BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. D601189 & D614780

EDWARD L. WARREN, EMPLOYEE	CLAIMANT
ALEXANDER YOUTH SERVICES CENTER, EMPLOYER	RESPONDENT
PUBLIC EMPLOYEE CLAIMS, INSURANCE CARRIER/TPA	RESPONDENT #1
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT #2

OPINION FILED NOVEMBER 29, 2006

Matter submitted upon a stipulated record before Chief Administrative Law Judge David Greenbaum in Little Rock, Pulaski County, Arkansas.

Claimant represented by Mr. C. Michael White, Attorney-at-Law, North Little Rock, Arkansas.

Respondents #1 represented by Mr. Richard S. Smith, Attorney-at-Law, Little Rock, Arkansas.

Respondent #2 represented by Ms. Judy W. Rudd, Attorney-at-Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

The above-styled claims are currently before this administrative law judge on remand from the Full Workers' Compensation Commission, Opinion filed June 15, 2006, following a remand from the Arkansas Court of Appeals, Opinion delivered February 22, 2006. The case has been the subject of multiple hearings and has an extremely lengthy and unusual procedural history. Although not exhaustive, a summary of the history of this claim is warranted to fully understand that immediate issues.

It is undisputed that the claimant sustained compensable injuries arising out of and during the course of his employment with Alexander Youth Services Center on both October 22, 1985, and October 14, 1986. A hearing was conducted December 14, 1994, to determine claimant's entitlement to additional workers' compensation benefits, specifically, to determine the extent of claimant's permanent disability as the result of the two (2) admitted injuries. An Opinion was filed on March 30, 1995, at which time it was found, *inter alia*, that the claimant's healing period ended January 3, 1988; that the claimant sustained a twenty percent (20%) permanent impairment; that respondents #1 accepted and paid a thirty-three percent (33%) wage-loss disability; while controverting permanent disability in excess of fifty-three percent (53%) to the body as a whole. Based upon the prior record, it was determined that the claimant had sustained an overall permanent disability of sixty percent (60%) to the body as a whole or an additional seven percent (7%) wage-loss beyond the amount paid by respondents #1. Respondents were directed and ordered to pay the balance of claimant's permanent disability in lump sum and without discount. No appeal was taken from the March 30, 1995, decision.

A second hearing was conducted June 21, 2004, to determine whether the claimant was entitled to additional permanent disability benefits. An Opinion was filed by this Administrative Law Judge on July 20, 2004. The issue presented for determination concerned claimant's entitlement to permanent total disability benefits. The following findings of fact and conclusions of law were made:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction over these claims.
2. The stipulations agreed to by the parties are hereby accepted as fact.
3. These claims are barred by the doctrine of *res judicata*.
4. The claimant has failed to prove that there has been a change in his physical or mental condition since the prior Opinion and Award filed March 30, 1995. Even if the claimant has shown a change in his condition, which is not conceded herein, a modification of the prior Award is not warranted pursuant to A.C.A. §11-9-713.
5. Respondents have controverted claimant's entitlement to additional permanent disability benefits.
6. Issues not addressed herein are specifically reserved.

The aforementioned decision was then appealed to the Full Workers' Compensation Commission. While on appeal, claimant's prior attorney requested another hearing on the payment of additional, permanent partial disability related to claimant's cervical spine. However, again, the claim was on appeal to the Full Commission at the time said request. During the appeal, claimant's attorney next filed a Motion to Remand for additional proceedings and to submit additional evidence. Respondents filed a response to the Motion. In an Opinion filed March 15, 2005, the Full Workers' Compensation Commission affirmed and adopted the Law Judge decision filed July 20, 2004. The Commission further noted that while the claim was pending on appeal, claimant filed a Motion to Remand proceedings to the

Administrative Law Judge to consider new evidence which was specifically denied pursuant to Ark. Code Ann. §11-9-713; *Haygood v. Belcher*, 5 Ark. App. 127, 633 S.W.2d 391 (1982). Thereafter, claimant's former attorney filed a Motion to Withdraw, and an Order was entered by the Full Commission on May 4, 2005, permitting the withdrawal of representation. On July 12, 2005, claimant's current attorney made an entry of appearance. In an Opinion delivered February 22, 2006, the Arkansas Court of Appeals reversed the decision of the Full Commission, which had affirmed and adopted the decision of the Administrative Law Judge and remanded this case for proceedings consistent with said decision. In an Opinion filed June 15, 2006, the Full Commission remanded the case to the Administrative Law Judge for additional findings consistent with the February 22, 2006, Opinion of the Arkansas Court of Appeals. Contemporaneous with the reassignment of the claim to the Administrative Law Judge, respondents #1 joined respondent 2, the Death & Permanent Total Disability Trust Fund, (hereinafter referred to as "Fund"). After its joinder, the Fund filed interrogatories and requests for production of documents. The Fund further requested the right to be represented at all prehearing conferences at which the issue of permanent total disability was to be litigated while, at the same time, requesting that no conference be held until discovery had been completed. On July 3, 2006, a notice of a prehearing telephone conference was sent to all parties scheduling a conference for August 2, 2006, which was subsequently reset by request of the parties for August 23, 2006.

At the August 23, 2006, prehearing conference, all parties agreed to

specifically reserve the extent of the respective respondents' liabilities for additional disability benefits, if any, pending a final determination of the claim following the Commission's remand for additional findings consistent with the Opinion of the Arkansas Court of Appeals.

The Court reversed the finding that the claim for permanent and total disability was barred by *res judicata*. The Court also correctly pointed out that this Administrative Law Judge erred as a matter of law by failing to consider the effects of aging on the compensable injury in determining permanent disability because I cited A.C.A. §11-9-713(e) which was not in effect at the time of claimant's compensable injury. Subsection (e) was added by Act 796 of 1993. However, I did specifically find that even if the claimant did show a change in his condition (which I concede occurred), a modification of the prior Award is not warranted pursuant to A.C.A. §11-9-713. Another portion of this section states that the application for a modification of a prior Award must be made within six (6) months of termination of the compensation period fixed in the original compensation Order or Award. A.C.A. §11-9-713(a)(2).

The claimant and respondents #1 agreed that no further hearing was necessary and that a decision could be made on the prior record, together with legal briefs, specifically, the parties were to submit legal arguments addressing any conflicting interpretation between the provisions of A.C.A. §11-9-702 and A.C.A. §11-9-713(a)(2). Accordingly, by agreement of both parties, simultaneous briefs were due on or before **September 25, 2006**, at which time the case was to

be submitted for decision.

Following submission of the case for decision, a teleconference was conducted with all parties participating. Following the teleconference, the parties entered into settlement negotiations. The parties requested that a decision in this matter be held in abeyance to allow the parties time to exhaust settlement possibilities. Accordingly, a decision was delayed for the purpose of allowing the parties to explore settlement.

Further, by letter dated November 3, 2006, claimant's attorney advised that the parties were willing to offer an additional stipulation. Specifically, the parties agreed that the claimant entered into permanent total disability status on December 23, 2003. As previously noted, at the August 23, 2006, prehearing conference, the parties agreed to specifically reserve the extent of the respective respondents' liabilities for additional disability benefits, if any, pending a final determination of the claimant. In order to avoid reopening litigation to address the issue, an October 25, 2006, letter, as well as a November 7, 2006, letter from respondents' #1 and #2, respectively, confirmed the stipulation concerning the date the claimant entered permanent total disability status.

By letter dated November 13, 2006, and received November 15, 2006, claimant's attorney advised that his client was not interested in settling his claims and requested that a decision be entered based upon the stipulated record, specifically, the record of the prior proceedings, together with legal briefs. The Prehearing Order filed August 24, 2006, the legal briefs, as well as copies of all correspondence and

stipulations submitted following the August 23, 2006, prehearing conference are blue-backed and made a part of the record herein.

As previously noted, the Arkansas Court of Appeals reversed the Commission on the finding that the claims were barred by the doctrine of res judicata. The Court also found that the Commission erred in its application of A.C.A. §11-9-713(e) making it necessary to reverse and remand the case for reconsideration of the claim, applying the correct law. As pointed out by the Court, and, confirmed by the record of the hearing conducted June 21, 2004, the claimant's condition changed between December 14, 1994, and July 20, 2004. Although by the claimant's own admission, the major cause of the claimant's change in his physical condition was the effects of aging which, under current law, can no longer be considered in determining whether there had been a change in physical condition, the claimant's injury occurred prior to the change in the law. Accordingly, the primary issue requiring resolution is whether the claimant timely requested additional benefits based upon a change of physical condition. Clearly, the fixed period of compensation awarded by the Opinion filed March 30, 1995, ended well before the claimant made a request for permanent total disability benefits for the second time. The parties were asked to submit legal briefs addressing potential conflicting interpretations between the provisions of A.C.A. §11-9-702 and A.C.A. §11-9-713(a)(2).

Respondents #1 contended that there was no conflict between the aforementioned statutory sections, maintaining that A.C.A. §11-9-702 was not a factor in this case. Specifically, respondents #1 have never contended that the claim is

barred by statute of limitations. Rather, respondents #1 continue to contend, as it did at the June 21, 2004, hearing, that the claim is barred by the provisions of A.C.A. §11-9-713(a)(2) requiring that any modification to a final award be made within six (6) months of the termination of the compensation period fixed in the original compensation order. Respondents #1 argue that substantially more time than six (6) months had passed between the termination of the period fixed in the March 30, 1995, order and that the claimant has failed to satisfy the statute because he failed to file his claim for additional benefits within the six (6) month period required by §11-9-713(a)(2) and, further, that the claimant had not demonstrated a change in physical condition, even considering age-related changes to merit an increase in the prior Award.

Respondent #1's arguments are simply not supported by the Arkansas case law interpreting whether the limitations period set forth in A.C.A. §11-9-713 or A.C.A. §11-9-702 control.

The Arkansas Supreme Court, the Arkansas Court of Appeals, and the Full Arkansas Workers' Compensation Commission have considered this issue, and each have concluded that the longer limitations period established in Ark. Code Ann. §11-9-702 prevails. *Reynolds' Metal Company v. Brumley*, 226 Ark. 388, 290 S.W.2d 211 (1956); *Southern Wooden Box Co. v. Smith*, 5 Ark. App. 14, 631 S.W.2d 620 (1982); *Arlene Dixon v. Baxter County Regional Hospital*, Full Arkansas Workers' Compensation Commission, Opinion filed June 7, 2006 (Claim No. E112173).

Under Ark. Code Ann. §11-9-713, a party may petition for a modification of a

prior award based on a change in physical condition within six (6) months after the entry of the prior award. Ark. Code Ann. §11-9-702 provides that a claim for additional benefits must be filed within one (1) year from the last payment of compensation. In a claim with the same issue as the matter presently before the Commission, the Full Commission recently rejected the contention that the shorter limitations period established by Ark. Code Ann. §11-9-713 is controlling and, instead, found the limitations established by Ark. Code Ann. §11-9-702 is controlling. *Arlene Dixon v. Baxter County Regional Hospital*, Full Arkansas Workers' Compensation Commission, Opinion filed June 7, 2006 (Claim No. E112173). In so finding, the Commission relied on the precedent established by *Brumley, supra*, and *Smith, supra*.

I recognize and feel compelled to point out that the facts in the instant case are distinguishable from the facts in *Dixon*, argued in claimant's brief. Specifically, in *Dixon*, the claimant's change in condition was not based upon aging, but, rather, was the result of additional surgeries which increased the claimant's overall impairment, as well as permanent disability. However, despite the factual distinctions, the legal issue concerning the time limitations are similar and the Full Commission found that the claim was timely filed.

Significant to the issue under consideration in the present matter, the Full Commission expressly found that the longer limitations period established by Ark. Code Ann. §11-9-702, and not the six (6) month limitations period established in

Ark. Code Ann. §11-9-713, should be applied under these circumstances. In doing so, the Full Commission quoted the following language from the Arkansas Supreme Court's decision in *Reynold's Metal Company v. Brumley*, 226 Ark. 388, 290 S.W.2d 211 (1956):

> In this situation we are committed to the rule that if a substantial doubt exists as to which is the applicable statute of limitations, the longer rather than the short period of limitation is to be preferred and adopted. *Jefferson v. Nero*, 225 Ark. 302, 280 S.W.2d 884. This rule is in harmony with our settled policy of giving a broad and liberal construction to the provisions of the Compensation Act to effectuate its purposes and the further policy of resolving doubtful cases in favor of the claimant.

Notably, in *Brumley*, the Court was also specifically considering the conflict between Ark. Code Ann. §11-9-702 and Ark. Code Ann. §11-9-713, and, applying the logic quoted by the Commission above, the Court concluded that the limitations period established by Ark. Code Ann. §11-9-702 prevailed.

In addition, the Full Commission made the following finding in *Dixon*:

> Furthermore, the Arkansas Court of Appeals has indicated that when a claimant seeks additional benefits subsequent to a final award, that while 11-9-713 provides the criteria for a basis for a claim, then 11-9-702(b)(1) governs the statute of limitations. *Southern Wooden Box Co. v. Smith*, 5 Ark. App. 14, 631 S.W.2d 620 (1982). [Citation in original]. This means in effect, that the one-year statute of limitations provided by 11-9-702 would be controlling.

In *Southern Wooden Box Co. v. Smith*, 5 Ark. App. 14, 631 S.W.2d 620 (1982), the Court also considered the potential conflicts between the two statutes and stated the following:

> In construing these two statutes, it is our duty so far as practicable to

> reconcile different provisions so as to make them consistent, harmonious, and sensible.... Although the court, in *Brumley*, found a conflict between §§[11-9-702] and [11-9-713], it is clear that no case law has construed these provisions in the present context. It is also patently clear that if appellee is permitted to pursue his claim under §[11-9-702] without satisfying the grounds in §[11-9-713] to reopen his award, §[11-9-713] would be rendered meaningless. There is only one consistent, harmonious construction to be placed on the relationship between §§[11-9-702] and [11-9-713] in an effort to make them both effective, viz., where a claimant seeks additional benefits after a final award, §[11-9-713] governs as to the grounds required and §[11-9-702] governs the period of limitation for all claims for additional benefits whether or not there has been a final award.

In the present matter, the claimant is seeking additional benefits after a final award. Consequently, under the decisions cited above, Ark. Code Ann. §11-9-702 governs the period of limitations, and Ark. Code Ann. §11-9-713 governs only as to the grounds required.

In this regard, the claimant, Edward L. Warren, sustained two admittedly compensable injuries to his low back while employed by the Alexander Youth Services Center. The first injury occurred on October 22, 1985, and the second injury occurred on October 14, 1986. A hearing was conducted before this Administrative Law Judge on December 14, 1994, and an Opinion and Order was filed on March 30, 1995. On June 21, 2004, a second hearing was conducted before the same Administrative Law Judge. At that hearing, the parties stipulated that a prior hearing has been conducted on December 14, 1994, that an Opinion and Order had previously been filed on March 30, 1995, opinion "is now final and the law of the case." At the June 21, 2004, hearing, Mr. Warren

contended that he was permanently and totally disabled as a result of the effects of his two admittedly compensable injuries or that he sustained a permanent disability in excess of the permanent disability previously awarded in the March 30, 1995, Opinion.

Consequently, just like the claimant in *Dixon, Brumley*, and *Smith*, the claimant in the matter presently before the Commission is seeking additional benefits subsequent to a final award of benefits, and Court's decision in *Brumley* and *Smith*, as well as the Commission's decision in *Dixon*, are controlling and mandate a conclusion that the limitations period established by Ark. Code Ann. §11-9-702 is applicable to this claim and that the claim presently before the Commission is not barred by time in filing the request for additional benefits.

The only remaining issue is whether the claimant has proven a change in his physical condition to justify the increase in the permanent disability previously awarded. Respondents #1 argue that even considering age-related changes, the claimant has failed to demonstrate a change in his physical condition. This argument is totally without merit. Clearly, having overcome any legal obstacle, the claimant has shown, by a preponderance of the credible evidence, that he is permanently and totally disabled. In fact, during the settlement negotiations, as reflected by the correspondence submitted by the parties, it appears that the parties agree that the claimant entered into permanent total disability status on December 23, 2003. Although respondent #2's stipulation appeared more cautious, agreeing

that the claimant entered permanent and total disability status on December 23, 2003, if it was ultimately determined that the claimant was permanently and totally disabled.

The record as a whole supports a finding that the claimant is permanently and totally disabled. In addition to the lay testimony offered at the June 21, 2004, hearing, the medical evidence supports this conclusion. The proposed stipulation appears to be based upon a December 23, 2003, report from Dr. Beverly A. Beadle who opined that the claimant was permanently disabled from working primarily due to chronic pain while, at the same time, opining that the claimant had reached maximum medical improvement as far as his workers' compensation injury goes. (Resp. Ex. A, p.96)

A similar conclusion was reached by Dr. Steven Buchanan in a report dated April 9, 2002, which is set out below:

> Mr. Edward Warren has been under my care for a major, chronic depression since 03/13/96.
>
> Prior to that he saw Dr. Wrende Gallien. In my professional opinion his psychiatric problems are due to the injuries suffered on the job in 1985 and 1986; he has had chronic pain and been disabled since then. Prognosis is guarded; he has responded only partially to a number of antidepressants and anti-anxiety agents. Please feel free to contact me if more information is needed. (Resp. Ex. A, p.63)

Rather than conduct a further analysis of the record in this cause, suffice it to say that after consideration of the claimant's age, education, and work experience, the effects of his injury, together with the effects of aging, claimant has

proven, by a preponderance of the credible evidence, that he is permanently totally disabled within the meaning of the Arkansas workers' compensation laws.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The claimant sustained compensable injuries arising out of and during the course of his employment with the Alexander Youth Service Center on both October 22, 1985, and again on October 14, 1986, at which time he earned sufficient wages to entitle him to the maximum compensation rates of $175.00 per week for total disability and $154.00 per week for permanent partial disability.
3. The claimant entered into permanent total disability status on December 23, 2003.
4. Respondents #1 have controverted claimant's entitlement to additional permanent disability benefits.

DISCUSSION

_____At the August 23, 2006, prehearing conference, all parties agreed to specifically reserve the extent of the respective respondents' liability for additional disability benefits, if any, pending a final determination of the additional issues presented for determination. The parties subsequently stipulated that the claimant entered permanent and total disability status on December 23, 2003. Accordingly,

the date the claimant became permanently and totally disabled has been established. Respondents #1 may claim credit for permanent disability benefits previously paid subject to its maximum liability for permanent total disability under the Workers' Compensation Act. Thereafter, respondent #2 will assume liability for permanent total disability. Accordingly, I hereby make the following:

AWARD

The claimant, Edward Warren, is hereby awarded permanent total disability benefits at the rate of $175.00 per week, beginning December 23, 2003.

All accrued benefits shall be paid in lump sum and without discount. Respondents #1 may claim credit for benefits previously paid.

Additionally, claimant's attorney, Mr. C. Michael White, is hereby awarded the maximum statutory attorney's fee on this entire Award, to be paid pursuant to Ark. Code Ann. §11-9-715.

This Award shall bear interest at the legal rate until paid.

IT IS SO ORDERED.

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DAVID GREENBAUM
Chief Administrative Law Judge