

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E500581

BRENDA VANWAGNER, EMPLOYEE

CLAIMANT

**WAL-MART STORES, INC,
A SELF-INSURED EMPLOYER**

RESPONDENT

CMI, TPA

RESPONDENT

OPINION FILED AUGUST 30, 2005

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

Claimant represented by HONORABLE LAURA J. MCKINNON,
Attorney at Law, Fayetteville, Arkansas.

Respondent represented by HONORABLE CURTIS NEBBEN ,Attorney
at Law, Fayetteville, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

Respondents appeal the decision of the Administrative Law Judge filed September 21, 2004, finding that the respondents have failed to prove by a preponderance of the evidence that the claim is barred by the statute of limitations and finding that the claimant is entitled to permanent partial disability for a 10% impairment rating assigned by Dr. Gary Moffitt. Based upon our de novo review of the record, we find that the Administrative Law Judge erred in finding that this claim is not barred by the statute of limitations. Accordingly, we find that the

decision of the Administrative Law Judge is hereby reversed and this claim for benefits denied and dismissed.

The claimant sustained a compensable injury to her shoulder on November 17, 1994. On December 19, 1994, the claimant signed an AR-C which was filed with the Commission on or before January 12, 1995, as reflected by the 15-day letter sent by the Commission to the respondents. This AR-C commenced the hearing process and a full hearing was held on August 23, 1995. The transcript from this hearing has been made a part of the record. The hearing transcript and October 18, 1995, Administrative Law Judge opinion do not indicate that any issues (other than a subsequent claim from a ruptured breast implant) were to be reserved. Medical documentation introduced at the August 23, 1994, hearing indicated that the claimant was assigned a zero percent impairment rating by Dr. Gary Moffitt. The respondents last paid benefits to the claimant in December of 1995. The October 18, 1995, opinion was appealed and on August 19, 1996, the Full Commission issued an opinion affirming and adopting the decision of the Administrative Law Judge. The Full Commission opinion was not appealed and is *res judicata*. Through correspondence from her attorney, the

claimant filed a request for additional benefits on November 3, 2000.

A.C.A. § 11-9-702(b) provides:

In cases where compensation for disability 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 last payment of compensation, or two (2) years from the date of injury, whichever is greater....

The record reflects that benefits were last paid to the claimant in December of 1995. One year from the last payment of benefits would thus be December of 1996, which is greater than two years from the date of injury. Therefore, the time for filing a claim for additional benefits would have to be filed on or before December of 1996. Although the claimant initially filed a claim for additional benefits on December 19, 1994, well within the statute of limitations period, and which tolled the statute of limitations, this claim for additional benefits was litigated on August 23, 1995, and disposed of via the Full Commission opinion filed August 19, 1996, thus lifting the toll. The claimant did not file a subsequent request for additional benefits until November 3, 2000, well beyond the statute of limitations.

In Spencer v. Stone Container Corp., Full Commission opinion filed February 24, 2000, (E121478), the Full Commission found that the claim was not barred by the statute of limitations because the claimant filed a claim for additional benefits within the appropriate time, thus tolling the statute of limitations. This decision was affirmed by the Arkansas Court of Appeals in Spencer v. Stone Container Corp., 72 Ark. App. 38 S.W.3d 909 (2001). Admittedly, the claimant's AR-C filing in December of 1994, operated to toll the statute of limitations pursuant to the holding in Spencer. However, unlike the claim in Spencer, the present claimant's claim for additional benefits was adjudicated on August 23, 1995, with a final opinion on the issues rendered via the Full Commission opinion dated August 19, 1996. Once the claim for additional benefits was settled through the adjudication process and the final opinion issued, the statute of limitations began running again.

In a more recent opinion, the Court of Appeals reversed the Full Commission and found that because an open claim for benefits was not properly dismissed, the statute of limitations remained tolled by the initial AR-C filing.

See Dillard v. Benton County Sheriff's Office, CA-04-025 (Ark. App. 9-22-2004). The court specifically stated that the claimant in Dillard was entitled to additional benefits because the claim remained opened since there was insufficient evidence to support a finding that the claim was properly dismissed. The holding, therefore, supports the argument that when a claim is properly adjudicated, the statute of limitations is no longer tolled.

Since the claimant in the present claim did not file her request for additional benefits until November of 2003, we are constrained to find her request for additional benefits is barred by the statute of limitation. Therefore, we find that the decision of the Administrative Law Judge must be reversed, and this claim denied and dismissed.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.

DISSENTING OPINION

The Majority is finding that the statute of limitation acts as a bar to the present claim. Because I believe this holding is contrary to numerous decisions of the Arkansas Court of Appeals, I respectfully dissent from the above Opinion.

On or about January 12, 1995, the claimant filed a claim with the Commission for certain additional benefits, permanent partial disability benefits being among them. In 1995, some of the benefits requested in that claim were submitted to Adjudication. In a decision affirmed by this Commission, the portion of the claim relating to the claimant's request for temporary total disability benefits was denied.

Present litigation began when the claimant filed a second claim on November 3, 2000, once again requesting permanent partial disability benefits. The respondent contested this claim arguing, among other things, that the statute of limitation acted as a bar to it. The dispute eventually went to trial and, after the hearing, the

Administrative Law Judge correctly held that the 1995 claim for additional benefits tolled the statute of limitation and, pursuant to several decisions of the Appellate Courts of this State, once tolled, the statute could not start running again. The Majority has failed to consider those past decisions, as well as the plain language of the Act, and has held that the statute of limitation did begin running again.

A.C.A. §11-9-702 (b) states, "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 year from the date of the last payment of compensation or two years from the date of the injury whichever is greater." (Emphasis added). In this case, the claimant, when she filed original claim in 1994 tolled the running of the statute. That interpretation has long been the law in this State. As has been frequently noted in statute of limitation cases: "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 that the statute means what its plain language implies." **Bledsoe v. Georgia Pacific Corp.**,

12 Ark. App 293, 675 S. W. 849 (1984).

That holding has been reinforced on innumerable occasions. For example in **Spencer v. Stone Container Corp**, 72 Ark. App. 38 S. W. 3rd 909 (2001), the Court of Appeals held that a request for a change of physician was a claim for additional benefits which was sufficient to toll the running of the statute of limitations and that therefore a second claim filed by the claimant six years later was not time barred.

The Majority attempts to distinguish these cases on the basis that there has been an adjudication in this case subsequent to the filing of the original claim for additional benefits. However, that situation was addressed by the Court of Appeals in the recent case of **Dillard v. Benton County Sheriff's Office**, ___ Ark. App. ___, ___ S. W. 3rd ___ (September 22, 2004). In this case, the claimant's original claim for additional benefits was dismissed by the Commission for lack of prosecution. After the statute had run, the claimant filed a second claim for additional benefits which the respondent controverted, based upon the statute of limitation. In reversing the Commission's dismissal of the claim, the Court held that since

Mr. Dillard's claim was one for additional benefits then his original claim filing had tolled the statute of limitation and it could not act as a bar to his subsequent claim. In other words, the Commission's prior dismissal of his claim would have no apparent effect. In attempting to distinguish the Dillard claim, the Majority asserts that the Dillard decision was based upon the fact that the dismissal was improper. However, a review of the Dillard decision, demonstrates that such was not the case. The Court clearly held that Mr. Dillard's claim was one for additional benefits and had been tolled by his first claim filing. However, the Court noted in dicta that the respondent had argued that the claim was an original claim. They explained that the result would not have been changed even if that were correct because the dismissal was without a hearing, and since original claims can only be dismissed after a hearing, the dismissal would have been invalid.

I also fail to see the significance of the adjudication referred to in the Majority's opinion. The January 1995 claim filing included a request for a variety of benefits, including permanent disability benefits. However, the claim for permanent disability benefits was not

presented for determination to the Administrative Law Judge in the hearing subsequent to that claim filing. Obviously, had the Judge ruled on this claim, the *Doctrine of Res Judicata* would prevent a relitigation of this same issue. However, the Majority did not even attempt to argue that such was the case. Since there clearly had been no determination made on the claimant's entitlement to permanent disability benefits, I fail to see the relevance of a dismissal of the portions of his first claim filing which dealt with temporary total disability benefits.

This Commission is required to follow the decisions of the Arkansas Court of Appeals when they interpret and apply the Workers' Compensation Act. While I realize that there may be some that disagree with the Court of Appeals' opinions, we are nonetheless bound to follow them. I believe the Court of Appeals has made it abundantly clear on several occasions that a claim filing for additional benefits tolls the statute of limitation as it applies to that claim. To date, the Court of Appeals has not indicated that any activity can start the statute of limitation running again. However, the Majority has overlooked the clear mandates from the Court of Appeals and

is holding that, in this case, the statute of limitation has in fact begun running again even in the case where a timely claim for additional benefits has previously been filed. The Majority's decision in this case is simply not in accordance with the applicable law. For that reason, I respectfully dissent.

SHELBY W. TURNER, COMMISSIONER