

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. E700818

BOBBY POSEY, Employee	CLAIMANT
UNITED PARCEL SERVICE, Employer	RESPONDENT
LIBERTY MUTUAL INSURANCE CO., Carrier	RESPONDENT

OPINION FILED FEBRUARY 18, 2004

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Fort Smith, Sebastian County, Arkansas.

Claimant represented by AARON MARTIN, Attorney, Fayetteville, Arkansas.

Respondents represented by DAVID C. JONES, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On February 2, 2004, the above captioned claim came on for a hearing at Fort Smith, Arkansas. A pre-hearing conference was conducted on December 3, 2003, and a pre-hearing order was filed on December 5, 2003. A copy of the pre-hearing order has been marked Commission's Exhibit #1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The relationship of employee-employer-carrier existed among the parties at all relevant times.
3. The claimant sustained a compensable injury on January 20, 1997.
4. Claimant filed a claim for additional medical on July 21, 2003.
5. Respondent last paid benefits on January 3, 2002 for medical received in December 2001.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Whether claimant's claim for additional medical is barred by the statute of limitations.

2. Reasonableness and necessity of additional medical.
3. Attorney fee.

The claimant's contentions as set forth in his pre-hearing questionnaire are as follows: "The claimant contends that his claim for additional medical benefits is not barred by the statute of limitations. The claimant contends that the medical treatment he received on July 29, 2002 constituted furnishing of medical services, which constitutes a payment of compensation under A.C.A. §11-9-702(b). See, *Plante v. Tyson Foods, Inc.*, 319 Ark. 126, 890 S.W. 2d 353 (1994). The claimant also contends that the respondent had actual notice of the July 29, 2002 treatment because it was processed through the respondent and was denied. The claimant argues that the respondent had constructive notice of the July 29, 2002 treatment in the alternative. Therefore, the claimant contends that the July 29, 2002 furnishing of medical treatment began the running of the one year statute of limitations for this claim for additional benefits, and that this claim was properly filed within the one year statute of limitations on July 21, 2003."

The respondents contend this claim is barred by the statute of limitations.

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 witness and to observe his demeanor, the following findings of fact and conclusions of law are made in accordance with A.C.A. §11-9-704:

#### FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on December 3, 2003, and contained in a pre-hearing order filed December 5, 2003, are hereby accepted as fact.
2. Claimant's claim for additional compensation benefits is not barred by the statute of limitations.

3. Claimant has met his burden of proving by a preponderance of the evidence that additional medical treatment is reasonable and necessary as a result of his compensable injury.

4. Respondent has controverted claimant's entitlement to additional medical benefits.

#### FACTUAL BACKGROUND

The claimant is a thirty-five year old man who worked for the respondent as a delivery driver. On January 20, 1997, the claimant suffered multiple compensable injuries including a fractured right leg when his UPS truck was struck head on by a another vehicle. As a result of this accident, claimant had a steel rod inserted in his leg and was off work for approximately nine months. The surgery was performed by Dr. Axelsen.

On January 12, 1999, the claimant underwent a second surgical procedure to remove the rod from his leg. Claimant testified that after the rod was removed he had a bone "spur" on his leg which would occasionally poke through his skin. On March 22, 1999, Dr. Axelsen released the claimant to return to work without restrictions. He also indicated that claimant should return to see him on an as needed basis. On March 30, 1999, Dr. Axelsen assigned the claimant a permanent physical impairment rating in an amount equal to 10% to the body as a whole.

Following his release and the assignment of the impairment rating claimant continued to return to see Dr. Axelsen for evaluations on a periodic basis. Claimant testified that after the rod was removed he continued to have pain in his right leg and knee.

Claimant testified that Dr. Axelsen would take x-rays at each visit and would prescribe medication and give him injections to relieve the pain. Respondent continued to pay for these visits with Dr. Axelsen through the visit in December 2001.

After December 2001 claimant sought additional medical treatment from Dr. Axelsen

on July 29, 2002. Respondent has not paid for that evaluation. As a result, claimant has filed this claim contending that he is entitled to additional medical treatment as a result of his compensable injury. Respondent contends that claimant's claim for additional benefits is barred by the statute of limitations.

### ADJUDICATION

The initial issue to be considered is whether claimant's claim for additional compensation is barred by the statute of limitations. A.C.A. §11-9-702(b)(1) states that claims for additional compensation are barred unless they are filed with the Commission within one year from the date of last payment of compensation or two years from the date of injury, whichever is greater.

It is the furnishing of medical treatment, not the actual payment for those services, which constitutes payment of compensation for purposes of the statute. *Heflin v. Pepsi-Cola Bottling Company*, 195 Ark. 244, 424 S.W. 2d 365 (1969); *Cheshier v. Foam Molding*, 37 Ark. App. 78, 822 S.W. 2d 412 (1992). Thus, if the employer furnishes medical treatment the statute of limitations is tolled. *McFall v. US Tobacco Company*, 246 Ark. 43, 434 S.W. 2d 838 (1969).

The furnishing of medical services was discussed by the Commission in *Diane Jack v. Around The World Travel*, Full Commission Opinion filed June 15, 1995 (D916900). In that particular case, the Full Commission stated:

Consequently, the receipt of medical treatment is not sufficient, standing alone, to prevent the statute of limitations from barring a claim. Instead, it must be shown that the employer furnished the medical services. Where a respondent furnishes medical treatment and has either actual or constructive knowledge that the claimant is receiving medical treatment or that the claimant would require further medical treatment, the respondent continues to furnish medical treatment until it communicates to the claimant that it is controverting the claimant's entitlement to

further medical treatment. *Plante v. Tyson Foods, Inc.*, 319 Ark. 126, 890 S.W. 2d 253 (1995); see also, *Safeway Stores, Inc. v. Lamberson*, 5 Ark. App. 191, 634 S.W. 2d 396 (1982).

In this particular case, I find that the respondent furnished medical treatment subsequent to December 2001 because it had both actual and constructive knowledge that claimant was continuing to receive medical treatment or that claimant would require further medical treatment. Furthermore, respondent did not communicate to the claimant that it was controverting his entitlement to further medical treatment until claimant received a letter in July 2003 from a collection agency indicating that Dr. Axelsen's treatment had not been paid.

The evidence indicates that subsequent to claimant's release by Dr. Axelsen in March 1999 the claimant continued to have problems with his right leg. Claimant testified that he continued to see Dr. Axelsen for evaluations of those leg problems. Claimant testified that Dr. Axelsen prescribed medication and injections. The documentary evidence submitted into evidence indicates that respondent continued to pay for this medical treatment up to and including December 2001. There is insufficient evidence of record indicating that respondent informed claimant that it would no longer pay for additional medical treatment. As a result, claimant again returned to Dr. Axelsen on July 29, 2002. Claimant testified that at that visit Dr. Axelsen again gave him an injection in his right leg. Based upon the claimant's testimony which I find to be credible as well as the remaining evidence of record, I find that the medical treatment provided by Dr. Axelsen on July 29, 2002, was reasonable and necessary and causally related to claimant's original compensable injury. There is no indication that claimant had suffered any other injury to his right leg other than the compensable injury of January 20, 1997.

Respondent was aware that claimant had undergone additional medical treatment for his right leg in July 2002 and denied payment for that medical treatment. Respondent

contends that even if the July 2002 visit was reasonable and necessary that claimant had one year from the date of last payment in December 2001 to pursue his claim for additional compensation benefits. I find no merit to the argument. As previously noted, the statute of limitations continues to be tolled if medical treatment is furnished and the respondent has actual or constructive knowledge that claimant is receiving medical treatment or that claimant will require further medical treatment. In this particular case, I find that additional medical treatment was furnished in July 2002 when claimant sought additional medical treatment from Dr. Axelsen for his right leg. Respondent was aware that claimant was receiving additional medical treatment and that he would require additional medical treatment.

Having found that additional medical treatment was furnished on July 29, 2002, claimant's filing of a claim for additional benefits on July 21, 2003 was within one year from the date of last medical payment or the furnishing of medical benefits as required. Accordingly, for the foregoing reasons, I find that claimant's claim for additional compensation benefits is not barred by the statute of limitations.

I also find that claimant has met his burden of proving by a preponderance of the evidence that he is entitled to additional medical treatment for his compensable injury. A claimant has the burden of proving by a preponderance of the evidence that medical treatment is reasonably necessary for the treatment of a compensable injury. *Norma Beatty v. Ben Pearson, Inc.*, Full Commission Opinion filed January 17, 1989 (D612291).

Here, claimant testified that he continued to have additional problems with his compensable right leg injury subsequent to his release by Dr. Axelsen in March 1999. Dr. Axelsen indicated at the time of his release that claimant should return to him for additional medical treatment as needed. The evidence indicates that claimant did return to Dr. Axelsen for additional medical treatment on numerous occasions at which time Dr. Axelsen took x-rays, prescribed pain medication, and gave injections. The claimant testified that

he currently has constant pain in his right leg and is in need of additional medical treatment. There is no evidence that claimant's right leg problems are the result of any other incident. Accordingly, for the foregoing reasons, I find that claimant has met his burden of proving by a preponderance of the evidence that he is entitled to additional medical treatment as a result of his compensable injury. This includes the medical treatment provided by Dr. Axelsen in July 2002.

Respondent has controverted claimant's entitlement to additional medical treatment.

#### AWARD

Claimant's claim for additional compensation benefits is not barred by the statute of limitations. Claimant has met his burden of proving by a preponderance of the evidence that he is entitled to additional medical treatment as a result of his compensable injury. Respondent has controverted claimant's entitlement to additional medical treatment.

The claimant's attorney is entitled to the maximum statutory attorney's fee on benefits awarded herein, one-half to be paid by the respondents but with no fee forthcoming from the claimant since no benefits are being paid directly to the claimant.

IT IS SO ORDERED.

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GREGORY K. STEWART  
ADMINISTRATIVE LAW JUDGE