

**NOT DESIGNATED FOR PUBLICATION**

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION  
CLAIM NO. F200619

RICHARD COSNER, EMPLOYEE CLAIMANT

C & J FORMS & LABELS CO., EMPLOYER RESPONDENT NO. 1

LIBERTY MUTUAL GROUP  
INSURANCE CARRIER/TPA RESPONDENT NO. 1

SECOND INJURY FUND RESPONDENT NO. 2

DEATH & PERMANENT TOTAL DISABILITY  
TRUST FUND RESPONDENT NO. 3

OPINION FILED JANUARY 5, 2021

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

Claimant represented by the HONORABLE EDDIE H. WALKER, JR.,  
Attorney at Law, Fort Smith, Arkansas.

Respondents No. 1 represented by the HONORABLE GUY ALTON WADE,  
Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by the HONORABLE DAVID L. PAKE,  
Attorney at Law, Little Rock, Arkansas.

Respondent No. 3 represented by the HONORABLE CHRISTY L. KING,  
Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

Claimant appeals an amended opinion and order of the Administrative Law Judge filed March 16, 2020. In said order, the Administrative Law Judge made the following findings of fact and conclusions of law:

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on October 4, 2019 and contained in a Pre-hearing Order filed on that same date, are hereby accepted as fact.
2. Respondent No. 1 has proven that the statute of limitations has run with respect to the claimant's claim for additional permanent partial disability benefits in relation to his knee and/or his shoulders. Having found that the statute of limitations has run, the issue of the claimant's entitlement to permanent impairment for his right knee and bilateral shoulder is moot.

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.

Therefore, we affirm and adopt the March 16, 2020 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.

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SCOTTY DALE DOUTHIT, Chairman

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CHRISTOPHER L. PALMER, Commissioner

Commissioner Willhite dissents.

#### DISSENTING OPINION

After my *de novo* review of the entire record, I dissent from the majority opinion finding that the statute of limitations has run with respect to the claimant's claim for additional permanent partial disability (hereinafter, "PPD") benefits in relation to his knee and/or his shoulders.

#### **Factual & Procedural Background**

The claimant sustained a compensable right knee injury on December 19, 2001. On October 2, 2009, the claimant received an impairment rating of 50% to the lower extremity from Dr. C. Lowry Barnes. The respondents paid PPD benefits based on this rating. Following a failed

total knee arthroplasty, by letter dated October 30, 2019, Dr. James Buie opined that the claimant's impairment was at least 75%.

The claimant also sustained bilateral shoulder injuries that was determined to be a compensable consequence of his compensable knee injury pursuant to an opinion dated June 30, 2017. On March 30, 2019, Dr. Shahryar Ahmadi assessed a 26% whole person impairment rating based on the claimant's bilateral shoulder injuries. The primary issue is whether the statute of limitations for PPD benefits expired prior to a valid claim.

A timeline of relevant dates in the process of this claim is as follows:

On September 9, 2002 an AR-C was filed as an initial claim for PPD, medical expenses, and attorney fees for injuries to knees, back, and neck.

The initial hearing was conducted on April 10, 2003. Following this hearing, the Administrative Law Judge issued an opinion on July 2, 2003, finding that (1) the claimant sustained compensable injuries; (2) the claimant is entitled to temporary total disability benefits from February 25, 2003 to April 9, 2003; and (3) the claimant is entitled to temporary partial disability from April 9, 2003 to a date to be determined.

On January 18, 2006, a Pre-hearing Order was filed. The issues to be litigated were noted as (1) [p]ayment of \$860.36 regarding Mr. Cosner's out of pocket expenses submitted on August 5, 2003; (2) [p]ayment of the difference between the \$7,790.00 in temporary disability benefits requested on August 5, 2003, and the \$2,752.85 in temporary disability paid on August 25, 2003; and (3) [a]ttorney fees.

A hearing was conducted on April 13, 2006. All issues outlined in the Pre-hearing Order were resolved prior to the hearing. The issues litigated were compensability of the claimant's ulnar nerve palsy; medical treatment for the claimant's ulnar nerve palsy; and whether the referral from Dr. Buie to Dr. Woods was reasonable and necessary medical treatment.

On July 12, 2006 an Administrative Law Judge issued an opinion, finding that (1) the respondents have agreed to let the claimant return to Dr. Buie for medical treatment; (2) the claimant failed to prove that his ulnar nerve palsy is a compensable consequence of his compensable right knee injury; and (3) the claimant has proven that it is reasonable and necessary for him to be referred to Dr. William Woods in Dallas for a second opinion as to the course of treatment for his right knee.

On January 12, 2011 an AR-4 was filed and subsequently, 92 weeks of PPD benefits were paid. On June 9, 2011 the PPD claim was closed.

On October 17, 2011 the claimant requested additional benefits via letter which was acknowledged as received by the AWCC's Operations & Compliance Division on October 18, 2011.

The claimant requested additional benefits and that the claim be assigned to an Administrative Law Judge by letter dated May 12, 2015.

On June 18, 2015 the claimant requested additional benefits via letter.

On April 6, 2017, a hearing was conducted on this matter. An Opinion was issued on June 30, 2017, wherein, a finding was made that the claimant suffered compensable bilateral shoulder injuries as a compensable consequence of his compensable right knee injury and claimant is entitled to reasonable and necessary medical treatment of his shoulders bilaterally.

On April 10, 2018, the claimant requested additional benefits via letter which was acknowledged as received by the AWCC on the same day.

Claimant requested a hearing via letter dated March 11, 2019, which was conducted on December 5, 2019. The parties agreed to litigate: (1) the extent of permanent impairment regarding the claimant's right knee;

(2) the extent of permanent impairment regarding the claimant's bilateral shoulders; (3) Respondent No. 1 raises the statute of limitations defense; and (4) whether claimant's attorney is entitled to an attorney's fee.

On March 16, 2020 the Administrative Law Judge issued an opinion, finding that the statute of limitations has run with respect to claimant's claim for additional PPD benefits in relation to his knee and shoulders.

### **Opinion**

A.C.A. §11-9-702(b) states, in pertinent part:

(1) In cases in which 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.

A claim that is never acted upon continues to toll the statute of limitations. *Barnes v. Fort Smith Pub. Sch.*, 95 Ark. App. 248, 235 S.W.3d 905 (2006); *Eskola v. Little Rock Sch. Dist.*, 93 Ark. App. 250, 218 S.W.3d 372 (2005); *Spencer v. Stone Container Corp.*, 72 Ark. App. 450, 38 S.W.3d (2001); and *Bledsoe v. Georgia-Pacific Corp.*, 12 Ark. App. 293, 675 S.W.2d 849 (1984).

On September 9, 2001, the claimant filed a timely AR-C which included a claim for PPD benefits for injuries to his knees, back, and neck. A hearing was conducted on April 10, 2013; however, the issue of PPD benefits was not addressed<sup>1</sup>.

The claimant received his initial impairment rating for his right knee injury on October 2, 2009. Benefits on this rating were paid for 92 weeks and appear to have been completed on January 12, 2011<sup>2</sup>. The claimant requested additional benefits by letter dated October 17, 2011, which is clearly within one year of the date of the last PPD payment. Although it does appear from this letter that medical treatment was an issue, it is impossible to say without speculation that this request for additional benefits was limited to a request for only additional medical benefits. Certainly, this additional treatment could have resulted in the right to additional indemnity benefits. The broad use of the language, "additional benefits" left room for such a scenario. Therefore, I find that the October 17, 2011 letter requesting additional benefits tolled the statute of limitations.

After this request for additional benefits, there was a hearing on April 6, 2017 to determine whether the claimant's bilateral shoulder injuries were suffered as a compensable consequence of his compensable

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<sup>1</sup> Clearly litigating PPD benefits at this point would have been premature.

<sup>2</sup> The AR-4 filed on January 12, 2011 is stamped closed on June 9, 2011.



right knee injury. The issue of PPD benefits was not addressed. An opinion in favor of the claimant was issued. On April 10, 2018, another request for additional benefits was submitted. The December 5, 2019 hearing was the first hearing scheduled to adjudicate the issue of PPD.

In *VanWagner v. Wal-Mart Stores, Inc.*, 95 Ark. App. 173, 234 S.W.3d 893 (2006), VanWagner filed a claim for additional PPD benefits in 1995. A hearing was held that same year to adjudicate the issues of temporary total disability benefits, end of healing period, and medical and attorney fees. The *VanWagner* court ruled that the claim for additional PPD benefits that tolled the statute of limitations remained outstanding because it was neither litigated nor dismissed. Also, the hearing, which did not address the issue of PPD, did not lift the toll.

Here, as in *VanWagner, supra*, the PPD issue was never adjudicated prior to the 2019 hearing. Therefore, the tolling of the statute of limitations was not lifted. Additionally, the PPD claim was not dismissed through any previous adjudication. Given that the statute of limitations was tolled by the October 17, 2011 and April 10, 2018 letters, that the toll was not lifted through litigation, and that the PPD claim was not dismissed, I find that the claimant's PPD claim is not time barred.

For the foregoing reasons, I dissent from the majority opinion.

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M. Scott Willhite, Commissioner