

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F009134

WESLEY DARRELL JOHNSTON, EMPLOYEE	CLAIMANT
FOX TRUCKING, INC., EMPLOYER	RESPONDENT
CAMBRIDGE INTEGRATED SERVICES, INC., INSURANCE CARRIER/TPA	RESPONDENT

OPINION FILED MAY 18, 2004

Hearing before Chief Administrative Law Judge David Greenbaum on May 14, 2004, at Jonesboro, Craighead County, Arkansas.

Claimant appearing *pro se*.

Respondents represented by Ms. Amy S. Huffman, Attorney-at-Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted May 14, 2004, to determine whether the claimant was entitled to additional workers' compensation benefits.

A prehearing conference was conducted in this claim on April 14, 2004, and a Prehearing Order was filed on said date. At the hearing, the parties announced that the stipulations, issues, as well as their respective contentions were properly set out in the Prehearing Order. A copy of the Prehearing Order was introduced as "Commission's Exhibit 1" and made a part of the record without objection.

It was stipulated that the employee/employer/carrier relationship existed at all relevant times, including July 21, 2000; that the claimant sustained a

compensable low back injury on said date; that respondents paid temporary total disability at the rate of \$277.00 per week through on or about February 19, 2001, at which time the claimant was released by Dr. Reginald Rutherford; that the last payment of benefits for this claim was on or about August 9, 2001; and that the respondents controverted claimant's entitlement to any additional benefits.

At the prehearing conference, the following issues were presented for determination:

- 1) Whether the respondents had paid benefits at the appropriate compensation rate.
- 2) Whether the claimant was entitled to permanent disability benefits.
- 3) Whether the claim was barred by the Statute of Limitations.

Claimant contended, in summary, that his average weekly wage was greater than that proposed by the respondents, and that he was entitled to additional temporary total disability at the rate to be determined by this Commission. The claimant further contended that he was permanently totally disabled as the result of the admitted injury or, alternatively, that he had sustained substantial permanent disability in an amount to be determined by this Commission. Finally, the claimant maintained that respondents wrongfully terminated medical treatment, and that he was entitled to further medical treatment, including, but not limited to a change of treating physicians.

The respondents contended that they had paid all appropriate benefits to which the claimant was entitled and that he could not prove additional benefits were reasonably necessary in relation to the July 21, 2000, injury. As an affirmative defense, respondents contended that the last payment of benefits was August 9, 2001; that the claimant filed a claim for additional benefits on May 21, 2003, and that the Statute of Limitations barred a claim for additional benefits.

The claimant was the only witness to testify. The claimant did bring several corroborating witnesses, specifically to testify about their observations of the claimant's physical condition before and after the July 21, 2000, admitted injury. In view of the undisputed facts, together with the claimant's testimony, I found, that the testimony of claimant's witnesses, was unnecessary and that if permitted to testify, would corroborate the claimant's pre-injury condition and post-injury complaints. However, for reasons set out further below, this claim for additional benefits fails because the claimant did not timely request additional benefits.

The issue concerning the applicable compensation rate was resolved at the hearing. The claimant admitted that his average weekly wage with the employer herein was \$408.33 per week and that he was averaging his pre-injury wages for the year prior to his injury with additional employers when arriving at an average weekly wage which the claimant is not permitted to do. Further, as

reflected by the claimant's contentions, aforementioned, another issue not specifically listed concerned the claimant's entitlement to further medical treatment, including a change of treating physicians; however, this issue is, likewise, rendered moot because of the Statute of Limitations defense asserted and proven by the respondents.

Again, the claimant was the only witness to testify. The record is composed solely of the transcript of the May 14, 2004, hearing containing a joint documentary exhibit consisting of eighty-six (86) pages.

From a review of the record as a whole, to include medical reports, documents and other matters properly before the Commission, and having had an opportunity to hear the testimony of the claimant and to observe his demeanor, the following findings of fact and conclusions of law are made in accordance with Ark. Code Ann. §11-9-704:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. On July 21, 2000, the claimant sustained a compensable low back injury which arose out of and during the course of his employment with Fox Trucking, Inc., at which time his average weekly wage was \$408.33, entitling him to compensation rates of \$272.00 per week for temporary total disability and \$204.00 per week for permanent partial disability.

3. The claimant's healing period ended on or before February 19, 2001.
4. The respondents have paid all appropriate temporary total disability to which the claimant is entitled.
5. Respondents last paid indemnity benefits on February 19, 2001. Respondents last paid a medical bill on or about August 9, 2001, for medical services previously incurred.
6. The claimant signed a Commission Form AR-C claiming additional benefits on May 21, 2003, which was filed on May 27, 2003.
7. This claim for additional benefits is barred by the Statute of Limitations, Ark. Code Ann. §11-9-702 (Repl. 2002).
8. Even if the claim is not barred by the Statute of Limitations, which is contrary to the findings and conclusions reached herein, nevertheless, the claimant has failed to establish that he is entitled to permanent disability benefits.
9. Respondents have controverted this claim in its entirety.

DISCUSSION

The time for filing of claims is set out in Ark. Code Ann. §11-9-702 which is set out, in part, below:

(a) **Time for Filing.**

(1) 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 two (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.

(B) For purposes of this section, the date of the compensable injury shall be defined as the date an injury is caused by an accident as set forth in §11-9-102(4).

* * * * *

(b) Time for Filing Additional Compensation.

(1) 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 (1) year from the date of the last payment of compensation or two (2) years from the date of the injury, whichever is greater.

(2) The time limitations of this subsection shall not apply to claims for the replacement of medicine, crutches, ambulatory devices, artificial limbs, eyeglasses, contact lenses, hearing aids, and other apparatus permanently or indefinitely required as the result of a compensable injury, where the employer or carrier previously furnished such medical supplies, but replacement of such items shall not constitute payment of compensation so as to toll the running of the Statute of Limitations.

(c) A claim for additional compensation must specifically state that it is a claim for additional compensation. Documents which do not specifically request additional benefits shall not be considered a claim for additional compensation. (Emphasis supplied)

The facts in this case are undisputed. The claimant sustained a compensable injury on July 21, 2000. Respondents paid temporary total disability benefits through February 19, 2001, when the claimant was released by Dr. Reginald Rutherford as having achieved maximum medical improvement without any permanent impairment. Respondents have paid no disability

benefits since February 19, 2001. Respondents last paid a medical bill on August 9, 2001, for bills incurred prior to that date. The within claim for additional benefits was filed with this Commission on May 27, 2003. Clearly, the claim for additional benefits was filed more than one (1) year from the date of last payment of compensation and more than two (2) years from the date of the injury. Accordingly, it is barred by limitations of action.

At the hearing, the claimant stated that he thought he had two (2) years from the date of last payment of compensation in which to file a claim for additional benefits. Unfortunately, the claimant's misunderstanding does not extend his time for filing a claim. Our Supreme Court has previously held that if an injury becomes known to the claimant, his lack of knowledge as to the law on filing of claims is no defense, since one in full possession of his mental faculties should know that he should file a claim if he has an injury. *Sanderson & Porter vs. Crow*, 214 Ark. 416, 216 S.W.2d 796 (1949). The burden of filing a claim within the Statute of Limitations is on the claimant. *Plunkett vs. St. Francis Valley Lumber Co.*, 25 Ark. App. 195, 755 S.W.2d 240 (1988).

Clearly, the Statute of Limitations is a bar to this claim. Even if the claimant could show that the claim was not barred, which is not conceded herein, nevertheless, a review of the record as a whole reflects that the claimant cannot prove entitlement to permanent disability benefits.

The claimant must prove, by a preponderance of the evidence, that he is

entitled to an award for a permanent anatomical impairment. *Weber vs. Best Western of Arkadelphia*, Workers' Compensation Commission F100472 (November 20, 2003). Permanent benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment. Ark. Code Ann. §11-9-102(4)(F)(ii)(a). The present claimant failed to show that he sustained a compensable anatomical impairment as a result of his compensable injury. A claimant must prove a specific percentage of permanent impairment before he is eligible for permanent disability benefits and wage-loss benefits. *Wal-Mart Stores, Inc., vs. Cornell*, 340 Ark. 475, 10 S.W.3d 727 (2000).

The claimant failed to offer any medical evidence reflecting that he sustained any permanent impairment. Further, the record reflects that the claimant was involved in an automobile accident approximately one month before filing his claim for additional benefits. Even if the claim was not barred by time, which it clearly is, nevertheless, it would require sheer speculation and conjecture to attribute the claimant's current problems to the admitted incident of July 21, 2000. Conjecture and speculation, however plausible, cannot be permitted to supply the place of proof. *Dena Construction Company vs. Hearndon*, 264 Ark. 791, 575 S.W.2d 155 (1979); *Arkansas Methodist Hospital vs. Adams*, 43 Ark. App. 1, 858 S.W.2d 125 (1993).

The claimant has the burden of proving entitlement to additional benefits.

In view of the foregoing, it is herein concluded that claimant has failed to establish entitlement to additional benefits. Accordingly, the within claim is hereby respectfully denied and dismissed.

IT IS SO ORDERED.

DAVID GREENBAUM
Chief Administrative Law Judge