

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NUMBER E904260**

**FRANCES WHALEY, EMPLOYEE**

**CLAIMANT**

**BEMIS COMPANY, INC., EMPLOYER**

**RESPONDENT**

**ST. PAUL FIRE & MARINE  
INSURANCE COMPANY, CARRIER**

**RESPONDENT**

**OPINION FILED JULY 31, 2003**

The hearing was conducted on May 21, 2003, before ADMINISTRATIVE LAW JUDGE DON N. CURDIE, at Little Rock, Pulaski County, Arkansas.

The claimant appeared on her own behalf.

The respondent was represented by Guy A. Wade, Attorney at Law, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

A hearing was held on May 21, 2003, in Little Rock, Arkansas. It was stipulated as follows:

1. The employee-employer-carrier relationship existed at all relevant times.
2. At the time of the injury, the claimant was earning \$9.97 per hour, working 40 hours a week. The average weekly wage was \$398.80, giving rise to a temporary total disability rate of \$265.60.
3. The claim was treated as a medical only claim and is controverted as of the date the claimant was treated and released to returned to work.

The issues to be litigated at the hearing were as follows:

1. Is this claim barred by the statute of limitations?
2. Did claimant sustain a compensable injury on February 23, 1999?
3. Is claimant entitled to temporary total disability and medical benefits?
4. Is the claimant entitled to an attorney's fee?

The claimant testified that she was injured on February 23, 1999, when a forklift hit the claimant while in the course of her employment. She indicated that she injured her abdomen, chest, right shoulder, right side, shoulder blade area and low back. The claimant ultimately saw Dr. Garcia on March 2, 1999. The claimant's chest x-ray was negative. The claimant was released to return to work, retroactive to February 23, 1999. (Cx-2, p.1) Dr. Garcia did not record any objective findings of injury. Apparently, the claimant refused to sign a Form AR-N (Employee Notice of Injury) for the respondent on February 24, 1999, but did ultimately sign an AR-N dated March 31, 1999. (Comm. Ex. 1, p. 66) The claimant mailed a letter to the St. Paul Insurance Company claim's adjuster on March 25, 1999. By letter dated April 7, 1999, the claim's adjuster stated the position of the insurance company regarding additional treatment, denying it. On April 28, 1999, the claimant signed Form AR-C (Claim for Compensation) (Comm. Ex.1, p.2).

On May 7, 1999, the claimant, on her own, saw Dr. J. D. Patterson in Monroe, Louisiana. Dr. Patterson noted the following:

"Pain and spasms were present in all planes of the shoulder on attempted range of motion." (Cx-6, p.2)

Dr. Patterson also stated that he detected spasms in the claimant's back during flexion and extension. He prescribed pain medication and took the claimant off of work. He

prescribed a course of moist heat and muscle stimulation therapy to the affected regions of her neck, shoulder and back. Notes from that May visit to the doctor reflect that the claimant was having similar problems on March 15, 1999, and April 23, 1999. Letters from the respondent reflected the controversion of the claim. By a letter dated May 19, 1999, Mr. Kenneth Buckner notified the Workers' Compensation Commission that he no longer represented the claimant. Workers' Compensation Commission Exhibit 2, page 1 (blue backing exhibit) reflects that during a conversation with a legal advisor on July 19, 1999, the claimant stated that she wanted to "drop the matter." Commission Exhibit 2, page 2 reflects that on July 26 the claimant told a legal advisor that she wanted to "drop the case."

On April 4, 2001, respondent's attorney filed a Motion for Dismissal for Lack of Prosecution. By that time the claimant had obtained an attorney. By Order dated May 15, 2001, the claimant's claim was dismissed without prejudice. On December 20, 2001, the claimant's attorney filed a "Motion to Reinstate Claim." (Comm. 1, p.23) By a response filed December 27, 2001 respondent's attorney stated the re-filing of the claim was not within the statutory period and was barred by the applicable statute of limitations.

By a letter dated February 28, 2002, the claimant's Pine Bluff, AR attorney stated that he no longer represented the claimant. The case was then returned to general files. The respondent's attorney filed another Motion to Dismiss. On March 19, 2002, claimant was notified regarding the motion to dismiss. The claimant responded by letter dated April 15, 2002. (Comm. Ex. 1, p. 50) She asked to have more time to seek an attorney. By letter dated April 22, 2002, the administrative law judge stated

that he would not dismiss her case at that time, but that she or her attorney should notify the Commission “as quickly as possible as to how they wish to proceed with this case.”

Since there was no further action by the claimant, the respondents again asked for the case to be dismissed for lack of prosecution on August 28, 2002. The case was dismissed without prejudice for lack of prosecution pursuant to A.C.A. § 11-9-702 and Rule 13 of the Arkansas Workers’ Compensation Commission on October 21, 2002. (Comm. Ex-1, p.58) In December, 2002, the claimant requested a hearing on her dismissal and a chance to present full issues for consideration. Prehearing information was distributed to claimant, who was pro se, and to respondents. A hearing date was set ,and the hearing was held on May 21, 2003.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. The employee-employer-carrier relationship existed at all relevant times.
2. At the time of the injury, the claimant was earning \$9.97 per hour working 40 hours a week. The average weekly wage was \$398.80, giving rise to a temporary total disability rate of \$265.60.
3. The claim was treated as a medical only claim and is controverted as of the date the claimant was treated and released to returned to work.
4. The preponderance of the evidence reflects that the claimant is not allowed to re-file her claim after it was dismissed by the Administrative Law Judge. The filing of the claim is barred by the stature of limitations, A.C.A. 11-9-702 (Repl. 2000.)

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#### **DISCUSSION**

Respondents raised the issue of statute of limitations pursuant to A.C.A. § 11-9-702(a)(1) which provides that:

“A claim for compensation for disability on account of an injury, other than an occupational disease or occupational infection, 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.”

It does appear that the claimant filed a claim on April 28, 1999.

Commission Exhibit 1, page 9, reflects that the claimant requested a hearing at least prior to June 11, 1999. On July 7, 1999, respondent’s counsel was entered as attorney of record and forwarded discovery requests to claimant’s counsel. As of April, 2001, the claimant had failed to respond to discovery requests or pursue the claim. The claimant, after being provided additional time to respond to the motion to dismiss, did not respond, and the matter was dismissed on May 15, 2001. (Comm. Ex-1, p. 35)

In December, 2001, the claimant’s attorney filed a motion to re-instate the claim and respondent’s attorney answered on December 27, 2001. The motion filed by the claimant’s attorney indicated that he experienced trouble getting in touch with the claimant until recently because she had lived out of state. No action was taken by the claimant, and by letter dated March 4, 2002, the claimant’s Pine Bluff, AR attorney stated that he no longer represented the claimant. On October 21, 2002, a second Order of Dismissal was entered for lack of prosecution pursuant to A.C.A. § 11-9-702 and Rule 13. The claimant later asked that her claim be reopened to raise all the issues, including the previous dismissal of her claim. Respondents responded that the matter was barred by the statute of limitations due to multiple dismissals and the fact

that over two years had passed since the date of the claimant's injury. The claimant's initial claim was filed on April 29, 1999. The claim was dismissed without prejudice on May 15, 2001. Within two years after claimant filed her claim on April 28, 1999, the claimant had received additional medical treatment. She saw Dr. J. D. Patterson on May 7, 1999, for treatment. His note indicated that she had seen him on March 1, 1999, March 15, 1999, and April 23, 1999. The claimant, therefore, filed her claim within two years after the date of her compensable injury and received medical treatment within two years after her compensable injury. In December, 2001, as stated earlier, the claimant's then counsel, moved to reinstate the original claim. The attempt to reinstate was a little over six months after the claim was dismissed originally, in May, 2001. The attempt to reinstate was over two years and ten months after the initial injury. The Commission allowed the claim to be re-opened so that the claimant could make her arguments because she had not received the counsel of an attorney. Again, the claimant failed or refused to prosecute the matter, which resulted in another request to dismiss in March, 2002. In October, 2002, a second Order of Dismissal was entered. The claimant, once again, asked that the claim be re-opened. It was believed that the claimant, since she had no attorney, should have the opportunity to make an argument and present whatever evidence that she desired at a full hearing in this matter.

A.C.A. § 11-9-702(a)(4) provides that:

"If within six 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 subdivision (a)(1)-(3) of the section."

It is the clear intent of the statute that any re-filing of the claim must take

place within a two year statutory period.

The earliest that the claimant could argue that her claim was re-instated would be December, 2001. That is when her attorney filed a motion to re-instate her claim. The claimant's claim was initially filed on April 29, 1999. Any attempt to re-instate a claim filed in December, 2001, was clearly beyond the statute of limitations, therefore, the claimant's claim is barred according to the statute of limitations. The other issues need not be addressed. Therefore, the claimant's claim is denied and dismissed.

**IT IS SO ORDERED.**

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DON N. CURDIE,  
Administrative Law Judge

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