

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F213375 (10/18/02)

JORGE PEREZ, EMPLOYEE

CLAIMANT

LEXICON, INC./PROSPECT STEEL, EMPLOYER

RESPONDENT

LIBERTY MUTUAL INSURANCE CO., CARRIER

RESPONDENT

OPINION FILED APRIL 10, 2007

Hearing before ADMINISTRATIVE LAW JUDGE ANDREW L. BLOOD, on February 14, 2007, at Little Rock, Pulaski County, Arkansas.

Claimant represented by the HONORABLE ROBERT R. CORTINEZ, II, Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE JOSEPH H. PURVIS, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted in the above style claim to determine whether the claim should be dismissed for want of prosecution and whether the claim for additional benefits is barred by the statute of limitations.

On January 9, 2007, a pre-hearing conference was conducted in this claim, from which a Pre-hearing Order of the same date was filed. The Pre-hearing reflects stipulations entered by the parties, the issues to be addressed during the course of the hearing and the parties' contentions relative to the afore. The Pre-hearing Order is herein designated a part of the record as Commission Exhibit #1.

The testimony of Jorge Perez, the claimant; Bonnie Gentry King, and Steven Dineen, coupled with medical reports and other documents comprise the record in this claim.

DISCUSSION

Joreg Rives Perez Gonzales, the claimant, with a date of birth of August 12, 1971, commenced his employment with respondent on August 18, 1997. On October 18, 2002, the claimant sustained an injury within the course and scope of his employment, which was accepted as compensable, and which serves as the basis for the present claim.

In describing the mechanics of the October 18, 2002, accident, testified that he was hit by a 2,000 pound beam in the upper left arm, which crushed him against another beam resulting in damage in his back as well. Claimant asserts that while respondents paid for the cost of his medical treatment growing out of the injury, there came a point in time when they refused to be responsible for further medical treatment. Claimant's testimony reflects, regarding the afore:

Yes, sir. I was sent out for two, three weeks on Dr. Frazier's office. I was sent out for therapy over there on Northwest Plaza and the third week I got a letter from Steve Dineen over there at Lexicon, they fired me. And then when I went back to my therapy the next day Dr. Frazier said he could not treat me because the insurance was not going to pay no more for my treatment and he was releasing me from therapy. I say, you cannot do that. (T. 13).

The testimony of the claimant reflects that after Dr. Frazier declined to provide further treatment he sought assistance from the state Medicaid office and was referred to Dr. Bullock.. Claimant's testimony reflects that he received treatment from Dr. Bullock for his arm and upper back complaint, both of which he attributes to his on-the-job injury of October 18, 2002. With respect to other medical treatment he received which was related to the October 18, 2002, injury but not paid for by respondents, claimant's testimony reflects that he has received therapy and

been seen by doctors at Baptist Hospital. The testimony of the claimant reflects that he has seen Dr. Prabhat Hebbar, whose deposition was obtained in December 2005, relative to his injury.

The testimony of the claimant reflects that in an April 10, 2003, Pre-hearing Questionnaire Response filed in his claim he sought additional medical benefits and a change of physician as a part of his claim. Further, the claimant testified that he also requested permanent partial disability benefits and loss of wage earning capacity benefits as a result of the October 18, 2002, accident. Claimant's testimony reflects that pursuant to a April 20, 2005, Pre-hearing Questionnaire filed with the Commission he again sought the same additional benefits that had been denied by respondents. Claimant noted that to date he had not had a hearing on the claims for additional benefits.

Claimant asserts that in 2006 he returned to his authorized treating physician, Dr. Frazier, for complaints relative to the compensable injury and was re-evaluated by same on March 22, 2006. Claimant acknowledged that a February 14, 2006, hearing was scheduled before the Arkansas Workers' Compensation Commission on his claim for additional benefits growing out of the October 18, 2002, accident, and that he requested that the hearing be canceled in order to return to Dr. Frazier.

Further, claimant's testimony reflects that following his evaluation by Dr. Frazier he authorized his attorney to engage in settlement negotiations with respondents. Claimant concedes that demanded a specific dollar amount in the settlement negotiations, which was not accepted by respondents. Thereafter, claimant instructed his attorney to proceed to a hearing on his claim for additional workers' compensation benefits. Claimant maintains that the settlement negotiations occurred approximately two (2) months prior to the present hearing. Claimant

continued to desire to have his hearing on the claim for additional workers' compensation benefits.

The claimant acknowledged that he was seen by Dr. J. K. Buckman, however denies that he received medical treatment relative to his back and hip. Claimant maintains that Dr. Buckman treated him for blood pressure and did some surgery on his "boodie", however the back was treated by Dr. Safman. Claimant's testimony reflects that he was released by Dr. Buckman on January 16, 2003.

The testimony of the claimant reflects that he received treatment under the care of Dr. Frazier for his arm injury growing out of the accident. Further, claimant concedes that in December 2002, he was released to light duty work by Dr. Frazier and Dr. Buckman, and that he returned to the employment of respondent-employer. Claimant concedes that his employment was terminated by respondent-employer in mid-January 2003, however he disputes the basis for the termination.

Claimant denies that he was put at maximum improvement by Dr. Frazier on February 17, 2003. Claimant asserts that Dr. Frazier told him information contrary to that reflected in the February 17, 2003, report. Claimant acknowledged that his next medical treatment following the February 17, 2003, visit to Dr. Frazier was the March 17, 2003, treatment by Dr. Rose Shaw-Bullock. The claimant was seen by Dr. Bullock under Medicaid from March 17, 2003, until May 2, 2003. Claimant contends that he has continued to see Dr. Bullock to date. Claimant asserts that he sees Dr. Bullock every month, during which time she fills his prescription for pain medication. Claimant concedes that he was referred by Dr. Bullock under Medicaid to Dr. Zachary Mason for a one time examination.

The claimant was seen by Dr. Mason on May 12, 2003. Claimant disputes that he was not seen by a physician between the May 12, 2003, visit of Dr. Mason and the March 22, 2006, visit of Dr. Frazier. Claimant maintains that it was “part” his decision to return to Dr. Frazier in March 2006. Claimant concedes that he was not referred back to Dr. Frazier in March 2006, by a physician.

Claimant maintains that he has seen Dr. Bullock on a monthly basis since November 2005. Regarding the medication prescribed for him by Dr. Bullock, the testimony of the claimant reflects:

She prescribes a, first she started prescribing some Zoloft and Hydrocodone but not she took me off the Zoloft, you know, because I’m working light duty and then I take the pain, Hydrocodone medication everyday for my back aches. (T. 24).

The claimant acknowledged awareness that Dr. Bullock , in her deposition, expressed the opinion that his back problems are related to the compensable accident.

The March 22, 2006, report of Dr. Frazier relative to the claimant reflects that a courtesy copy was provided to Karen Junot, with Liberty Mutual Insurance Company, at P.O. Box 152067, Irving, Texas. Claimant asserts that the only physician that he is currently seeing for complaints growing out of the October 18, 2002, accident is Dr. Bullock. Claimant’s testimony reflects, regarding physical therapy prescribed by Dr. Bullock:

Otter Creek. She sent me to physical therapy at Otter Creek. Like every year I get 14 visits, you know, paid for by the state, you know, that’s all that I can get. (T. 26).

Ms. Bonnie Gentry King, the current insurance adjuster of the claimant’s claim, testified that the claim was previously handled by Karen Junot, who is no longer employed by the carrier.

Ms. King acknowledged that Dr. Frazier was an authorized treating physician in the claim. Further Ms. King's testimony reflects that respondent-carrier never sent a notice to Dr. Frazier informing him that he was no longer authorized to treat the claimant. Ms. King testified that her review of the respondent-carrier's file relative to the claimant did not reflect the presence of the March 22, 2006, report of Dr. Frazier.

Ms. King's testimony reflects that she was aware that the claimant was seeking additional medical and temporary total disability benefits, which was contested in the responsive filing to the pre-hearing questionnaire, and that a February 14, 2006, hearing was scheduled before the Commission on the claim. The evidence further reflects that depositions were taken as late as December 12, 2005. Ms. King maintains that she is unaware of any settlement offer being communicated to respondent-carrier at the end of the year 2006, by the claimant. Additionally, Ms. King testified that she did not recall seeing a copy of a December 12, 2006, letter from claimant's attorney to respondents' attorney offering to settle the claim based on the results of Dr. Frazier's evaluation. Ms. King testified that she is confident that she received a copy of a December 15, 2006, letter from respondents' attorney to the attorney for the claimant, which confirmed that the claimant had made an offer of settlement.

Ms. King concedes the occurrence of activity in the claim as of December 2006, in terms of communication between the attorneys. Ms. King denies that the motion to dismiss the claim for want of prosecution was the product of the settlement offer extended by the claimant.

Ms. King's testimony reflects that she does not recall why the scheduled February 14, 2006, hearing was taken off of the docket. Ms. King acknowledged that it is possible that the hearing was taken off so that the claimant could be re-evaluated by Dr. Frazier.

The testimony of Ms. King reflects that the last benefits paid in this claim by the respondents was a 2003 pharmacy bill at Walgreen. Ms. King's testimony reflects that she is aware, pursuant to the claimant's pre-hearing filing, that in April 2003, claimant requested additional benefits. Likewise, in April 2005, pursuant to a pre-hearing filing claimant requested additional workers' compensation benefits. Ms. King testified that to her knowledge a hearing had never been conducted on either of the afore claims to date.

Ms. King's testimony reflects that all indemnity as well as all medical benefits paid in the claim would have required her approval for payment. Ms. King testified that she did not receive any medical bills or claims for indemnity in the present matter from the February 17, 2003, bill of Dr. Frazier to the present. Ms. King denies that she authorized the examination of the claimant by Dr. Frazier which resulted in the March 22, 2006, report. The testimony of Ms. King reflects that she has not seen, authorized, been requested or done anything in the presence claim in excess of three (3) years.

Ms. King acknowledged that the bill of respondents' attorney has been paid. Further Ms. King's testimony reflects that she was aware that the attorney for respondents was working on the claim and that the claim was being pursued by virtue of the fact that depositions were being taken in December 2005. Ms. King testified regarding her knowledge of preparation for the pre-hearing as well as the scheduled February 14, 2006, hearing.

Mr. Steven Michael Dineen, corporate safety director of respondent-employer who supervise the workers' compensation program, testified that the claimant's claim was accepted as compensable from the onset, which entailed the payment of indemnity and medical benefits. Respondents paid in excess of \$18,000.00, in medical benefits on behalf of the claim. The

claimant received medical treatment for his back and hip complaints under the care of Dr. Buckman, and from his arm under the care of Dr. Frazier. Mr. Dineen testified that the claimant was released by Dr. Buckman on January 16, 2003, and Dr. Frazier on February 17, 2003, neither of which assigned a permanent impairment. The claimant worked light duty for from mid-December 2002 until January 17, 2003, when his employment was terminated.

Mr. Dineen's testimony reflects that he has not had any contact with the claimant or his attorney since the claimant left the employment of respondent on January 17, 2003. Mr. Dineen acknowledge receipt by respondents of the December 2006 settlement demand of the claimant. Mr. Dineen's testimony reflects that he rejected the settlement demand and directed the filing of the motion to dismiss. Mr. Dineen denies that he authorized the claimant to go back to see Dr. Frazier or any other physician subsequent to February 17, 2003.

Regarding the reason why the February 14, 2006, scheduled hearing in the claim was cancelled, Mr. Dineen's testimony reflects:

As I understand it, you and Mr. Purvis were having difficulty getting medical records and getting a deposition with Dr. Hebbar, so. (T. 51-52).

Mr. Dineen acknowledged that as of the time of the prior scheduled February 14, 2006, hearing activity was taking place in the claim. While acknowledging that the depositions of two (2) of the claimant's treating physicians, Dr. Rose Bullock and Dr. Prabhat Hebbar, were being scheduled, Mr. Dineen testified that he did not consider either to be treating physicians for the workers' compensation claim because respondents did not authorize the treatment. (T. 52).

Mr. Dineen was aware that the claimant filed a pre-hearing request for additional medical treatment, which included the treatment by Dr. Bullock and Dr. Hebbar. Finally, Mr. Dineen

concedes that he does not know if the claimant received additional medical treatment because a hearing has not been conducted on the issue of the additional medical treatment.

After a thorough consideration of all of the evidence in this record, to include the testimony of the witnesses, review of the medical reports and other documentary evidence, application of the appropriate statutory provisions and case law, I make the following:

FINDINGS

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On October 18, 2002, the relationship of employee-employer-carrier existed among the parties.
3. On October 18, 2002, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$374.00/\$318.00, for temporary total/permanent partial disability.
4. On October 18, 2002, the claimant sustained an injury to his left arm, low back and hip arising out of and in the course of his employment.
5. Respondents last paid benefits in the present claim in 2003 in the form of a pharmacy expenditure.
6. On or about January 3, 2003, the claimant filed a claim for additional workers' compensation benefits and submitted a responsive filing to the Pre-hearing Questionnaire on April 10, 2003. On or about March 2005, the claimant requested a hearing before the Commission and submitted a responsive filing to the Pre-hearing Questionnaire on April 22, 2005.
7. Pursuant to a July 5, 2005, pre-hearing conference, a July 11, 2005, Pre-Hearing

Order was entered scheduling a hearing on the claimant's claim for additional workers' compensation benefits for November 15, 2006. By Joint motion of the parties the November 15, 2005, scheduled hearing was continued and rescheduled for February 14, 2006.

8. On or about February 7, 2006, at the request of the claimant, the scheduled February 14, 2006, hearing was cancelled, and the file returned to the general files of the Commission.

9. The January 2003, filing of the claim for additional workers' compensation benefits tolled the limitations provisions of Ark. Code Ann. §11-9-702 (b)(1).

10. The claimant has actively pursued his claim for additional workers' compensation benefits growing out of the October 18, 2002, compensable accident, such that an order to dismiss for want of prosecution is not warranted.

CONCLUSIONS

The compensability of the claimant's October 18, 2002, accidental injury is not disputed. Respondents contend that the claimant's claim should be dismissed for want of prosecution. Further, respondents maintain that the statute of limitations bars the claimant's claim for additional workers' compensation benefits. The claimant contends that he has actively pursued his claim for workers' compensation benefits and that the motion of respondent to dismiss for want of prosecution should be denied. Claimant also maintain that his filing of a claimant for addition workers' compensation benefits tolled the statute of limitations.

The present claim is one governed by the provisions of Act 796 of 1993, in that the claimant asserts entitlement to workers' compensation benefits as a result of an injury having been sustained subsequent to the effective date of the afore provision.

As noted above the compensability of the October 18, 2002, accident is not disputed. Respondents paid temporary total disability benefits to the claimant through mid-December 2002. The claimant performed light duty work for respondents from mid-December 2002 through on or about January 16, 2003. Respondents paid medical benefits on behalf of the claimant relative to his injuries growing out of the October 18, 2002, accident through February 2003.

On or about January 2003, the claimant filed a claim for additional workers' compensation benefits growing out of the October 18, 2002, compensable accident. While the parties prepared and submitted responsive filings to the pre-hearing questionnaire and participated in a pre-hearing conference a hearing was not scheduled or conducted on the claim for additional workers' compensation benefits.

In 2005, the claimant, through his attorney, again requested that the file be referred to an administrative law judge of a hearing on his claim for additional workers' compensation benefits. The claimant submitted another responsive filing to the Pre-hearing Questionnaire, which was filed with the Commission on April 22, 2005. Pursuant to a July 2006, pre-hearing conference a July 11, 2006, Pre-hearing Order was filed scheduling a November 15, 2006, hearing before the Arkansas Workers' Compensation Commission. To accommodate discovery, to included the depositions of two (2) of the claimant's treating physicians the November 15, 2006, scheduled hearing was continued and rescheduled for February 14, 2006.

The evidence preponderates that at the request of the claimant the February 14, 2006, scheduled hearing was cancelled and the file returned to the Commission's general files pending a re-evaluation by the one of the claimant's prior authorized treating physician, Dr. G. Thomas

Frazier. The claimant was seen by Dr. Frazier on March 22, 2006, with a report being generated of the same date. There is no evidence to reflect that the March 22, 2006, visit was the product of a scheduling by respondents or a referral from a treating physician. Nevertheless, the March 22, 2006, report was considered in a settlement demand by the claimant in December 2006, and respondents' response thereto.

Respondents assert that the present claim should be dismissed for want of prosecution. The evidence preponderates that while a hearing has not been conducted on the claimant's claim for additional workers' compensation benefits, the claimant has pursued his claim. Specifically, the parties scheduled and obtained depositions from the claimant's treating physician in November and December 2005, in preparation of a hearing. Indeed, it was the scheduling of the December 12, 2005, deposition of Dr. Prabhat Hebbar, which resulted in the rescheduling of the November 15, 2005, hearing to February 14, 2006. Further, it was the claimant's pursuing the claim through a re-evaluation by Dr. Frazier which resulted in the cancellation of the February 2006, hearing.

The evidence preponderates that after filing his January 2003, claim for additional workers' compensation benefits the claimant requested a hearing. On April 10, 2003, the claimant submitted his responsive filing to the pre-hearing questionnaire. Further, on April 22, 2005, claimant submitted a responsive filing to a pre-hearing questionnaire pursuant his request for a hearing on his claim for additional workers' compensation benefits growing out of the October 18, 2002, compensable accident. The motion of respondents to dismiss the claim for want of prosecution is not warranted by the credible evidence in the record and is respectfully denied.

The respondents' argument that the present claim is barred by the limitation periods set forth in Ark. Code Ann. §11-9-702 (b)(1) is not persuasive. 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 injury, whichever is greater. However, when a claimant files a timely request for additional benefits that is never acted upon, the statute of limitations is tolled. *Eskola v. Little Rock School District*, 93 Ark. App. 250, ___ S.W.3d ___, (2005); *Dillard v. Benton County Sheriff's Office*, 87 Ark. App. 379, 192 S.W.3d 287 (2004). In the instant claim the claimant filed a timely claim for additional workers' compensation benefits relative to the October 18, 2002, compensable accident, which to date has not been acted upon and tolled the statute of limitations. The present claimant for additional workers' compensation benefits is not barred by the statute of limitations, and the claimant may pursue his claim before the Arkansas Workers' Compensation Commission.

IT IS SO ORDERED.

Andrew L. Blood, ADMINISTRATIVE LAW JUDGE