

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
WCC NO. H206637**

ROBIN USSERY, EMPLOYEE	CLAIMANT
MY FIRST SCHOOL, EMPLOYER	RESPONDENT
NAT'L SPECIALTY INS., CARRIER	RESPONDENT
SEDGWICK CLAIMS MGMT. SVCS., THIRD PARTY ADMINISTRATOR	RESPONDENT

OPINION FILED JUNE 12, 2023

Hearing before Administrative Law Judge O. Milton Fine II on June 8, 2023, in Little Rock, Pulaski County, Arkansas.

Claimant represented by Mr. James W. Stanley, Jr., Attorney at Law, Little Rock, Arkansas (neither appearing).

Respondents represented by Ms. Lauren Scroggins, 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 June 8, 2023, in Little Rock, Arkansas. No testimony was taken in the case. Claimant failed to appear at the hearing; and her counsel waived his appearance. . The record consists of Respondents' Exhibit 1, the Motion to Dismiss, consisting of two pages; and Respondents' Exhibit 2, pleadings, forms and correspondence related to the claim, consisting of eight pages. In addition, without objection, the Commission's file has been incorporated herein in its entirety by reference.

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The record reflects the following procedural history:

Per the First Report of Injury or Illness filed on September 15, 2022, Claimant purportedly injured her toes at work on August 19, 2022. According to the Form AR-2 that was filed on September 15, 2022, Respondents accepted the claim and paid medical and indemnity benefits pursuant thereto.

On September 22, 2022, Claimant filed a Form AR-C, requesting initial benefits and alleging that she injured her left foot and great toe on August 18, 2022, when they were struck by the door of a metal cooler at her place of employment. She added that she is diabetic. Accompanying this filing was a hearing request, signed by Claimant's counsel, on the issue of her entitlement to temporary total disability benefits. In response, Crystal Cox with the respondent third-party administrator emailed the Commission on September 26, 2022, stating that their position had not changed.

On September 12, 2022, Claimant's counsel wrote the Commission, requesting a one-time change of physician. Notes from Susan Washington with the Medical Cost Containment Division indicate that the request was not ultimately processed because: (1) on September 30, 2022, she was informed by Cox that Claimant was no longer represented; and (2) as of October 13, 2022, she had been unable to reach Claimant or her attorney to see if the change of physician was still desired.

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Respondents' counsel entered her appearance before the Commission on October 11, 2022. On October 25, 2022, Claimant's counsel wrote her, stating that his client "no longer wishes to pursue her workers' compensation claim as she has returned to work."

The record reflects that no further activity took place on this claim until March 22, 2023, when Respondents filed the instant Motion to Dismiss and brief in support thereof. Therein, they alleged that dismissal of the claim was called for under AWCC R. 099.13 and Ark. Code Ann. § 11-9-702 because Claimant "ha[d] taken no further action to prosecute this claim" since her attorney's October 25, 2022, letter. The file was assigned to me on March 23, 2023; and on April 3, 2023, I wrote Claimant and her counsel, requesting a response to the motion within 20 days. The letter was sent to Claimant by both certified and first-class mail, and to her attorney by first-class mail. The United States Postal Service was unable to verify whether Claimant claimed the certified letter; but the first-class letters to her and her attorney were not returned. Regardless, no response from forthcoming from either of them by the deadline.

On May 9, 2023, I scheduled a hearing on the Motion to Dismiss for June 8, 2023, at 11:30 a.m. at the Commission in Little Rock. The hearing notice was sent not only to the attorneys of record, but to Claimant. She signed for the certified mail on May 11, 2023; and the first-class mail was not returned.

On May 11, 2023, Claimant’s counsel wrote the Commission, stating:

I am in receipt of the Notice of Hearing on the Motion to Dismiss. We are not opposed to the granting of the Motion to Dismiss. Therefore, neither myself nor the claimant, Robin Ussery, will be present at the hearing.

(Emphasis in original) The hearing on the Motion to Dismiss proceeded as scheduled on June 8, 2023. Both Claimant and her counsel waived their appearance; but, again, counsel has indicated no objection to a dismissal of this claim. 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. The evidence preponderates that Claimant has failed to prosecute this 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 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, 85, 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 the 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).

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 prosecute the claim because she has taken no further action in pursuit of it—including appearing at the June 8, 2023, hearing on the Motion to Dismiss—since making her change-of-physician request on September 12, 2022. Thus, the evidence preponderates that dismissal is warranted under Rule 13. Because of this finding, it is unnecessary to address the applicability of Ark. Code Ann. § 11-9-702 (Repl. 2012).

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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 the claim should be and hereby is entered without prejudice.

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