

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E510879

ALLEN SEXTON,  
EMPLOYEE

CLAIMANT

ATLAS CARRIERS, INC.,  
EMPLOYER

RESPONDENT

INSURISK MANAGEMENT SERVICES,  
INSURANCE CARRIER

RESPONDENT

OPINION FILED OCTOBER 13, 2003

Upon review before the FULL COMMISSION in Little Rock,  
Pulaski County, Arkansas.

Claimant represented by HONORABLE WALTER MURRAY, Attorney at  
Law, Little Rock, Arkansas.

Respondents represented by HONORABLE JOHN D. DAVIS, Attorney  
at Law, Little Rock, Arkansas.

Decision of the Administrative Law Judge: Reversed and  
remanded.

OPINION AND ORDER

The claimant appeals an Administrative Law Judge's  
opinion filed January 17, 2002. The Administrative Law  
Judge found, "The claim filed by the claimant in the present  
matter is barred by the Statute of Limitations." After  
reviewing the entire record *de novo*, the Full Commission  
finds that the statute of limitations does not bar the  
present claim. We therefore reverse the opinion of the  
Administrative Law Judge, and we remand for the  
Administrative Law Judge to adjudicate the claimant's  
entitlement to vocational rehabilitation.

I. HISTORY

The parties stipulated that the claimant sustained a compensable injury on July 14, 1995. The claimant testified that he injured his back, underwent surgery, and subsequently developed "drop foot." The claimant testified, "It's hard to walk across a flat floor." The claimant testified that the respondent-employer did not provide light duty in accordance with the treating physician's physical restrictions. The claimant's attorney wrote to the Clerk of the Commission on June 20, 1997:

Please let your records reflect that I represent the Claimant in the above-referenced case. I previously notified Mr. Bischoff, in my correspondence of March 4, 1997. In that correspondence, I requested certain information but Mr. Bischoff has not responded. Accordingly, I am submitting Interrogatories and Request for Admissions to Mr. Bischoff but, in keeping with the Commission Rule, I am not enclosing a copy for your file.

At this particular juncture, the Respondents were interested in job placement as opposed to vocational rehabilitation and it looks as though this is a possibility. Rehabilitation Management, Inc., has been working with Mr. Sexton and he is considering purchasing an interest in an existing company. Because of the delays which have been encountered, we ask that you refer this matter to an Administrative Law Judge so it can be set for a Hearing on the Respondents' desire for job placement.

The claimant signed on July 2, 1997 a Form AR-C, Claim For Compensation. The claim was for "initial" and "additional" benefits. The claim for additional benefits included "rehabilitation."

The claimant testified that he began a program of vocational rehabilitation, but that he was arrested on or about September 8, 1998. The claimant's testimony on cross-examination indicated that the State dropped charges due to "speedy trial." The claimant testified that he was without transportation after his truck was confiscated, and that the vo-tech school was 8-10 miles from his home in Searcy. The claimant testified that he did not re-enroll in 1999, because "I didn't have any money; didn't have the money to." The claimant's testimony indicated that he was eventually able to get back in school after borrowing money from a relative.

The Administrative Law Judge entered the following ORDER OF DISMISSAL on October 17, 2000:

This matter comes before the Commission on the respondents' motion for dismissal. After considering the respondents' motion, and all other matters properly before the Commission, I find that this claim must be, and hereby is dismissed without prejudice under Rule 13 of the Arkansas Workers' Compensation Commission.

The claimant's attorney wrote to the Administrative Law Judge on October 3, 2001:

Information recently forwarded to me by John Davis contains an Order of Dismissal dated October 17, 2000. I have not previously seen that Order and, in order to avoid a statute of limitations defense hereby and herein request that this correspondence be considered as the filing of a claim on behalf of Mr. Sexton. Specifically, Claimant requests

that this matter be treated as a petition for additional benefits.

A pre-hearing order was filed with the Commission on October 12, 2001. According to the pre-hearing order, the parties agreed to litigate the issue of whether the claimant was entitled to vocational rehabilitation. Hearing before the Commission was held on October 18, 2001. At that time, the respondents' attorney contended that the statute of limitations barred the claim. The claimant testified that he would graduate from vocational training in June 2002. The claimant testified that he wanted to finish the program at the respondents' expense. Rudy Bischof, vice-president of claims for the respondent-carrier, testified that no benefits had been paid to the claimant since November 17, 1998.

The Administrative Law Judge filed an opinion on January 17, 2002, finding, "The claim filed by the claimant in the present matter is barred by the Statute of Limitations." In an Order filed July 25, 2002, the Full Commission remanded the case for the Administrative Law Judge to settle the record. The Administrative Law Judge thereafter filed an "Opinion" on October 18, 2002, stating, "the Full Commission directed me to supplement the record with the June 23, 1997, claim filed by the claimant, and with a copy of the claim filed subsequent to the October 17,

2000, dismissal without prejudice. Those documents have been identified by attaching a blue-back to them, and are hereby accepted into the record." The matter was eventually placed on the Full Commission's June 25, 2003 submission docket.

## II. ADJUDICATION

Ark. Code Ann. §11-9-702(b) provides:

(1) In cases where any compensation, including disability or medical, has been paid on account of injury, a claim for additional compensation shall be barred unless filed with the commission within one (1) year from the date of the last payment of compensation or two (2) years from the date of the injury, whichever is greater.

In the present matter, the Administrative Law Judge (Administrative Law Judge) noted that the claimant sustained a compensable injury on July 14, 1995. The Administrative Law Judge determined that the claimant "filed a claim for compensation on June 23, 1997." The Administrative Law Judge correctly noted that the last payment of compensation was made to the claimant on November 17, 1998. The Administrative Law Judge determined, "the claim filed on June 23, 1997, served to prevent the Statute of Limitations from barring the claim until that claim was resolved by the order of dismissal filed on October 17, 2000." The Administrative Law Judge cited the "savings" statute, Ark. Code Ann. §16-56-126, which allows a plaintiff to re-file a

claim within one year of a dismissal. The Administrative Law Judge determined, "I can find no authority which suggests that Ark. Code Ann. §16-56-126 would apply to dismissals under Rule 13 of the Rules of the Arkansas Workers' Compensation Commission."

The Administrative Law Judge found:

In short, the claim filed on June 23, 1997, served to toll the Statute of Limitations until that claim was dismissed by the order filed on October 17, 2000. However, the limitations period had expired by the time that claim was dismissed on October 17, 2000. Consequently, in the absence of a statute or any other authority to extend the period of time to re-file a claim, I am compelled to find that the Statute of Limitations barred the filing of a subsequent claim. Accordingly, I find that the claim filed by the claimant in the present matter is barred by the Statute of Limitations.

The Full Commission finds that the Administrative Law Judge erred in dismissing this claim pursuant to the statute of limitations. The burden is on the claimant to act within the time allowed for filing a claim. Superior Fed'l S&L v. Shelby, 265 Ark. 599, 580 S.W.2d 201 (1979). The running of the statute of limitations is largely a question of fact. Cromwell v. University of Arkansas, 76 Ark. App. 5, 61 S.W.3d 864 (2001). In Arkansas workers' compensation cases, a claimant has two years from the date of injury to claim additional compensation, or one year from the last payment

of compensation, whichever period is greater. Ark. Code Ann. §11-9-702(b)(1).

The present claimant sustained a compensable injury on July 14, 1995. The claimant's attorney asked in writing for a hearing, in correspondence dated June 20, 1997. The Administrative Law Judge has essentially considered this request to be a claim for additional compensation, thus tolling the statute of limitations. But the record also includes a Form AR-C, dated July 2, 1997, where the claimant claimed entitled to additional benefits, including rehabilitation. This July 2, 1997 filing was clearly within two years from July 14, 1995 and therefore tolled the statute of limitations. See, Sisney v. Leisure Lodges, Inc., 17 Ark. App. 96, 704 S.W.2d 173 (1986); Spencer v. Stone Container Corp., 72 Ark. App. 450, 38 S.W.3d 864 (2001).

The Full Commission does not affirm the Administrative Law Judge's implicit determination in the instant matter that his October 17, 2000 dismissal order acted to "decide" or "resolve" the claim, thus bringing the claim to an end. First, the record does not show that the claimant was duly served with a motion to dismiss with regard to the October 17, 2000 order. The Full Commission has vacated an Administrative Law Judge's order of dismissal where it

appeared the claimant was not given a chance to respond to a motion. Toothman v. Superior Industries, Workers' Compensation Commission E501575 (April 25, 2001). Accord, Greene v. McGehee School District, Workers' Compensation Commission E912139 (Aug. 29, 2001).

More importantly, an order which is not a final order is not appealable. Dodd v. Bonds, 220 Ark. 951, 251 S.W.2d 587 (1982). The Commission has held that orders of dismissal which are without prejudice, such as in the instant matter, are not appealable orders. Phylant v. R.L. Johnson & Sons, Inc., Workers' Compensation Commission D505505 (June 23, 1987); Johnson v. Powell Oil Company, Workers' Compensation Commission E114843 (Aug. 26, 1999). In Johnson, the Full Commission determined that an order of dismissal would not act as a statutory bar of a claim.

Based on our *de novo* review of the entire record, the Full Commission reverses the Administrative Law Judge's finding that the instant claim is barred by the statute of limitations. The Full Commission finds that the claimant timely filed a claim for additional benefits on July 2, 1997, thus tolling the statute of limitations. We reverse the Administrative Law Judge's determination that his October 2000 dismissal acted as a bar to further benefits. The Full Commission remands this matter to the

Administrative Law Judge, and we direct the Administrative Law Judge to conduct those proceedings necessary to determine the claimant's entitlement to vocational rehabilitation.

All accrued benefits shall be paid in a lump sum without discount and with interest thereon at the lawful rate from the date of the Administrative Law Judge's decision in accordance with Ark. Code Ann. § 11-9-809 (Repl. 2002).

Since the claimant's injury occurred prior to July 1, 2001, the claimant's attorney's fee is governed by the provisions of Ark. Code Ann. § 11-9-715 as it existed prior to the amendments of Act 1281 of 2001. Compare Ark. Code Ann. § 11-9-715 (Repl. 1996) with Ark. Code Ann. § 11-9-715 (Repl. 2002). For prevailing on this appeal before the Full Commission, claimant's attorney is hereby awarded an additional attorney's fee in the amount of \$250.00 in accordance with Ark. Code Ann. § 11-9-715(b) (Repl. 1996).

IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

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SHELBY W. TURNER, Commissioner

Commissioner McKinney dissents.

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DISSENTING OPINION

I must respectfully dissent from the majority opinion finding that the claimant's claim is not barred by the statute of limitations. In my opinion, the Administrative Law Judge correctly found that the "savings statute" does not apply to workers' compensation claims. The majority finds that the October 17, 2000, Order of Dismissal did not act as a bar to further benefits because; (1) the claimant was not properly served with the Motion to Dismiss; (2) the dismissal order was not a final appealable order; and (3) a dismissal order does not act as a statutory bar of a claim. I do not agree. First, the claimant did not argue at the hearing nor in his briefs before the Commission that he was not properly served with the Motion to Dismiss, only that his attorney had not seen the Order of Dismissal until one year after it was filed. Moreover, the record clearly indicates that claimant's attorney was properly served with a copy of the Motion to Dismiss. In this regard the record specifically states:

Judge White: So Mr. Murray you're contending you did not receive a copy of this Order.

Mr. Murray: That's correct. My file contains a letter from Mr. Davis dated October 3<sup>rd</sup> on a Motion to Dismiss, and the next thing my file contains is my correspondence to Ms.

Jackson in July asking it to be set for a hearing.

With regard to receipt of the Order of Dismissal by the claimant's attorney, the record clearly indicates that the Administrative Law Judge addressed the cover letter for the Order of Dismissal to the proper address for the claimant's attorney. Accordingly, I do not find this argument persuasive.

Second, while a Dismissal without Prejudice is normally a non-appealable order, I find that in the present claim, the October 17, 2000, Order of Dismissal operated to permanently bar the claimant's claim since it was entered after the statutory period for filing a claim pursuant to A.C.A. § 11-9-702(b), and would thus have been a final and appealable order.

This Commission has previously found that the A.C.A. § 16-56-126 does not apply to workers' compensation claims. Thomas Boston v. Hickory Hills Property Owners Assoc., Full Commission Opinion filed January 9, 1991 (D804013). Since I find that the October 17, 2000, Order of Dismissal was a final and appealable order, I further find that this claim is barred by the Statute of Limitations.

Therefore, I respectfully dissent from the majority opinion.