

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION  
WCC NO. H008203**

<b>GARY W. SMITH, EMPLOYEE</b>	<b>CLAIMANT</b>
<b>RODRIGUEZ COURIER FREIGHT, INC., EMPLOYER</b>	<b>RESPONDENT</b>
<b>NATL. LIAB. &amp; FIRE INS. CO., CARRIER</b>	<b>RESPONDENT</b>

**OPINION FILED JANUARY 12, 2023**

Hearing before Chief Administrative Law Judge O. Milton Fine II on January 12, 2023, 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 that was filed by Respondents. A hearing on the motion was conducted on January 12, 2023, 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. The record consists of Respondents' Exhibit 1, pleadings related to this claim, consisting of two pages. In addition, and without objection, the Commission's file has been incorporated herein in its entirety by reference.

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The evidence reflects that per the First Report of Injury or Illness filed on October 22, 2020, Claimant purportedly injured his lower back on September 28, 2020, when he was lifting a box at work. According to the Form AR-2 that was filed on November 3, 2020, Respondents accepted the claim and paid medical and temporary total disability benefits pursuant thereto.

On May 25, 2021, a Joint Petition was filed with the Commission on this matter. A hearing thereon was set for June 8, 2021, at the Commission in Little Rock. However, Respondents' counsel informed the Commission by letter on that date that Claimant had elected not to proceed with settlement. For that reason, the hearing on the Joint Petition was cancelled, and the file was returned to the Commission's general files.

Attorney Greg Giles entered his appearance on behalf of Claimant on August 18, 2021; and on that same date, he filed a Form AR-C on August 18, 2021. Therein, Claimant requested the full range of initial and additional benefits and alleged that he hurt his back at work on September 28, 2020, when he was "picking up [a] heavy package." No further action occurred on the claim until August 12, 2022, when Giles moved to withdraw from his representation of Claimant. In his motion, Giles stated that his client "appear[ed] to have abandoned his claim," and had failed to respond despite efforts to contact him by both phone and mail. In an Order entered on August 25, 2022, the Full Commission granted Giles's motion under AWCC Advisory 2003-2.

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On October 26, 2022, Respondents filed the instant Motion to Dismiss. Therein, they argued that dismissal was warranted under AWCC R. 099.13 and Ark. Code Ann. § 11-9-702 (Repl. 2012). The case was assigned to me on October 27, 2022; and on that same date, my office wrote Claimant, requesting a response to the motion within 20 days. The letter was sent by first-class and certified mail to the address listed by Claimant in his Form AR-C. The certified letter was returned to the Commission, undelivered, on November 21, 2022; but the first-class letter was not returned. Regardless, no response to the motion was forthcoming. On December 16, 2022, a hearing on the motion was scheduled for January 12, 2023, at 11:00 a.m. at the Commission in Little Rock. The notice was sent to Claimant by first-class and certified mail at the same address as before. In this instance, the certified letter was claimed by him on December 24, 2022; and the first-class letter was not returned. The evidence thus preponderates that Claimant received notice of the hearing.

The hearing on the Motion to Dismiss proceeded as scheduled on January 12, 2023. Again, Claimant failed to appear. But Respondents 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):

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

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 matter—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)

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Claimant has failed to pursue his claim because he has taken no further action in pursuit of it (including appearing at the January 12, 2023, hearing to argue against its dismissal) since the filing of his Form AR-C on August 18, 2021. Thus, the evidence preponderates that dismissal is warranted under Rule 13. Because of this finding, it is unnecessary to address the application of § 11-9-702.

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)). Respondents at the hearing 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*.<sup>1</sup>

#### **IV. CONCLUSION**

In accordance with the findings of fact and conclusions of law set forth above, this claim is hereby dismissed *without prejudice*.

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**IT IS SO ORDERED.**

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O. MILTON FINE II  
Chief Administrative Law Judge

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<sup>1</sup>“A dismissal ‘without prejudice’ allows a new [claim] to be brought on the same cause of action.” BLACK’S LAW DICTIONARY 825 (abridged 5<sup>th</sup> ed. 1983).