

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
WCC NO. H307469**

GREGORY L. McKILLION, EMPLOYEE	CLAIMANT
RAZORBACK CONCRETE CO., INC., EMPLOYER	RESPONDENT
XL SPECIALTY INS., CARRIER	RESPONDENT

OPINION FILED JUNE 27, 2024

Hearing before Chief Administrative Law Judge O. Milton Fine II on June 7, 2024, in Jonesboro, Craighead County, Arkansas.

Claimant *pro se*.

Respondents represented by Mr. Eric Newkirk, Attorney at Law, Little Rock, Arkansas.

On June 7, 2024, the above-captioned claim was heard in Jonesboro, Arkansas. A prehearing conference took place on April 1, 2024. The Prehearing Order entered that same day pursuant to the conference was admitted without objection as Commission Exhibit 1. At the hearing, the parties confirmed that the stipulations, issues, and respective contentions were properly set forth in the order.

Stipulations

The parties discussed the stipulations set forth in Commission Exhibit 1. They are the following, which I accept:

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.

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2. The employee/employer/carrier relationship existed among the parties on November 10, 2022, and at all other relevant times.
3. Respondents have controverted this claim in its entirety.

Issues

The parties discussed the issues set forth in Commission Exhibit 1. The following were litigated:

1. Whether Claimant sustained a compensable injury in the form of right cubital tunnel syndrome.
2. Whether Claimant is entitled to reasonable and necessary medical treatment.

All other issues have been reserved.

Contentions

The respective contentions of the parties read as follows:

Claimant:

1. Claimant contends that he suffered a compensable injury in the form of right cubital tunnel syndrome, and that he is entitled to reasonable and necessary treatment of it at the expense of Respondents.

Respondents:

1. Respondents contend that Claimant cannot establish a right carpal/cubital tunnel injury on or about November 10, 2022. Respondents have no knowledge whatsoever of a purported

incident on November 10, 2022, and assert that no work event/incident occurred on that date. Furthermore, to the extent that Claimant is alleging a gradual onset cubital tunnel claim culminating in such an injury, Respondents assert that his job duties were neither rapid nor repetitive, and that the major cause element cannot be met, either.

2. Additionally, Respondents are unaware of any objective medical findings of a right carpal tunnel injury. They further assert that, to the extent any objective medical findings do exist establishing either a right carpal or right cubital tunnel injury, that any such findings are traceable to pre-existing abnormalities and are not in any way work-related or causally connected to the work environment sufficient to meet the major cause requirements.
3. By way of additional affirmative defense, Respondents assert that there was no notice of a purported work injury involving the alleged right carpal tunnel/cubital tunnel injury until October 30, 2023. Thus, no benefits would be owed prior to Respondents receiving notice of an alleged incident/event on October 30, 2023.
4. By way of further contention, Respondents plead an offset for any group medical insurance or group short-term disability benefits paid to Claimant or on his behalf. They also assert an offset for any

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unemployment benefits paid to him, to the extent allowed under Arkansas law.

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 the claimant and to observe his demeanor, 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. The stipulations set forth above are reasonable and are hereby accepted.
3. Because the evidentiary portion of the hearing was not completed (due to Claimant's expressed unwillingness to continue with the hearing while he was still on the witness stand), the merits of the substantive issues cannot be reached.
4. Respondents have proven by a preponderance of the evidence that the claim should be dismissed pursuant to AWCC R. 099.13 due to Claimant's expressed unwillingness to continue with the hearing while still on the witness stand, which prevented the hearing from being completed.
5. This claim is hereby dismissed *without prejudice*.

6. Because of the above findings/conclusions, the remaining issues—whether Claimant sustained a compensable injury in the form of right cubital tunnel syndrome, and whether he is entitled to reasonable and necessary treatment of this alleged injury—are moot and will not be addressed.

CASE IN CHIEF

Summary of Evidence

Claimant was the sole witness. Respondents announced at the outset of the hearing that they were calling two witnesses—Misty Hammock and Greg Vaught—but because the hearing was ended while Claimant was still on the witness stand, these individuals were prevented from testifying.

In addition to the Prehearing Order discussed above, admitted into evidence in this case were the following: Claimant's Exhibit 1, a compilation of his medical records, consisting of 29 pages; and Claimant's Exhibit 2, non-medical records, consisting of 13 pages.

Adjudication

A. Motion to Dismiss

During the hearing, Claimant took the witness stand. Because he had no attorney to question him on direct examination, I conducted this portion of his examination, asking questions that were geared toward helping me to make findings of fact and conclusions of law on the above-stated issues. This was in keeping with Ark. Code Ann. § 11-9-705(a)(1) (Repl. 2012), which provides in

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pertinent part that the “Commission . . . may make such investigation or inquiry, or conduct the hearing, in a manner as will best ascertain the rights of the parties.” Claimant gave extensive testimony about the parts of his job that he contended involved rapid, repetitive motion—and caused his alleged cubital tunnel syndrome. After he had been on the witness stand for an extended period of time, I elected to take a recess in order to conduct a joint petition hearing on another claim, and to give my court reporter a break. I advised the parties that, to make better use of the time allotted, I would consider allowing Claimant (subject to objection by Respondents) to testify in a more narrative fashion.

However, when I got back on the record, the following colloquy took place:

JUDGE FINE: Now I want the record to reflect this. I’m going to—I want to advise you, Mr. McKillion, you’re still under oath as a witness. I need to delve into this. I don’t want to close the record without inquiring into this. I need to make a record on this. You told me when we were visiting here in the room when I got back on the bench that—and forgive me, I don’t want to—I can’t quote you exactly—but that you didn’t want to pursue this matter any further. Was that—was I correct on that?

CLAIMANT: Yes, sir. Yes, sir.

JUDGE FINE: Okay. Why is that, why are you no longer pursuing this?

CLAIMANT: I don’t—I don’t—I just don’t feel like going no more, you know what I mean? I mean, hell, I can—I was just trying to see could I get workmen’s [sic] comp basically to pay for my surgery. And right now, this is going so long, I don’t feel like wasting nobody’s time. I’m just saying—I’m just being honest with you.

JUDGE FINE: Well, I want to be sure you understand, then.

CLAIMANT: Yeah, I—I understand exactly what I’m saying—

JUDGE FINE: Okay.

CLAIMANT: —and I understand what you [sic]. I'm done.

JUDGE FINE: All right. I need you to sit there for a second. I will need to make a record on this, okay? I want to be sure you understand this is your day in court.

CLAIMANT: Yes.

JUDGE FINE: Now I will tell you, I made a reference to the parties and I don't recall right at the moment whether it was on or off the record. I know Mr. Newkirk advised me that he thought this [hearing] would take hours and hours, and I did advise the parties that I did not schedule this for hours and hours and hours, I had scheduled it for two-and-a-half hours, and it wasn't my intent[ion] to stay here all day, and I will still tell the both of your that is [the case]. Is that statement the reason why you're doing this?

CLAIMANT: I'm just done, Your Honor. That's all I can tell you.

JUDGE FINE: Okay.

CLAIMANT: I'm withdrawing my case.

JUDGE FINE: All right. I need you to understand something. This is your day in court. If you do this, and the record is reflecting you're saying you're done, are you will[ing] to end the hearing now?

CLAIMANT: Yes, sir.

JUDGE FINE: All right. Now, if you end the hearing now, Mr. Newkirk is being deprived of the opportunity to cross-examine you. Do you understand that? I'm not even done.

CLAIMANT: Yes, sir.

JUDGE FINE: You understand that?

CLAIMANT: I understand.

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JUDGE FINE: He has witnesses that he wants to call. You understand if we end the hearing, they don't get to get called. Do you understand that?

CLAIMANT: That's correct.

JUDGE FINE: You understand, at least from my under—what I believe Mr. Newkirk is saying based upon my conversation off the record—and I'll ask him to confirm—that if we do this and I go ahead and end the hearing at your insistence, he is orally moving for a dismissal of your claim. We have a provision on this. It's Commission Rule 13 that says a claim can be dismissed for want of prosecution. You understand that I will very seriously consider dismissing this if we do this. Do you understand that?

CLAIMANT: Yes, I understand.

...

JUDGE FINE: All right. I will tell the both of you, I want to take a look at the law on this before I rule. I see no reason that I wouldn't dismiss it based upon what's happened, based upon the fact that the—is it a fair statement—and I'm not trying to put words in your mouth, Mr. McKillion—are you unwilling to proceed further with this today?

CLAIMANT: Yes. I'm willing—unwilling—I'm willing to—I'm ready to go. I ready to get this over with.

JUDGE FINE: All right. I'm going to ask you one more time, though. Are you unwilling to continue with the hearing today?

CLAIMANT: Yes, I'm unwilling.

JUDGE FINE: You're unwilling. That's the word that I need to hear, whether it was yes or no.

CLAIMANT: Yes, yes.

JUDGE FINE: You're unwilling. All right. Well, what I will do is I'm going to close the record. Based upon this, I will tell the parties that I will—I will look at this and issue a ruling. There's still going to be a transcript prepared from today's proceedings with all the

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evidence—everything is going to come in—and I will take a second look at the circumstances on this and decide how I’m going to proceed on this, okay . . . [a]nd with that, I will tell you that I will do my best to expedite a ruling on this based upon what’s arisen.

Arkansas Code Annotated § 11-9-705(a)(1) (Repl. 2012), alluded to earlier, provides as follows:

In making an investigation or inquiry or conducting a hearing, the Workers’ Compensation Commission shall not be bound by technical or statutory rules of evidence or by technical or statutory rules of procedure, except as provided by this chapter, but may make such investigation or inquiry, or conduct the hearing, in a manner that will best ascertain the rights of the parties.

Notwithstanding its not being bound by the rules of evidence or procedure, the Commission must conduct hearings in a manner that promotes “fairness” to the parties. *See Sapp v. Tyson Foods*, 2010 Ark. 517, 2010 Ark. App. LEXIS 549. I find that to rule on the merits of this claim based on the incomplete evidentiary record—lacking the complete testimony of Claimant and the testimonies of Respondents’ two witnesses completely—would unfairly surprise and prejudice Respondents.

Respondents, based on Claimant’s stated unwillingness to continue with the hearing, moved for a dismissal of his claim under AWCC R. 099.13, which 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.

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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 claims—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 demonstrated by the foregoing, Claimant without good cause declined to litigate the merits of his claim any further after recess of the hearing. Not only was his case-in-chief left incomplete, but Respondents were left unable to conduct their cross-examination of him and call their own witnesses. The evidence thus establishes that Claimant has failed to prosecute his claim, and that reasonable notice of the proceeding was provided to him. Hence, dismissal of the instant claim is readily justified under Rule 13. Respondents have met their burden of proof on this matter.

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)).

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Respondents at the hearing asked for a dismissal with prejudice, and Claimant concurred. But based on the foregoing, I find that the dismissal of this claim should be and hereby is entered *without prejudice*.¹

B. Remaining Issues

Because of the foregoing, the remaining issues—whether Claimant sustained a compensable injury in the form of right cubital tunnel syndrome, and whether he is entitled to reasonable and necessary treatment of this alleged injury—are moot and will not be addressed.

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).