

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F005923

LAVERNE IRWIN,
EMPLOYEE

CLAIMANT

AREA AGENCY ON AGING,
EMPLOYER

RESPONDENT

RISK MANAGEMENT RESOURCES,
INSURANCE CARRIER

RESPONDENT

OPINION FILED APRIL 2, 2004

Hearing conducted before ADMINISTRATIVE LAW JUDGE MARK CHURCHWELL, at Conway, Faulkner County, Arkansas.

The claimant was represented by HONORABLE SCOTT ADAMS, Attorney at Law, Morrilton, Arkansas.

The respondents were represented by HONORABLE BETTY DEMORY, Attorney at Law, LITTLE ROCK, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above-styled claim on January 21, 2004 in Little Rock, Arkansas. A prehearing order was entered in this case on or about November 13, 2003. A copy of this prehearing order set out the stipulation offered by the parties and outlined the issues to be litigated and resolved at the present time. A copy of this prehearing order was made Commission's Exhibit No. 1 to the hearing.

The following stipulation was submitted by the parties and is hereby accepted:

1. The employee-employer relationship existed in January 2000.

By agreement of the parties, the issues to be litigated and resolved at the present time were limited to the following:

1. Compensability and whether the claim is barred by the statute of limitations.

2. Appropriate attorney's fees.

The record consists of the transcript of the January 21, 2004 hearing, with the exhibits contained therein, and the post-hearing briefs of the respondents and the claimant received on March 8, 2004. I have "blue backed" the briefs.

DISCUSSION

1. Statute of limitations.

Since the respondents have never paid any benefits on any injuries that the claimant may have sustained in her January 24, 2000 automobile accident, any claims filed in this case are original claims and not claims for additional benefits. Consequently, the applicable statute of limitations is contained in Ark. Code Ann. § 11-9-702(a) which provides in part that a claim for compensation must be filed within two years from the date of injury.

In the present case, the claimant's first attorney filed a claim in June of 2000, within the two year limitations period. However, this claim was subsequently

dismissed without prejudice pursuant to Commission Rule 13 on April 30, 2002. A new claim (i.e., request for hearing) was not filed until April 30, 2003, precisely one year after the first dismissal, but more than two years after the date of injury. Consequently, the claim filed on April 30, 2003 was not timely filed unless the limitations period was sufficiently tolled in some manner until April 30, 2003. Resolution of the statute of limitations issue in this case appears to involve a number of potential sub-issues.

A. Did the original claim for benefits filed in June of 2000 toll the statute of limitations until that claim was dismissed on April 30, 2002?

An original claim for benefits does not necessarily toll the statute of limitations indefinitely. For example, where an injured worker files an original claim for benefits and the claim is later accepted as compensable and some benefits paid, the original claim does not toll the statute of limitations indefinitely, and a claim for additional benefits under those circumstances must be filed within two years from the date of injury or within one year from the last payment of compensation, pursuant to Ark. Code Ann. § 11-9-702(b). See Petit Jean Air Service v. Wilson, 251 Ark. 871, 475 S.W.2d 531 (1972). Accord Bledsoe v. Georgia-Pacific Corp., 12 Ark. App. 293, 675 S.W.2d 849 (1984).

The present case is distinguishable from Wilson, however, in that the respondents in the present case never accepted compensability or began paying benefits. Consequently, having found no authority on point to the contrary, I find that the original claim for benefits filed in June of 2000 tolled the statute of limitations until that claim was dismissed on April 30, 2002.

B. If the statute of limitations was tolled by the June 2000 claim filing until that filing was dismissed on April 30, 2002, was the statute of limitations further tolled for an additional one year until the claim was re-filed on April 30, 2003?

My research indicates that a tolling may occur after entry of various orders in various forums. For example, under Ark. Code Ann. § 16-56-126, the General Savings Statute, a plaintiff who suffers a non-suit or an arrested verdict may commence a new action within one year of the non-suit or arrested verdict.

On several occasions, a majority of the Full Commission has found that the General Savings Statute has no application to dismissals filed pursuant to Ark. Code Ann. § 11-9-702(a)(4), which has its own specific refiling provisions. See Carl Buchanan v. A. Tenenbaum Company, Full Workers' Compensation Commission, Opinion filed May 26, 1993 (E001249); Kim Lively v. Libbey Memorial Physical Medical

Center, Full Workers' Compensation Commission, Opinion filed January 25, 1993 (D903866); Thomas Boston v. Hickory Hills Property Owners Assoc., Full Workers' Compensation Commission, Opinion filed January 9, 1991 (D804013).

However, this conclusion has apparently never been reviewed by the Arkansas Courts, and likewise, apparently neither the Full Commission or the Courts have ever concluded whether or not the General Savings Statute may apply under appropriate circumstances to a dismissal pursuant to Commission Rule 13 (which does not have its own refiling provisions). See Terry Holman v. Form-All, Full Workers' Compensation Commission, Opinion filed April 17, 1997 (E214277) (Commissioner Pat Humphrey concurring).

In yet another line of more recent decisions, the Full Commission, without citation to specific statutory authority, has found on several occasions that the statute of limitations does not commence to run again on a timely filed claim until a final order is entered ending the litigation or adjudication of a claim for benefits, and that the claimant then has one year from the date of the order ending litigation in which to file another claim for benefits. See Hebert Brake v. The Kroger Company, Full Workers' Compensation Commission, Opinion filed March 7,

2003 (E702191); Arlene Denise Dixon v. Baxter County Regional Hospital, Full Workers' Compensation Commission, Opinion filed February 14, 2001 (E112173); Shelly S. Cooper v. Cleo, Inc., Full Workers' Compensation Commission, Opinion filed March 29, 2000 (E518275); Bernie Barker v. National Transportation, Full Workers' Compensation Commission, Opinion filed August 19, 1993 (D803687); Michelle T. Underwood v. TEC, Full Workers' Compensation Commission, Opinion filed April 15, 1992 (D708150). However, the Full Commission has never suggested that this line of cases applies to a Rule 13 dismissal.

Finally, I note that filings similar to those at issue in the present case are also currently on appeal to the Arkansas Court of Appeals in a court case captioned *Rick W. Dillard v. Benton County Sheriff's Office*, CA 04-25. However, the Full Commission's decision in that case was not designated for publication. Consequently, the Full Commission's conclusions in that case will not be discussed or cited as authority herein.

The claimant has the burden of establishing an entitlement to benefits. Absent any published statutory authority, published statutory interpretation by the Commission or the Courts on point, or any legal argument in

the claimant's brief asserting the existence of any controlling authority other than Ark. Code Ann. § 11-9-702(a)(1), I find that the statute of limitations issue in the case is governed solely by the language of Ark. Code Ann. § 11-9-702(a)(1). Because the June 2000 claim was dismissed, and because the subsequent filing on April 30, 2003 was made more than two years after the date of injury, I find that the present claim filed on April 30, 2003 is barred by the statute of limitations.

In reaching that conclusion, I am mindful of one recent Full Commission decision finding that the statute of limitations did not bar a claim for additional benefits filed before a dismissal without prejudice. See Allen Sexton v. Atlas Carriers, Inc., Full Workers' Compensation Commission, Opinion filed October 13, 2003 (E510879). However, in Sexton the Full Commission appears to have concluded that the dismissal order filed in that case was inappropriate for lack of prior notice to the claimant of the motion to dismiss.

Numerous Commission precedent, including Sexton, supra, indicate that entry of a dismissal without prejudice is an interlocutory non-appealable order. Consequently, my conclusion that the claimant's claim in the present case

became time-barred when the first claim was dismissed presumes that the Commission would affirm the ALJ's April 30, 2002 dismissal order if/when the Full Commission reviews that dismissal order in the future.

C. Even if the Full Commission were to reverse the ALJ's April 30, 2002 dismissal order, is the current request for benefits nevertheless barred by the provisions of Ark. Code Ann. § 11-9-702(a)(1)?

_____ Another potentially significant difference between the present case and Sexton, supra is that Sexton involved a claim for additional benefits, while the present case involves an original claim for benefits. In this regard, I note that a timely filed claim for additional benefits tolls the statute of limitations until the claim is decided. See Arkansas Power & Light Co. v. Giles, 20 Ark. App. 154, 725 S.W.2d 583 (1987); Sisney v. Leisure Lodges, Inc., 17 Ark. App. 96, 704 S.W.2d 173 (1986); Bledsoe v. Georgia-Pacific Corp., 12 Ark. App. 293, 675 S.W.2d 849 (1984).

On the other hand, a majority of the Full Commission has previously found that a timely filed original claim for benefits does not toll the statute of limitations indefinitely. Instead, the Commission found that even a timely filed original claim for benefits becomes time barred under Ark. Code. Ann. § 11-9-702(a)(1) if the claimant does

not receive either disability benefits or medical benefits from the respondents within two years after filing the claim. See William J. Wadlow v. Conagra Frozen Foods, Full Workers' Compensation Commission, Opinion filed July 9, 1997 (D609833).

Since there is no dispute that the claimant in the present case did not receive from the respondents either disability compensation or medical benefits during the two year period beginning in June of 2000, the present claim would appear to have become time barred under the reasoning in Wadlow in June of 2002 even if the Full Commission were ultimately to reverse or vacate the ALJ's April 30, 2002 dismissal order.

Therefore, for the reasons discussed herein, I find that the claimant's present claim for benefits is barred by the statute of limitations regardless of whether or not the ALJ was correct in dismissing the claimant's claim on April 30, 2002.

2. Compensability and attorney's fees.

Because I find that the present claim is barred by the applicable statute of limitations, I find that the issues of compensability and attorney's fees are moot.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The employee-employer relationship existed in January 2000.
2. The claimant's original claim for benefits filed in June of 2000 was dismissed without prejudice pursuant to Commission Rule 13 on April 30, 2002.
3. The applicable statute of limitations under Ark. Code Ann. § 11-9-702(a)(1) was not tolled for any period after the claimant's claim was dismissed on April 30, 2002.
4. The claimant's subsequent claim, filed on April 30, 2003, was filed more than two years after the date of injury and is therefore barred by the applicable statute of limitations in Ark. Code Ann. § 11-9-702(a)(1).
5. Even if the claim filed in June of 2000 was not properly dismissed on April 30, 2002, the claim filed in June of 2000 became time barred under the provisions of Ark. Code Ann. § 11-9-702(a)(1) when the claimant received no disability compensation or medical benefits from the respondents during the two year period following the claim filing in June 2000.
6. Because this claim is barred by the applicable statute of limitations, the compensability and attorney's fees issues are moot.

ORDER

For the reasons discussed herein, this claim must be, and hereby is, respectfully denied and dismissed.

IT IS SO ORDERED.

MARK CHURCHWELL
Administrative Law Judge