

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NUMBER E905906 & F002818

DEBRA K. WHEELER, EMPLOYEE	CLAIMANT
CARE MANOR OF BAXTER COUNTY, EMPLOYER	RESPONDENT NO. 1
RISK MANAGEMENT RESOURCES, CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT NO. 3

OPINION FILED SEPTEMBER 21, 2007

A hearing was held before ADMINISTRATIVE LAW JUDGE CHANDRA HICKS, on August 15, 2007, in Mountain Home, Baxter County, Arkansas.

The claimant was represented by THE HONORABLE Frederick S. "Rick" Spencer, Attorney at Law, Mountain Home, Arkansas.

The respondent was represented by THE HONORABLE Melissa Wood, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above-styled claim on August 15, 2007, in Mountain Home, Arkansas. A Prehearing Order was entered in this case on June 4, 2007. This Prehearing Order set out the stipulations offered by the parties, and outlined the issues to be ligated and resolved at the hearing.

Stipulations

The following stipulations were accepted by the parties:

1. The Arkansas Workers' Compensation Commission has

jurisdiction of the within claim.

2. The employee-employer relationship existed at all relevant times, including May 10, 1999 and March 5, 2000.

3. The claimant suffered injuries on May 10, 1999 and March 5, 2000, while working for the respondent.

Issues

By agreement of the parties, the issues to be resolved were limited to the following:

1. Whether the statute of limitations has run on the claim.
2. All other issues were reserved.
3. Constitutional issues. (Prior to and at the hearing, the claimant raised the aforementioned issues).

Contentions

The claimant contends that the statute of limitations is not applicable, a timely claim was filed and a change of physician order was entered and some medicals were paid. Respondents thereafter refused payment and this should not avail them to the statute of limitations defense. Claimant further relies on her February 19, 2007, which has been made part of the record.

The respondents relied on their December 19, 2006, letter brief, which has been made part of the record.

Record

The documentary evidence in this matter consists of the the Prehearing Order of June 4, 2007, which has been marked as Commission's Exhibit No. 1. Commission's Order of August 7th and

accompanying letter of August 7th has been marked as Commission's Exhibit No. 2. The claimant's medical packet has been marked as Claimant's Exhibit No. 1. The claimant's Letter Brief on the statute of limitations dated February 19, 2007 has been marked as Claimant's Exhibit No. 2. For clarification of the record, Claimant's Exhibit No. 3 consists of the Constitutional Issues and the March 7, 2001, Hearing Transcript, as these have been blue-backed and are hereby incorporated by reference. Claimant's Exhibit No. 4 consists of claimant's attorney letter of March 24, 2005. Respondents' No. 1 first exhibit is its medical packet, which has been marked as Respondents' Exhibit No. 1, and its non-medical packet has been marked as Respondents' Exhibit No. 2. Respondents No. 1 submitted an August 6, 2007 letter Brief, which has been marked as Respondents' Exhibit No. 3. Respondents No. 1 have filed a post-hearing brief (dated August 24, 2007), and it has been marked as Respondents' Exhibit No. 4, as it has been blue-backed, and is hereby incorporated by reference.

Because the issue in this matter was limited to the statute of limitations defense, Respondent No. 2 and Respondent No. 3, did not attend the hearing. Respondent No. 1, will be hereafter referred to as the respondent(s).

The following witnesses testified at the hearing: the claimant, Shirley Luna, and Misty Thompson.

Discussion

On May 10, 1999, the claimant sustained compensable injuries

to her left hip, neck, upper thoracic spine, lower back, and both shoulders while working for the respondent. The claimant was involved in another work-related incident on March 5, 2000 when a resident was falling forward out of a wheelchair and she caught the resident to prevent her from falling out of the wheelchair.

As a result of this incident, the claimant alleged that she pulled muscles in her neck, arms, legs, and back, and began experiencing more significant, continuous pain associated with her shoulders. Ultimately, the claimant had surgery for a torn rotator cuff on June 17, 2000.

On July 19, 2000, the claimant completed and filed the Form AR-C for benefits due to the March 5, 2000 incident.

This was a claim for additional benefits. Pursuant to this claim for additional benefits, a hearing was held on March 7, 2001 before an Administrative Law Judge. The issues litigated at this hearing were:

1. Whether claimant had sustained a recurrence of her May 10, 1999 compensable injury on March 5, 2000, or a new injury.
2. Whether claimant had been receiving temporary total disability benefits at the correct compensation rate. (May 10, 1999 rate vs. March 5, 2000 rate)
3. Whether claimant was entitled to additional medical benefits.
4. Whether claimant was entitled to a controverted attorney's fee.

In an Opinion dated April 4, 2001, the Administrative Law

Judge found, in pertinent part:

3. The claimant has proven by a preponderance of the evidence that on March 5, 2000, she sustained an aggravation of her May 10, 1999 compensable injury and has satisfied every element of compensability; namely, the March 5, 2000 incident "exacerbated" the injuries already sustained by claimant and accelerated the degenerative condition already suffered by the claimant; and the March 5, 2000 incident was clearly the cause or precipitated the need for medication, treatment, and surgery for claimant's right torn rotator cuff.
4. The claimant's correct rate of compensation for temporary total disability benefits is \$280.00 per week.
5. The claimant has proven by a preponderance of the evidence that she is entitled to receive all reasonable and necessary medical treatment as a result of her March 5, 2000 aggravation injury; specifically, claimant is entitled to receive all reasonable and necessary medical treatment for her neck, arms, legs, back, and shoulders.
6. The claimant's attorney is entitled to the maximum statutory attorney's fee on all benefits awarded herein.

The Full Commission affirmed the Administrative Law Judge's decision in an opinion dated January 31, 2002. No further appeals were filed.

The claimant filed a request to change physicians. Therefore, on February 27, 2003, the Commission entered a Change of Physician Order granting the claimant a one-time change of physician from treating with Dr. Robert Foster to treat with Dr. Richard Burnett, for treatment relating to the claimant's compensable injuries sustained to her hip, neck, shoulders and back on or about May 10, 1999 and March 5, 2000.

A review of the payment history demonstrates that benefits

were last paid for services rendered on May 28, 2002 for a functional capacity evaluation (FCE).

On October 7, 2003, the claimant filed a request for a hearing, and on February 18, 2005, the claimant filed another request for a hearing on her entitlement to reasonable and necessary medical care.

At the hearing, Shirley Luna, an employee of the claimant's attorney, gave testimony. According to Ms. Luna, she is the custodian of records for the claimant's case file. She testified that in February of 2003, after the hearing, the respondents were sent bills associated with the claim, which included Mountain Home Emergency Group and Baxter Regional Medical Center. According to Ms. Luna, these bills also included bills from Professional Credit Management in the amount of \$4,830.00 on behalf of Dr. Burnett. Ms. Luna testified that bills continued to be sent to the respondents from Dr. Burnett in 2003. She further admitted the claimant was granted a one-time change of physician to treat with Dr. Burnett.

On cross examination, Ms. Luna essentially admitted it is customary practice for their office to put the carrier on notice that there is a potential claim for unpaid medical bills even if a claim is controverted. She was unaware of a fall sustained by the claimant in August of 2002 in an unrelated incident and of emergency room visits.

The claimant also testified at the hearing. According to the claimant, she worked for the respondent/employer approximately seven years. The claimant admitted to having sustained two different injuries in January while working for the respondent. The claimant admitted to seeing Dr. Doug Foster, after being referred to him by Dr. Burnett. According to the claimant, after Dr. Foster left the area, he referred her back to Dr. Burnett. The claimant testified that at this point, the respondents refused to pay the bills. She agreed that after the Change of Physician Order had been entered, the respondents then paid some bills and refused to pay the others. However, the claimant admitted she continued to treat with Dr. Burnett, who referred her to Dr. Doug Foster after she had another accident. According to the claimant, Dr. Foster performed surgery.

The claimant admitted to going to see Dr. Travis Richardson on her own to see if he could fix her neck and arm. The claimant admitted to bringing bills to her attorney office for Dr. Burnett's services after 2003, as she was being sued by Professional Credit due to these bills.

The claimant essentially testified she has never stopped treatment for her May 10, 1999 and March 5, 2000 injuries, because she has continued to have problems. She testified she last saw Dr. Burnett last year (February 2006) for her injury. The claimant testified that these bills have not been paid.

On cross examination, the claimant essentially admitted the unpaid medical bills that went into collection with Professional Credit Management in April of 2003, totaled some \$4,830.00. She also agreed that these were the bills given to her attorney's office.

The claimant admitted to receiving a letter from the respondents stating the reasons for her bills not being paid, as they alleged these were from emergency rooms visits that she should not have gone to because she had a treating physician, and they alleged the others were unrelated because she had sustained a fall in August of 2002.

She admitted that Dr. Burnett became her family physician and to seeing him for whatever was bothering her (in addition to being the respondents' company doctor). The claimant admitted to continuing to treat with Dr. Burnett after the respondents stopped paying. The claimant admitted to seeing Dr. Burnett for unrelated conditions such as thyroid problems, osteoporosis, foot and ankle pain, and a sleep apnea study.

On redirect examination, the claimant essentially testified she started having problems with dizzy spells after her injury. She denied having related her dizziness to anything other than her injuries.

Upon being questioned by the Commission, the claimant admitted she has continuously treated with Dr. Burnett since her

2001 injury.

The parties stipulated that if Allen Sikes had been called as a witness, he would have corroborated the claimant's testimony, as he has taken the claimant to doctors' appointments and things of that nature.

Misty Thompson, gave testimony during the hearing. She testified she has worked for Risk Management Services for approximately nine years. She testified concerning the authorized treating physicians for the claimant. According to Ms. Thompson, they were Dr. Reigler and Dr. Harp. She testified Dr. Riegler referred the claimant to Dr. Foster for a second opinion, and the only other doctors they authorized were Dr. Robbins for an EMG study, which had been ordered by Dr. Foster, then to Bruce Woll, Physical Therapy and Brent Byrd, Physical Therapy for the FCE's. She also admitted she was aware of the one-time change of physician to Dr. Burnett in February. She admitted she was aware the claimant was treating with Dr. Burnett prior to the entry of the Change of Physician Order. Ms. Thompson admitted to being aware of the medicals in May of 2003. She agreed that the ER visits for pain medication while the claimant was treating with Dr. Foster was not authorized treatment.

Ms. Thompson testified the last authorization for treatment would have been in May 2002 for the authorization of the FCE, as she was contacted by Dr. Foster's office. Ms. Thompson also

testified that this was approved. According to Ms. Thompson, the last payment for temporary total disability was in September of 2000, and then a 2% rating was paid for the shoulder, with the last payment being paid on May 21, 2002 for permanent partial disability (PPD).

She denied having any idea that the claimant was treating with Dr. Travis Richardson. According to Ms. Thompson, her first notice of treatment since 2002 was in 2006, when she got correspondence from the claimant's attorney office.

On cross examination, Ms. Thompson testified that after the Change of Physician Order had been entered, she never received anything from Dr. Burnett's office, nor did she request any kind of information from his office. She admitted that the fall would not have necessarily been excluded from the benefits. She also essentially admitted that this claim was in negotiations for settlement in 2005, up until some time in 2006.

On re-cross examination, Ms. Thompson finally admitted she was aware in 2005 that the claimant was being treated by Dr. Burnett.

Upon being questioned by the Commission, Ms. Thompson testified that after the case was affirmed by the Full Commission the claimant had cervical fusion in August of 2001 with Dr. Foster, which was paid. The claimant was then placed at MMI in January of 2002, therefore treatment was paid up until that date.

After which, the claimant had an FCE, which was the last paid for treatment.

A review of the medical evidence shows that the claimant saw Dr. Robert Foster for follow-up care on February 12, 2002, for status-post anterior cervical discectomy and fusion at C5/6 level with allograft and plating. He also noted that she was status-post right shoulder arthroscopy, acromioplasty and rotator cuff repair. At that time, Dr. Foster opined that the claimant was medically maximized. Pursuant to the AMA Guides to the Evaluation of Permanent Impairment (4th Ed. 1993), Dr. Foster assessed the claimant with an eight percent impairment to the body as a whole for her cervical spine, and he assessed her with an eight percent impairment to the body as a whole for her right shoulder. On March 20, 2002, Dr. Foster reported, in pertinent part, the following to Ms. Thompson:

In reply to: Impairment rating of above named patient (the claimant).

Total Impairment of 8% (includes 6% from 7/1998).

On March 31, 2006, the claimant sought treatment from Dr. Travis Richardson due to complaints of severe pain from both her rotator cuffs and her neck. The claimant gave a history of having had several problems since these surgeries. Dr. Richardson injected the claimant's shoulders and recommended further diagnostic testing in the form of an MRI.

Adjudication

A. Statute of limitations

The respondents essentially contend that the claimant's claim for additional benefits is barred by the statute of limitations pursuant to Arkansas Code Ann. § 11-9-702(b), which provides:

(b) TME FOR FILING ADDITIONAL COMPENSATION.

(1) In cases in which 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.

Pursuant to the rulings in Helena Contracting Company v. Williams, 45 Ark. App. 137, 872 S.W. 2d 423 (1994); Carroll Elec. Coop v. Pack, 85 Ark. App 293, 151 S.W. 3d 324 (2004), I find that this claim would not be controlled by the provisions of Ark. Code Ann. §11-9-702(b). Specifically, I find that the evidence presented establishes that the instant claim is not actually a claim for additional benefits, but rather a request for resumption of medical treatment, or simply put, a request to enforce the Administrative Law Judge's prior Opinion of April 4, 2001. In that Opinion, the Administrative Law Judge found, among other things, "The claimant has proven by a preponderance of the evidence that she is entitled to receive all reasonable and necessary medical treatment as a result of her March 5, 2000 aggravation injury; specifically, claimant is entitled to receive all reasonable and necessary medical treatment for her neck, arms, legs, back, and shoulders." This award became final

pursuant to the Full Commission's opinion of January 31, 2002, wherein it rendered an affirming Opinion of the Administrative Law Judge's decision of April 4, 2001, as no further appeals were filed.

Subsequently, the respondents paid additional medical and indemnity benefits, which included a 2% rating for the claimant's shoulder, with the last payment being paid on May 21, 2002 for permanent partial disability, and the last medical benefit was paid for the services of an FCE, which was obtained on May 28, 2002. Ms. Thompson also testified that the respondents paid medical benefits relating to the claimant's cervical surgery. The claimant obtained a Change of Physician Order on February 27, 2003 to treat with Dr. Burnett. Thereafter, the claimant essentially testified she has continued to treat with Dr. Burnett for her compensable injury, as well as for problems unrelated to her compensable injury. In addition to this, she admitted to having sought emergency room treatment for her compensable injury and an August 2002 fall, which she attributed to her compensable injury. In a letter dated May 7, 2003, the respondents denied these charges as being unrelated to her compensable injury and as not being reasonable and necessary. On February 18, 2005 the claimant filed a request for a hearing on her entitlement to reasonable and necessary medical treatment.

Based on the evidence as a whole, I find that the instant

request is one for a continuation or resumption of the benefits that the claimant was awarded in the prior Opinion. Therefore, in actuality, the claimant is merely seeking to enforce the award made pursuant to the prior Opinion. There is nothing in the record demonstrating that the award of all reasonable and necessary medical treatment for her compensable injury made pursuant to the Commission's award of April 4, 2001 (which was affirmed by the Full Commission on January 31, 2002) had expired or that the stop payment of benefits by the respondents was sanctioned in any form. It appears from the evidence of record that the respondents merely refused to continue payment of medical benefits (after May 28, 2002) previously awarded by the Commission on the grounds that they were unrelated and not reasonably necessary in connection with the claimant's compensable injury without the benefit of an Order to do so.

Therefore, based on all of the foregoing, I find that the claimant's present claim is for enforcement of a prior award rather than for additional benefits. As such, this claim is not barred by the statute of limitations.

B. Motion to Recuse and Constitutional Challenges of the Act

The claimant filed a Motion to Recuse and a Brief in support of said Motion on July 25, 2007. Therein, the claimant sought my recusal from hearing this case, and challenged, *inter alia*, the constitutionality of the Workers' Compensation Act as it provides

for administrative adjudication of workers' compensation claims. The respondents filed a response objecting to said Motion on August 6, 2007. In an Order dated August 7, 2007, the claimant's Motion to Recuse was denied. At the time of the hearing, the claimant challenged the constitutionality of the Act. With respect to the claimant's Motion for Recusal and the balance of the motion pertaining to the constitutional challenges, I find that the Arkansas Court of Appeals has soundly rejected the same arguments in Long v. Wal-Mart Stores, Inc., ___ Ark. App. ___, ___ S.W.3d ___ (Ark. Ct. App. Feb. 21, 2007). Therefore, the claimant's Motion for Recusal is denied, and I find her constitutional challenges to be without merit.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The employee-employer relationship existed at all relevant times, including May 10, 1999 and March 5, 2000.
3. The claimant suffered injuries on May 10, 1999 and March 5, 2000, while working for the respondent.
4. The preponderance of the evidence demonstrates that the claimant is not barred by the statute of limitations from receiving appropriate benefits.
5. The claimant's Motion to Recuse is denied and her constitutional challenges of the Act are found to be without merit pursuant to Long v. Wal-Mart Stores, Inc., ___ Ark. App. ___, ___ S.W.3d ___ (Ark. Ct. App. Feb. 21, 2007).

Order

This claim is not barred by the statute of limitations. The claimant's Motion to Recuse is denied and her constitutional challenges of the Act are found to be without merit.

IT IS SO ORDERED.

CHANDRA HICKS
Administrative Law Judge