

**NOT DESIGNATED FOR PUBLICATION**

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E813491

MELISSA PHILLIPS,  
EMPLOYEE

CLAIMANT

HOLIDAY DRY CLEANERS & LAUNDRY,  
EMPLOYER

RESPONDENT

TRAVELERS INSURANCE COMPANY,  
INSURANCE CARRIER

RESPONDENT

OPINION FILED JUNE 21, 2005

Upon review before the FULL COMMISSION in Little Rock,  
Pulaski County, Arkansas.

Claimant appeared PRO SE.

Respondents represented by HONORABLE PHILLIP CUFFMAN,  
Attorney at Law, Little Rock, Arkansas.

Decision of the Administrative Law Judge: Affirmed and  
Adopted.

OPINION AND ORDER

This case comes on for review by the Full  
Commission on appeal by respondents from an opinion filed  
herein by an Administrative Law Judge on August 27, 2004.

The Administrative Law Judge entered the following  
findings of fact and conclusions of law:

1. The Arkansas Workers' Compensation  
Commission has jurisdiction over  
this claim.
2. The stipulations agreed to by the  
parties and set forth above are  
hereby accepted as fact.

3. Respondents are estopped from raising the statute of limitations in this matter.
4. Claimant's current symptoms are the result of a recurrence of the September 14, 1998 injury and the liability of the respondents.
5. Respondents have controverted the claimant's entitlement to any benefits not previously paid.

We have carefully conducted a de novo review of the entire record herein, and it is our opinion that the decision of the Administrative Law Judge is correct and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings of fact made by the Administrative Law Judge are correct, and they are, therefore, adopted by the Full Commission.

We therefore affirm the August 27, 2004, opinion of the Administrative Law Judge, including all findings of fact and conclusions of law therein, and adopt the opinion as the decision of the Full Commission. All accrued benefits shall be paid in a lump sum without discount and with interest thereon at the lawful rate from the date of the Administrative Law Judge's decision in accordance with Ark. Code Ann. § 11-9-809 (Repl. 2002).

Since the claimant's injury occurred prior to July 1, 2001, the claimant's attorney's fee is governed by the provisions of Ark. Code Ann. § 11-9-715 as it existed prior to the amendments of Act 1281 of 2001. Compare Ark. Code Ann. § 11-9-715(Repl. 1996) with Ark. Code Ann. § 11-9-715 (Repl. 2002). For prevailing on this appeal before the Full Commission, claimant's attorney is hereby awarded an additional attorney's fee in the amount of \$250.00 in accordance with Ark. Code Ann. § 11-9-715(b) (Repl. 1996).

IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

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SHELBY W. TURNER, Commissioner

Commissioner McKinney dissents.

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**DISSENTING OPINION**

I respectfully dissent from the majority opinion finding that the respondents were estopped from asserting a statute of limitations defense and finding that the claimant's current need for medical treatment was a

recurrence of her 1998 compensable injury. Based upon my de novo review of the entire record, I find that the claimant has failed to prove by a preponderance of the evidence that the respondents are estopped from asserting the statute of limitations. I further find that this claim is barred by the statute of limitations.

The claimant sustained an admittedly compensable injury to her lower back on September 14, 1998. This injury was accepted as compensable and all of the claimant's indemnity and medical benefits were paid. The record reflects that the claimant last received indemnity benefits for her compensable injury on June 7, 2000, and she last visited the doctor on August 31, 1999. From August 31, 1999, until October of 2003, the claimant did not seek any additional medical treatment for her compensable injury.

After returning to the doctor in October of 2003, the claimant sought to obtain additional medical benefits related to her 1998 compensable injury.

The burden of proof rests upon the claimant to prove the compensability of her claim. Ringier America v. Comles, 41 Ark. App. 47, 849 S.W.2d 1 (1993). There is no presumption that a claim is compensable, that the claimant's injury is job-related or that a claimant is entitled to

benefits. Crouch Funeral Home v. Crouch, 262 Ark. App. 417, 557 S.W.2d 392 (1977); O.K. Processing, Inc. v. Servold, 265 Ark. 352, 578 S.W.2d 224 (1979). The party having the burden of proof on the issue must establish it by a preponderance of the evidence. Ark. Code Ann. § 11-9-704(c)(2) (Repl. 1996). In determining whether a claimant has sustained her burden of proof, the Commission shall weigh the evidence impartially, without giving the benefit of the doubt to either party. Ark. Code Ann. § 11-9-704; Wade v. Mr. C Cavanaugh's, 298 Ark. 363, 768 S.W.2d 521 (1989); and Fowler v. McHenry, 22 Ark. App. 196, 737 S.W.2d 663 (1987). Since the statute of limitations is an affirmative defense, the respondents must establish by a preponderance of the evidence that the claimant's claim for additional benefits was not timely filed in accordance to the law.

A claim for additional benefits will be barred unless it is filed within one year from the date of last payment of compensation or two years from the date of injury, whichever is greater. A.C.A. § 11-9-702(b)(1). Pursuant to this statute, the claimant had until June 7, 2001, one year after the payment of benefits, to file her claim for additional benefits, as this date is greater than September 14, 2000, two years from the date of her injury.

The claimant did not return for additional medical treatment until October 2003. Thus, the claimant clearly did not file her claim for additional benefits within the time allowed by law. Therefore, I find that the respondents have proven by a preponderance of the evidence that this claim is barred by the statute of limitations.

The claimant asserts, however, that the respondents should be estopped for relying upon the statute of limitations as a defense. In order to prevail on this theory, the claimant bears the burden of proof. The elements of equitable estoppel, as set out in Snow v. Alcoa, 15 Ark. App. 205, 691 S.W.2d 194 (1985), are as follows:

- (1) The party to be estopped must know the facts;
- (2) he or she must intend that his or her conduct shall be acted upon or must act so that the party asserting the estoppel has the right to believe the other part [party] so intended;
- (3) the party asserting the estoppel must be ignorant of the true facts; and
- (4) the party asserting the estoppel must rely on the other party's conduct to his or her injury.

After reviewing the evidence, I find that estoppel does not apply to the facts of this case. The claimant

testified that she was told by someone with the carrier that her medicals would be covered. In this regard, the claimant testified:

A. I honestly do not remember the name. I know I dealt with Travelers and - but I do not remember the name of the person who dealt with me on it. I didn't do a lot of one-on-one dealing with them during the original injury. It was pretty much handled through my job, you know. I went to see Amy Clem, who was one of the owners of Holiday Cleaners. She dealt with the insurance company. I filled the papers out for them and medical bills were paid until I began receiving - until the checks for what I found out was - at the time I wasn't expecting it but then found out was the PPD, partial permanent disability, the 10% whole body impairment that they found. I was not expecting that. I had never dealt with a Workers' Comp case before, no one that I knew of had dealt with it, so - - - -

Q. It was my understanding , and I believe you testified earlier, if not we did discuss this during the prehearing conference, that you were under the impression from either the claims adjuster or someone with the Respondents that your medical claim would remain open. Can you tell us where that understanding came from?

A. When I first received the checks for the partial permanent disability that was awarded based on the 10% whole body impairment, when those checks appeared I was not expecting them. I was working for another company at a desk job and,

you know, at that point my injury had been getting better. I had gone back and had the appointment with Dr. Green, Dr. Barry Green, I believe he is with Health South and he is the one who assessed the 10% whole body impairment. When I received these checks in the mail, I wasn't really sure what they were about and the first thing that - I think it was my father that said, well, don't cash those because then they won't be responsible for anything else. So I called Travelers Insurance Company, I got the number from the check or - I don't remember exactly how, I don't have the paperwork, but I called the Travelers Insurance. I'm not sure who I spoke with but I know that we discussed - I don't think that I ended up talking to my actual claim representative. I called asking about the checks. I said, I received some checks, some money I wasn't expecting, what are these for? If I cash them, does that mean that you guys are no longer responsible for any further problems I might have with this disc, because the doctor, in his original doctor's notes from 1998 and 1999, he discusses the fact that it is very possible that in the future I would end up needing surgery on this disc. That the ESI's had made the pain bearable and I could work with it now but that in the future that disc was liable to reinjure or become a problem again and therefore would need surgery at some point in the future. When discussing this with the doctor, and in his notes, he states it would be covered by current on-the job insurance. I asked the man that I called at Travelers when I got these checks, do these checks - if I cash these, does that mean you guys would no longer be responsible if I have more problems with this disc. And I

don't know if he asked me questions about where I was injured and where I lived, which is kind of contrary to where the workers' comp ended up being handled, through Arkansas when the injury was done in Texas and I lived in Texas, but he said, oh, no the claim - basically what it boiled down to was that, no, the medical claim, if anything happens, with this disc, it will be covered. He didn't say anything about a statute of limitations, he didn't say anything except just, no, it would be covered. So that's what I went by, that and the fact that my doctor had said that if anything happens with this, you will be covered. There was never any talk about needing to stay under medical supervision over a certain amount of time, it was just that it would be covered and that was what I took on faith as what would happen...

The claimant then went on to explain that in Texas, medical benefits are not covered by a statute of limitations, and that if she had known that she needed to receive medical treatment at least once a year to keep her claim open she would have done so.

The parties introduced the deposition of Amy Kepple, the present claims manager for the claimant's workers' compensation claim. Ms. Kepple testified that it is the ordinary and usual course of business for the respondent carrier to maintain a computer list of all payments made on a claim, as well as, notes concerning the activity on the

claim by the various people to handle the claim. After explaining the date of payments made to or on behalf of the claimant, Ms. Kepple was questioned about the notes in the file. Pursuant to Ms. Kepple, there is no indication whatsoever that the claimant ever inquired about the affect the permanent partial disability payments would have on her entitlement to receive further medical treatment, or that the claimant did not have to be concerned about the statute of limitations. The claimant then ventured into the realm of possibilities when questioning Ms. Kepple.

Q. But in Texas as far as medical goes, it's covered. So what I'm trying to establish is the possibility that if I called someone and didn't end up talking with my actual claim rep, and gave him the information that I was injured and they asked me where were you injured and I said Texas and they asked me where do I live and I said Texas, could somebody possibly - - mistakenly given me the information that - that I would be covered medically for life on a Texas claim? Is that within the realm of possibilities?

A. I don't think I can answer that. I mean, I wasn't the one that was speaking to you so I don't feel comfortable saying that it could have happened or would not have happened.

Q. Okay. So if someone calling asking you that question, you wouldn't - -

A. No, because that would not have been a question I would have asked you. I would have looked at the file. So I don't feel like that would have been a mistake that would have been made.

With regard to the claimant's memory of events surrounding her claim in 2000, the claimant stated during Ms. Kepple's deposition that she recalled receiving a check in excess of \$900.00 as well as a check for \$588.00. However, Ms. Kepple specifically testified that the first check issued on the claim was for \$588.00 and then the checks went down to \$294.00 per week.

The only evidence in the record that the claimant was told that her medical benefits would always be covered is the testimony of the claimant, herself. A claimant's testimony is never considered uncontroverted. Lambert v. Gerber Products Co., 14 Ark. App. 88, 684 S.W.2d 842 (1985). Nix v. Wilson World Hotel, 46 Ark. App. 303, 879 S.W.2d 457 (1994). The findings of the Administrative Law Judge on issues of credibility are not binding on the Commission. Roberts v. Leo-Levi Hospital, 8 Ark. App. 184, 649 S.W.2d 402 (1983); Linthicum v. Mar-Bax Shirt Co., 23 Ark. App. 26, 741 S.W.2d 275 (1987). It is the exclusive function of the Commission to determine the credibility of the witnesses and

the weight to be given their testimony. Johnson v. Riceland Foods, 47 Ark. App. 71, 884 S.W.2d 626 (1994). Furthermore, the Commission is not required to believe the testimony of the claimant or other witnesses, but may accept and translate into findings of fact only those portions of the testimony it deems worthy of belief. Morelock v. Kearney Co., 48 Ark. App. 227, 894 S.W.2d 603 (1995). The claimant was unable to even identify the person with the respondent carrier who supposedly gave her this information upon which she supposedly relied. Moreover, the claimant's recollection of the amount of money she received is not verified by the payment records maintained by the respondents. Thus, calling the claimant's recollection into question. When the claimant asked if it was possible for someone with the respondent carrier to have given her this "misinformation," Ms. Kepple testified that it was highly unlikely, since the claimant's information would have been in the computer. Being a resident of Texas, it is just as likely that the claimant received information regarding the Texas law from someone else, and not necessarily from the respondent carrier. Furthermore, as noted by the claimant and as born out in the medical records, the claimant's physician propagated this misconception when he wrote in his reports that the

claimant's future surgery would be covered by workers' compensation insurance. However, the respondents cannot be responsible for the actions or statements made by a third party. Accordingly, based upon the merger evidence presented, I cannot find that the claimant has established by a preponderance of the evidence that the telephone conversation she described ever took place. Nevertheless, even if I were to assume that it did take place, a finding I specifically do not make, I do not find that the statement supposedly made by this unknown person on the other end of the phone would be sufficient to establish the second element of estoppel. From the claimant's testimony, it is clear she only called to inquire into the effect cashing her permanent partial disability benefit checks would have on her claim. It is true that cashing these checks would have no affect on her entitlement to additional medical benefits. I do not believe that the statement allegedly made by this unknown person would be intended to convey the impression that the statute of limitations was being waived or that medical benefits would be indefinitely paid. See Scott v. Georgia-Pacific Corp., Full Commission opinion filed August 14, 1998 (AWCC No. E006693). By the claimant's own admission, she does not recall whether she advised the

person on the phone she was hurt in Texas or that she lives in Texas. In my opinion, the claimant did not offer convincing evidence that the person on the other end of the line assumed that the claim was a Texas claim, nor is there any reason to assume that Texas law was ever quoted to the claimant by the respondents.

Therefore, based upon all the evidence in this claim, I find that the claimant's claim for additional benefits is barred by the statute of limitations as it was not filed within one year from the date of last payment of benefits, or within two years from the date of injury. I further find that the claimant has failed to establish by a preponderance of the evidence that the respondents are estopped from asserting the affirmative defense of statute of limitations.

Therefore, I respectfully dissent from the majority opinion.

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KAREN H. MCKINNEY, Commissioner