

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
WCC NO. H204222**

MARIA G. LOPEZ, EMPLOYEE	CLAIMANT
CHENAL PKWY. SHELL, INC., EMPLOYER	RESPONDENT
FIRSTCOMP INS. CO., CARRIER	RESPONDENT

OPINION FILED JULY 12, 2024

Hearing before Chief Administrative Law Judge O. Milton Fine II on July 11, 2024, in Little Rock, Pulaski County, Arkansas.

Claimant, *pro se*, not appearing.

Respondents represented by Mr. Randy P. Murphy, Attorney at Law, Little Rock, Arkansas.

I. BACKGROUND

This matter comes before the Commission on the Motion to Dismiss filed by Respondents. A hearing on the motion was conducted on July 11, 2024, in Little Rock, Arkansas. Claimant, who is *pro se*, failed to appear. Respondents were represented at the hearing by Mr. Randy P. Murphy, Attorney at Law, of Little Rock, Arkansas. 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 documents from the Commission’s file on the claim, consisting of 29 pages. In accordance with *Sapp v. Tyson Foods, Inc.*, 2010 Ark. App. 517, ___ S.W.3d ___, these documents have been

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served on the parties in conjunction with this opinion. Also, the transcript of the February 22, 2024, hearing in this matter, consisting of 16 numbered pages plus three pages of exhibits, has been incorporated herein by reference.

The evidence reflects that per the First Report of Injury or Illness filed on August 2, 2022, Claimant purportedly suffered an injury to her left wrist at work on April 15, 2022, when a customer closed a door on her hand. According to the Form AR-2 that was filed on August 2, 2022, Respondents accepted the claim as a medical-only one.

On June 9, 2022, Claimant filed a Form AR-C, requesting the full range of additional benefits, and stated that her left wrist was broken as a result of an assault by a customer. Respondents' counsel made his entry of appearance on June 17, 2022.

On January 26, 2023, Mark Alan Peoples entered his appearance before the Commission on Claimant's behalf, and requested that she be granted her one-time change of physician. In an order entered by Interim Medical Cost Containment Division Administrator Mark McGuire on March 2, 2023, Claimant's authorized treating physician was changed from Brian Norton, M.D., to Barry Baskin, M.D.; and she was scheduled for a visit with the latter for March 14, 2023.

On July 18, 2023, Peoples moved to withdraw from the case. In an order entered on July 28, 2023, the Full Commission granted the motion pursuant to AWCC Advisory 2003-2.

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No further action on the claim took place until November 6, 2023. On that date, Respondents filed the instant Motion to Dismiss. Therein, they argued that dismissal was warranted under Ark. Code Ann. § 11-9-702 (Repl. 2012) and AWCC R. 099.13 because Claimant had not sought a hearing on her claim. On February 22, 2024, the hearing on the motion took place. Claimant appeared, objected to dismissal, and requested a hearing on her claim. Based on this, Respondents asked that their motion be held in abeyance. This was granted. I informed them that I would hold the file in my office for 30 days to allow them to pursue an amicable resolution of the matter.

However, because no joint petition was filed during that timeframe, my office issued prehearing questionnaires to the parties on April 23, 2024. Respondents filed a timely response thereto on May 24, 2024. However, Claimant failed to respond. While the questionnaire was sent to Claimant via certified and first-class mail, the certified mailing was returned to the Commission, unclaimed, on May 20, 2023. The first-class mailing was not returned. On May 31, 2024, Respondents renewed their Motion to Dismiss. That same day, I reset the hearing on the motion for July 11, 2024, at 10:00 a.m. The Notice of Hearing, like all other correspondence in this matter, was sent to Claimant at the address she confirmed in her February 22, 2024 testimony. She claimed the certified mailing on June 5, 2024; and the first-class mailing was not returned as undeliverable. The hearing on the Motion to Dismiss proceeded as scheduled on July 11, 2024. Again, Claimant failed to appear. Respondents

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appeared through counsel and argued for dismissal of the action under the aforementioned authorities.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record as a whole, 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 July 11, 2024, hearing thereon pursuant to AWCC R. 099.13.
3. Respondents have proven by a preponderance of the evidence that Claimant has failed to prosecute her claim under AWCC R. 099.13.
4. Respondents' Motion to Dismiss should be, and hereby is, granted.
5. This claim is hereby dismissed *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). (Emphasis added)

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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 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 her claim because she has taken no further action in pursuit of it—including appearing at the July 11, 2024, hearing to argue against its dismissal—since she appeared at the first hearing thereon on February 22, 2024. Thus, the evidence preponderates that dismissal is warranted under Rule 13. Because of this finding, the application of Ark. Code Ann. § 11-9-702 (Repl. 2012) is moot and will not be addressed.

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 with prejudice. But based on

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the foregoing, I find that the dismissal of this claim should be and hereby is entered *without prejudice*.¹

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

¹“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).