

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F102835

HARLAN PENNINGTON,
EMPLOYEE

CLAIMANT

SERVICE EXPERTS,
EMPLOYER

RESPONDENT

KEMPER INSURANCE COMPANY,
INSURANCE CARRIER

RESPONDENT

OPINION FILED JULY 18, 2005

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

Claimant appeared *Pro se*.

Respondents represented by the HONORABLE BETTY J.
DEMORY, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and
Adopted.

OPINION AND ORDER

Respondents appeal an opinion and order of
the Administrative Law Judge filed January 20, 2004. In
said order, the Administrative Law Judge made the
following findings of fact and conclusions of law:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On or about February 27, 2001, the relationship of employee-employer-carrier existed among the parties.
3. On or about February 27, 2001, the claimant earned wages sufficient to entitle him to weekly compensation

benefits of \$410.00/\$308.00, for temporary total/permanent partial disability.

4. The claimant was temporarily totally disabled for the period commencing October 3, 2003, and continuing until such time as he reaches the end of his healing period or is released to return to appropriated work, a date to be determined, in addition to prior periods of total incapacitation growing out of the February 27, 2001, compensable injuries.
5. The evidence preponderates that claimant made numerous requests of appropriate supervisory personnel of respondents for further workers' compensation medical benefits, subsequent to May 15, 2002, such to toll the limitation period set forth in Ark. Code Ann. § 11-9-702(b), and, pursuant to *Plante v. Tyson Foods, Inc.*, 319 Ark. 126, 890 S.W. 2d 253 (1994).
6. Respondents are estopped from asserting the statute of limitations as a defense to the claimant's present claim for workers' compensation benefits growing out of the February 27, 2001, compensable injuries. *Snow v. Alcoa*, 15 Ark. App. 205, 691 S.W. 2d 194 (1985).
7. Medical treatment rendered to the claimant under the care of Dr. William F. Hefley, Jr., as well as referrals therefrom, subsequent to May 15, 2002, is reasonably necessary in connection to the claimant's compensable injuries of February 27, 2001.
8. The respondent shall pay all reasonable hospital and medical expenses arising out of the injury of February 27, 2001.
9. The respondents have controverted the claimant's entitlement to all workers'

compensation benefits in this claim
subsequent to May 15, 2002.

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

We therefore affirm the January 20, 2004 decision 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 on appeal.

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.

OLAN W. REEVES, Chairman

SHELBY W. TURNER, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I respectfully dissent from the majority opinion. At the time of his compensable injury, the claimant worked as a master plumber for the respondent employer. The claimant testified that on February 28, 2001, he was carrying pipe fittings and wrenches when he tripped on the turned-up edge of a piece of concrete reinforcement wire that was partially hidden under pine straw. After his fall, the claimant presented to the emergency room of a local hospital where he was treated for a broken right wrist. In a follow-up visit on March

9, 2001, the claimant complained of left shoulder discomfort. X-rays taken at that time of the claimant's right wrist showed that his fracture was healing properly, whereas films of his left shoulder revealed a slightly elevated humeral head, with signs of arthritis in the claimant's glenohumeral joint. Accordingly, the claimant was prescribed anti-inflammatories for his left shoulder. The claimant continued to receive conservative treatment for his complaints under the direction of Dr. William Hefley, Jr..

On April 13, 2001, Dr. Hefley reported that the claimant had developed "new complaints" which were associated with his left knee.

He is 6 weeks post right Colles ex/fix. The wrist is felling well. He has a new problem today of left knee problems. He originally fell and fractured his patella in 1978. He was treated in Hot Springs with ORIF. About six months later he had hardware removed then one year ago he was having problems with the knee and Jim Mulhollan did an arthroscopy for him. The knee has been doing well until six weeks ago when he was injured at work. ... He didn't realize the knee had been injured as well because the wrist was hurting so much but he had giving way episodes in the left knee since then and wanted to have it checked.

Based upon his examination and x-rays of the claimant's left knee, Dr. Hefley assessed the claimant

with left knee patellofemoral osteoarthritis. Dr. Hefley reported that he did not see any new injury that might have occurred six weeks earlier, and he initiated a knee home exercise program for the claimant. Dr. Hefley continued to treat the claimant conservatively, primarily in regards to his broken wrist. Although the claimant still reported knee pain, on April 27, 2001, Dr. Hefley reported that the claimant's home exercise program seemed to be helping to alleviate the symptoms associated with his left knee.

On May 9, 2001, the claimant was seen by Dr. David Rhodes for progressively worsening left knee symptoms. Upon physical examination of the claimant's left knee, Dr. Rhodes stated, "There is effusion. Painful range of motion but it is full. There is no instability. Crepitation at the patellofemoral joint." A series of x-rays of the claimant's left knee revealed severe patellofemoral osteoarthritis. Dr. Rhodes gave the claimant a steroid injection and prescribed him Vioxx . By his examination of the claimant on May 25, 2001, Dr. Hefley reported that the claimant's right wrist had healed in good position, and that the claimant's left knee was "still hurting some." At the time of that appointment, Dr. Hefley stated that he was going to advance the claimant from light work duty to

full duty status. On June 22, 2001, Dr. Hefley added synovitis of the left knee to his diagnosis of the claimant's knee condition. Dr. Hefley continued the claimant on a conservative course of treatment for his knee complaints, including injections and home exercises. On September 12, 2001, Dr. Hefley stated that the claimant's left knee was reportedly "bothering him a great deal" and that he planned to proceed with left knee arthroscopy. In terms of his expected results from this procedure, Dr. Hefley stated:

More than anything else the long-term result will depend on whether or not there are significant articular chondral degenerative changes. We will grade that carefully at the time of arthroscopy. If the arthritis is mild we expect a very good long term result. If the arthritis is more significant further procedures could be required in the future including the possibility of knee replacement surgery.

Dr. Hefley added:

He is working at full duty now and will continue working in that manner until the time of surgery and we'll try to get him back to full duty soon after the arthroscopy.

On September 21, 2001, Dr. Hefley proceeded with a left knee arthroscopy, tri-compartmental chondroplasty, and revision of a medial meniscectomy of

the claimant's left knee. The medical record shows that the claimant was found to have Grade 3 and Grade 2 lateral, and Grade 4 patellofemoral degenerative changes in his left knee. The claimant reportedly tolerated the surgery well, and Dr. Hefley expected him to be able to return to work in approximately two weeks. In a follow-up report dated October 8, 2001, Dr. Hefley stated that the claimant could return to work on October 15, and that he should be able to release the claimant and assign him an impairment rating in four weeks from that date. In his next report dated November 5, 2001, Dr. Hefley indicated that the claimant could "continue working at full duty." In addition, Dr. Hefley stated that he was ready to release the claimant and assign his impairment rating, but that the claimant "does not want to do that yet." Therefore, Dr. Hefley instructed the claimant to return for a follow-up review of his progress in three months.

On February 4, 2002, Dr. Hefley reported that the claimant was "not improving and would like to proceed with knee replacement surgery." Dr. Hefley added:

4½ months post left knee arthroscopy. He was noted to have tri-compartmental degenerative changes at that time that was down to bare bone in the patellofemoral

joint and Grade 3 in the medial compartment.

On March 14, 2002, the claimant underwent an independent evaluation by Dr. Kenneth Rosenzweig. Although Dr. Rosenzweig opined that the claimant was a candidate for total knee replacement, he confirmed that "the majority of clinical findings," as far as x-rays and intraoperative reports, revealed that the claimant's current problems were "mostly pre-existing." In his report of that evaluation, Dr. Rosenzweig made the following comments:

Mr. Pennington, in 1978, sustained a mid waist patellar fracture that underwent open reduction and internal fixation of his patella, and then subsequent hardware removal approximately six months later. He was doing fine until the year 2000, when he sustained a twisting injury while at work, and underwent arthroscopy by Dr. Mulholland, and a medial meniscectomy. Subsequent to that, he reports that he was doing just fine until February 28th, when at work he tripped over some concrete stuff on the ground. He fractured his right wrist that underwent external fixation and uneventful healing. After he recovered from his wrist fracture, the left knee pain was persistent, and underwent arthroscopy by Dr. Hefley, who documents a meniscal tear of a remnant of a previous meniscectomy, patellofemoral joint and tri-compartment arthritis. Obviously, all of this pretty much pre-dates his injury, except for the

meniscal tear, that is probably the result of his injury.

Dr. Rosenzweig assessed the claimant with tri-compartmental arthritis with advanced patellofemoral degenerative disease. Although Dr. Rosenzweig opined that total knee replacement surgery would help improve the claimant's pain and quality of life, he expressed reservations about the potential risks. More specifically, Dr. Rosenzweig stated that considering the claimant's age and activity level, loosening and further surgery were possibilities. Dr. Rosenzweig further stated, "In regard to the apportionment of current findings and pre-existing conditions, it is clear that the previous meniscectomy and chondromalacia and exposed subchondral bone is pre-existing to his trauma. The fall in February of 2001 has propagated the symptoms beyond response to conservative care." The claimant underwent total knee replacement surgery on January 20, 2004.

In order to consider the issue of additional medical treatment and temporary total disability benefits, we must first dispose of the statute of limitation question raised in this claim. Arkansas Code Annotated §11-9-702(b), provides:

TIME FOR FILING FOR ADDITIONAL
COMPENSATION. In cases where
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.

Moreover, in Plante v. Tyson Food, Inc., 319 Ark. 126, 890 S.W.2d 253 (1994), the high Court stated that it is the furnishing of services that tolls the statute, not the payment thereof. Citing, Heflin v. Pepsi-Cola Bottling Co., 244 Ark. 195, 424 S.W.2d 365 (1968). The Court further stated that the primary purpose of the one year statute of limitations is to give the claimant that much extra time to decide whether he has been fully compensated for his injury. Id.; See also, Superior Federal Savings and Loan Assn. v. Shelby, 265 Ark. 599, 580 S.W.2d 201 (1979). Consistent with this purpose is the rule that the period is tolled so long as the claimant is being furnished medical services or is being "compensated." Plante, supra; Heflin, citing Ragon v. Great American Indemnity Co., 224 Ark. 387, 273 S.W.2d 524 (1954) and Reynolds Metal Co., 226 Ark. 388, 290 S.W.2d 2111 (1956). The Plante Court stated that it could "think of no better way for a petitioner to decide whether he has been fully compensated than to return to his authorized physician or staff for follow-up

treatments after surgery." Plante, supra. "Moreover," continued the Court, "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." Id.

The record reveals that the claimant's last compensable injury related doctor's visit in year 2002 was with Dr. Kenneth Rosenzweig in March of that year. The record also reveals that the respondents last paid benefits for the claimant's February 2001 injury on May 15, 2002. Furthermore, the claimant did not return to see a physician or file a claim for additional benefits after May 15, 2002, until October of 2003. The Supreme Court in Petit Jean Air Service v. Wilson, 251 Ark. 871, 475 S.W.2d 531 (1972), held that carriers should know when their liability in a particular claim has terminated. "It is plainly the better rule," stated the Court, "to put upon the claimant the burden of filing his claim for additional compensation within the time allowed by the statute." Id. Clearly, the burden for filing for additional benefits within the statute of limitations was upon the claimant in this claim. See, St. John v. Arkansas Lime Co., 8 Ark. App. 278, 651 S.W.2d 104 (1983). The claimant testified, however, that

he made persistent attempts through respondent employer supervisory personnel to obtain medical treatment for his left knee during the time between his last doctor's visit in May of 2002, and when he was next seen in October of 2003. Moreover, several of the claimant's co-workers testified that they routinely heard the claimant speaking to supervisory personnel concerning "getting something done" about his condition. During the claimant's hearing, each of these witnesses corroborated that the claimant injured himself as described above, and each stated that they were generally aware that the claimant complained to supervisory personnel about his problems in obtaining benefits. However, each of the claimant's witnesses, with the exception of one, admitted that they were not personally present at those times when the claimant spoke to supervisory personnel regarding his worker's compensation benefits. Only Mr. Collin Ledford was able to state that he was present on two occasions when the claimant made complaints to his supervisor, Mr. Penning. Mr. Ledford's memory of what transpired on one of those occasions was, however, vague, at best.

Q. Okay. Let me ask you, in terms of
- - tell me exactly - - your were
present at the time that Mr.
Pennington made statements to Mr.
Penning, is that correct?

A. Yes, sir.

Q. Okay. Tell me what took place.
What you recall about that
conversation.

A. Basically, what I can recall is
that he had complaints about his
knee and his shoulder and his arm
and basically was told that there
was nothing that could be done about
it at that time, I believe. That's
my best recollection that I can
remember.

In later questioning, Mr. Ledford admitted
that this particular conversation took place while the
claimant was still undergoing treatment for his broken
wrist. Therefore, this conversation would have occurred
before benefits concerning the claimant's knee would
have possibly become an issue for the claimant.

The respondents called the claimant's former
supervisor, Mr. George Penning, as their first witness.
Mr. Penning denied that the claimant ever approached him
after meetings in an effort to discuss his worker's
compensation benefits.

No. We have a meeting every Friday
morning and if he had asked me about
that he would have been referred
immediately to the human resources
manager. I had no control over that.

Further, Mr. Penning testified that the
claimant was furnished with an employee handbook in

which Corporate human resources 1-800 number was listed. According to Mr. Penning, employees were encouraged to call this number "if they ever had a problem and they couldn't get it resolved." Mr. Penning further stated that the claimant was present at all of the meetings during which this resource was discussed, and that he had been required to sign for his handbook in order to verify that he had received it.

The respondents also called Ms. Connie Phillips. Ms. Phillips testified that beginning in April or May of 2003, she was the Corporate contact person in the respondent employer's human resources department. Ms. Phillips further testified that she first learned of the claimant's request for additional benefits in November of 2003. Upon a cursory review of the claimant's file after learning of his request for additional benefits, Ms. Phillips testified that she saw no notations from her predecessor, Mr. Mike Jones, concerning the claimant ever having requested additional benefits or medical treatment prior to that time.

Part-owner of Air Masters LLC, and former general manager of Service Experts of Arkansas, Mr. James William Monk, Jr., testified that he had occasional contact with the claimant during the time in question, but he denied that the claimant ever advised

him of the alleged problems he was having with his claim. Mr. Monk corroborated Mr. Penning's earlier testimony concerning the legitimacy of the claimant having been laid off from the company in October of 2003. Mr. Monk's testimony was corroborative of Mr. Penning's testimony in that he stated that the claimant's termination was part of a gradual elimination of the company's commercial plumbing department.

The Court of Appeals has formerly held that the statute of limitations was tolled where a claimant's unsuccessful attempts to arrange treatment with his primary provider resulted from appellant's failure to notify the doctor's office that it would pay for medical treatment as ordered by an Administrative Law Judge. See, Cooper Tire & Rubber Co. v. Angell, 75 Ark. App. 325 (2001). The present case is distinguishable from the Angell case, however, in that the physician to whom the claimant was referred by his primary care physician for treatment of his back, refused to treat the claimant until the appellant approved the treatment, which the appellant never did. Therefore, the appellee was forced to seek treatment for his back condition by another physician, who, incidentally, had been treating the claimant for his knee. In the present case, the claimant did not seek medical attention in any form, authorized

or independently, for well over a year. Moreover, after his March 2002 visit with Dr. Rosenzweig, the claimant did not file a claim for additional benefits with the Commission, nor did he call the toll free number in the back of his employee handbook during the time in question. The claimant testified that, among other things, he had sought assistance with his claim through the respondent employer's human resources department. Ms. Marijean Voss testified that she worked in the respondent employer's human resources department from about May of 1998 through May of 2001. She further testified that she was familiar with the claimant's injury, and that she processed all of the paperwork associated with his injury until May of 2001, when she became a corporate recruiter. The claimant alleged that he had contacted the Worker's Compensation Commission regarding his temporary total disability benefits for that time that he was unable to work following his injury, and that upon informing Ms. Voss that he had done so, she instructed him that all future contact regarding his injury should go through the company's human resources office. The claimant's failure to seek outside assistance for his claim, was therefore, according to the claimant, based upon his belief that he would lose his job should he deviate from Ms. Voss's

instructions. Although the claimant was eventually terminated for non-injury related reasons, the record is devoid of corroborating evidence which shows that the claimant was ever in danger of losing his job should he elicit outside assistance with his claim. Moreover, the testimony of Mr. Penning reflects that employees were, in fact, encouraged to call the toll free number in the back of their employee handbooks for assistance with unresolved problems. The claimant has failed to establish by a preponderance of the evidence that he sought assistance from the respondent employer in obtaining additional benefits during the time in question, and/or that the respondent employer refused to assist him. Therefore, and for the above stated reasons, I find that the claimant has failed to prove by a preponderance of the evidence that the respondents are estopped from asserting that the statute of limitations acts to bar his claim for additional benefits. Accordingly, it should be found that this claim is barred by Ark. Code Ann. §11-9-702(b).

Although I find that the statute of limitations bars recovery, I further find that the claimant has failed to prove by a preponderance of the evidence that his total knee replacement surgery was reasonable and necessary to the treatment of his

compensable injury. Rather, the medical evidence indicates that the claimant's total knee replacement was necessary due to pre-existing arthritis. As previously mentioned, the objective medical evidence indicates that the claimant's knee injury from this incident amounted to a "possible" meniscus tear, whereas his patellofemoral joint and tri-compartment arthritis, "Obviously, all" pre-dated his injury.

Both doctors, Hefley and Rosenzweig, opined that the claimant's candidacy for total knee replacement was based, primarily, upon the claimant's pre-existing osteoarthritis. Although in his report of March 13, 2002, Dr. Rosenzweig stated that the claimant's fall of February 2001 "propagated the [claimant's] symptoms beyond response to conservative care," he further stated that "In regard to the apportionment of current findings and pre-existing conditions, it is clear that the previous meniscectomy and chondromalacia and exposed subchondral bone is pre-existing to his trauma." The preponderance of the medical evidence reflects that the claimant's meniscal tear, which likely resulted from the claimant's compensable fall, was surgically repaired by Dr. Hefley in September of 2001. The record further reflects that as of November 5, 2001, Dr. Hefley was prepared to release the claimant and assign him his

impairment rating, but that the claimant did not want to do that. However, by February of 2002, Dr. Hefley reported that the claimant was "not improving and would like to proceed with knee replacement surgery."

Thereafter, the claimant was seen for independent evaluation by Dr. Rosenzweig, who agreed that the claimant was a candidate for total knee replacement surgery, but was reluctant to perform said surgery. The claimant was not treated again for knee related symptoms until October of 2003. Based upon the above and foregoing, I find that the claimant has failed to prove that his total knee replacement and related treatment was reasonable and necessary to the treatment of his compensable injury. Furthermore, especially in view of the claimant's pre-existing knee problems and the fact that he waited for well over a year before proceeding with surgery, I find that the claimant has failed to prove that his total knee replacement surgery and associated treatment was causally connected to his compensable injury. Based primarily upon the objective medical evidence contained within the records, it is more likely than not that the claimant's need for knee replacement surgery was due to his severe arthritis as was noted by Dr. Hefley during the arthroscopic procedure that he performed on the claimant's left knee

in September of 2001. The record clearly indicates by September of 2001, Dr. Hefley, who saw no "new" knee injury as a result of the claimant's fall, anticipated that total knee replacement was likely in the claimant's future given the severity of the his long-standing arthritis. Therefore, I respectfully dissent from the majority opinion.

KAREN H. MCKINNEY, Commissioner