

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NUMBER E614047

BOBBY GRAY, EMPLOYEE

CLAIMANT

**KURT MANUEL,
UN-INSURED, EMPLOYER**

RESPONDENT

OPINION FILED SEPTEMBER 11, 2003

The Opinion, in this case, is being submitted on the record. By agreement, there was no additional hearing subsequent to the Full Commission Opinion of June 19, 2002, which vacated and remanded the opinion of the ALJ.

The claimant was represented by David Solomon, Attorney at Law, Helena, Arkansas.

The respondent was represented by Roy C. Lewellen, Attorney at Law, Marianna, Arkansas.

STATEMENT OF THE CASE

The first hearing in this case was conducted on March 8, 2001, in Brinkley, Monroe County, Arkansas. Both the claimant and his attorney appeared for the hearing. Neither the respondent, nor his attorney, appeared for the hearing. There was evidence that the respondent's attorney received notice that the hearing would be held on March 8, 2001. The Administrative Law Judge found that since neither the respondent, nor his attorney, appeared at the hearing, the respondent waived his defense of the statute of limitations. The claimant testified at the hearing and introduced documents.

An Opinion from the ALJ was filed April 30, 2001. The Administrative Law

Judge found that the claimant sustained a compensable injury, that he was entitled to temporary total disability from September 12, 1996, through March 11, 1997, and that the claimant was entitled to an attorney's fee on the temporary total disability award and the unpaid medical expenses.

The respondent appealed, and in an Order filed June 19, 2002, the Full Arkansas Workers' Compensation Commission vacated and remanded the Administrative Law Judge's Opinion. The Full Commission stated as follows:

"Subsequent to the Administrative Law Judge's decision in this case, the Arkansas Court of Appeals has found that a claimant has the burden of proving that a claim for benefits was timely filed. See Aluminum Company of America v. Rollon, 76 Ark. App. 240, ____ S.W.3d ____ (2001). Because we interpret from Rollon that a claimant has the burden of proof on a statute of limitations issue, we find that the Administrative Law Judge erred as a matter of law in concluding that the statute of limitations issue raised prior to the hearing was waived simply because the respondent did not present any evidence at the hearing.

Further, we note that resolution of the statute of limitations issue presented in this case appears to turn, at least in part, on the precise language of the written claim, which the claimant testified that he filed on October 23, 1996, but which the claimant did not offer into evidence at the hearing held on March 8, 2001. See generally Ark. Code Ann. § 11-9-702(a)-(c).

We vacate the Administrative Law Judge's finding that the statute of limitations issue was waived by the respondent's nonappearance at the hearing. In addition, we remand this case to the Administrative Law Judge to take such additional action as is necessary to obtain and make a part of the record the request for additional benefits which the claimant testified that he filed on October 23, 1996. The Administrative Law Judge shall thereafter make additional findings on the statute of limitations issue presented in this case."

On June 28, 2002, by agreement of all parties, a prehearing conference was scheduled for August 5, 2002. On August 5, 2002, a prehearing conference was held with all parties. As the Prehearing Order filed August 5, 2002, reflects, (copy

enclosed as Commission Exhibit A), the parties desired to litigate a number of issues, including employee-employer relationship, compensability, temporary total disability, controversion for the purposes of an attorney fee, and the statute of limitations. A full hearing was set in this case for November 7, 2002, in Helena, Arkansas.

At the request of the attorney for the claimant, Mr. David Solomon, for medical reasons, and by agreement, the hearing set for November 7, 2002, was cancelled, and the hearing was rescheduled for January 9, 2003, in Helena, Arkansas.

Mr. David Solomon had eye surgery in January, 2003, and by agreement, the January 9, 2003, hearing was cancelled and rescheduled for February 13, 2003, in Helena, Arkansas.

In February, 2003, Mr. Solomon stated that his wife was in the hospital with a serious illness. By agreement of all parties, the hearing scheduled for February 13, 2003, was cancelled.

On April 25, 2003, another prehearing conference was scheduled for May 12, 2003, since it appeared that Mr. Solomon's emergency situations which caused previous postponements had resolved. The Administrative Law Judge telephoned Mr. Solomon on May 12, 2003, but Mr. Llewellyn, attorney for respondent, could not be reached so the conference could be conducted because his daughter was experiencing complications in child birth. Mr. Llewellyn asked for an extension of the deadline to submit argument and briefs based on the statute of limitations defense. On July 8, 2003, by letter to the Commission, Mr. Llewellyn requested a hearing to present additional testimony. Based on a July 16, 2003, prehearing conference, it was agreed that all parties desired to have the Commission decide the issue of whether the statute

of limitations is a bar to the claim prior to taking additional testimony on substantive issues (such as compensability, etc.) It was noted in an Order dated July 17, 2003, that neither party desired to present additional live testimony regarding the statute of limitations issue. The Order stated:

“By August 23, 2003, both parties shall submit a stipulated set of facts regarding the statute of limitations issue, A.C.A. § 11-9-702. Simultaneously, the parties shall submit a memorandum letter brief applying the law to the facts. The parties shall pay particular attention to the Full Commission Opinion in this case dated June 19, 2002, regarding the statute of limitation. It is the claimant’s burden to prove that a claim for benefits was timely filed.”

On August 27, 2003, it was noted that the parties had not filed a set of facts or briefs, nor requested additional time.

On August 29, 2003, Mr. David Solomon sent a letter stating that on August 19, 2003, he mailed a copy of the proposed stipulation to the respondent’s attorney, Mr. Llewellyn. (Commission Exhibit B.) Mr. Solomon stated that as of August 29, 2003, he had not heard from Mr. Llewellyn. Mr. Solomon enclosed copies of a proposed stipulation and letter. As of the date of this Opinion, Mr. Llewellyn had not complied with the previous Order, nor replied to Solomon’s proposed stipulation.

Commission Exhibit C, the AR-C Form filed by claimant, Bobby Gray, on October 23, 1996, reflects that he smashed and severed his right index finger on September 11, 1996, in a logging accident.

On October 25, 1996, the Arkansas Workers’ Compensation Commission delivered Mr. Kurt Manuel a letter asking the respondent to state his position regarding the claim within fifteen (15) days. Respondent obtained an attorney, and a prehearing conference was held. At a hearing in Brinkley, AR, (the one during which neither the

respondent, nor his attorney appeared), the claimant testified that he worked for Kurt Manual in 1996 for five or six months prior to the accident. The claimant testified that he was hired to assist in cutting trees. His job was to hook a truck onto the tree after it was cut down, so that the tree could be dragged out and loaded.

Prior to being hired, the claimant talked to the respondent, Kurt Manual, and agreed that he would be paid \$50.00 or \$60.00 in case per day, depending on how much work was done and how many logs were pulled. The claimant testified that he usually received \$250.00 per week. The claimant apparently did not have an automobile, and Mr. Manual gave the claimant a ride nearly everyday to go to work and returned him back home after the day was over. The claimant was paid in cash and the claimant rode to work with Kurt Manual five or six days a week.

The claimant testified that he was pulling some logs and was on the back of the "skidder" that pulled out the logs. A co-employee let the apparatus down that pulled the logs and the cable smashed claimant's hand. He was rushed to the hospital and part of his finger had to be amputated. The claimant testified that the employer paid the hospital emergency room bill.

The claimant was off work from the date of the injury until October 4, 1996. He saw Dr. Prasad Athota, in Helena, Arkansas. The claimant testified that he was not able to return to work until six months after he was injured because he was still having pain in his finger. Six months after the accident, however, he was able to return to work and ultimately begin to work at Shoney's Restaurant in Memphis, Tennessee.

The records and statements made in the previous hearing (a copy of which is made part of the record herein as Commission Exhibit D,) indicated that the

claimant filed his claim on October 23, 1996, and he requested a hearing in December, 1996. The claimant was incarcerated from February, 1997, until sometime in 1999. The medical records admitted in the previous hearing reflect that the claimant had amputated the tip of his finger halfway through the nail with partial amputation of the distal phalanx of the little finger.

Claimant's Exhibit 3 to the previous hearing reflects that the claimant saw Dr. Athota on September 19, 1996, and October 4, 1996. As stated earlier, the claimant was incarcerated for two years until 1999.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The preponderance of the evidence reflects that the claimant's claim is barred by the statute of limitations, A.C.A. 11-9-702. The preponderance of the evidence reflects that the claimant, within two years after the filing of the claim, did not receive weekly benefit compensation or medical treatment.

DISCUSSION

By agreement, the issue to be decided was limited to whether the claim was barred by the statute of limitations. The preponderance of the evidence reflects that the claimant alleged that he was injured on September 11, 1996. He filed a form AR-C on October 23, 1996. He sought medical treatment up to October 4, 1996. He was told to follow-up if he had any problems, and, at least, according to Dr. Athota's letter of February 6, 1997, he did not return to the doctor's office complaining of complications with his finger. It is noted that the Form AR-C is a claim for initial

benefits. The Form AR-C shows that the Workers' Compensation Commission received the claimant's Form AR-C on October 25, 1996.

Pursuant to the decision in Aluminum Company of America v. Rollon, 76 Ark. App. 240, ___ S.W.3d ___ (2001), the claimant has the burden of proof on the statute of limitation issue.

A.C.A. § 11-9-702 (a)(1) states:

"A claim for compensation for disability on account of an injury shall be barred unless filed with the workers' compensation commission within two years from the date of the compensable injury. If during the two year period following the filing of the claim the claimant receives no weekly benefit compensation and receives no medical treatment resulting from the alleged injury, the claim shall be barred thereafter."

_____The preponderance of the evidence reflects that the claimant filed his claim for compensation within two years from the date of the injury. However, he received no weekly benefit compensation, nor any medical treatment as a result of his injury for more than two years following the filing of the claim, according to the evidence. The preponderance of the evidence reflects that the claimant's claim is time barred since the claimant did not receive any weekly benefit compensation or medical treatment during the two year period following the filing of his claim.

Therefore, the preponderance of the evidence reflects that the Form AR-C was a claim for initial benefits subject to the provisions of A.C.A. § 11-9-702(a)(1). The preponderance of the evidence reflects that the claim became time barred when the claimant did not receive any compensation or treatment during the two year period following October 25, 1996. The claimant has not demonstrated that the statute of limitations was tolled. Therefore, the preponderance of the evidence reflects that the

claimant's claim is barred by the statute of limitations, and his claim is respectfully denied and dismissed.

IT IS SO ORDERED.

DON N. CURDIE,
Administrative Law Judge

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