

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F705940

BEVERLY A. NEWSOM, EMPLOYEE **CLAIMANT**

**WAL-MART ASSOCIATES, INC.,
SELF-INSURED EMPLOYER** **RESPONDENT**

**CLAIMS MANAGEMENT, INC.,
THIRD PARTY ADMINISTRATOR,** **RESPONDENT**

OPINION FILED MAY 1, 2008

Hearing before Administrative Law Judge O. Milton Fine II on April 16, 2008 in Conway, Faulkner County, Arkansas.

Claimant, *pro se*, did not appear.

Respondents represented by Ms. Susan M. Fowler, 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 April 16, 2008, in Conway, Arkansas. The Claimant, who is *pro se*, did not appear. Respondents were represented at the hearing by Ms. Susan M. Fowler, Attorney at Law, of Little Rock, Arkansas. No testimony was taken in the case. The record consists of Respondents' Exhibit 1, comprised of 30 pages of documents that include the motion to dismiss, brief in support, and exhibits thereto; and Respondents' Exhibit 2, a payout history on the claim. In addition, I have blue-backed to the record documents from the Commission's file that detail the history of the claim.

On December 28, 2006, Claimant was removing pallets from the store of Respondent Wal-Mart when her foot became pinned between two stacks of pallets.

Respondents accepted the injury and paid medical benefits. Claimant filed a Form AR-C on June 14, 2007, asking for medical benefits in connection with the ankle, plus gastro-intestinal difficulties she alleged were caused by anti-inflammatory medication prescribed for the ankle injury. Respondents controverted this portion of the claim.

By certified mail on July 23, 2007, Claimant was served with interrogatories and a request for production of documents. However, she never responded to this discovery. Respondents' counsel represented to the Commission that on or about August 10, 2007, Claimant contacted counsel and stated that she did not intend to pursue the claim. This is corroborated by the fact that Claimant has never requested a hearing.

On February 25, 2008, Respondents filed the instant motion and brief in support, requesting that the claim be dismissed pursuant to Ark. Code Ann. § 11-9-702(a)(4) and AWCC R. 099.13. On February 27, 2008, I wrote Claimant and gave her 15 days to respond. "Beverly Newsom" signed for the certified letter on February 28, 2008; but no response was filed. On March 14, 2008, notice was sent to Claimant of the April 16, 2008 scheduled hearing. "Edna Newsom" signed for the notice on March 15, 2008; but again, Claimant did not 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. Claimant has failed to prosecute her claim.
3. Claimant was provided reasonable notice of the motion to dismiss and of the hearing thereon.
4. Dismissal of this claim is not warranted under Ark. Code Ann. § 11-9-702(a)(4) (Rep. 2002) because this is a claim for additional benefits.
5. 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 addition, 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)(discussing these provisions).

As shown by the evidence, Claimant has received some benefits. Respondents accepted the ankle injury, but controverted the alleged gastro-

intestinal injury. Hence, the claim is one for additional benefits, and § 11-9-702(a)(4) does not apply. Respondents have not asked for a dismissal under § 11-9-702(d), which pertains to claims for additional benefits. Thus, while Claimant has not made a *bona fide* hearing request within six months of the claim's filing, dismissal is not warranted under § 11-9-702.

As for Rule 13, the evidence at bar clearly shows that Claimant has failed to prosecute her claim, and that reasonable notice of the motion to dismiss and of the April 16, 2008 hearing thereon was provided to her. Hence, dismissal of the instant claim is justified 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