

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
WCC NO. H304329**

KIMBERLY D. McCUIEN, EMPLOYEE	CLAIMANT
AMAZON COM SVCS. LLC, EMPLOYER	RESPONDENT
AMER. ZURICH INS. CO., CARRIER	RESPONDENT

OPINION FILED JUNE 6, 2024

Hearing before Administrative Law Judge O. Milton Fine II on June 6, 2024, in Little Rock, Pulaski County, Arkansas.

Claimant, *pro se*, not appearing.

Respondents represented by Mr. Rick Behring, Jr., Attorney at Law, Little Rock, Arkansas.

I. BACKGROUND

This matter comes before the Arkansas Workers' Compensation Commission (the "Commission") on a Motion to Dismiss by Respondents. A hearing on the motion was conducted on June 6, 2024, in Little Rock, Arkansas. No testimony was taken in the case. Claimant failed to appear at the hearing; she notified the Commission that she was waiving her appearance *see infra*). Admitted into evidence were Commission Exhibit 1 and Respondents' Exhibit 1—forms, pleadings and correspondence related to the claim—consisting of 29 and 24 pages, respectively.

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The evidentiary record reflects the following procedural history:

Per the Form AR-C filed on July 7, 2023, Claimant allegedly injured her right knee at work on June 6, 2023, with she was struck by the tongue of a cart. On August 15, 2023, she emailed the Clerk of the Commission, requesting a hearing on her claim. According to the Form AR-2 that was filed on October 24, 2023, Respondents accepted the claim as a medical-only one.

The file was assigned to the Legal Advisor Division of the Commission. However, on September 14, 2023, Claimant was sent a letter, informing her that because she had not returned her Legal Advisor questionnaire response, her file was being returned to the Commission's general files. She complied thereafter, filing a completed questionnaire on October 12, 2023. Therein, Claimant represented that the value of her claim was in excess of \$2,500.00, and that she was not interested in pursuing mediation.

Because of this, the file was reassigned to my office on October 17, 2023, to conduct a full hearing. Prehearing questionnaires and preliminary notices were issued to the parties on October 18, 2023. In the meantime, on November 2, 2023, Claimant emailed the Commission, requesting her one-time change of physician. As a result, I suspended the prehearing process and had the file reassigned to the Medical Cost Containment Division of the Commission to process the request. That division entered an order on December 18, 2023, changing Claimant's authorized treating physician from Dr. John Adametz to Dr.

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Scott Bowen, and scheduling an appointment with the latter for December 28, 2023. The appointment took place, and Respondents accepted the treatment recommendations of Bowen. The doctor released her from treatment as of February 1, 2024, assigning no permanent restrictions in connection with her knee injury.

Claimant made another hearing request on April 2, 2024. The file was reassigned to my office on April 3, 2024. But before prehearing questionnaires were issued to the parties, Respondents on April 10, 2024, filed the instant Motion to Dismiss under Ark. Code Ann. § 11-9-702(a)(4) & (d) (Repl. 2012) and AWCC R. 099.13.

Prehearing questionnaires were issued to the parties on April 12, 2024. Since the hearing request came before the motion's filing, I informed the parties on April 15, 2024, that I was holding the motion in abeyance. On May 1, 2024, Claimant emailed my office that she was withdrawing her hearing request because Respondents and she were able to resolve the matter amicably. Based on this, Respondents' counsel that same day requested a hearing on the Motion to Dismiss. The next day, May 2, 2024, Claimant notified my office that she did not object to the motion being granted, and that she would not be appearing at the hearing thereon. The Notice of Hearing, which scheduled a hearing on the Motion to Dismiss for June 6, 2024, at 9:30 a.m. at the Commission in Little Rock, was

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sent to the parties that same day via certified mail. Claimant signed for her copy of the notice on May 9, 2024.

The hearing on the motion proceeded as scheduled on June 6, 2024. Again, Claimant did not appear. But 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

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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 this 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 pursue the claim because she has taken no further action in pursuit of it—including appearing at the June 6, 2024, hearing on the Motion to Dismiss—since withdrawing her hearing request and communicating that she did not object to dismissal of the claim. 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(a)(4) & (d) (Repl. 2012).

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.

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137, 744 S.W.2d 402 (1988). The Commission and the Appellate Courts have expressed a preference for dismissals *without prejudice*. See *Professional Adjustment Bureau v. Strong*, 75 Ark. 249, 629 S.W.2d 284 (1982)). Respondents at the hearing asked for a dismissal without prejudice. I agree and find that the dismissal of this 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