

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E509478

SCIPIO JOHNSON, EMPLOYEE	CLAIMANT
BONDS FERTILIZER, INC., EMPLOYER	RESPONDENT NO. 1
AGRI GROUP-COMP SI FUND, CARRIER	RESPONDENT NO. 1
BONDS BROTHERS, INC., EMPLOYER	RESPONDENT NO. 2
CNA INSURANCE COMPANY, CARRIER	RESPONDENT NO. 2

OPINION FILED AUGUST 20, 2004

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

Claimant represented by HONORABLE TIMOTHY S. PARKER, Attorney at Law, Eureka Springs, Arkansas.

Respondents No. 1 represented by HONORABLE J. MICHAEL DENNIS, Attorney at Law, Pine Bluff, Arkansas.

Respondents No. 2 represented by HONORABLE D. KEITH FORTNER, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

The claimant appeals from a decision of the Administrative Law Judge filed November 26, 2003.

The Administrative Law Judge entered the following findings of fact and conclusions of law:

The statute of limitations has run on this claim and the Commission has no further jurisdiction in this matter.

We have carefully conducted a de novo review of the entire record herein and it is our opinion that the Administrative Law Judge's decision is supported by a preponderance of the credible evidence, correctly applies the law, and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings of fact made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission. We also affirm the decision that the Commission does not render advisory opinions.

Thus, we affirm and adopt the decision of the Administrative Law Judge, including all findings and conclusions therein, as the decision of the Full Commission on appeal.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.

DISSENTING OPINION

_____ I dissent from the opinion of the majority finding that the statute of limitations bars the Commission from making the requested determination of fact regarding Claimant's employment status at the time of the injury, as described in the Supreme Court's opinion in Scipio Johnson v. Union Pacific Railroads, et. al, 352 Ark. 534 (2003), and that such a determination would be an advisory opinion. In so finding, the majority does not address the issue of Claimant's employment status, which the Supreme Court stated was within this Commission's exclusive and original jurisdiction. In my opinion, the Commission should remand the matter for a determination and development of the record on the issue specifically addressed in the Supreme Court's decision, whether Claimant was an employee of Bonds Fertilizer or the Farm at the time of the accident.

This case comes to the Commission following the Supreme Court's review of related proceedings pending in Jefferson County Circuit Court. Johnson and his wife filed suit in Jefferson County Circuit Court against Bonds Fertilizer, Inc., Bonds Brothers, Inc. and Union Pacific

Railroad alleging negligence and a loss of consortium. The Supreme Court summarized the factual findings of the trial court as follows:

The record reflects that, on the date of the accident, Johnson was an employee of both the Farm and Bonds Fertilizer. Both companies, along with Bonds Brothers were either owned or controlled by Kenny Bonds and Brian Bonds. Kenny and Brian each owned fifty percent of Bonds Brothers. Bonds Brothers is the sole shareholder of Bonds Fertilizer. The Farm is a partnership comprised of Kenny Bonds Farms, Brian A. Bonds Trust, and Bonds Brothers. When Johnson performed work for either the Farm or Bonds Fertilizer, he reported to the same supervisor, Allan Maxey. Some weeks Johnson would perform tasks for both employers, but he would receive only one paycheck from the company that he did the most work for that week. The week before the accident and the week of the accident, Johnson was paid by Bonds Fertilizer.

On the morning of the accident, Johnson was performing work for the Farm, because one of the Farm's employees was out sick. That afternoon, Johnson was supposed to deliver a load of fertilizer that was coming in at 3:00 p.m. for Bonds Fertilizer. In the meantime, around 1:00 p.m., Maxey instructed Johnson to pick up a tractor for the Farm and begin laying irrigation pipe. Maxey instructed Johnson to ride with Frances Birmingham, an employee of Bonds Fertilizer. Alyston Luster, an employee of the Farm, also rode with them. The truck they were riding in was

owned by Bonds Brothers, and it had a 1,000-gallon water tank hooked to the back.

When they approached the railroad crossing at Clemmons Road, Birmingham applied the brakes and slowed the truck to one or two miles per hour. She did not come to a complete stop. According to their depositions, both Birmingham and Johnson looked both ways to see if a train was coming. Neither of them saw or heard a train. Birmingham then began driving the truck across the track, when Johnson hollered for her to "step on it." The train collided with the bed of the truck, throwing all three passengers from the vehicle. Johnson and Birmingham received serious injuries from the collision, but Luster's injuries were fatal.

Following the accident, Kenny Bonds reported Johnson's accident to the insurance carrier for Bonds Fertilizer. The insurance carrier approved the claim and paid approximately \$61,000 in medical and temporary total disability benefits to or on behalf of Johnson. Johnson accepted these benefits for over nine months, from July 1995 to April 1996. Subsequently, in February 1998, Johnson made a claim for additional benefits, listing as his employer: "Bonds Fertilizer, Inc. or Bonds Brothers Farms, Inc." That claim was later withdrawn by Johnson, in favor of the civil suit.

Based on these facts, the trial court granted summary judgment to Bonds Fertilizer. The trial court found that Bonds Fertilizer was Johnson's employer at the time of the accident. The trial

court also found that because Johnson had received workers' compensation benefits and had made no attempt to repay those benefits, his exclusive remedy against the company was under the Workers' Compensation Act.

Johnson urges us to reverse the grant of summary judgment. However, before we may reach the merits of his argument, we must first address the argument made by Bonds Fertilizer that the trial court lacked jurisdiction to determine which employer Johnson was working for at the time of the accident. Bonds argues that the exclusive jurisdiction to determine this issue belongs to the Arkansas Workers' Compensation Commission. We agree.

The Supreme Court relied on VanWagoner v. Beverly Enters., 334 Ark. 12, 13, 970 S.W.2d 810,811 (1998) and WENCO Franchise Management, Inc. v. Chamness, 341 Ark. 86, 13 S.W.3d 903 (2000) (per curiam) in concluding that this Commission has exclusive, original jurisdiction to determine Claimant's employer at the time of his injury:

[T]he Commission had the exclusive, original jurisdiction to determine whether Johnson's injuries were covered by the Act. The evidence adduced below is not so one-sided to demonstrate, as a matter of law, which employer Johnson was working for at the time of the accident. Thus, it is an issue of fact for the Commission to resolve. Accordingly, we reverse the trial court's grant of summary judgment to Bonds Fertilizer, as the trial court

lacked jurisdiction to determine the applicability of the Act to Johnson's claim. We thus remand to the trial court with leave for Johnsonto seek a determination from the Commission as to whether he was performing employment services for Bonds Fertilizer or the Farm on the date of the accident.

Thereafter, Claimant sought a determination from the Commission as to who his employer was at the time of the injury. Respondents asserted that this Commission no longer has jurisdiction to decide that issue because the statute of limitations has run on the claim. The Administrative Law Judge permitted the parties to brief the statute of limitations issue. The Administrative Law Judge held that the statute of limitations barred the Commission from determining who Claimant's employer was at the time of the injury and that such a decision would be an impermissible advisory opinion because the Claimant does not seek benefits but only a factual determination. Claimant then timely filed the instant appeal.

After conducting a de novo review of the entire record, I find that the Full Commission should reverse and remand this case. Specifically, I find that the majority has erred in addressing the statute of limitations and incorrectly concluded that an opinion on the question

presented by the Supreme Court would be advisory.

The statute of limitations does not apply here because Claimant is not requesting benefits or compensation under the Act. The statute of limitations provision under the Act, Section § 702, applies only to claims "for compensation for disability on account of an injury." Here, Claimant is not seeking compensation or benefits. Instead, he is only seeking a determination from the Commission as to whether he was performing employment services for Bonds Fertilizer or the Farm on the date of the accident in order to proceed with the action pending before the circuit court. Claimant is requesting that the Commission make a factual determination for use in the pending civil action because the Supreme Court has held that the circuit court does not have jurisdiction to make that finding. I, therefore, find that the statute of limitations under Section 702 of the Act does not apply to this proceeding because Claimant is not seeking compensation or benefits under the Act.

I also disagree with the majority's finding a determination regarding Claimant's employer at the time of injury would amount to an advisory opinion. Such a determination would not be an impermissible advisory opinion

because this Commission has exclusive and original jurisdiction over that issue and that determination is necessary for the advancement claims and defenses in the pending circuit court case.

It is well recognized that "Courts do not sit for the purpose of determining speculative and abstract questions of law or laying down rules for future conduct." Tsann Kuen Enterprises Co. v. Campbell, No. 03-391 (Ark. Nov. 11, 2003). The Supreme Court "has consistently refused to issue advisory opinions based on facts not in evidence and events that have not yet occurred." Harris v. City of Little Rock, 344 Ark. 95, 40 S.W.3d 214 (2001). Further, courts decline to address an issue raised by a party when "there is no issue in controversy, thus rendering any decision a mere advisory opinion." Arkansas DHS v. Schroder, 353 Ark. 885 (2003); See Worth v. City of Rogers, 341 Ark. 12, 14 S.W.3d 471 (2000); Jenkins v. Bogard, 335 Ark. 334, 980 S.W.2d 270 (1998).

Here, however, the question of Claimant's employment relationship with the Respondents at the time of the injury is not a speculative issue, but is necessary for the continuation of proceedings in a pending controversy in

the circuit court. Essentially, the circuit court cannot rule on the Claimant and Respondents' claims and defenses in the pending action until the Commission makes a determination on the issue framed by the Supreme Court. The Supreme Court held, in reliance on Vanwaggoner, that this Commission, and not the circuit court, has exclusive and original jurisdiction to address the issue presented by Claimant. I find, therefore, that the Commission may properly determine which company was Claimant's employer at the time of the injury.

Based on the foregoing, I dissent from the majority opinion and find that this case should be remanded for development of the record on the issue of whether Claimant was performing employment services for Bonds Fertilizer or the Farm at the time of Claimant's injury.

SHELBY W. TURNER, Commissioner