

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
WCC NO. H100357**

WYLLOW TREE, EMPLOYEE	CLAIMANT
METRO BUILDERS & RESTORATION, EMPLOYER	RESPONDENT
ALLIED EASTERN INDEMN. CO., CARRIER	RESPONDENT

OPINION FILED JANUARY 13, 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. R. Scott Zuerker, 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. R. Scott Zuerker, Attorney at Law, of Fort Smith, Arkansas. The record consists of the Commission's file, which has been incorporated herein in its entirety by reference without objection.

The evidence reflects that per the First Report of Injury or Illness filed on January 11, 2021, Claimant purportedly injured her right knee at work on December 28, 2020. According to the Forms AR-2 that were filed on January 11

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and 27, 2021, Respondents accepted the claim and paid medical and temporary total disability benefits pursuant thereto.

Attorney Laura Beth York entered her appearance on behalf of Claimant on April 8, 2022; and on that same date, she filed a Form AR-C. Therein, she requested the full range of initial and additional benefits and alleged that her client hurt her “right knee, right ankle, and other whole body” at work on December 20, 2020. Respondents’ counsel entered his appearance on April 19, 2022.

On June 27, 2022, York moved to withdraw from her representation of Claimant. In an Order entered on July 7, 2022, the Full Commission granted the motion under AWCC Advisory 2003-2.

On October 11, 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(a)(4)¹ (Repl. 2012) because Claimant has not requested a hearing and “has had reasonable time to move forward with this claim but has failed to do so.” The case was assigned to Administrative Law Judge Terry Don Lucy on October 12, 2022; and on October 14, 2022, he 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 on her 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

¹Because this is a claim for additional benefits, the applicable provision is Ark. Code Ann. § 11-9-702(d) (Repl. 2012).

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response to the motion was forthcoming. On November 15, 2022, a hearing on the motion was scheduled for December 22, 2022, at 9:30 a.m. at the Commission in Little Rock. Later, on November 30, 2022, the hearing was rescheduled for the same location on January 12, 2023 at 11:30 a.m. 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 her on December 6, 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 before me 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):

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 her claim under AWCC R. 099.13.

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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) Claimant has failed to pursue her claim because she 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 her Form AR-C on April 8, 2022. 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.

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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*.²

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

²“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).