

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. G904463

KEYA TURNER, EMPLOYEE	CLAIMANT
CITY OF WEST MEMPHIS, SELF-INSURED EMPLOYER	RESPONDENT
ARK. MUNICIPAL LEAGUE, THIRD PARTY ADMINISTRATOR	RESPONDENT

OPINION FILED MARCH 28, 2022

Hearing before Administrative Law Judge O. Milton Fine II on March 25, 2022, in Marion, Crittenden County, Arkansas.

Claimant, *pro se*.

Respondents represented by Ms. Mary K. Edwards, Attorney at Law, North Little Rock, Arkansas.

I. BACKGROUND

This matter comes before the Commission on Respondents' Motion to Dismiss. A hearing on the motion was conducted on March 25, 2022, in Marion, Arkansas. Claimant, who is *pro se*, failed to appear. Respondents were represented at the hearing by Ms. Mary K. Edwards, Attorney at Law, of North Little Rock, Arkansas. The record consists of Respondents' Exhibit 1—forms, pleadings and correspondence related to the claim—consisting of one index page and four numbered pages thereafter. In addition, Commission's file has been, without objection, incorporated herein in its entirety by reference.

Per the First Report of Injury or Illness filed on July 16, 2019, Claimant purportedly injured her neck and throat on June 21, 2019, when a rear-end

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loader struck a truck in which she was sitting. According to the Form AR-2 that was filed that same date, Respondents accepted the claim as a medical-only one.

On July 11, 2019, Claimant filed a Form AR-C, requesting additional medical treatment. Therein, she alleged that her vehicle was struck by a bulldozer. She petitioned the Commission for a one-time change of physician. In an order entered on October 11, 2019, her authorized treating physician was changed to Laverne Lovell, M.D. An appointment with Lovell was scheduled for October 17, 2019. Email correspondence in the file reflects that Claimant thereafter attempted to obtain MRIs for her neck and back, but Respondents refused to authorize them. However, nothing before me indicates that Claimant asked for a hearing on this issue at that time. The last contact she made with the Commission up to that point took place on January 13, 2020, when she made an email inquiry to the Medical Cost Containment Division about her claim.

The record reflects that no further action was taken on this case until April 12, 2021. On that date, Respondents filed a Motion to Dismiss. The file was assigned to me on April 13, 2021; and my office wrote Claimant the next day, asking for a response to the Motion to Dismiss within 20 days. The correspondence was sent by certified and first-class mail to the address that Claimant listed in her Form AR-C. While the certified letter was returned to the Commission, undelivered, on May 19, 2021, the first-class letter was not returned. Regardless, no response from Claimant was forthcoming.

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On May 12, 2021, I scheduled a hearing on the Motion to Dismiss for May 28, 2021, at 10:30 a.m. at the Crittenden County Courthouse in Marion. The hearing notice was sent to Claimant via certified and first-class mail at the same address as before. The certified letter was signed for on May 14, 2021, and the first-class correspondence was not returned. The evidence thus preponderates that Claimant had notice of the hearing.

The hearing on the Motion to Dismiss proceeded as scheduled on May 28, 2021. Claimant appeared at the hearing and objected to dismissal of her claim. Respondents appeared through counsel (who entered her appearance on May 12, 2021) and argued for dismissal under AWCC R. 099.13.

At the hearing, Claimant testified that the reason that she did not take any steps to prosecute the claim after she obtained her change of physician was that she did not understand how to do so. Shown the letter from my office dated April 14, 2021, Claimant stated that she thought—incorrectly—that it originated from Respondents. She has confused Respondents with the Commission. Claimant requested a hearing on her claim, in the event that it is not dismissed, to obtain additional treatment.

In an opinion filed on June 7, 2021, I denied the Motion to Dismiss. In so doing, I wrote: “Prehearing questionnaires will be immediately issued to the parties, and this matter will proceed to a full hearing on the merits.” However, the file was inadvertently returned to the Commission’s general files. It was retrieved from the Clerk of the Commission on July 27, 2021; and prehearing

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questionnaires were issued to the parties that same day. Claimant failed to file a timely response thereto. Thus, on August 20, 2021, my office sent her an email, warning her that if she failed to respond by the close of business that day, her file would again be returned to general files. Because she still failed to respond, I followed through on that action on August 23, 2021.

The record reflects that nothing further took place on the claim until January 11, 2022, when Respondents filed the instant Motion to Dismiss. It was again grounded in AWCC R. 099.13, along with Ark. Code Ann. § 11-9-702(d) (Repl. 2012). On January 12, 2022, my office wrote Claimant, requesting a response to the motion within 20 days. The letter was sent to her both by certified and first-class mail to the same address that had been used—successfully—previously. Claimant signed for the certified letter on February 14, 2022; and the first-class letter was never returned. Regardless, no response from her was forthcoming. On February 9, 2022, I scheduled a hearing on the Motion to Dismiss for March 25, 2022, at 10:30 a.m. at the Crittenden County Courthouse in Marion—the same location as the previous hearing. As before, Claimant signed for the certified letter—this time on March 1, 2022—and the first-class letter to her was never returned to the Commission.

While Respondents appeared at the hearing through counsel and argued in support of their Motion to Dismiss, Claimant did not appear in this instance.

II. 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, 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 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 under AWCC R. 099.13.
5. Because of the above finding, it is unnecessary to address the application of Ark. Code Ann. § 11-9-702(d) (Repl. 2012).

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). In turn, Ark. Code Ann. § 11-9-702(a)(4) (Repl. 2012) reads:

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If within six (6) months after the filing of a claim for compensation no bona fide request for a hearing has been made with respect to the claim, the claim may, upon motion and after hearing be dismissed without prejudice to the refiling of the claim within limitation periods specified in subdivisions (a)(1)-(3) of this section.

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).

The evidence preponderates that (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 March 25, 2022, hearing to argue against its dismissal) since she appeared at the previous hearing on May 28, 2021. Thus, dismissal is warranted under RulPe 13, and is hereby granted. For that reason, it is unnecessary to address the application of Ark. Code Ann. § 11-9-702(d) (Repl. 2012) here.

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). This includes claims dismissed under Rule 13. *Johnson, supra*. In *Abo v. Kawneer Co.*, 2005 AWCC 226, Claim No. F404774 (Full Commission Opinion filed November 15, 2005), the Commission wrote: “In

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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*.¹

CONCLUSION

Based on the findings of fact and conclusions of law set forth above, Respondents’ Motion to Dismiss is hereby granted, and 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).