

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F011460

DEBRA W. DAVIS, EMPLOYEE	CLAIMANT
LEISURE ARTS, INC., EMPLOYER	RESPONDENT
TRAVELERS INDEMNITY COMPANY C/O ST. PAUL TRAVELERS, INSURANCE CARRIER	RESPONDENT

OPINION FILED OCTOBER 31, 2006

Hearing before Administrative Law Judge Barbara W. Webb on July 28, 2006, in Little Rock, Pulaski County, Arkansas.

The claimant appeared and was represented by Mr. H. Oscar Hirby, Attorney at Law, Little Rock, Arkansas.

Respondents were represented by Mr. Robert H. Montgomery, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held on the above-styled claim on July 28, 2006, before Administrative Law Judge Barbara W. Webb, in Little Rock, Pulaski County, Arkansas. A Pre-hearing telephone conference was held on this claim on March 22, 2006. A Pre-hearing Order was entered in this case on March 22, 2006. The Pre-hearing Order set forth the stipulations offered by the parties and outlined the issues to be litigated and resolved at this hearing. A copy of the Pre-hearing Order was made Commission's Exhibit No. 1 to the hearing record. The following stipulations as submitted by the parties in the Pre-hearing Order and as adopted on the record are hereby accepted:

STIPULATIONS

By agreement of the parties, the stipulations applicable to this claim are as follows:

1. That the Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. That the employee/employer/carrier relationship existed at all relevant times, including September 11, 2000, at which time the claimant sustained an injury to her low back.
3. That the respondents accepted the claim as compensable and paid medical and indemnity benefits.
4. That the claimant earned wages sufficient to entitle her to a compensation rate of \$198.00 per week.

ISSUES

By agreement of the parties, the issues to be presented at the hearing are as follows:

1. Claimant's entitlement to payment of medical expenses incurred since October 1, 2002, and whether such expenses are related and reasonably necessary for the care and treatment of her work-related injury.
2. Claimant's requested return to Dr. William Blankenship for a re-evaluation of her current condition.
3. Additional benefits, including vocational rehabilitation.

4. Whether the claim for additional benefits is barred by the statute of limitations.

5. Controversion and attorney's fees. The record consists of a one volume transcript of the hearing, consisting of the testimony of Debra Davis and all documentary evidence consisting of Commission's Exhibit 1 (Pre-hearing Order), Claimant's Exhibit 1 (Medical and other records), Respondent's Exhibit 1 (Deposition of Kathy Sandoval), Respondent's Exhibit 2 (Form AR-C), and Respondent's Exhibit 3 (Functional Capacity Test). In addition, the claimant's post-hearing brief and supplemental information submitted on August 23, 2006, and the letter response submitted by Respondents filed on August 30, 2006, have been blue-backed and made a part of the record herein.

CONTENTIONS

The claimant contends that she sustained a work-related injury to her low back on September 11, 2000, while lifting heavy boxes of books at work and that her back problems have continued; that she remains entitled to payment of benefits in this claim and to a return appointment with Dr. Blankenship or another physician directed by the Commission, for re-evaluation of her work-related injury at employer's expense; payment of medical expenses incurred while being treated by Dr. Hearne and referral care providers; and controversion and attorney's fees.

The respondents contend that appropriate benefits have been paid for the claimant's compensable injury; and that additional benefits are barred by the statute of limitations.

FACTUAL BACKGROUND

On September 11, 2000, the claimant suffered an admittedly compensable injury to her lower back while lifting heavy boxes of books during the course and scope of her employment as an order picker with Leisure Arts.

Following the injury, the claimant treated with St. Vincent Family Clinic and was treated conservatively with physical therapy, x-rays, and prescription medications for pain. In October of 2000, after continued complaints of pain, she was referred for examination to Dr. William F. Blankenship, an orthopedic specialist. She was diagnosed with a lumbosacral strain and grade II spondylolisthesis L4 on L5. Her physical therapy was discontinued and she was referred for an MRI. The MRI revealed a posterior annular tear of the L5-S1 disc without any disc herniation or stenosis. It also showed a moderate facet degenerative change at L4-5 with an 8 mm right L4-5 facet synovial cyst without nerve root compromise. Based on the results of the MRI, the claimant was referred to a radiologist for aspiration of the apparent cyst. Upon examination by the radiologist, the doctor noted that the cyst could not be located. The claimant returned to Dr. Blankenship and was scheduled for an EMG and nerve conduction study and given a lumbar epidural steroid injection. The nerve conduction study showed normal findings. In December of 2000, the claimant returned for a follow-up evaluation and was scheduled for physical therapy. In January of 2001, the clinic's notes reflect that the claimant did not have physical therapy and was given a repeat epidural injection. On February 13, 2001, the claimant was examined by Dr. Wilson. He noted that the claimant's tests were normal and that she has facetar arthritis. He noted that "Ms. Davis does not have objective findings of a disabling type injury". He

recommended a functional capacity assessment and that the claimant be released to return to her duties with the appropriate limitations as determined by the assessment. On March 14, 2001, the claimant returned for a follow-up evaluation with Dr. Blankenship after completion of the Functional Capacity Evaluation ("FCE"). He recommended that the claimant could return to work with the light level DOT designated activity level as outlined in the FCE. On March 28, 2001, clinic notes reflect that the claimant returned for evaluation and informed the doctor that she was not allowed to return to work by her employer due to her limitations. She was scheduled for a bone scan. On April 9, 2001, the results of the bone scan were reviewed and showed only degenerative changes. Dr. Blankenship noted that he explained to the claimant that he was not aware of any further treatment available and that it was his opinion that she was capable of returning to work within the FCE limitations. On December 11, 2001, the claimant again sought treatment with Dr. Blankenship. At that time, he noted that based on the lack of findings from an objective standpoint, he did not see any objective basis for any additional treatment or any reason she could not work at least on the FCE capacity. He released her from treatment. In August of 2002, the claimant underwent a second MRI. Clinic notes reflect that the MRI did not reveal significant changes from the previous MRI with the exception of progression of Grade 1 spondylolisthesis of L4 on L5 with severe degenerative changes.

Employment records reflect that the claimant was notified by letter dated March 13, 2001, that she had exhausted all possible medical leave available and was being terminated from employment as of March 13, 2001, due to her extended illness. The claimant testified that in March of 2001, she became concerned about payment of her medical bills:

I was still receiving my check at the time. My bills started coming in and I contacted the resource office at Leisure Arts, and she said that they had filed workmen comp, but I wasn't hearing anything from workman comp. So I took it upon myself to come down to the office to see what was going on about getting my medical bills and stuff paid.

She explained that after she received the termination letter, she went to the workers' compensation office and met with a legal advisor. She testified that she completed several forms provided to her, including a claim form dated March 19, 2001, and returned it to another legal advisor who assured her it would be filed in her case. The claimant introduced a copy of the claim form which was admittedly not a part of the claimant's workers' compensation file. The claim form did not specify whether the claim was for initial benefits or additional benefits and further did not specify the type of benefits sought.

The claimant testified that after she was released by Dr. Blankenship, she continued to treat with Dr. Hearne, Dr. Bruffett, and Dr. Charles Schultz for her back condition. She explained that she paid for the medical services with Medicare under a Social Security disability awarded as of January 29, 2003, based on her combined problems of diabetes, asthma, and eye injury and her back.

She attempted to seek replacement employment with Arkansas Rehabilitation Services, but explained that she could not find work due to her pain and limitations. On November 5, 2005, the claimant filed a workers' compensation claim requesting additional permanent partial and medical benefits.

In the instant case, the evidence demonstrates that respondents paid temporary total disability payments and some medical expenses to the claimant in connection with the admittedly compensable injury to her lower back of September 11, 2000. The records offered by respondents reflect that the claimant was paid temporary total

benefits beginning September 12, 2000 until the last payment on May 2, 2001, for the time period ending May 15, 2001. The records further reflect that the last payment for medical services paid by the respondents to the claimant was issued November 1, 2002. The records further reflect that there was no communication between the claimant or her counsel and the respondents from November, 2002, until June of 2005.

DISCUSSION

The threshold issue in this case is whether the claim of Davis is barred by the statute of limitations. Ark. Code Ann. § 11-9-702 (b) sets out the allowable time for filing a claim for additional benefits. In cases where any compensation has been paid, the claim for additional compensation, including disability or medical, will be barred unless filed within one year from the date of the last payment of compensation or two years from the date of the injury, whichever is greater. Ark. Code Ann. § 11-9-702 (b)(1). When the claimant submits a timely request for additional benefits that is never acted upon, the statute of limitations is tolled. *Barnes v. Fort Smith Public Schools*, ___ Ark. App. ___, ___ S.W.3d ___ (May 17, 2006); *Eskola v. Little Rock Sch. Dist.*, ___ Ark. App. ___, ___ S.W.3d ___ (Nov. 30, 2005); *Dillard v. Benton Co. Sheriff's Office*, 87 Ark. App. 379, ___ S.W.3d ___ (Sept. 22, 2004); *Spencer v. Stone Container Corp.*, 72 Ark App. 450, 38 S.W.3d 309 (2001); *Bledsoe v. Georgia-Pacific Corp.*, 12 Ark. App. 293, 675 S.W.2d 849 (1984).

In this case, the first claim for benefits purportedly filed by the claimant was dated March 19, 2001. Assuming arguendo that the claim was filed, it is clearly within two years of the date of claimant's on-the-job injury. Davis did not make another request for additional compensation until November of 2005. Two years from the date

of injury would have been September 11, 2003. One year from the last payment of benefits would have been November 1, 2003; this would be the applicable limitations period because it is greater than two years from the date of the compensable injury. Because Davis did not make a claim for additional compensation until November, 2005, I find that the claim is barred by the statute of limitations.

Davis argues that her claim for additional benefits was timely filed because the March, 2001 claim was delivered to the legal advisor for the commission after benefits had been paid and therefore was for additional benefits. First, there is no evidence that the March, 2001 claim was ever filed. In fact, claimant's attorney readily admits that the claim is not located within the official file. Moreover, the claim is incomplete and does not reflect whether the claimant is seeking initial or additional compensation. The testimony of the claimant was that she met with the legal advisor after she was terminated and because she became concerned whether her medical bills were being paid. At that time, the evidence reflects that claimant's medical bills were not controverted and were paid through November of 2002, at which time she had been released from further treatment by Dr. Blankenship due to a lack of objective findings for need for treatment.

Alternatively, Davis contends that she has continued regular medical treatment for her back and such services constitute payments of compensation within the meaning of Ark. Code Ann. § 11-9-702(b). See, *Plante v. Tyson Foods, Inc.*, 319 Ark. 126, 890 S.W.2d 253(1994). However, as in *Barnes*, Davis was told in 2002 that Leisure Arts and its insurance carrier were denying further medical treatment. *Barnes v. Fort Smith Public Schools*, ___ Ark. App. ___, ___ S.W.3d ___ (May 17, 2006). She submitted no medical bills to Leisure Arts or its insurance carrier after this date and

had no contact with either party after November of 2002. Her medical bills after November 2002 have been paid by other entities. There is no evidence that the respondents had actual notice or had reason to know that Davis was receiving further medical treatment. Consequently, the contention that there was a furnishing of medical services, with knowledge of the respondents, within the statutory period is simply not supported by the preponderance of the evidence and simply must fail.

Therefore, for the reasons set forth herein, I find the preponderance of the evidence shows that claimant did not file her claim for additional benefits until November of 2005, and the claim is barred by the statute of limitations.

After the hearing, claimant's counsel submitted supplemental information offered with claimant's post-hearing brief, which consists of medical records for treatment after November of 2002. Claimant contends that such records were not available as of the date of the hearing. Respondents contend that the medical records should be excluded from evidence on the basis that the records were not produced at least seven (7) days prior to the hearing in accordance with the Pre-hearing Order. Because I have ruled that the preponderance of the evidence shows the claim is barred by the statute of limitations, it is not necessary for me to address this issue or the remaining claim on the merits of whether the medical treatment was reasonable or necessary and whether claimant is entitled to a re-examination and further treatment. However, I would note that it is clear from the medical reports from Dr. Blankenship that there were no objective medical findings of an injury that warranted further medical treatment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.

2. The employee/employer/carrier relationship existed at all relevant times, including September 11, 2001.

3. The claim for additional benefits is barred by the applicable statute of limitations.

IT IS SO ORDERED.

BARBARA WEBB
Administrative Law Judge