BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
CLAIM NO. G806604

DONALD ROBERTSON, EMPLOYEE — **CLAIMANT**

SPA CONSTR. CO., INC., EMPLOYER — **RESPONDENT NO. 1**

BITCO INS. CO., INS CARRIER/TPA — **RESPONDENT NO. 1**

DEATH & PERMANENT TOTAL DISABILITY TRUST FUND — **RESPONDENT NO. 2**

OPINION AND ORDER FILED MAY 26, 2021

Issue submitted for decision on March 2, 2021, based on the parties' briefs, and the agreed exhibits attached thereto, to the Arkansas Workers' Compensation Commission (the Commission), Administrative Law Judge (ALJ) Mike Pickens.

The claimant is represented by the Honorable Thomas Baxter, Baxter Law Firm, Benton, Saline County, Arkansas.

Respondent No. 1 is represented by the Honorable Jason Ryburn, Ryburn Law Firm, Little Rock, Pulaski County, Arkansas.

Respondent No. 2 is represented by the Honorable Christy L. King, Little Rock, Pulaski County, Arkansas

INTRODUCTION

In the Amended Prehearing Order filed February 12, 2021, the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission (the Commission) has jurisdiction over this claim.
2. The employer/employee/carrier-TPA relationship existed with the claimant at all relevant times, including September 24, 2018, the date of the claimant's alleged injury.
3. The parties shall confer prior to any scheduled hearing date on the merits and be prepared to stipulate to the claimant's average weekly wage (AWW), and to the corresponding weekly temporary total disability (TTD), and permanent partial disability (PPD) rates, before or at the hearing.

4. The respondents controvert this claim in its entirety.

5. All parties specifically reserve any and all other issues for future determination and/or hearing.

(Commission Exhibit 1 at 2-3). Pursuant to the partis' mutual agreement, the issues to be litigated at any future hearing were:

1. Whether this claim is barred by the applicable statute of limitations. (Pursuant to the parties' mutually agreement, this issue will be submitted for decision based on the parties' briefs in lieu of a hearing before any hearing on the merits is scheduled.)

2. If it is determined this claim is not barred by the applicable statute of limitations, whether the claimant sustained a "compensable injury" – specifically, a detached retina in his left eye – within the meaning of the Arkansas' Workers' Compensation Act (the Act) on September 24, 2018.

3. If and when the claim is tried on the merits, whether the claimant's attorney is entitled to a controverted fee on these facts.

4. The parties specifically reserve any and all other issues for future litigation and/or determination.

(Comms'n Ex. 1 at 3).

The claimant contends that on September 24, 2018, he tripped over a portable mat and hit his left shoulder and the left part of his head on a cherry picker. He contends this incident caused him to sustain a detached retina; and that he is entitled to all appropriate medical, and indemnity benefits, and an attorney's fee (if he retains an attorney in this matter). The claimant reserves any and all other issues for future litigation and/or determination. (Comms'n Ex. 1 at 3-4).

Respondent No. 1 contends this claim is barred by the applicable statute of limitations. Alternatively, Respondent No. 1 contends the claimant cannot meet his burden of proof pursuant

to the Act in demonstrating the detached retina in his left eye constitutes a "compensable injury" within the Act's meaning. Specifically, Respondent No. 1 contends the claimant's detached retina is the result of degeneration, and/or the natural aging process, and/or is idiopathic in nature. Respondent No. 1 reserves any and all other issues for future litigation and/or determination. (Comms'n Ex. 1 at 4).

Respondent No. 2 contends the claimant failed to make a timely filing with the Commission for a "claim for compensation" pursuant to the applicable law and, therefore, this claim is barred by the applicable statute of limitations. (Comms'n Ex. 1 at 4; Respondent No. 2's Brief at 1).

The claimant initially was pro se in this matter. The ALJ strongly encouraged him to retain counsel, and the claimant did so. (Comms'n Ex. 1). After the claimant retained counsel the originally scheduled February 26, 2021, hearing was continued and, pursuant to the parties' mutual agreement, the threshold issue of whether this claim is barred by the applicable statute of limitations was submitted for decision based on the parties' briefs, and the agreed exhibits attached thereto.

The record consists of the Amended Prehearing Order filed February 12, 2021; the parties' original briefs, and any responses and/or replies thereto; as well as any and all agreed exhibits contained in, and/or attached to, the parties' briefs.

*(Please Note: Unless otherwise indicated, all references to exhibits refer to the exhibits attached to the claimant's original brief.)

STATEMENT OF THE CASE

The claimant, Mr. Donald Robertson (the claimant) alleges he slipped on a mat at work on

September 24, 2018, which caused him to sustain a detached retina. He apparently reported the alleged injury one (1) week later, at which time he signed a Form AR-N dated October 1, 2018, which stated he was alleging injuries to his “left eye, left bicep, and left & right knee”. (Claimant’s Brief, Exhibit 1). On October 1, 2018, the claimant’s employer, Spa Construction, filed the required First Report of Injury or Illness form with the Commission. Information contained on the form indicates the claimant had treated with McFarland Eye Clinic, and Retina Associates, P.A., and there is an “X” in the box which states, “Future Major Medical/Lost Time Anticipated”. The Commission claim number for this claim, “G806604”, is written in the upper right-hand portion of the form. (Cl’s Ex. 2).

On October 10, 2018, Respondent No. 1 filed a Form AR-2 with the Commission clearly stating they were controverting the claim in its entirety. The Form AR-2 states their reason for controverting the claim as being: “Not compensable under the Act.” Although the copy of the Form AR-2 in the record is somewhat difficult to read, it appears to show Respondent No. 1 also checked the boxes noting the claim was not a “medical only claim”, nor a “PPD-Only Claim”. (Cl’s Ex. 3). On this same date, October 10, 2018, Respondent No. 1 mailed the claimant a letter informing him they were denying his claim. (Cl’s Ex. 4). Respondent No. 1 has to date not paid the claimant any medical or indemnity benefits relating to this claim, as is indicated by the Form AR-4 Respondent No. 1 filed with the Commission on October 12, 2020. (Cl’s Ex. 5 (the exhibit number was inadvertently left blank in the claimant’s brief; however, it is clear this is Cl’s Ex. 5); Cl’s Brief at 2). On October 13, 2020, the Commission stamped the Form AR-4 “**CLOSED**”. (Cl’s Ex. 5) (Emphasis in original).

At some point the claimant contacted and communicated with the Commission's legal advisor division. On September 11, 2020, he filed a letter with the Commission directed to a person he identified as "Katrina". The letter contains no surname for "Katrina," nor does it reference where she works, what her position is, or any other identifying information about her. The claimant's letter does not state what specific body part(s) he alleges were injured, or how the alleged injury occurred. It contains no specific request for benefits, nor does it request a hearing. The claimant's letter states simply:

> Dear Katrina,
>
> I'm writing to inform you that I would like to appeal your decision to deny my Workers' Compensation Claim.

(Cl's Ex. 6). The letter references the Commission's claim number; identifies the employer as Spa Construction Company; and references the alleged injury date as September 24, 2018. Immediately under the Commission's P.O. box (the address to which the claimant addressed and mailed the letter) the letter lists and references what appears to be Respondent No. 1's "CLAIM NUMBER", and "CASE NUMBER". It is undisputed the Commission had not made any decision whatsoever on any issue related to this claim as of the date of this letter, September 7, 2020; i.e., the Commission had made no decision from which the claimant could "appeal".

On September 23, 2020, the claimant filed his response to the Commission "Legal Advisor Claimant Questionnaire", the purpose of which is to indicate whether the amount of money in controversy is less than or greater than $2,500, and whether mediation is required, or requested. If the claim is less than $2,500, it is subject to mandatory mediation. The claimant checked option B on this form, thereby indicating he believed the amount of money in dispute was greater than

$2,500, but he still "…would like to attempt mediation before the case is assigned for a hearing." (Cl's Ex. 7). It is undisputed that no mediation was ever scheduled, nor did one take place.

That same day, September 23, 2020, Commission legal advisor Catherine Richart wrote a form letter to Respondent No. 1 (specifically, to Mr. Steve Perry, the adjuster handling the claim) requesting Respondent No. 1 to respond to the Commission's Preliminary Notice form so it could be determined "…whether mandatory mediation is in order or whether a Legal Advisor telephone conference might be possible." The form letter goes on to state "…a hearing **has** been requested should either conference not resolve the current dispute." (Cl's Ex. 8) (Emphasis in original).

The claimant signed a medical release on November 23, 2020. (Respondent No. 2's Exhibit, page 8). The claimant filed a pro se prehearing questionnaire with the Commission on December 4, 2020, but he did not provide Respondent No. 1 a copy of this document, so the ALJ's office did so via email on December 14, 2020. (Resp. No. 2's Ex., pages 4 – 7, and page 3, respectively). The claimant's attorney first entered his entry of appearance by notice filed with the Commission on February 21, 2021. (Resp. No. 2's Ex., pages 9-10).

It is undisputed that neither the claimant, his attorney, nor anyone acting on the claimant's behalf ever filed a Form AR-C with the Commission.

DISCUSSION

The Burden of Proof

When deciding any issue, the ALJ and the Commission shall determine, on the basis of the record as a whole, whether the party having the burden of proof on the issue has established it by a preponderance of the evidence. ***Ark. Code Ann***. § 11-9-704(c)(2) (2020 Lexis Replacement).

The claimant has the burden of proving by a preponderance of the evidence he is entitled to benefits. *Stone v. Patel,* 26 Ark. App. 54, 759 S.W.2d 579 (Ark. App. 1998). In a claim involving a statute of limitations issue, the claimant must prove he acted within the time allowed for filing a claim for compensation. *Stewart v. Ark. Glass Container*, 2010 Ark. 198, 366 S.W.3d 358 (2010).

Ark. Code Ann. Section 11-9-704(c)(3) (2020 Lexis Repl.) states that the ALJ, the Commission, and the courts "shall strictly construe" the Act, which also requires them to read and construe the Act in its entirety, and to harmonize its provisions when necessary. *Farmers' Coop. v. Biles,* 77 Ark. App. 1, 69 S.W.2d899 (Ark. App. 2002). In determining whether the claimant has met his burden of proof, the Commission is required to weigh the evidence impartially without giving the benefit of the doubt to either party**.** ***Ark. Code Ann***. § 11-9-704(c)(4) (2020 Lexis Supp.); *Gencorp Polymer Products v. Landers,* 36 Ark. App. 190, 820 S.W.2d 475 (Ark. App. 1991); *Fowler v. McHenry*, 22 Ark. App. 196, 737 S.W.2d 633 (Ark. App. 1987).

All three (3) parties submitted excellent, thoughtful, informative briefs which were of notable assistance in rendering the decision herein. Based on the applicable law as applied to the facts of this case, and as explained in greater detail *infra,* I find this claim is barred by the applicable statute of limitations, ***Ark. Code Ann.*** Section 11-9-702(a)(1).

This Claim is Barred Pursuant to *Ark. Code Ann.* Section 11-9-702(a)(1).

Since it is undisputed Respondent No. 1 never paid any medical or indemnity benefits in this claim, this claim cannot be deemed a request for additional benefits. Therefore, the controlling statute of limitations (S/L) is set forth in ***Ark. Code Ann.*** §11-9-702(a)(1) which mandates:

> A claim for compensation for disability on account of an injury, other than an occupational disease and occupational infection, *shall*

> *be barred unless filed with the Workers' Compensation Commission within (2) years from the date of the compensable injury*. If during the two-year period following the filing of the claim the claimant receives no weekly benefit compensation and receives no medical treatment resulting from the alleged injury, the claim shall be barred thereafter.

(Emphasis added). Again, while this fact is not dispositive, it is undisputed that neither the claimant, his attorney, nor anyone acting on the claimant's behalf ever filed a Form AR-C with the Commission at any time. The parties have stipulated the date of the alleged injury is September 24, 2018. It is undisputed the claimant notified his employer of the alleged September 24, 2018, injury on October 1, 2018, one (1) week after it allegedly occurred. Respondent No. 1 filed both the required First Report of Injury form, and then a Form AR-2 with the Commission on October 1st and 10th, 2018, respectively, advising they intended to controvert the subject claim. (Cl's Exs. 2 and 3). Consequently, as far back as October 10, 2018, Respondent No. 1 advised both the Commission, and the claimant they were controverting/denying this claim. (Cl's Exs. 3 and 4).

Thereafter – some 22 months and four (4) weeks after he received notice Respondent No. 1 was denying his claim – on September 7, 2020, the claimant mailed a vague, single-sentence letter to the Commission's post office box address to a person he identified only as "Katrina", stating he desired "to appeal your [i.e., Katrina's] denial of [his] Workers' Compensation Claim." (Cl's Ex. 6) (Bracketed material added). The primary, and threshold, issue to be decided here is whether this vague letter constitutes the filing of a "claim for compensation" within the meaning, and two (2)-year time limitation, of ***Ark. Code Ann.*** Section 11-9-702(a)(1). ***Ark. Code Ann.*** § 11-9-704(a)(2) requires that: "An application for a hearing must set forth clearly *the specific issues of fact or law in controversy and the contentions of the party applying for the hearing*." (Emphasis

added). It is abundantly clear based on both the applicable law and the specific facts of this case that the claimant's September 7, 2011 letter, which was filed with the Commission on September 11, 2020, does not meet the required specificity requirements of either a "claim for compensation" – or even an "application for a hearing" – within the meaning of the applicable law.

The claimant notified Respondent No. 1 of his alleged injury on October 1, 2018, one (1) week after the date it allegedly occurred on September 24, 2018. Thereafter, Respondent No. 1 timely filed the required forms with the Commission, and advised both the claimant and the Commission they intended to controvert the claim in its entirety. (Cl's Exs. 2, 3, 4, and 5). Of course, Arkansas law requires Respondent No. 1 to complete and file these forms when an employee reports an alleged injury. The claimant did not file a Form AR-C with the Commission requesting any medical or indemnity benefits at this or any other time. Respondent No. 1's filing of these forms is not the same thing – nor does their filing constitute – *the claimant's filing of a "claim for compensation" with the Commission*. Indeed, the majority of work-related injuries do not result in the claimant hiring an attorney, and/or filing a Form AR-C or other written "claim for compensation", and/or making a hearing request with the Commission. Respondents routinely pay compensable work-related claims without the necessity of litigation.

The claimant's vague, one (1) sentence letter, mailed to the Commission's post office box address, and directed to an unknown person the claimant identified only as "Katrina"; which simply references an almost two (2)-year old file number, and other non-Commission-related claim numbers; wherein he mentions his desire "to appeal your decision to deny my Workers' Compensation claim", but does *not* mention what *specific* body parts were allegedly injured and

when; what *specific* benefits he is seeking; and in which he does not *specifically* request a hearing, does not, and cannot reasonably be deemed to constitute either a "claim for compensation" or an "application for a hearing" as defined by ***Ark. Code Ann.*** Sections 11-9-702(a)91), and 11-9-704(a)(2), respectively. This is especially true in light of the fact the alleged injury occurred some 22 months and four (4) weeks in the past; the claimant had failed and/or refused to actively prosecute his claim since the date of the alleged injury; there existed no Commission decision from which the claimant could possibly appeal; and the letter to "Katrina" neither requested a hearing nor did it state what benefits the claimant was requesting. (Cl's Ex. 2). Indeed, this letter did not only fail to state what specific benefits the claimant was requesting, it failed to state he was requesting *any benefits at all*. (Cl's Ex. 2).

In *Wal-Mart Associates, Inc. v Armstrong*, 2017 Ark. App. 175 (Ark. App. 2017), our court of appeals addressed a fact scenario similar to the one at bar. In *Wal-Mart* the issue before the court was whether the Commission was correct in finding that an AR-C stopped the running of the applicable S/L when the particular AR-C at issue did not state the body part injured, but did check all of the boxes for "benefits requested." In holding the AR-C did not stop the S/L from running, the court explained:

> We must answer the question of whether the Commission erred as a matter of law in concluding that the 2008 Form AR-C filed in this case tolled the statute of limitations. To phrase the question another way, was the 2008 Form AR-C an unresolved claim for benefits pertaining to Armstrong's left-shoulder injury? Under the circumstances of this case, we hold that the Commission did err as a matter of law. Here, Armstrong failed to provide sufficient information in the 2008 Form AR-C to toll the statute of limitations. In completing the 2008 Form AR-C, Armstrong did not specifically list that she suffered neck and shoulder injuries. In fact, she listed no

> specific injury to any part of her body, choosing to leave her claim for injuries open-ended. Additionally, with regard to the type of benefits being sought, Armstrong checked all the boxes available on the 2008 Form AR-C. Such a generic filing is the equivalent to no filing at all. It simply provides no information about the type of claim being asserted by the claimant. To allow such a generic filing to toll the limitations period indefinitely for some unspecified injury is contrary to the plain language of the statute and to the rationale of our prior caselaw. As such, we hold, as a matter of law, the generic Form AR-C filed in this case was not sufficient to toll the statute of limitations.

Armstrong, 2017 Ark. App. at 313. (While not relevant to this decision, it should be noted the *Armstrong* holding applies to both claims for initial and additional benefits.). *Armstrong* is the controlling precedent for a decision in this case. It holds that a generic filing is equivalent to no filing at all. If anything is, the claimant's September 7, 2020, vague, single-sentence letter to the mysterious "Katrina" is the equivalent of "no filing at all."

Since the claimant never filed a Form AR-C with the Commission; and since the claimant's vague, confusing September 7, 2020 letter (perhaps he intended the letter for the respondent-insurer?) which was filed with the Commission on September 11, 2020, clearly does not meet the statutory requirements for either a "claim for compensation", or even an "application for a hearing", the only other possible, purported filing of a "claim for compensation" within the meaning of ***Ark. Code Ann.*** Section 11-9-702(a)(1), would be the claimant's handwritten pro se prehearing questionnaire response which he filed with the Commission on December 4, 2020. (Resp. No. 2's Ex., pages 3-8). The claimant made this filing *two (2) years, (2) months, and one (1) week after the date of the alleged September 24, 2018, injury,* well beyond the applicable two (2)-year S/L ***Ark. Code Ann.*** Section 11-9-702(a)(2) mandates.

In the December 4, 2020, response the claimant states his reason for requesting a hearing is: "I've asked for this hearing because I was denied workman's comp and payment for my medical bills. This injury happened while on the job, due to a work mat not put up properly. Any further surgeries [sic] or eyecare." (Resp. No. 2's Ex., pages 3-8) (Bracketed material added). Consequently, even if the Commission were ultimately to somehow find this claim is not barred by the applicable S/L, the claimant would be limited to a claim for medical benefits only since he has never even mentioned he was entitled to, nor has he ever requested, any indemnity benefits at any time whatsoever – that is, not until after he finally retained counsel in February 2021.

It must also be noted that even though the claimant was pro se at the time of both the September 7, 2020, letter, and the December 4, 2020, questionnaire response, the ALJ and Commission must hold pro se claimants (and appellants) to the same standards as those represented by counsel. *Moon v. Holloway*, 353 Ark. 520, 110 S.W.3d 250 (2003). Moreover, ALJ's, the Commission, and the courts must strictly construe ***Ark. Code Ann.*** § 11-9-702. *Sykes v. Williams*, 373 Ark. 236, 283 S.W.3d 209 (2008).

In his brief the claimant cites the Full Commission's decision in *Lockhart v. Ark. Dep't of Health*, AWCC No. G309119 (Full Commission, July 28, 2019), and the court of appeals' decision in the same case styled *Arkansas Dep't of Health v. Lockhart*, 2020 Ark. App. 166, 594 S.W.3d 924, 925 (Ark. App. 2020), in support of his contention his claim is not barred by the applicable S/L. However, *Lockhart* is readily distinguishable from the instant case.

In *Lockhart* the claimant "filed a letter with the Commission on July 16, 2014, and requested a hearing seeking "TTD benefits from the date of his alleged injury(ies) through March

17, 2014, and for any impairment related to his neck and spinal cord." *Lockhart v. Ark. Dep't of Health*, AWCC No. G309119 (ALJ Opinion, November 16, 2018) at 8. The *Lockhart* claimant made a a *specific* claim citing the *specific* location of his alleged injuries, as well as the *specific* benefits he was seeking based on them. The court deemed this level of specificity to meet the requirements of the applicable statutes. Moreover, as is readily apparent, the *Lockhart* court's reasoning is consistent with the reasoning of the *Armstrong* decision.

Read together, *Armstrong* and *Lockhart* demonstrate that an adequately specific letter (or presumably any other written document) may constitute the "filing of a claim for compensation" within the meaning of ***Ark. Code Ann.*** Section 11-9-702(a)(1). However, a non-specific letter (or other writing) that does not list the specific allegedly injured body parts, the specific benefits requested cannot be deemed to constitute the filing of a "claim for compensation" pursuant to ***Ark. Code Ann.*** §11-9-702(a)(1). As the *Lockhart* court explained further: "The letter placed everyone, including the appellants, on notice that Lockhart intended to pursue a claim for medical and disability benefits."

Here, in distinct contrast to the relevant facts in *Lockhart,* the September 7, 2020, letter the claimant mailed to the Commission to the mysterious "Katrina" *only* expressed his desire to "appeal" the claim she – "Katrina" – had denied: it stated no request for benefits whatsoever, specific or otherwise. Indeed, this letter contains no specific facts or requests at all, save the claimant's desire to "appeal" "Katrina"['s] denial of his claim. This letter simply cannot be read to have put anyone on notice of his intent to pursue a claim and, if he did, what specific benefits he was requesting. The claimant had two (2) years to retain an attorney to represent him in this

claim if he in fact intended to pursue it; however, he failed and/or refused to do so, and he did so at his own peril. By the time the claimant finally retained an attorney, the applicable S/L had long since expired.

Finally, a recent Arkansas Supreme Court case demonstrates the necessity for the filing of a "claim for compensation" to be specific. In *White Cty. Judge v. Menser*, 2020 Ark. 140, at 6, 597 S.W.3d 640, 644 (2020), the court found that *even a prehearing order did not toll the statute of limitations* with respect to a claim for additional benefits because it did not *specifically* request "additional benefits." While the instant case is one for initial benefits, as in *Armstrong* the *Menser* court's reasoning applies to claims for compensation for both initial and additional benefits. Moreover, the *Menser* decision, which was rendered and published after the *Lockhart* decision, specifically overruled any prior case law inconsistent with its holding. Consequently, our courts of appeal have held the requirement for a valid, legal filing of a "claim for compensation" is *specificity* with respect to exactly what benefits the claimant is requesting, for what alleged injury(ies), as well as other relevant facts. In the instant case, it is abundantly clear the claimant's September 7, 2020, letter to "Katrina" lacks the required specificity to be considered a validly filed claim for compensation pursuant to pursuant to ***Ark. Code Ann.*** § 11-9-702(a)(1); and the December 4, 2020, pro se claimant questionnaire response was filed *well after the applicable S/L expired on or about September 24, 2020.*

Consequently, based on the applicable law as applied to the specific facts of this claim, I hereby make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this claim.

2. The stipulations contained in the Amended Prehearing Order filed February 12, 2021, hereby are accepted as facts.

3. Neither the claimant nor anyone on his behalf ever filed a Form AR-C for his alleged detached retina injury of September 24, 2018.

4. The statute of limitations in this claim expired on or about September 24, 2020.

5. The claimant's claim for both medical and indemnity benefits for his alleged detached retina injury of September 24, 2018, is barred by the applicable statute of limitations of ***Ark. Code Ann.*** Section 11-9-702(a)(1). The claimant's letter dated September 7, 2020 – which he filed with the Commission on September 11, 2020 – and which was addressed to the Commission's post office box address, and directed to an unknown and unidentified "Katrina" requesting to "appeal" "Katrina"['s] denial of his "Workers' Compensation claim" clearly does not meet the specificity requirements for the filing of a "claim for compensation" within the meaning of ***Ark. Code Ann.*** Section 11-9-702(a)(1); and the Arkansas Court of Appeals' and Supreme Court's holdings in *Armstrong* and *Menser, supra.* Moreover, the claimant's pro se questionnaire response filed with the Commission on December 4, 2020, was filed *well after* the applicable statute of limitations expired on or about September 24, 2020.

Therefore, for all the aforementioned reasons, this claim hereby is denied and dismissed. If they have not already done so, Respondent No. 1 shall pay the court reporter's invoice within ten (10) days of their receipt of this opinion and order.

IT IS SO ORDERED.

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Mike Pickens
Administrative Law Judge

MP/mp