

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. G908137

LEXINGTON S. ARTHUR, CLAIMANT
EMPLOYEE

STAFFMARK INVESTMENTS, LLC, RESPONDENT
EMPLOYER

INDEMNITY INS. CO. OF NORTH AMERICA/ RESPONDENT
CCMSI, INSURANCE CARRIER/TPA

OPINION FILED JANUARY 9, 2024

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

Claimant represented by the HONORABLE GARY DAVIS, Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE JARROD S. PARRISH, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Vacated.

OPINION AND ORDER

The claimant appeals an **ORDER OF DISMISSAL WITHOUT PREJUDICE FILED JULY 12, 2023**. The Full Commission vacates the administrative law judge's dismissal, and we remand for further proceedings.

I. HISTORY

The record indicates that Lexington Arthur, now age 25, was hired by the respondents, Staffmark Investments, LLC on September 17, 2019. The record contains a FIRST REPORT OF INJURY OR ILLNESS prepared December 16, 2019. The FIRST REPORT OF INJURY OR ILLNESS

indicated that the claimant sustained a “Crushing injury to left forearm” on December 10, 2019. The FIRST REPORT indicated, “Left forearm caught in auger.”

A Form AR-2, EMPLOYER’S INTENT TO ACCEPT OR CONTROVERT CLAIM dated December 16, 2019 indicated that the respondents “Accepted Left Forearm Injury.”

Dr. John W. Bracey reported on June 30, 2021:

Patient is a 23-year-old returns today for follow-up evaluation of severe left upper extremity injury. This was a bur (sic) related crush avulsion injury when his upper extremity was caught in an auger. He underwent multiple surgeries including revascularization by the vascular surgery team, soft tissue coverage, and soft tissue repairs. His last surgery was on 12/16/2019.

Overall he has done very well. He reports that he is not really [having] any pain. He continues to have some limitations in function but the (sic) relatively mild. He is working without restrictions and not having any difficulty....

Today I had a very long discussion with the patient. We again discussed that he had a very severe injury. Despite the severity he has done excellent job of regaining function. He has been very dedicated with therapy that is (sic) resulted in good overall function. He still has some limitations particularly regards to his loss of strength. He also has some mild loss of range of motion....I do believe he is at maximal medical improvement. I do believe he can continue working without restrictions he was given the today (sic). Will therefore proceed with his final rating using the Cassat evaluation of permanent impairment, 4th edition....due to the work related injury there is a 30% impairment to the left upper extremity.

Dr. Bracey’s impression was “Status post surgical treatment left upper extremity crush avulsion injury.”

Dr. Mohammed M. Moursi, Division of Vascular & Endovascular Surgery, University of Arkansas for Medical Sciences, stated on July 14, 2021, "From a Vascular Surgery standpoint, Lexington Arthur is cleared for work with no restrictions. He should continue vascular lab surveillance for life."

The claimant filed a Form AR-C, CLAIM FOR COMPENSATION on January 13, 2022. The ACCIDENT INFORMATION section of the Form AR-C indicated that the Date of Accident was December 10, 2019, and the injury was described: "Left arm caught in auger causing multiple injuries from fingers to bicep resulting in surgeries, vascular grafts, and months of rehab and therapy returning for visits and ultrasound on the graft." The CLAIM INFORMATION section of the Form AR-C indicated that the claimant claimed "additional" benefits, specifically "Additional Medical Expenses."

The claimant filed another Form AR-C, CLAIM FOR COMPENSATION, on May 17, 2022. The CLAIM INFORMATION section of the Form AR-C indicated that the claimant claimed "additional" benefits, specifically "Additional Medical Expenses."

A Senior Claims Examiner with the third-party administrator informed an employee with the Commission on May 25, 2022, "We are in receipt of your notice dated May 17, 2022. The aforementioned claim was accepted

as compensable and all appropriate medical and indemnity benefits due have been paid.”

On or about November 14, 2022, the respondents served on the claimant a MOTION TO DISMISS FOR FAILURE TO PROSECUTE. The respondents stated:

1. This claim involves an injury which occurred on or about 12/10/19. Respondents will stipulate that an Employer-Employee relationship existed on that date. More than six months have passed since Claimant filed an AR-C with the Commission. Claimant has not sought any type of bona fide hearing before the Workers’ Compensation Commission over the last six months.
2. Rule 099.13 of the Arkansas Workers’ Compensation Commission provides that upon application by either party for a dismissal for failure to prosecute, the Commission may, after reasonable notice to all parties, enter an order dismissing the claim.
3. Ark. Code Ann. §11-9-702 provides for dismissal if no bona fide request for a hearing has been made within six (6) months of the filing of a claim.
4. In the event Claimant objects to the dismissal but does not request a hearing on the merits, Respondents request a hearing on the Motion to Dismiss.

An administrative law judge corresponded with the claimant on November 17, 2022:

A Motion to Dismiss has been filed for failure to diligently prosecute or pursue this claim.
If you wish to respond to this Motion or request a hearing, please contact my office, **in writing**, within twenty (20) days, Tuesday, December 6, 2022. Failure to respond may result in the dismissal of this claim.

The claimant corresponded with the administrative law judge on November 29, 2022:

Dear Sir:

Enclosed is the AR-C to request continuance of my workers compensation claim due to additional medical expenses. The employer is aware that I have a lifetime of medical procedures required due to my workplace injuries. It is also noted in my medical records.

Compliance with completion of AR-C every six months is difficult for me. I regret if I was late with my November 2022 submission.

It is my desire that the motion to be dismissed be denied on my need for additional medical expenses.

The claimant filed a third Form AR-C, CLAIM FOR COMPENSATION on November 30, 2022. The ACCIDENT INFORMATION section of the Form AR-C indicated that the Date of Accident was in December 2019, and the claimant appeared to write, "Auger caught glove and pulled arm in up to shoulder resulting in multiple lacerations and artery severing in upper left arm." The CLAIM INFORMATION section of the Form AR-C indicated that that the claimant claimed entitlement to "additional" benefits, specifically, "Additional Medical Expenses."

The respondents' attorney corresponded with the administrative law judge on December 1, 2022:

I have received a copy of the claimant's November 29, 2022 correspondence to you indicating an objection to the dismissal request that I've made in this matter. Your Honor, medical expenses are continuing to be paid with regard to this claim.

There are no benefits or issues that are outstanding or that warrant litigation. A formal hearing has not been requested. In light of this, Respondents request that a hearing be scheduled on the dismissal so that we can close the litigation aspect of this file. That will have no bearing on Mr. Arthur's continued medical care so long as the same is reasonable and necessary.

The record contains an undated letter from Dr. Moursi:

To Whom It May Concern,
Arthur Lexington, date of birth 4/11/98, had a left brachial artery repair by Dr. Mohammed Moursi at UAMS in 2019. He is currently a vascular lab surveillance patient, and receives an ultrasound yearly.
If you have any questions, please call the UAMS Vascular Surgery department at (501) 686-6176.

A hearing was held on January 4, 2023. The respondents' attorney argued, among other things, "There's been no prosecution in this case since these multiple Form C filings. Therefore, Respondents respectfully request that you dismiss the case, both under §11-9-702 and Rule 13 of the Commission's rules for failure to prosecute."

The claimant stated that he filed Forms AR-C for purposes of the statute of limitations. The administrative law judge examined the *pro se* claimant:

JUDGE PICKENS: And my understanding is, again, that you are objecting to the motion because as far as you're concerned, there are some outstanding issues that you need to address with Mr. Parrish and his client. Is that correct?
MR. L. ARTHUR: That is correct. And we also do have an upcoming appointment with the vascular lab once again, so....Dr. Moursi did warn me of that – that I will need to have

ultrasounds to monitor the artery that they took from my leg and put into my, you know, my arm.

The respondents' attorney cross-examined the claimant:

Q. Mr. Arthur, you mentioned an upcoming vascular lab appointment. When is that appointment?

A. That's Friday the 6th.

Q. Okay. Can you agree with me that you don't have any evidence of any bills that have been submitted to the Work Comp adjuster that have been denied in this case? Is that right?

A. Uh, I don't believe anything has been denied.

Q. Okay.

A. I just know we have that one outstanding balance.

Q. Okay. And you're not requesting a hearing here today?

A. Uh, not today, no.

The administrative law judge re-examined the claimant:

JUDGE PICKENS: Mr. Parrish asked you if you were requesting a hearing here today, and he didn't – I wasn't sure if you understood that to mean requesting a hearing on the medical issues today or a hearing at some point in the future.

MR. L. ARTHUR: Um, I – I guess we can do it at some point in the future. I'm not sure what –

JUDGE PICKENS: Are you requesting a hearing at some point in the future?

MR. L. ARTHUR: Yes.

The administrative law judge filed an opinion on January 9, 2023 and found in pertinent part:

2. The ALJ will hold in abeyance a decision on the respondents' subject motion to dismiss without prejudice for a period of 45 days, or until Monday, February 20, 2023 (since 45 days from the hearing date falls on a Saturday).

3. The parties have 45 days from the hearing date, or until Monday, February 20, 2023, to obtain any and all additional information they require and to attempt to resolve any and all outstanding issues, if they remain.

4. If, after the expiration of this 45-day time-period the claimant does not request, in writing (with a copy to the respondents' attorney, or course) a hearing before the Commission and advise both the Commission and the respondents exactly what specific issues he believes are ripe for a hearing, the ALJ will grant the respondents' motion to dismiss filed November 14, 2022, without prejudice, and without the necessity of either the respondents filing another motion, and without holding another hearing on the motion.

The administrative law judge subsequently entered an **ORDER OF DISMISSAL WITHOUT PREJUDICE FILED JULY 12, 2023**. The administrative law judge concluded:

Having given the parties significantly more time to comply with the terms of the attached order filed January 12, 2023, that applied to them, and pursuant to the attached order filed January 12, 2023, this claim hereby is dismissed without prejudice to its refiling pursuant to the deadlines prescribed by **Ark. Code Ann. §11-9-702(a)(4)**(2023 Lexis Replacement), and Commission Rule 099.13 (2023 Lexis Repl.). This Order shall not be construed to prohibit the claimant, his attorney of record, any attorney he may retain in the future, or anyone acting legally and on his behalf from refiling the claim **if** it is refiled within the applicable time periods prescribed by **Ark. Code Ann. §11-9-702(a)** and (b).

The claimant appeals to the Full Commission.

II. ADJUDICATION

Ark. Code Ann. §11-9-702(Repl. 2012) provides, in pertinent part:

- (b) TIME FOR FILING ADDITIONAL COMPENSATION....
- (d) If within six (6) months after the filing of a claim for additional compensation no bona fide request for a hearing has been made with respect to the claim, the claim may, upon motion and after hearing, if necessary, be dismissed without prejudice to the refiling of the claim within the limitation period specified in subsection (b) of this section.

Commission Rule 099.13 provides, in pertinent part:

Upon meritorious application to the Commission from either party in an action pending before the Commission, requesting that the claim be dismissed for want of prosecution, the Commission may, upon reasonable notice to the parties, enter an order dismissing the claim for want of prosecution.

In the present matter, the Full Commission vacates the administrative law judge's dismissal of the claim and we remand for further proceedings.

The record indicates that the claimant became employed with the respondents in September 2019. The record indicates that the claimant sustained a serious work-related injury on December 10, 2019. The claimant's left forearm was pulled into an auger. The Full Commission notes that the respondent-carrier "accepted" the claim for medical treatment, but there has never been a stipulation of compensability. Dr. Moursi at UAMS stated in July 2021, "He should continue vascular lab surveillance for life."

The claimant filed Forms AR-C claiming entitlement to additional medical benefits on January 13, 2022, May 17, 2022, and November 30, 2022. The last Form AR-C filing was after the respondents filed a Motion to Dismiss for Failure to Prosecute.

A hearing was held at the respondents' initiative on January 4, 2023. The claimant, then *pro se*, was unsure with to regard to whether or not he

requested a hearing. Yet the Full Commission reiterates the following portion of the administrative law judge's examination of the claimant:

JUDGE PICKENS: Are you requesting a hearing at some point in the future?
MR. L. ARTHUR: Yes.

This colloquy of record plainly shows that the claimant timely requested a hearing within six months of his last Form AR-C filing in accordance Ark. Code Ann. §11-9-702(b)(d)(Repl. 2012). The claimant testified on January 4, 2023, well within six (6) months after the Form AR-C filed on November 30, 2022, that he requested a hearing. The Full Commission finds that the claimant made a timely "bona fide request for a hearing" in accordance with Ark. Code Ann. §11-9-702(b)(d)(Repl. 2012).

The purpose of Commission Rule 099.13 is to permit the claimant to resist dismissal of the claim and to show, if he can, why the application for dismissal is without merit. *Dura Craft Boats, Inc. v. Daugherty*, 247 Ark. 125, 444 S.W.2d 562 (Ark. 1969). In the present matter, the respondents are asking the Commission to dismiss a claim while they are still purportedly paying medical benefits provided in connection with the work-related injury, for which injury they have not formally stipulated to compensability. The claimant stated at hearing that at least one of his medical bills has not been paid by the respondent-carrier. The claimant in the present matter sustained a serious injury at work, apparently underwent

multiple surgeries, and has been assigned a permanent anatomical impairment. The record does not clearly show whether the respondents have paid a permanent rating.

The Full Commission therefore vacates the administrative law judge's dismissal of the claim. We remand the matter to the administrative law judge for consideration of the claimant's entitlement to additional medical treatment, including unpaid medical bills and any other benefits to which the claimant may be entitled. The Full Commission strongly advises the claimant to timely submit evidence in accordance with Ark. Code Ann. §11-9-705(c)(2)(A)(Repl. 2012).

IT IS SO ORDERED.

SCOTTY DALE DOUTHIT, Chairman

M. SCOTT WILLHITE, Commissioner

Commissioner Mayton dissents.

DISSENTING OPINION

I must respectfully dissent from the Majority's finding that the Administrative Law Judge's dismissal of this claim should be vacated and the matter be remanded to the Administrative Law Judge for consideration of the claimant's entitlement to additional medical treatment including

unpaid medical bills and other benefits to which the claimant may be entitled.

The Act provides for the dismissal of claims if

within six (6) months after the filing of a claim for additional compensation no bona fide request for a hearing has been made with respect to the claim, the claim may, upon motion and after hearing, if necessary, be dismissed without prejudice to the refiling of the claim within the limitation period specified in subsection (b) of this section.

Ark. Code ann. § 11-9-702(d).

The Commission, therefore, has the authority to

[u]pon meritorious application to the Commission from either party in an action pending before the Commission, requesting that the claim be dismissed for want of prosecution, the Commission may, upon reasonable notice to the parties, enter an order dismissing the claim for want of prosecution.

Commission Rule 099.13.

This matter originated when the claimant sustained a left forearm injury on December 10, 2019. The respondents accepted this claim as compensable on December 16, 2019, and the claimant filed subsequent Forms AR-C on January 13 and May 17, 2022. However, beyond submitting these forms to the Commission, the claimant took no further steps to pursue this claim, and no hearing request was ever filed. Due to

this want of prosecution, the respondents filed a Motion to Dismiss on November 14, 2022. In response, the claimant filed a third Form C on November 30, 2022, requesting additional medical benefits. No hearing request was made by the claimant.

A dismissal hearing was held on January 4, 2023, and the claimant testified that he had not filed for any form of prosecution simply because “we believed at that time that everything was paid up to date. Uh, therefore, we did not pursue any form of a hearing or other legal action followed, simply because of that.” (Hrng. Tr, P. 11). The claimant later testified that he believed no bills had been submitted and denied. (Hrng. Tr, P. 24). When asked directly at the hearing on January 4, 2023 if he was requesting a hearing, the claimant stated “Uh, not today, no.” (Hrng. Tr, P. 24).

After the dismissal hearing, the ALJ ruled that he would hold his decision in abeyance for 45 days or until Monday, February 20, 2023 (since 45 days from the date of the hearing falls on a Saturday). During this period, the claimant retained Mr. Gary Davis to represent him; however, to date, no hearing request has been submitted. The Commission has long held that

The fact that the filing of a claim tolls the statute of limitations does not, in itself, justify the filing of claims where no justiciable controversy exists or justify allowing claims to remain open where all justiciable controversies have been

resolved. To do so would be contrary to the purposes underlying the statute of limitations.

Johnson v. Triple T Foods, 55 Ark. App. 83, 929 S.W.2d 730, 731 (1996).

In the case at bar, the claimant has failed to identify any justiciable issue and has, in fact, agreed that no bona fide request for a hearing has been made. By the Majority's own admission, the claimant has merely stated that he may request a hearing at some point in the future. (Hrng. Tr., Pp. 26-27). To date, no request has been made and no controversies have been identified. The claimant has wholly failed to provide any justification why his claim should remain open.

Accordingly, for the reasons stated above, I respectfully dissent.

MICHAEL R. MAYTON, Commissioner