

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION  
WCC NO. H404748**

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|-----------------------------------------------|-------------------|
| <b>EUGENE R. PENDERGAST, EMPLOYEE</b>         | <b>CLAIMANT</b>   |
| <b>XYLEM TREE EXPERTS, INC.,<br/>EMPLOYER</b> | <b>RESPONDENT</b> |
| <b>TRUMBULL INS. CO.,<br/>CARRIER</b>         | <b>RESPONDENT</b> |

**OPINION FILED MAY 15, 2025**

Hearing before Administrative Law Judge O. Milton Fine II on May 14, 2025, in Clinton, Van Buren 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 by Respondents. A hearing on the motion was conducted on May 14, 2025, in Clinton, Arkansas. No testimony was taken in the case. Claimant, who according to Commission records is *pro se*, failed to appear at the hearing. In order to address adequately this matter under Ark. Code Ann. § 11-9-705(a)(1) (Repl. 2012)(Commission must “conduct the hearing . . . in a manner which best ascertains the rights of the parties”), and without objection, I have blue-backed to the record documents from the Commission’s file on the claim, consisting of nine pages. In accordance with *Sapp v. Tyson Foods, Inc.*, 2010 Ark. App. 517, 2010

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Ark. App. LEXIS 549, these documents have been served on the parties in conjunction with this opinion.

The record shows the following procedural history:

On July 24, 2024, through then-counsel Mark Alan Peoples, Claimant filed a Form AR-C, requesting the full range of initial benefits in connection with an injury in the form of Lyme disease, which he alleged he contracted as a result of a tick bite he suffered while at work on June 19, 2024. No hearing request accompanied this filing. On July 31, 2024, Respondents filed a Form AR-2, stating that they were controverting the claim in its entirety. Peoples moved to withdraw from his representation of Claimant. In an order entered on December 20, 2024, the Full Commission granted the motion under AWCC Advisory 2003-2.

The record reflects that nothing further took place on the claim until February 14, 2025. On that date, Respondents filed the instant motion, asking for dismissal of the claim under Ark. Code Ann. § 11-9-702 (Repl. 2012) and AWCC R. 099.13 because Claimant had not sought a hearing before the Commission and had otherwise failed to pursue his claim. The file was assigned to Administrative Law Judge James D. Kennedy on February 20, 2025. His office wrote Claimant that same day, asking for a response to the motion within 20 days. The letter was sent by first class and certified mail to the Mountain View, Arkansas address for him listed in the file and on his Form AR-C. The certified letter was returned to the Commission on February 26, 2025, with the notation

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that his address lacked a mail receptacle; but the first-class letter was not returned. Regardless, no response from Claimant to the motion was forthcoming. On March 13, 2025, a hearing on the Motion to Dismiss was scheduled for May 14, 2025, at 10:00 p.m. at the Van Buren County Quorum Courtroom in Clinton. The notice was sent to Claimant via first-class and certified mail to the same address as before. In this instance, Claimant claimed the certified letter on March 17, 2025; and the first-class letter was, again, not returned.

The hearing on the Motion to Dismiss proceeded as scheduled before the undersigned. Again, Claimant failed to appear at the hearing. But Respondents appeared through counsel and argued for dismissal under the foregoing 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 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 this claim under AWCC R. 099.13.
4. The Motion to Dismiss is hereby granted; this claim for initial benefits 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 pursue his claim because he has taken no further action in

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pursuit of it (including appearing at the May 14, 2025, hearing to argue against its dismissal) since the filing of his Form AR-C on July 24, 2024. Thus, the evidence preponderates that dismissal is warranted under Rule 13. Because of this finding, it is unnecessary to address the application of Ark. Code Ann. § 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). 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*.<sup>1</sup>

#### **IV. CONCLUSION**

In accordance with the Findings of Fact and Conclusions of Law set forth above, this claim for additional benefits is hereby dismissed *without prejudice*.

**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).