

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
CLAIM NO. H204175**

OPAL M. RUSSELL, EMPLOYEE

CLAIMANT

**ST. BERNARD HOSPITAL INC.,
EMPLOYER/ INSURANCE CARRIER**

RESPONDENT

**RISK MANAGEMENT RESOURCES,
THIRD PARTY ADMINISTRATOR**

RESPONDENT

OPINION FILED SEPTEMBER 11, 2023

Hearing before Administrative Law Judge Steven Porch on September 8, 2023 in Jonesboro, Craighead County, Arkansas.

Claimant was represented by Mr. Jim R. Burton, Attorney at Law, Jonesboro, Arkansas.

The Respondents were represented by Mr. S. Shane Baker, Attorney at Law, Jonesboro, Arkansas.

I. BACKGROUND

This matter comes before the Commission on a Motion to Dismiss filed by Respondents. A hearing on the motion was conducted on September 8, 2023, in Jonesboro, Arkansas. Claimant, was represented by Mr. Jim R. Burton, Attorney at Law. However, Claimant herself was not present at the hearing. Respondents were represented at the hearing by Mr. S. Shane Baker, Attorney at Law, of Jonesboro, Arkansas. In addition to Respondent's argument, the record consists of the Commission's file which has been incorporated herein in its entirety by reference.

The evidence reflects that Claimant's injury occurred on February 8, 2022, where she purportedly injured her right knee picking up a resident off the floor after having several falls back to back. This incident allegedly occurred during the course and scope of her employment. Claimant has not contacted her attorney with any updates or statuses

concerning her claim. Claimants expressed his desire to file a motion for withdrawal for the lack of communication. Since filing the Form C on June 8, 2022, this case has been inactive until Respondents filed a Motion to Dismiss due to the lack of prosecution. A hearing was held on September 8, 2023, in Jonesboro, Arkansas on the Motion to Dismiss. As previously stated, the Claimant's attorney appeared but the Claimant herself did not appear for the hearing.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record as a whole and other matters properly before the Commission, 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 reasonable and timely notice of the Motion to Dismiss and the hearing thereon pursuant to AWCC R. 099.13.
3. Respondents did prove by a preponderance of the evidence that Claimant has failed to prosecute his claim under AWCC R. 099.13.
4. The Motion to Dismiss should be, and hereby is, granted 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).

Under Ark. Code Ann. § 11-9-705(a)(3) (Repl. 2012), Respondents must prove by a preponderance of the evidence that dismissal should be granted. The standard “preponderance of the evidence” 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).

A claimant’s testimony is never considered uncontroverted. *Nix v. Wilson World Hotel*, 46 Ark. App. 303, 879 S.W.2d 457 (1994). The determination of a witness’ credibility and how much weight to accord to that person’s testimony are solely up to the Commission. *White v. Gregg Agricultural Ent.*, 72 Ark. App. 309, 37 S.W.3d 649 (2001). The Commission must sort through conflicting evidence and determine the true facts. *Id.* In so doing, the Commission is not required to believe the testimony of the claimant or any other witness, but may accept and translate into findings of fact only those portions of the testimony that it deems worthy of belief. *Id.*

After consideration of all the evidence, I find that Claimant and Respondents were given reasonable notice for the Motion to Dismiss hearing under Rule 13. I further find that Claimant has abridged this rule. Thus, I find Respondent’s Motion to Dismiss should be granted.

CONCLUSION

Based on the findings of fact and conclusions of law set forth above, Respondents’ Motion to Dismiss is hereby granted *without prejudice*.

IT IS SO ORDERED.

STEVEN PORCH
Administrative Law Judge