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**

STATE OF ARKANSAS,
DEATH & PERMANENT TOTAL DISABILITY
TRUST FUND **RESPONDENT NO. 2**

OPINION AND ORDER FILED JANUARY 19, 2022

Single issue concerning applicability of the statute of limitations submitted for decision based on the parties' briefs, and their agreed, blue-backed record, 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 Second Amended Prehearing Order filed December 3, 2021 (the Second Amended Prehearing Order), the three (3) parties once again 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 unanimously and specifically waive their right to a full hearing on the statute of limitations (S/L) issue; and they hereby unanimously agree to submit the S/L issue to the ALJ/Full Commission for consideration and decision based solely on their briefs and the record as specifically set forth on pages one (1) and two (2) of the Second Amended Prehearing Order.

4. The parties unanimously agree: that no hearing or witness(es) is (are) required in order for the ALJ (and Full Commission, if necessary) to consider and render an opinion and order relative to the S/L issue; and, again, that the record for consideration and decision shall consist of the aforementioned documents set forth on pages one (1) and two (2) of the Second Amended Prehearing Order.

4. Respondent No. 1 controverts this claim in its entirety.

5. All parties specifically reserve any and all other issues including, but not limited to, a hearing on the merits for future determination and/or hearing.

(Commission Exhibit 1 at 2-3). Pursuant to the agreement of all three (3) parties, the sole issue submitted for decision based on the agreed record herein is:

1. Whether this claim is barred by the applicable S/L.

2. The parties specifically reserve any and all other issues not specifically addressed herein, including but not limited to a hearing on the merits, for future litigation and/or determination.

(Comms'n Ex. 1 at 3).

The claimant contends this claim is not barred by the applicable S/L. He 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, as well as a controverted attorney's fee. The claimant reserves any and all other issues for future litigation and/or determination.

(Comms'n Ex. 1 at 3).

Respondent No. 1 contends this claim is barred by the applicable S/L. Respondent No. 1 controverts this claim in its entirety, and specifically reserves any and all other issues for future litigation and/or determination. (Comms'n Ex. 1 at 4).

Respondent No. 2 also contends this claim is barred by the applicable S/L. Respondent No. 2 reserves the right to plead further upon the completion of necessary investigation and/or discovery. Furthermore, Respondent No. 2 reserves any and all other issues for future litigation and/or determination. (Comms'n Ex. 1 at 4).

As the three (3) parties agreed, and as specifically set forth in the Second Amended Prehearing Order, the record for the ALJ's consideration and decision will consist of: the parties' blue-backed briefs, and any response briefs filed; the parties' mutually agreed joint exhibit; their most recently-amended and Commission-filed responses to the prehearing questionnaire; and the Commission's entire file in this claim which, pursuant to the parties' unanimous agreement, is hereby incorporated into, and made a part of the record herein, by reference. (Comms'n Ex. 1 at 1-2).

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 the claimant was alleging injuries to his "left eye, left bicep, and left & right knee". (Joint Exhibit 2). 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. (JX 1).

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 that Respondent No. 1 also checked the boxes noting that the claim was not a "medical only claim", nor a "PPD-Only Claim". (JX 3). On this same date, October 10, 2018, Respondent No. 1 mailed the claimant a letter informing him they were denying his claim. (JX 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. (JX 8). On October 13, 2020, the Commission stamped the Form AR-4 "**CLOSED**". (JX 8) (Emphasis in original).

Thereafter the claimant contacted and communicated with the Commission's legal advisors. On September 11, 2020, the claimant filed with the Commission a letter directed to a person named "Katrina". (JX 5). The letter contains no surname for "Katrina," nor does it reference her employer/where she works, what her position is, or any other identifying information about her. The letter contains no request for benefits, nor does it state the claimant is requesting a hearing. The 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.

(JX 5). The letter referenced the Commission's claim number; identified the employer as Spa Construction Company; and referenced the alleged accident date as September 24, 2018. Immediately under the address to which the letter was directed, Respondent No. 1's "CLAIM NUMBER" and "CASE NUMBER" are listed. 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. (JX 5).

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 the claimant is amenable to mediation. 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 benefits/money in dispute was greater than $2,500, but that he still "…would like to attempt mediation before the case is assigned for a hearing." (JX 7).

That same day, September 23, 2020, Commission legal advisor Catherine Richart, wrote a form letter to Respondent No. 1 (specifically, to Mr. Steven Perry, the adjuster handling the claim) which began the "…Commission received Claimant's request for a hearing." Legal advisor Richart requested Respondent No. 1 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 once again goes on to state "…a hearing has been requested should either conference not resolve the current dispute." (JX 6).

The claimant signed a medical release on November 23, 2020. (JX 13). 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. (JX 9 at 1-4; JX 11). The claimant's attorney first entered his entry of appearance by notice filed with the Commission on February 21, 2021. (JX 12 at 1-2).

It is undisputed that neither the claimant, his attorney, nor anyone acting on his 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) (2021 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) (2021 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 her 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) (2021 Lexis Repl.); *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 claims for workers' compensation benefits must be based on proof. Speculation and conjecture, even if plausible, cannot take the place of proof. *Ark. Dep't of Corrections v. Glover,* 35 Ark. App. 32, 812 S.W.2d 692 (Ark. App. 1991); *Dena Constr. Co. v. Herndon*, 264 Ark. 791, 595 S.W.2d 155 (1979). It is the Commission's exclusive responsibility to determine the credibility of the witnesses and the weight to give their testimony. *Whaley v. Hardees,* 51 Ark. App. 116, 912 S.W.2d 14 (Ark. App. 1995). The Commission is not required to believe either a claimant's or any other witness's testimony, but may accept and translate into findings of fact those portions of the testimony it deems believable. *McClain v. Texaco, Inc*., 29 Ark. App. 218, 780 S.W.2d 34 (Ark. App. 1989); *Farmers Coop. v. Biles,* 77 Ark. App. 1, 69 S.W.2d 899 (Ark. App. 2002).

All three (3) parties submitted excellent, thoughtful, well-written briefs which were of assistance in rendering the decision herein, for which the ALJ is appreciative. 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 of ***Ark. Code Ann.*** Section 11-9-702(a)(1).

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

Since it is undisputed that 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.

Again, *it is undisputed that neither the claimant, his attorney, nor anyone acting on his behalf filed an 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, as Respondent No. 1 filed both a First Report of Injury, and then a Form AR-2 with the Commission on October 1st and October 10th, 2018, respectively, advising they intended to controvert the subject claim. (JX 1 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. (JX 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 letter to the Commission's post office box address to a person he identified only as "Katrina." The primary issue to be decided in this claim is whether this vague letter constitutes a "filing" for benefits or a

hearing request 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." The claimant notified Respondent No. 1 of his alleged injury one (1) week after the date it allegedly occurred, 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, so the claimant had been put on notice and was well aware of this fact. (JX 1, 2, 3, 4, 6, and 5, respectively). Respondent No. 1 timely filed all the legally Commission-mandated forms it is required to file 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. It is beyond reasonable argument that the claimant's vague letter, addressed to the Commission's post office box address, but directed to an unknown and unidentified person he called only "Katrina", which mentions his desire "to appeal your decision to deny my Workers' Compensation [sic] claim, but does not mention what specific benefits he is seeking for the alleged September 2018 injury, does not, and cannot reasonably be deemed to constitute an application for a hearing as defined by ***Ark. Code Ann.*** Section 11-9-704(a)(2) (Bracketed material added). 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. (JX 5). 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*. (JX 5).

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 issue in this claim. In *Wal-Mart* the issue before the court was whether the Commission was correct in finding that an AR-C tolled, or 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 in question did *not* stop or prevent 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. The *Armstrong* holding applies to both claims for initial and additional benefits. There is no distinction in the law between the "filed" requirements of both

subsections. The crux of the issue is the word "filed." This question was clearly answered in *Armstrong*. *A generic filing is equivalent to no filing at all*. The claimant's September 7, 2020, 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?) clearly does not meet the statutory requirements for a hearing application, the first possible, purported filing of a specific request for benefits, and a hearing on the issues of whether his claim was compensable within the Act's meaning, and whether he was entitled to medical benefits (note there was never any indication of a request for indemnity benefits whatsoever until after the claimant retained counsel) was not filed with the Commission until December 4, 2020, the date he filed his handwritten pro se prehearing questionnaire response. (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 injury, September 24, 2018*. This is well beyond the applicable two (2)-year S/L.

In his hand-written December 4, 2020, questionnaire response, the claimant lists his reason for requesting a hearing to be: "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." (JX9 at 1-4) (Bracketed material added). Consequently, even if the Commission were ultimately to 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.

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 appellants to the same standards as those represented by counsel. *Moon v. Holloway*, 353 Ark. 520, 110 S.W.3d 250 (2003). Moreover, ALJ, 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 asked for 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 *specific claim* based on the *location of his alleged injury(ies)*, and *specifically stated the benefits* he was seeking based on the alleged injury(ies). This level of specificity met the requirements of the applicable statutes, and is consistent with the *Armstrong* decision.

Read together, *Armstrong* and *Lockhart* demonstrate that a specific letter (or presumably any other written document) *may* constitute the "filing" of a claim for benefits. However, a non-specific letter or writing that does not list the affected body parts, the specific benefits requested, and does

not clearly request a hearing will not be deemed to constitute the filing of a claim in lieu of the required AR-C filing for the purposes of ***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." In contrast, the letter the September 7, 2020, letter the claimant mailed to the unknown "Katrina" not only addressed the "appeal" of a denied claim, it simply cannot be reasonably 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. By the time the claimant retained an attorney, the applicable S/L had expired.

Finally, it should be noted that a recent Arkansas Supreme Court case demonstrates the necessity for a claim "filing" 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 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, the court's reasoning applies to claims for both initial and additional benefits. Moreover, the *Menser* decision, which was rendered and published after the *Lockhart* decision, specifically overruled previous case law that did not comport with its holding. Whether a claim is for initial or additional benefits, the claim-filing requirement is *specificity* with respect to when the claimant sustained the alleged injury; what body part(s) was(were) allegedly injured; and what benefits the claimant is seeking. 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 in lieu of the required Form AR-C 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 Second Amended Prehearing Order filed December 3, 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 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, to an unknown and unidentified "Katrina" requesting to "appeal" a denial of benefits at the Commission is inaccurate since the Commission had never heard or considered, much less denied, his claim; and this September 7, 2020, letter clearly does not meet the requirements of a claim filing pursuant to ***Ark. Code Ann.*** Section 11-9-702(a)(1); 11-9-704(a)(2), and the Arkansas Court of Appeals' decision in *Wal-Mart Assoc., Inc. v. Armstrong,* 2017 Ark. App. 175 (Ark. App. 2017). Moreover, the claimant's questionnaire response filed with the Commission on December 4, 2020, was filed well after the applicable statute of limitations had 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.

Mike Pickens
Administrative Law Judge

MP/mp