge Black wrote Claimant, asking for a response to the motion within 20 days. The letter was sent by first class and certified mail to the Camden, Arkansas address of Claimant listed in the file and on his Form AR-C. Claimant signed for the certified letter on November 6, 2023; and the first-class letter was not returned. Regardless, no response from him to the motion was forthcoming. On November 27, 2023, a hearing on the Motion to Dismiss was scheduled for January 10, 2024, at 9:30 a.m. at the Commission in Little Rock. The Notice of Hearing was sent to Claimant via first-class and certified mail to the same address as before. In this instance, “Carla Kricher” signed for the certified letter on December 12, 2023; and the first-class letter was not returned to the Commission. Thus, the evidence preponderates that Claimant received notice of the hearing.

The hearing on the Motion to Dismiss proceeded as scheduled on January 10, 2024, before the undersigned. 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):

KRICHER – H208220

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 his 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 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).

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 his claim because he has taken no further action in pursuit of it (including appearing at the January 10, 2024, hearing to argue against its dismissal) since the filing of his Form AR-C on December 19, 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 (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)). At the hearing, Respondents asked for a dismissal without prejudice. Based on the above authorities, I agree and find that the dismissal of this claim should be and hereby is entered *without prejudice*.²

²“A dismissal ‘without prejudice’ allows a new [claim] to be brought on the same cause of action.” BLACK’S LAW DICTIONARY 825 (abridged 5th ed. 1983).

KRICHER – H208220

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