

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F012603

LANA BARNES, Employee	CLAIMANT
FORT SMITH PUBLIC SCHOOLS, Employer	RESPONDENT
RISK MANAGEMENT RESOURCES DIVISION, Carrier	RESPONDENT

OPINION FILED MAY 12, 2005

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

Claimant represented by EVELYN BROOKS, Attorney, Fayetteville, Arkansas.

Respondents represented by E. DIANE GRAHAM, Attorney, Fort Smith, Arkansas.

STATEMENT OF THE CASE

On April 11, 2005, the above captioned claim came on for a hearing at Fort Smith, Arkansas. A pre-hearing conference was conducted on January 26, 2005, and a pre-hearing order was filed on that same date. 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 prior Commission opinions are final.

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

1. Temporary total disability benefits from February 27, 2002 through a date yet to be determined.

2. Medical after February 27, 2002.

3. Statute of limitations.

4. Res judicata.

5. Attorney fee.

The claimant contends she is entitled to additional temporary total disability and medical from February 27, 2002 through a date yet to be determined.

The respondents contend that claimant is not entitled to any additional benefits.

Furthermore, this claim is barred by the statute of limitations and res judicata.

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 her 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 stipulation agreed to by the parties at the pre-hearing conference conducted on January 26, 2005, and contained in a pre-hearing order filed that same date, is hereby accepted as fact.
2. Claimant's claim for additional benefits is barred by the statute of limitations.
3. Claimant has failed to prove by a preponderance of the evidence that she is entitled to additional medical benefits or temporary total disability benefits as a result of her compensable injury.

#### FACTUAL BACKGROUND

The claimant is a 47-year-old woman who began working as a cook in a cafeteria for respondent in the spring of 2000. Claimant suffered a compensable injury to her low back when she slipped and fell on a wet floor on October 5, 2000. After some initial medical treatment claimant was released to return to work with restrictions by her treating physician. In December 2000 the respondent denied claimant's entitlement to any further compensation benefits. As a result, claimant requested a hearing on her entitlement to temporary total disability benefits beginning October 10, 2000 and continuing through a date yet to be determined. In an opinion filed July 9, 2001 I found that claimant had failed to meet her burden of proving by a preponderance of the evidence that she was entitled to additional temporary total disability benefits. This finding was based in part upon the lack of medical reports, claimant's admission that her treating physician had always

released her to return to work, and evidence that respondent had offered claimant employment within her restrictions. On December 13, 2001 the Full Commission denied a motion from the claimant for remand/rehearing for consideration of additional evidence.

Subsequently, on February 26, 2002, the Full Commission affirmed and adopted the opinion of July 9, 2001.

Claimant filed this claim in November 2004 requesting payment of temporary total disability benefits beginning February 27, 2002 and continuing through a date yet to be determined as well as medical treatment subsequent to February 27, 2002.

### ADJUDICATION

The initial issue for consideration is respondent's contention that claimant's claim for additional benefits is barred by the statute of limitations. The claim filed by the claimant in November 2002 was a claim for additional compensation benefits. Pursuant to A.C.A. §11-9-702(b)(1) a claim for additional compensation benefits is barred unless it is 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.

In this particular case, claimant's injury occurred on October 5, 2000, and by claimant's own admission the respondent ceased paying compensation benefits in December of 2000. Obviously, the claim filed by the claimant in November 2004 was more than one year after the respondent last paid compensation benefits and more than two years after the date of injury.

Claimant would argue that the prior hearing and subsequent appeal to the Full Commission tolled the statute of limitations. I would agree. However, the Full Commission's opinion which the parties agree is now final was issued on February 26, 2002. Once that opinion was denied and dismissed and claimant's claim became final, the statute of limitations began running. Under either the one-year time period or two-year

time period the filing of the claim for additional benefits in November of 2004 was untimely.

Accordingly, for the foregoing reasons, I find that claimant's claim for additional compensation benefits is barred by the statute of limitations.

Furthermore, even if the claimant's claim for compensation benefits was not barred by the statute of limitations, I would nevertheless find that claimant has failed to meet her burden of proving by a preponderance of the evidence that she is entitled to additional temporary total disability benefits or medical treatment for her compensable October 5, 2000 injury. As noted in the prior Commission opinions, claimant was released by her treating physicians to return to work with lifting restrictions. Furthermore, claimant acknowledged that respondent had offered her light-duty jobs. Claimant's testimony was supported by Donna Turnipseed, the director of food services for respondent, and by Inice Swaim, the claimant's supervisor, who both testified at the initial hearing that respondent made work available to claimant within her physical restrictions. Despite that fact, claimant simply quit working for the respondent. In reaching this conclusion, I believe it is important to review the medical report of Dr. Tacoronti dated October 19, 2000. This report was written only two weeks after the claimant's compensable injury. Dr. Tacoronti diagnosed claimant as suffering from low back pain but stated that his examination indicated that claimant was exaggerating her complaints. Claimant underwent an EMG nerve conduction study in November 2000 which was interpreted as normal. In December 2000 claimant underwent a functional capacities evaluation which revealed an inconsistent effort. The report indicates that due to the many inconsistencies it was difficult to assess the claimant's true capabilities. The FCE report also indicates that claimant simply refused to perform some tests which were similar in nature to tests she had previously performed.

In support of her contention, claimant relies upon an MRI scan from May 2002 which was interpreted as showing a herniated disc at the L5 level. However, a subsequent MRI scan taken in October 2003 revealed only degenerative disc disease with minimal bulging

which was not affecting the thecal sac, nerve roots, or foramina. The October 2003 MRI report also indicates that there is no evidence of disc herniation.

In summary, even if claimant's claim for additional benefits was not barred by the statute of limitations, I would find based upon the evidence presented that claimant has failed to meet her burden of proving by a preponderance of the evidence that she is in need of additional medical treatment or that she is entitled to any additional temporary total disability benefits as a result of her October 5, 2000 compensable injury.

#### ORDER

Claimant's claim for additional benefits is barred by the statute of limitations. Furthermore, even if claimant's claim for additional benefits were not barred by the statute of limitations, I find that claimant has failed to meet her burden of proving by a preponderance of the evidence that she is entitled to additional medical treatment or temporary total disability benefits as a result of her compensable injury. Therefore, claimant's claim for additional compensation benefits is hereby denied and dismissed.

IT IS SO ORDERED.

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GREGORY K. STEWART  
ADMINISTRATIVE LAW JUDGE