

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. E500581

BRENDA VANWAGNER, Employee	CLAIMANT
WAL-MART STORES, INC., Employer	RESPONDENT
CMI, Carrier	RESPONDENT

OPINION FILED SEPTEMBER 21, 2004

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Springdale, Washington County, Arkansas.

Claimant represented by LAURA MCKINNON, Attorney, Fayetteville, Arkansas.

Respondents represented by CURTIS L. NEBBEN, Attorney, Fayetteville, Arkansas.

STATEMENT OF THE CASE

On August 4, 2004, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on February 4, 2004, and a pre-hearing order was filed on February 5, 2004. A copy of the pre-hearing order has been marked Commission's Exhibit #1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulation:

1. The Opinion filed August 19, 1996 is final and res judicata.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Statute of limitations.
2. Claimant's entitlement to additional medical treatment including shoulder surgery.
3. Extent of permanent disability, including a 10% rating assigned by Dr. Moffitt.
4. Attorney fee.

At the time of the hearing the claimant withdrew as an issue her entitlement to additional medical treatment and reserved that as an issue.

The claimant contends she is entitled to permanent partial disability benefits,

including a 10% rating assigned by Dr. Moffitt. The claimant reserves her right to future medical treatment.

The respondents contend this case is barred by the applicable statute of limitations. In the alternative, respondents contend the claimant has not sustained any permanent anatomical impairment.

From a review of the record as a whole, to include medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witness and to observe her demeanor, the following findings of fact and conclusions of law are made in accordance with A.C.A. §11-9-704:

#### FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulation agreed to by the parties at the pre-hearing conference conducted on February 4, 2004, and contained in a pre-hearing order filed February 5, 2004, is hereby accepted as fact.

2. Respondent has failed to prove by a preponderance of the evidence that claimant's claim for additional compensation benefits is barred by the statute of limitations.

3. Claimant has met her burden of proving by a preponderance of the evidence that she is entitled to permanent partial disability benefits in an amount equal to 10% to the body as a whole based upon an impairment rating assigned by Dr. Gary Moffitt.

4. Claimant has failed to prove by a preponderance of the evidence that she is entitled to permanent disability benefits for wage loss as a result of her compensable injury.

5. Respondent has controverted claimant's entitlement to all unpaid permanent disability benefits.

#### FACTUAL BACKGROUND

The claimant is a 48-year-old woman with a seventh grade education. Claimant

worked for the respondent in its bakery department making donuts and she suffered a compensable injury to her right shoulder while lifting a mixing bowl on November 17, 1994.

Following claimant's compensable injury she was initially treated by Dr. Gary Moffitt who diagnosed claimant as suffering from a shoulder strain. Claimant was given a sling, medication, and was returned to work using her left arm only. Due to persistent complaints Dr. Moffitt eventually ordered an MRI scan which revealed a probable partial tear of the supraspinatous tendon. While Dr. Moffitt did not initially believe that this condition would require surgery, Dr. Moffitt eventually referred claimant to Dr. Park for an evaluation. Dr. Park gave claimant a cortisone injection and advised conservative treatment including physical therapy. When claimant's condition did not improve, Dr. Park performed surgery on claimant's right shoulder on March 15, 1995. Following her surgery claimant again underwent physical therapy and was returned to work performing left arm duty. Claimant also continued to be evaluated by both Drs. Moffitt and Park following her surgical procedure.

While claimant continued to undergo evaluations by Dr. Moffitt and Dr. Park, she also sought medical treatment from Dr. David Ball in Joplin, Missouri on August 8, 1995. On that date Dr. Ball recommended that claimant undergo a second MRI scan and noted that a second arthroscopic procedure might be necessary. On August 21, 1995 Dr. Park indicated that claimant should avoid repetitive lifting of more than 20 pounds above 90 degrees. He also indicated that claimant had a permanent physical impairment rating in an amount equal to 1% to the body as a whole. On September 7, 1995 Dr. Ball authored a report indicating that the MRI scan revealed no evidence of a rotator cuff tear, but that findings were consistent with a subacromial impingement. Dr. Ball noted that if claimant's problems continued that additional surgery might be necessary. In reports dated September 21, 1995 and October 10, 1995, Dr. Park noted that claimant was now seeing Dr. Ball in Joplin. Dr. Park noted that if Dr. Ball felt surgery would be beneficial that he

would transfer claimant's care to him. However, as far as Dr. Park was concerned the claimant had reached maximum medical improvement and he again reiterated that claimant had a 1% to the body as a whole rating as a result of her shoulder injury.

On December 27, 1995 Dr. Moffitt also found that claimant had reached maximum medical improvement and he assigned claimant a permanent physical impairment rating in an amount equal to 10% to the body as a whole. Dr. Moffitt imposed restrictions of lifting no more than two pounds with her right arm and no pushing or pulling with greater than two pounds of force. Dr. Moffitt also noted that claimant should perform no work above chest level with her arm.

Dr. Ball did perform a second surgical procedure on the claimant's right shoulder on February 9, 1996. Following that surgical procedure the claimant again underwent an extensive period of physical therapy but still complained of discomfort. In July 1996 Dr. Ball noted that claimant's continued complaints were subjective with objective testing revealing excellent motion and strength. Dr. Ball opined that no further treatment was necessary.

Following claimant's release from Dr. Ball she returned to work for another employer, Talbot's, in Neosho, Missouri as a spot welder. Claimant suffered a second compensable injury to her right shoulder while working for Talbot's following a fall on March 28, 1997. Claimant underwent a surgical repair of her right shoulder following that second injury which was performed by Dr. Veitch. Following her work with Talbot's claimant also worked for Cummins and Sykes.

Claimant subsequently filed this claim contending that she was entitled to additional medical treatment including surgery for her compensable injury. As previously noted, claimant withdrew her entitlement to additional medical treatment as an issue. This would include the medical treatment provided by Dr. Ball and his subsequent surgery. Remaining as issues are claimant's entitlement to permanent disability benefits, the statute

of limitations, and a controverted attorney fee.

## ADJUDICATION

### STATUTE OF LIMITATIONS.

Respondent contends that claimant's claim for additional compensation benefits is barred by the statute of limitations. The respondent contends that this claim is barred by the statute of limitations because claimant's claim for additional compensation benefits was not filed within two years from the date of injury or one year from the last payment of compensation benefits. A.C.A. §11-9-702(b)(1). Respondent contends that it last paid claimant compensation benefits in December 1995; therefore, the statute of limitations expired in 1996.

With respect to this issue, it should be noted that claimant filed an AR-C requesting additional benefits including permanent disability benefits in January 1995. As a result of that filing, a hearing was conducted before Administrative Law Judge Hodge on August 23, 1995. At issue in that hearing was claimant's entitlement to additional temporary total disability benefits, the end of claimant's healing period, related medical benefits, and an attorney fee. In an Opinion filed by ALJ Hodge on October 18, 1995, he found that even though claimant had not reached the end of her healing period that she was not entitled to additional temporary total disability benefits because respondent had offered her work within her restrictions and that she had refused that employment. ALJ Hodge's opinion was appealed by the claimant to the Full Commission which in an opinion filed August 19, 1996 affirmed and adopted ALJ Hodge's opinion.

Respondent contends that the AR-C which was filed in January 1995 initiated a claim process which resulted in a final decision by the Commission on August 19, 1996. Therefore, any claims for additional compensation benefits in October or November of 2000 were already outside of the one year statute of limitations.

This issue was addressed by the Arkansas Court of Appeals in *Spencer v. Stone Container Corporation*, 72 Ark. App. 450, 38 S.W. 3d 909 (2001). In that particular case, the claimant suffered a compensable injury on September 26, 1991. The employer paid some compensation benefits but claimant subsequently requested a second medical opinion by filing an A-7 form on December 26, 1991. The claimant later made another claim for additional compensation which was filed on December 22, 1997. The Commission had concluded that claimant's claim for additional compensation benefits was not barred by the statute of limitations because the statute had been tolled when the claimant made a claim for additional compensation when she requested the change of physician on December 26, 1991. On appeal the court rejected an argument that the statute of limitations barred the claim for additional compensation benefits. In doing so the Court stated:

Additionally, Spencer's filing that requested a change of physician did toll the statute of limitations till December 22, 1997, when she made another claim for additional compensation. Cross-appellant argues that such an interpretation of the applicable statutory law is unreasonable and that the Commission's reliance on *Arkansas Power & Light Co. v. Giles*, 20 Ark. App. 154, 725 S.W. 2d 583 (1987), and *Bledsoe v. Georgia-Pacific Corp.*, 12 Ark. App. 293, 675 S.W. 2d 849 (1984), was in error because those cases are distinguishable from the case at bar inasmuch as they concerned claimants who did not wait as long as Spencer did to file a claim for additional compensation.

We are persuaded, however, that the Commission's decision was correct and consistent with our decision in *Sisney v. Leisure Lodges, Inc.*, 17 Ark. App. 96, 97-100, 704 S.W. 2d 173, 174-175 (1986). In *Sisney*, the claimant sustained a compensable injury on March 8, 1979; received some compensation benefits; filed a claim for additional compensation benefits on May 19, 1980; received her last benefits payment on May 6, 1982; and made another claim for additional benefits on August 26, 1983. With these key facts in mind, we held that the 1980 filing tolled the statute of limitations relying on the rationale used in *Bledsoe*, 12 Ark. App. at 295, 675 S.W. 2d at 850:

Otherwise, the statute has no meaning. If the statute is not tolled when the claimant files a claim for additional benefits, what could possibly toll the statute? We prefer to think the statute means what its plain language implies.

In this particular case, the claimant was injured on November 17, 1994. She received some compensation benefits and filed a claim for additional compensation in January 1995. The last payment of compensation occurred in December 1995. Although a hearing was held with respect to a portion of claimant's claim for additional compensation benefits, the claim for additional benefits filed in January 1995 operated to toll the statute of limitations. Therefore, even though additional claims were not filed until October and November of 2000, the statute of limitations had already been tolled by the filing of a claim for additional compensation benefits requesting permanent disability in January 1995; therefore, claimant's claim for additional compensation benefits is not barred by the statute of limitations.

#### PERMANENT DISABILITY BENEFITS - PERMANENT IMPAIRMENT.

\_\_\_\_\_After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that claimant has met her burden of proving by a preponderance of the evidence that she suffered a permanent physical impairment in an amount equal to 10% to the body as a whole as a result of her compensable shoulder injury. As previously noted, claimant underwent surgery which was performed by Dr. Park on March 15, 1995. Dr. Park in a report dated October 10, 1995 stated that as far as he was concerned the claimant had reached maximum medical improvement and he assigned claimant a permanent physical impairment rating in an amount equal to 1% to the body as a whole according to the *American Academy of Orthopedic Surgeons' Guidebook for Ratings*.

On the other hand, claimant has also been evaluated and treated by Dr. Gary Moffitt. In a report dated December 27, 1995, Dr. Moffitt opined that claimant had a permanent physical impairment rating in an amount equal to 10% to the body as a whole. Dr. Moffitt based his impairment rating on the *AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition*.

Normally, I would give greater weight to the opinion of a specialist who has performed surgery over the opinion of a general practitioner who did not perform surgery. However, in this particular case, Dr. Park's impairment rating is based upon a guide established by orthopaedic surgeons. On the other hand, Dr. Moffitt's impairment rating is based upon the fourth edition of the AMA guides. A.C.A. §11-9-522(g) provides that the Commission shall adopt an impairment rating guide to be used in the assessment of anatomical impairment. In accordance with this statutory mandate, the Commission pursuant to Rule 34 adopted the *AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition*.

Based upon Dr. Moffitt's opinion which I find to be credible and entitled to great weight and based upon the fact that he relied upon the AMA guides in assigning a permanent physical impairment rating, I find that claimant has suffered a permanent physical impairment in an amount equal to 10% to the body as a whole as a result of her compensable shoulder injury.

#### WAGE LOSS.

In addition to permanent partial disability benefits associated with permanent physical impairment, claimant also contends that she is entitled to permanent partial disability benefits for a loss in wage earning capacity as a result of her compensable shoulder injury. After my review of the relevant evidence presented, I find that claimant has failed to meet her burden of proving by a preponderance of the evidence that she has

suffered any loss in wage earning capacity as a result of her compensable injury. First, I believe it is important to note that claimant testified at the hearing about various physical problems which she attributes to her right shoulder injury. However, it must be remembered that this claimant suffered a second injury to her shoulder while working for another employer in March of 1997. Accordingly, this respondent cannot be liable for any physical condition which is the result of that March 1997 injury.

Furthermore, I find that claimant has failed to prove by a preponderance of the evidence that she suffered a loss in wage earning capacity based in part upon evidence presented indicating that claimant returned to work for other employers earning wages equal to or greater than those she was earning for the respondent. Claimant testified that when she initially went to work for the respondent she was earning \$6.50 per hour and she eventually had her wages increased to \$6.75 per hour. Following claimant's voluntary termination of her employment with respondent in April 1995, claimant went to work as a spot welder for Talbot's in Neosho, Missouri. Claimant testified at the hearing that she could have made \$8.50 per hour while working for Talbot's. Even after claimant suffered a second shoulder injury while working for Talbot's, she returned to work performing one-handed duty and quit only because her husband's job took her to Oklahoma. Claimant testified that approximately two years after moving to Oklahoma she took a job with Cummins Construction Company. Claimant initially worked as a gate keeper and eventually became a heavy equipment operator, operating equipment used to smooth asphalt including a rubber roller, finish roller, and break down roller. Claimant testified that she earned more than \$9.00 per hour and worked 40 or more hours per week for Cummins. After working for Cummins claimant also worked for Sykes, a telephone job involving the internet. Claimant testified that she earned \$8.50 an hour for Sykes.

In summary, even though the claimant was assigned a permanent physical impairment rating in an amount equal to 10% to the body as a whole by Dr. Moffitt and had

physical restrictions placed upon her ability to return to work, the evidence indicates that this claimant returned to work for other employers earning wages equal to or greater than those wages she earned while working for the respondent.

It should be noted that respondent did not specifically contend that claimant was barred from receiving permanent disability benefits in excess of her impairment rating pursuant to A.C.A. §11-9-522(b)(2) and I am not finding that claimant is barred pursuant to that statute from receiving benefits for a loss in wage earning capacity. Instead, I simply find after consideration of all of the relevant wage loss factors that claimant has failed to prove by a preponderance of the evidence that she has suffered a loss in wage earning capacity as a result of her compensable injury. This finding is based upon evidence that claimant has worked for other employers since her voluntary termination with respondent at wages greater than she was earning for the respondent. This evidence indicates that claimant has not suffered a loss in wage earning capacity as a result of her compensable injury.

#### AWARD

Respondent has failed to prove by a preponderance of the evidence that claimant's claim for additional compensation benefits is barred by the statute of limitations. Claimant has met her burden of proving by a preponderance of the evidence that she is entitled to permanent partial disability benefits in an amount equal to 10% to the body as a whole as a result of permanent impairment. Claimant has failed to prove by a preponderance of the evidence that she has suffered a loss in wage earning capacity as a result of her compensable injury. Respondent has controverted claimant's entitlement to permanent partial disability benefits in the amount of 10% to the body as a whole

The claimant's attorney is entitled to the maximum statutory attorney's fee on benefits awarded herein, one-half to be paid by the claimant and one-half to be paid by the

respondents. The respondents are to withhold the claimant's portion of the attorney's fee from the claimant's award and to pay the attorney's fee directly to the claimant's attorney.

All sums herein accrued are payable in a lump sum without discount and this award shall bear interest at the maximum legal rate until paid.

IT IS SO ORDERED.

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GREGORY K. STEWART  
ADMINISTRATIVE LAW JUDGE