

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NUMBER F010438

GERVIS D. RAYBON, EMPLOYEE	CLAIMANT
IMPERIAL BUILDING CONTRACTORS, INC., EMPLOYER	RESPONDENT
ARKANSAS PROPERTY & CASUALTY GUARANTY FUND, CARRIER	RESPONDENT

OPINION FILED JANUARY 17, 2008

Hearing conducted before ADMINISTRATIVE LAW JUDGE MARK CHURCHWELL, in Little Rock, Pulaski County, Arkansas.

The claimant was represented by HONORABLE M. KEITH WREN, Attorney at Law, Little Rock, Arkansas.

The respondents were represented by HONORABLE MELISSA WOOD, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above-styled claim on October 22, 2007, in Little Rock, Arkansas. A Prehearing Order was entered in this case on July 23, 2007. This Prehearing Order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. A copy of the Prehearing Order was made Commission's Exhibit No. 1 to the hearing record.

The following stipulations were submitted by the parties in the Prehearing Order and are hereby accepted:

1. The employer/employee relationship existed on August 28, 2000, when the claimant sustained

compensable injuries to his right hip, arm, stomach, and face.

2. The claimant was assigned a 10% rating to the whole body, which was accepted and paid by the respondent carrier before hip replacement surgery on September 13, 2004.
3. The claimant was paid the maximum statutory amount of \$3,500.00 for facial scarring.
4. The claimant's average weekly wage was \$314; therefore, his TTD rate is \$209 and his PPD rate is \$157.
5. The claimant's most recent request for a hearing was filed at the Commission on May 4, 2007.

By agreement of the parties, the issues to be litigated and resolved at the present time were limited to the following:

1. The claimant's entitlement to additional medical treatment.
2. The claimant's entitlement to temporary total disability compensation from December 14, 2006, to April 1, 2007.
3. Attorney's fees.
4. Whether or not the statute of limitations has run.

5. Whether the respondents are estopped from asserting the statute of limitations.
6. Whether the claimant has previously received an overpayment of temporary disability compensation for which the respondents are entitled to a credit against future benefits.

The record consists of the October 22, 2007, hearing transcript and the exhibits contained therein. In addition, I have "blue-backed" to designate as part of the record (1) Claimant's Post-Trial Brief filed October 31, 2007; (2) Respondent's Letter Brief filed November 9, 2007; and (3) Claimant's Post-Trial Reply Brief filed November 16, 2007.

DISCUSSION

1. REASONABLY NECESSARY MEDICAL TREATMENT/INDEPENDENT INTERVENING CAUSE FOR TREATMENT

Employers must promptly provide medical services which are reasonably necessary for treatment of compensable injuries. Ark. Code Ann. § 11-9-508(a). Injured employees have the burden of proving by a preponderance of the evidence that medical treatment is reasonably necessary for treatment of the compensable injury. Ark. Code Ann. § 11-9-705(a)(3); Jordan v. Tyson Foods, Inc., 51 Ark. App. 100, 911 S.W.2d 593 (1995). What constitutes reasonably

necessary medical treatment is a question of fact for the Commission. Gansky v. Hi-Tech Engineering, 325 Ark. 163, 924 S.W.2d 790 (1996); Air Compressor Equipment v. Sword, 69 Ark. App. 162, 11 S.W.3d 1 (2000).

In addition to his other injuries sustained on August 28, 2000, the claimant sustained a compensable right hip injury which ultimately required hip replacement surgery on September 13, 2004. (T. 9) Dr. Richard Hilborn, an orthopedic surgeon, performed the surgery and continued to treat the claimant in follow-up. Dr. Hilborn's March 29, 2005, follow-up note indicates that the claimant was doing well and having no pain and that the claimant would return for follow-up in six months or earlier as needed. (C. Exh. 2 p. 3) A May 24, 2005, follow-up note indicates that the claimant had been in pain for about a week since a fall on his hip, and x-rays of the right femur, right hip, and right knee demonstrated a non-displaced fracture in the area of the greater trochanter and around the proximal aspect of the femur and prosthesis. (C. Exh. 2 p. 3)

Dr. Hilborn's follow-up notes from June 2005 through October 2005 indicate that the fracture was well-healed on x-rays taken on September 29, 2005, and that the claimant showed good range of motion and no tenderness over the right

hip on October 28, 2005. Dr. Hilborn's October 28, 2005, office note indicates that he would see the claimant back "on a prn basis." (C. Exh. 2 p. 5)

The respondents have paid for the claimant's medical treatment through October 28, 2005, and it is my understanding that the reasonable necessity of this treatment is not at issue in the present claim.

At issue in this claim is the reasonable necessity of additional treatment which the claimant received on June 30, 2006, and beginning on December 14, 2006, and thereafter. Regarding this treatment, the respondents note that Dr. Hilborn's office had set up two accounts for the claimant's treatment - one for his *hip* and one for his *back*. The respondents contend that any treatment the claimant received for his *back* in June of 2006 would not be reasonably necessary for treatment of his compensable *hip* injury. (T. 36) In addition, the respondents contend that the claimant experienced events in December of 2006 which amount to independent intervening causes of his need for additional treatment and any disability, so that the respondents would not be liable for the additional treatment at issue beginning in December of 2006. (T. 35-36)

The claimant testified that Dr. Hilborn's staff scheduled the June 30, 2006, office visit at the time of his October 28, 2005, office visit. (T. 11) Dr. Hilborn's office note for June 30, 2006, indicates that Mr. Raybon was in fact returning for follow-up of his right total *hip* replacement, indicates that the claimant had good range of motion of the right *hip* without pain, and indicates that Dr. Hilborn took x-rays of the right *hip* which demonstrated satisfactory alignment of the right hip replacement. (C. Exh. 2 p. 6) While Dr. Hilborn's June 30, 2006, note does also make reference to the claimant experiencing low *back* pain since changing a tire the day before, for which he was given a prescription for Soma to relax his muscles, the primary focus of Dr. Hilborn's examination, x-rays, and follow-up on June 30, 2006, was clearly for the right total *hip* replacement for which his staff had scheduled the follow-up visit back on October 28, 2005. Because Dr. Hilborn's June 30, 2006, office note indicates to me that the purpose of the visit was primarily for follow-up of the right total *hip* replacement and contained only an incidental finding of *back* pain beginning the day before, I find that Dr. Hilborn's follow-up visit on June 30, 2006, including a physical examination and x-rays was reasonably necessary

medical treatment for the claimant's admittedly compensable right total hip replacement surgery.

The respondents also contend the claimant experienced events in December of 2006 which act as independent intervening causes of subsequent hip complications which ended the respondents' liability. The Arkansas Court of Appeals has described the following test for an independent intervening cause determination:

The test for determining whether a subsequent episode is a recurrence or an aggravation is whether the subsequent episode was a natural and probable result of the first injury or if it was precipitated by an independent intervening cause. Bearden Lumber Co. v. Bond, 7 Ark. App. 65, 644 S.W.2d 321 (1983). If there is a causal connection between the primary and the subsequent disability, there is no independent intervening cause unless the subsequent disability is triggered by activity on the part of the claimant which is unreasonable under the circumstances. Guidry v. J & R Eads Constr. Co., 11 Ark. App. 219, 669 S.W.2d 483 (1984).

Georgia-Pacific Corp. v. Carter, 62 Ark. App. 162, 167, 969 S.W.2d 677 (1998).

As noted by the Court of Appeals in Davis v. Old Dominion Freight Line Inc., 69 Ark. App. 74, 77, 13 S.W.3d 171 (2000):

the overriding issue in cases involving subsequent injury or disability is 'whether there is a causal connection between the primary injury and the subsequent disability,' and only if such a

connection exists does the question of the claimant's conduct need to be addressed.

See also KII Construction Co. v. Crabtree, 78 Ark. App. 222, 79 S.W.3d 414 (2002).

In December of 2006, the claimant first dislocated his prosthetic hip joint on December 14, 2006, and dislocated the hip again on December 17, 2006. (T. 15) Dr. Hilborn performed a revision of the right total hip replacement on December 21, 2006. (C. Exh. 2 p. 10) On August 15, 2007, Dr. Hilborn opined that the claimant's work injury of August 28, 2000, was a cause for the need for the revision of his total hip arthroplasty. (C. Exh. 2 p 12) Dr. Hilborn's written opinion does not appear on its face to be based on any material mistake of fact. Absent any persuasive evidence to the contrary, I find that the claimant has established through Dr. Hilborn's opinion a causal connection between his admittedly compensable hip injury and his need for revision surgery on December 21, 2006.

In addition, the claimant explained that the first hip dislocation in December of 2006 occurred as he reached around to pick up a drill on a table and attempted to rotate or turn to his right. (T. 12-14) The second dislocation occurred as he attempted to sit down in a lawn chair. (T.

15) Nothing in the medical reports available to me indicates that either turning, rotating, or sitting down was unreasonable conduct under the circumstances. I therefore find that a preponderance of the evidence establishes that no independent intervening event or cause occurred in December of 2006 necessitating the claimant's need for revision surgery as the respondents contend.

Following revision surgery in December of 2006, Dr. Hilborn's February 22, 2007, office note indicates that the claimant's hip at that time demonstrated good range of motion without pain (C. Exh. 2 p. 11), and Dr. Hilborn has opined that the claimant's healing period ended on April 1, 2007. (C. Exh. 2 p. 12) In light of the nature of the prosthesis dislocations which occurred in December of 2006 and the effectiveness of Dr. Hilborn's revision surgery as demonstrated in his 2007 office notes, I find that the claimant has established by a preponderance of the evidence that the hip revision surgery and follow-ups were also reasonably necessary medical treatments for his compensable injury.

2. STATUTE OF LIMITATIONS

Arkansas Code Annotated Section 11-9-702(b)(1) provides in relevant part:

(b) TIME 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.

(2) The time limitations of this subsection shall not apply to claims for the replacement of medicine, crutches, ambulatory devices, artificial limbs, eyeglasses, contact lenses, hearing aids, and other apparatus permanently or indefinitely required as the result of a compensable injury, when the employer or carrier previously furnished such medical supplies, but replacement of such items shall not constitute payment of compensation so as to toll the running of the statute of limitations.

In the present case, the claimant's most recent request for a hearing was filed at the Commission on May 4, 2007, more than two years beyond the date of injury, August 28, 2000. In addition, the respondents last made a payment for temporary disability on May 27, 2005, for the period ending June 5, 2005, and the respondents last paid for medical treatment on November 17, 2005, for the treatment provided by Dr. Hilborn on October 28, 2005. (T. 21 and 23) The claim filed on May 4, 2007, was therefore also filed more than one year after the last benefits actually paid by the respondent, i.e. medical services rendered on October 28, 2005. The respondents therefore contend that the claim

filed on May 4, 2007, is barred by the statute of limitations.

Notwithstanding the time lapse, the claimant contends on four grounds that the statute of limitations is not a bar to his present claim for additional benefits filed on May 4, 2007: (1) The respondents had actual notice of the claimant's treatment by Dr. Hilborn on June 30, 2006, which would toll the statute of limitations; (2) In the alternative, the respondents had constructive notice of the claimant's treatment by Dr. Hilborn which would toll the statute of limitations; (3) The respondents are estopped from asserting a statute of limitations defense because the respondents never gave the claimant notice of any intent to deny liability for additional medical treatment; and (4) The claimant seeks benefits for replacement of a prosthetic hip falling within the exclusion provisions of Ark. Code Ann. § 11-9-702(b) (2).

The respondents contend that the claimant cannot prevail because (1) The respondents had no actual or constructive notice of Dr. Hilborn's treatment provided after October 28, 2005; (2) Since the respondents had no knowledge of the claimant's ongoing treatment, the respondents had no reason to send him a letter denying

treatment if the respondents did not know that he was receiving treatment; and (3) The claimant's hip prosthesis is an artificial joint which is not specifically included or intended in the exclusionary language of Ark. Code Ann. § 11-9-702(b) (2).

In the present case, I find all three witnesses credible, and I find that their credible testimony establishes the following facts. When the claimant treated with Dr. Hilborn on October 28, 2005, Dr. Hilborn's office at that time scheduled the claimant's June 30, 2006, follow-up appointment.¹ (T. 11) A previously filed workers' compensation claim for permanent disability was denied by a decision of the Arkansas Court of Appeals on February 22, 2006. (T. 21) Jeannie Roberts, the adjuster handling Mr. Raybon's workers' compensation claim for the respondent, filed a Form AR-4 administratively closing Mr. Raybon's workers' compensation claim on May 22, 2006. (T. 25)

¹I recognize that Dr. Hilborn's two separate October 28, 2005, office notes state that the claimant would return "prn" for both his hip and for his back. Therefore, even if the respondents received and reviewed the October 28, 2005, written report about the hip, the respondents would not on the face of the report be aware that the claimant and Dr. Hilborn's staff scheduled a June 30, 2006, follow-up on October 28, 2005.

Dr. Hilborn's office began using a new computer system on June 1, 2006. (C. Exh. 4 p. 7) When Paula Hancock, a workers' compensation claims handler in Dr. Hilborn's office, telephoned the respondent's office about this claim on June 30, 2006, Ms. Hancock was advised that the workers' compensation claim for Mr. Raybon was closed. (C. Exh. 4 p. 7) Ms. Hancock did not document and does not recall who she spoke with on June 30, 2006. (C. Exh. 4 p. 7-8) Beginning with the June 30, 2006, visit, Dr. Hilborn's office filed Mr. Raybon's visits with Medicare (i.e., no longer with the Arkansas Property & Casualty Guaranty Fund). (C. Exh. 4 p. 9)

On November 21, 2006, Jeannie Roberts called Dr. Hilborn's office to see if Mr. Raybon had been seen for treatment after October 28, 2005, but had to leave a message. (T. 22) On November 30, 2006, Ms. Roberts again called Dr. Hilborn's office and left a message advising Dr. Hilborn's office that the statute of limitations ran on October 28, 2006. (T. 24)

On December 1, 2006, Cindy, the administrative assistant to Steve Uhrynowycz of the Arkansas Property & Casualty Guaranty Fund, received a telephone call from someone in Dr. Hilborn's office who advised Cindy that Mr.

Raybon was continuing to treat with Dr. Hilborn, "but it was not workers' compensation." Cindy gave that information to Ms. Roberts. (T. 24-25)

After considering this course of events in light of the decisions of the Arkansas Courts discussed below, I find that the claimant's receipt of reasonably necessary treatment for his hip on June 30, 2006, by his authorized treating physician, Dr. Hilborn, tolled the statute of limitations under the circumstances, rendering timely the request for additional benefits filed less than one year later on May 4, 2007.

In Safeway Stores, Inc. v. Lamberson, 5 Ark. App. 191, 634 S.W.2d 396 (1982), an injured employee's doctor wrote 19 letters to the respondent in the case over a four-year period, and each letter stated or implied that the patient would be examined again. The insurer never specifically denied liability until the last claim was made for payment of the doctor's last bill. Under these circumstances, the Court held that the insurer was estopped to assert the statute of limitations because it was reasonable for the injured worker to conclude that it was unnecessary to file a formal claim.

In Conway Printing Co. v. Higdon, 45 Ark. App. 185, 873, S.W.2d 172 (1994), the injured worker received medical treatment from his physician less than one year before filing a claim for additional benefits. The respondents nevertheless argued that the doctor's visit did not toll the statute of limitations an employer must have knowingly and voluntarily furnished the medical service, and in this case the respondent had controverted the medical service on the grounds that the statute of limitations had run. The Court rejected the respondents' controversion argument, reasoning that (1) the respondents cannot start the statute of limitations running by refusing to pay what it owes, and (2) the respondents did not preserve any issue regarding whether the treatment was reasonably necessary for the employee's compensable injury.

In Plante v. Tyson Foods, Inc., 319 Ark. 126, 890 S.W.2d 253 (1994), the injured worker had surgery and returned for follow-up with yearly visits. The doctor did not bill the insurer for the follow-up visits, and the insurer did not have actual notice of the follow-up visit. The Arkansas Supreme Court stated that an insurer must have either actual or constructive knowledge that medical services are being provided before the insurer is deemed to

have furnished medical services. However, the Court also found that the insurer in Plante should have known that additional treatment would be provided after surgery for a number of reasons. First, the Court indicated that the respondent should have known that post-surgical follow-ups would occur because "we can think of no better illustration of medical services with respect to the provision of which an employer or carrier should have knowledge than follow-up treatment from an authorized surgery." Second, the Court indicated that "regardless of whether the respondent had actual knowledge of the 1989 and 1990 [follow-up] visits, the respondent should have known they would occur, especially given the 20% failure rate of this petitioner's particular surgery." Third, the Court indicated that the employer could not prevail for the physician having never submitted a separate bill for the 1989 and 1990 follow-up visits because the Court stated these visits "were presumably included in the payment for surgery."

In Georgia-Pacific Corp. v. Dickens, 58 Ark. App. 266, 950 S.W.2d 463 (1997), the Court of Appeals again concluded that a respondent cannot start the running of the statute of limitations by refusing to pay what it owes. The Court found that the statute was tolled under circumstances where

(1) the employee received reasonably necessary treatment at least once per year, (2) the respondent got bills for the treatment but did not pay, and (3) the respondent sent the claimant a letter advising the claimant that the respondent would not pay the bills because the statute of limitations had run.

In Spencer v. Stone Container Corp., 72 Ark. App. 450, 38 S.W.3d 909 (2001), the Court again indicated that the furnishing of medical services constitutes payment of compensation for tolling the statute of limitations, and an employer is deemed to be furnishing medical services if (1) the employer has actual notice or reason to know a claimant is receiving medical treatment, and (2) the furnished services are reasonably necessary in connection with the injury received. In dicta, the Court concluded that the respondent had no reason to believe that treatments would cease, and the only reason payments stopped was because the claimant did not respond to an effort to coerce her into settling her workers' compensation claim. However, the Court ultimately affirmed a finding that the claim was barred by the statute of limitations because the treatment at issue was not reasonably necessary for the compensable injury.

In Cooper Tire & Rubber Co. v. Angell, 75 Ark. App. 325, 58 S.W.3d 396 (2001), an administrative law judge awarded additional benefits on October 29, 1997.

Thereafter, the respondent last paid for medical treatment from Dr. Bundrick, Mr. Angell's primary medical provider, on February 10, 1998. The respondent refused to provide treatment on referral to Dr. Kavanaugh. The claimant thereafter received treatment from Dr. Mitchell Young on September 23, 1998, January 13, 1999, April 20, 1999, and May 25, 1999, on referral from Dr. Bundrick. The claimant filed a claim for additional benefits in October of 1999. The Court held that the medical treatment provided by Dr. Young between September of 1998 and May of 1999 tolled the statute of limitations.

In Barnes v. Fort Smith Public Schools, 95 Ark. App. 248, __ S.W.3d __ (2006), the claimant received continued routine medical treatment from the time of a work injury until filing a claim for additional benefits in 2004, and the claimant asserted, in part under the reasoning of Plante, that the treatment she received tolled the statute of limitations until she filed her claim for additional benefits. In rejecting the claimant's argument, the Court found that neither the Fort Smith School District nor its

insurance carrier had actual notice or reason to know that the claimant was receiving medical treatment at issue where (1) the claimant found out on December 6, 2000, that Fort Smith School District and its insurance carrier were denying any further medical treatment; (2) the claimant submitted no bills to Fort Smith School District or its carrier after that date and had no further contact with either party after December 2000; (3) Barnes' medical bills after December 2000 were paid by other entities; and (4) Unlike Plante, "Barnes had no surgery, was not under the care of a surgeon, and was not regularly seeing a surgeon for post-surgery follow-up visits included in the payment for surgery."

In Superior Federal Savings & Loan Association v. Shelby, 265 Ark. 599, 580 S.W.2d 201 (1979), a worker became injured on February 14, 1975, and received chiropractic care after the injury. On August 25, 1975, the chiropractor submitted a bill accompanied by a final report indicating that the patient was asymptomatic and *no longer under the doctor's care*. Later the same day, the chiropractor's office telephoned the insurance carrier to keep the file open. When the insurance carrier sent the chiropractor's office written questions to complete on August 25, 1975, the chiropractor ignored the questionnaire and did not

communicate with the carrier for over 17 months. The chiropractor did continue to treat the worker and submitted a bill on February 8, 1977, to cover treatments between July 28, 1975, and January 17, 1977. The claimant filed a claim for additional benefits on July 7, 1977.

The Commission in Shelby concluded that the carrier's request for written answers on August 25, 1975, and the chiropractor never filing the requested answers clearly indicated to all concerned that the claimant was still being treated by the chiropractor.

In rejecting the Commission's finding, the Supreme Court stated:

[T]he Commission's reasoning asserts that in this case the carrier was actually furnishing medical services to the claimant, even though the carrier had merely inquired whether the employee was still under treatment and had no actual knowledge that any medical services were being provided...[S]uch an interpretation amounts to a nullification of the 1-year statute of limitations. We conclude that the statute was permitted to run in the case at bar, not as a result of any action on the part of the carrier but solely as a result of the failure of the claimant or her doctor to file a claim within the time allowed.

Finally, in Pennington v. Gene Cosby Floor & Carpet, 51 Ark. App. 128, 911 S.W.2d 600 (1995), the Court affirmed a Commission finding that treatment received after an

unauthorized change of physician did not toll the running of the statute of limitations.

In the present case, as discussed above, I find that the claimant has established that the medical treatment that Dr. Hilborn provided on June 30, 2006, was reasonably necessary for treatment of the claimant's compensable injury. In addition, Ms. Roberts' testimony indicates that the respondents did not have actual advance knowledge that the claimant treated with Dr. Hilborn on June 30, 2006. Therefore, under the precedents discussed herein, Dr. Hilborn's treatment on June 30, 2006, tolled the statute of limitations only if the respondents had constructive knowledge or reason to know that the claimant would be receiving additional treatment. After comparing the facts in this case to the facts reviewed in prior decisions, I conclude for the following reasons that the respondents had constructive knowledge that the claimant would receive additional treatment before the visit on June 30, 2006.

First, I note that Dr. Hilborn was an authorized treating physician, and the treatment at issue was therefore not obtained as a result of an unauthorized change of physician. This case is therefore distinguishable from Pennington. Second, I note that at no time did Dr. Hilborn

indicate that the claimant was released from future care. Therefore this case is distinguishable from Shelby. Third, Dr. Hilborn was a surgeon and was treating the claimant in post-surgical follow-up after a December 2005 hip revision surgery. As quoted above, the Arkansas Supreme Court in Plante reasoned "we can think of no better illustration of medical services with respect to the provision of which an employer or carrier should have knowledge than follow-up treatment from an authorized surgery."

Fourth, while the respondents note the lack of actual knowledge of the treatment, I note that Dr. Hilborn's office attempted to obtain billing information from the respondents *on the day treatment was provided* - June 30, 2006 - and Dr. Hilborn's assistant was instead advised by the respondents' office that the claim had been closed. On this point I find pertinent those decisions stating that an employer cannot cause the statute of limitations to run by refusing to pay what it owes. Georgia-Pacific Corp. v. Dickens, 58 Ark. App. 266, 950 S.W.2d 463 (1997); Conway Printing Co. Higdon, 45 Ark. App. 185, 873 S.W.2d 172 (1994). Clearly, the respondent had reason to know the claimant would receive additional treatment from Dr. Hilborn on or after June 30, 2006, when Dr. Hilborn's office telephoned on June 30, 2006,

to obtain billing information. I do not find persuasive the respondents' argued lack of knowledge of billable treatment on June 30, 2006, where someone in the respondents' office indicated to the physician's office on June 30, 2006, that the case was closed when the doctor's office telephoned to obtain billing information.

For all of the foregoing reasons, I find that the respondents had reason to know on and before June 30, 2006, that the claimant would receive additional treatment for his compensable hip injury. Since I also find the treatment at issue was reasonably necessary, I find that the statute of limitations was tolled by the June 30, 2006, treatment, so the claim filed on May 4, 2007, was timely filed.

3. TEMPORARY TOTAL DISABILITY/OVERPAYMENT/ATTORNEY'S FEES

Temporary total disability for unscheduled injuries is that period within the healing period in which a claimant suffers a total incapacity to earn wages. Ark. State Highway & Transportation Dept. v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981). The healing period ends when the underlying condition causing the disability has become stable and nothing further in the way of treatment will improve that condition. Mad Butcher, Inc. v. Parker, 4 Ark. App. 124, 628 S.W.2d 582 (1982).

The claimant seeks additional temporary total disability compensation from December 14, 2006, until April 1, 2007. In this regard, Dr. Hilborn, the claimant's treating surgeon, indicated in writing on August 15, 2007, that the claimant remained within his healing period from December 14, 2006, (when his hip first came out of his socket) until April 1, 2007, (approximately four months after surgery on December 21, 2006). (C. Exh 2 p. 12) The respondents contended at the hearing that the claimant is not entitled to the additional temporary disability benefits because the claimant doesn't work and doesn't have any intention of going back to work, so he would not have been seeking jobs. (T. 19)

Whether or not the claimant was working or seeking work before hip surgery, Dr. Hilborn's opinion establishes that the claimant was in his healing period and *incapable* of working from December 14, 2006, until April 1, 2007. I therefore find that the claimant has established that he is entitled to a period of temporary total disability compensation from December 14, 2006, until April 1, 2007.

The respondents previously paid the claimant temporary disability through June 5, 2005, and now contend that the claimant's healing period actually ended on March 29, 2005.

The respondents contend that they are entitled to a credit against future compensation for the alleged overpayment of temporary disability compensation after March 29, 2005.

Dr. Hilborn's medical report on March 29, 2005, states that the claimant was having no pain, that x-rays demonstrate the hip replacement to be in good position and alignment, and that Dr. Hilborn intended to see the claimant again in six months or earlier as needed. (C. Exh. 2 p. 3) Dr. Hilborn's May 24, 2005, report indicates that the claimant fell approximately a week earlier, and x-rays demonstrated a nondisplaced fracture in the area of the greater trochanter and around the proximal aspect of the femur and prosthesis. (Id.) Dr. Hilborn's September 29, 2005, progress note indicates that the fracture at that time was well-healed as demonstrated by x-rays. (C. Exh 2 p. 5) Based on Dr. Hilborn's progress notes, the claimant contends that *his disabling condition had not healed* by March 29, 2005. (C's Post-Trial Brief p. 6-7)

I do not find the claimant's argument persuasive for the following reasons. First, I note that Dr. Hilborn's first progress note *after* March 29, 2005, contains x-ray documentation of a fracture shortly after a fall that occurred *after* March 29, 2005. (C. Exh. 2 p. 3) Second, I

note that on a Form AR-3 dated August 3, 2005, Dr. Hilborn indicated that the claimant reached maximum medical improvement on March 29, 2005, and could return to work without restrictions on March 29, 2005. (R. Exh. 1 p. 3B) Third, no physician has rendered any medical opinion contrary to the opinion of Dr. Hilborn, and it would require speculation and conjecture on my part to conclude that Dr. Hilborn's opinions stated on August 3, 2005, were based on a material mistake of fact, particularly where, as here, Dr. Hilborn was the physician who continued to treat the claimant after March 29, 2005. Under these circumstances, I accord Dr. Hilborn's August 3, 2005, opinion great weight, and I therefore find that the respondents are entitled to a credit against future liability for an overpayment of temporary total disability compensation covering the period from March 29, 2005, through June 5, 2005.

The respondents have controverted the claimant's claim for additional benefits in its entirety. In Goodwin v. Phillips Petroleum Co., 72 Ark App. 302, 37 S.W.3d 644 (2001), the Court indicated that the granting of a credit against future benefits does not diminish the claimant's attorney's fee for establishing a claim for additional benefits in a controverted claim. Consequently, I find that

Mr. Wren is entitled to a 25% attorney's fee calculated on a period of temporary total disability from December 14, 2006, to April 1, 2007, even though the respondents will not pay the entire award to the claimant due to their credit awarded herein for a previous overpayment of temporary total disability benefits.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The employer/employee relationship existed on August 28, 2000, when the claimant sustained compensable injuries to his right hip, arm, stomach, and face.
2. The claimant was assigned a 10% rating to the whole body, which was accepted and paid by the respondent carrier before hip replacement surgery on September 13, 2004.
3. The claimant was paid the maximum statutory amount of \$3,500.00 for facial scarring.
4. The claimant's average weekly wage was \$314; therefore, his TTD rate is \$209 and his PPD rate is \$157.
5. The claimant's most recent request for a hearing was filed at the Commission on May 4, 2007.

6. The medical treatment documented in the hearing record which the claimant has received for his hip after October 28, 2005, was reasonably necessary medical treatment for his compensable hip injury.
7. The claimant's activities of turning and sitting on December 14, 2006, and December 17, 2006, respectively, were not independent intervening causes of his need for treatment and disability thereafter.
8. The present claim for additional benefits filed on May 4, 2007, is not barred by the statute of limitations.
9. The claimant has experienced a period of additional temporary total disability from December 14, 2006, until April 1, 2007.
10. The claimant's prior period of temporary disability ended on March 29, 2005. The respondents are entitled to a credit against future liability for their overpayment of temporary total disability compensation from March 30, 2005, through June 5, 2005.
11. The claimant's attorney is entitled to a controverted attorney's fee on indemnity benefits

calculated for temporary total disability compensation from December 14, 2006, until April 1, 2007, even though the respondents are entitled to a credit against liability for a portion of this additional temporary disability compensation.

AWARD

The respondents are directed to pay benefits in accordance with the findings of fact set forth herein. All accrued sums shall be paid in a lump sum without discount and this award shall earn interest at the legal rate until paid, pursuant to A.C.A. §11-9-809, and Couch v. First State Bank of Newport, 49 Ark. App. 102, 898 S.W.2d 57 (1995), and Burlington Industries, et al v. Pickett, 64 Ark. App 67, 983 S.W.2d 126 (1998); reversed on other grounds 336 Ark. 515, 988 S.W.2d 3 (1999).

The claimant's attorney is entitled to a 25% attorney's fee on the indemnity benefits awarded herein, one-half of which is to be paid by the claimant and one-half to be paid by the respondents in accordance with Ark. Code Ann. § 11-9-715 and Death & Permanent Total Disability Trust Fund v. Brewer, 76 Ark. App. 348, 65 S.W.3d 463 (2002).

IT IS SO ORDERED.

MARK CHURCHWELL
Administrative Law Judge