

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F712545

JANICE M. HOSKINS, EMPLOYEE **CLAIMANT**

**DOLLAR GENERAL STORE,
SELF-INSURED EMPLOYER** **RESPONDENT**

**DOLGENCORP, INC.,
THIRD PARTY ADMINISTRATOR,** **RESPONDENT**

OPINION FILED SEPTEMBER 18, 2008

Hearing before Administrative Law Judge O. Milton Fine II on September 17, 2008 in Conway, Faulkner County, Arkansas.

Claimant, *pro se*, did not appear.

Respondents represented by Ms. Betty Hardy, Attorney at Law, Little Rock, Arkansas.

I. BACKGROUND

This matter comes before the Commission on Respondents' motion to dismiss. A hearing on the motion was conducted on September 17, 2008, in Conway, Arkansas. The Claimant, who is *pro se*, did not appear. Respondents were represented at the hearing by Ms. Betty Hardy, Attorney at Law, of Little Rock, Arkansas. No testimony was taken in the case. The sole exhibit at the hearing was the Form AR-C filed by Claimant, which was admitted as Commission's Exhibit 1. Without objection, I have blue-backed to the record documents from the Commission's file that detail the history of the claim.

On December 4, 2007, Claimant filed a Form AR-C with the Commission. Therein, she stated that she sustained an injury on September 13, 2007 at the Dollar General Store in Conway. She described the incident as follows: "I lifted a

50 pound case of sugar and broke a disk in my back and pulled 3 muscles. Over the next few weeks I became numb from the chest down to my feet. I could not walk anymore.” On December 10, 2007, Respondent Dollar General wrote the Commission to state that the Form AR-C was the first notice it had of the alleged injury. Dollar General added that because it had no knowledge of the claim and had received no medical documentation to support that Claimant sustained a work-related injury, it was denying the claim at that time. This same position was taken by Dollar General in a Form AR-2 filed December 21, 2007.

Respondents’ counsel entered an appearance on their behalf before the Commission on January 31, 2008. Thereafter, the Commission record reflects no activity on this claim until Respondents filed its motion to dismiss on August 13, 2008. Therein, they alleged that not only has Claimant failed to take any action in support of the claim since the filing of the Form AR-C, but she has failed to answer interrogatories that were propounded to her on January 29, 2008. For these reasons, Claimant requested dismissal pursuant to Ark. Code Ann. § 11-9-702(d) (Repl. 2002) and AWCC R. 099.13.

On August 18, 2008, I wrote the Claimant by certified mail, return receipt requested, advising her that he had 15 days to respond to the motion. This letter was sent to the Claimant at the address she placed on the Form AR-C. However, the letter was returned unclaimed. Notice of the September 17, 2008 hearing was sent to the parties by first class and certified mail, return receipt requested, on August 25, 2008. However, both letters were returned as undeliverable—no forwarding address was available. The Commission resent the notice on

September 2, 2008 by first class and certified mail, return receipt requested, to a different address obtained from Respondents' counsel. However, both letters were again returned as undeliverable. As stated above, Claimant failed to appear at the hearing.

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. 2002):

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. Because Respondents have paid no benefits on this claim, the claim is one for initial benefits.
3. Respondents have based their motion in part on Ark. Code Ann. § 11-9-704(d) (Repl. 2002), which pertains to claims for additional benefits, instead of § 11-9-704(a)(4), which governs claims for initial benefits.
4. Dismissal of the claim is not warranted under Ark. Code Ann. § 11-9-704(d) (Repl. 2002).
5. Claimant and Respondents were provided reasonable notice of the motion to dismiss and of the hearing thereon.
6. Claimant has failed to prosecute her claim.

7. Dismissal of this claim *without prejudice* is warranted under AWCC R. 099.13.

III. DISCUSSION

Arkansas Code Annotated § 11-9-702(a)(4) (Repl. 2002) provides:

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.

In turn, § 11-9-702(d) states:

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

Respondents filed their motion under Subsection (d). But this only pertains to claims for additional benefits, and Respondents have denied this claim from its beginning. Hence, this provision does not apply. They did not move for dismissal under Subsection (a)(4), which would appear to allow dismissal under the facts presented here.

However, they have also based their motion on AWCC R. 099.13, which 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 shown by the evidence, Claimant has failed to pursue her claim in any fashion since she filed it on December 4, 2007. This neglect includes her failure to respond to discovery or, apparently, to keep the Commission apprised of her current address. I also find that reasonable notice of the motion to dismiss and of the September 17, 2008 hearing thereon was provided to the parties. Hence, dismissal of the instant claim is warranted under Rule 13.

That leaves the question of whether the dismissal 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*, 55 Ark. App. 83, 929 S.W.2d 730. In *Abo v. Kawneer Co.*, 2005 AWCC 226, 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 upon the foregoing, the dismissal of this claim should be *without prejudice*.

IT IS SO ORDERED.

O. MILTON FINE II
Administrative Law Judge