

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
WCC NO. H206730**

KYTRYK L. ROBINSON, EMPLOYEE

CLAIMANT

PODS LLC, EMPLOYER

RESPONDENT

**LM INS. CORP.,
CARRIER**

RESPONDENT

OPINION FILED NOVEMBER 13, 2023

Hearing before Chief Administrative Law Judge O. Milton Fine II on November 9, 2023, in Little Rock, Pulaski County, Arkansas.

Claimant, *pro se*, not appearing.

Respondents represented by Mr. David C. Jones, Attorney at Law, Little Rock, Arkansas.

I. BACKGROUND

This matter comes before the Commission on a Motion to Dismiss by Respondents. A hearing on the motion was conducted on November 9, 2023, 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. Without objection, the Commission's file on the claim has been incorporated herein in its entirety by reference. In addition, Respondents' Exhibit 1, forms, pleadings and correspondence related to the claim, consisting of 33 numbered pages, was admitted into evidence.

ROBINSON – H206730

The record reflects the following procedural history:

The First Report of Injury or Illness filed on September 19, 2022, reflects that Claimant purportedly injured his lower back in a motor vehicle accident on September 8, 2022. Per the Form AR-2 that was also filed on September 21, 2022, Respondents accepted the claim and paid medical and temporary total disability benefits pursuant thereto.

Through then-counsel Laura Beth York, Claimant filed a Form AR-C on November 1, 2022. Therein, he requested the full range of initial and additional benefits in connection with his alleged back injury. No hearing request accompanied this filing. On February 27, 2023, York moved to withdraw from her representation of Claimant. In an order entered on March 9, 2023, the Full Commission granted the motion under AWCC Advisory 2003-2.

The record reflects that no further activity occurred on the claim until September 11, 2023, when Respondents filed the instant motion, asking for dismissal of it under AWCC R. 099.13 and Ark. Code Ann. § 11-9-702(a)(4) & (d) (Repl. 2012). On September 14, 2023, my office wrote Claimant, asking for a response to the motion within 20 days. The letter was sent by first-class and certified mail to the address listed for Claimant in the file and matching that on his Form AR-C. Someone with an illegible signature claimed the certified letter on September 16, 2023; and the first-class correspondence was not returned to the Commission. Regardless, no response from him was forthcoming. On October 9, 2023, I scheduled a hearing on Respondents' motion for November 9, 2023, at

ROBINSON – H206730

11:00 a.m. at the Commission in Little Rock. Notice of this was sent to Claimant by certified and first-class mail at the same address as before. In this instance, the United States Postal Service was unable to verify whether or not he claimed the certified letter. But the record reflects that neither it nor the first-class correspondence was returned to the Commission. Thus, the evidence preponderates that he received the Notice of Hearing.

The hearing on the Motion to Dismiss proceeded as scheduled on November 9, 2023. 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 claim.
2. The parties were provided reasonable notice of the Motion to Dismiss and of the hearing thereon.
3. Claimant has failed to prosecute his claim.
4. Dismissal of this claim is thus warranted under AWCC R. 099.13.

ROBINSON – H206730

5. The application of Ark. Code Ann. § 11-9-702(d) (Repl. 2012) is moot and will not be addressed.
6. The claim is hereby dismissed *without prejudice*.

III. DISCUSSION

Arkansas Code Annotated § 11-9-702(d) (Repl. 2012) provides as follows:

If within six (6) months after the filing of a claim for additional compensation no bona fide request for a hearing has been made 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 period specified in subsection (b) of this section.

In turn, 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, 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 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).

ROBINSON – H206730

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 November 9, 2023, hearing to argue against its dismissal) since the filing of the Form AR-C on November 1, 2022. Thus, the evidence preponderates that dismissal is warranted under Rule 13. Because of this finding, the application of § 11-9-702(d) 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). 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*.¹

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).

ROBINSON – H206730

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