

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E606338

WALTER W. KENT,
EMPLOYEE

CLAIMANT

SINGLE SOURCE TRANSPORTATION CO.,
EMPLOYER

RESPONDENT

CRAWFORD & COMPANY,
INSURANCE CARRIER/TPA

RESPONDENT

OPINION FILED OCTOBER 4, 2006

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

Claimant represented by the HONORABLE AARON L. MARTIN,
Attorney at Law, Fayetteville, Arkansas.

Respondents represented by the HONORABLE CAROL L. WORLEY,
Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed.

OPINION AND ORDER

The respondents appeal an administrative law judge's
opinion filed October 4, 2005. The administrative law judge
found that the statute of limitations did not bar the claim,
and that the claimant proved he was entitled to additional
medical treatment. The administrative law judge found that
the claimant proved he was entitled to temporary total
disability from April 18, 2005 through June 7, 2005. After

reviewing the entire record *de novo*, the Full Commission affirms the opinion of the administrative law judge.

I. HISTORY

The parties stipulated that Wayne Kent, age 68, sustained compensable injuries to his neck and left shoulder on August 22, 1995. The claimant testified that the vehicle he was driving struck a bull standing in the road. The claimant testified, "The impact threw me up into the corner, the left hand corner of the cab, and my shoulder and neck hit[.]"

An MRI of the claimant's cervical spine was taken in October 1995, with the following impression:

1. C5-C6: Moderate degenerative disc disease with disc space narrowing, straightening of the spine, and mild bilateral neural foraminal stenosis.
2. C6-C7: Mild degenerative disc disease with mild loss of disc height and mild bilateral neural foraminal stenosis.

An x-ray of the claimant's left shoulder in October 1995 showed "severe degenerative changes in the glenohumeral joint. No acute changes are noted."

The claimant's testimony indicated that he underwent neck surgery in 1996.

Dr. Freddie L. Contreras reported on May 26, 1998:

Mr. Kent's cervical myelogram of 3-12-98 was done without difficulty. The plain myelogram showed post surgical changes t 5-6 and 6-7. At 6-7, he had some nipping of the nerve roots bilaterally, 5-6 didn't look all that bad. On the lateral view, it doesn't look like he has the most solid radiographic fusion. The CT scan revealed postoperative changes, more severe at 6-7 than at 5-6. At this point in time, he wishes to avoid any kind of surgical intervention.

The record indicates that the claimant continued to occasionally follow up with Dr. Contreras.

On January 21, 1999, Dr. Barry M. Green assigned the claimant a 13% whole person impairment for his neck. Dr. Green assigned a 9% left upper extremity impairment on March 10, 1999.

Dr. Contreras stated on January 27, 1999, "Mr. Kent comes in today. He indicates that he is pretty much unchanged. Dr. John Gregory has started him on some new meds and that has really helped. I am going to discharge him from my care at this time with a 13% impairment rating."

The claimant still continued to occasionally follow up with Dr. Contreras.

Dr. Gregory noted on November 6, 2000, "This patient returns today for follow-up. He's doing reasonably well with his shoulder although he's had a recent exacerbation of increased pain from swinging a sledge hammer....We received

a letter from Crawford & Company saying that this visit isn't work related. Granted the patient did have degenerative changes prior to the accident, but the accident is the sole cause for his continued difficulty and further development of posttraumatic arthritis."

The claimant continued to occasionally follow up with Dr. Gregory.

An orthopaedic specialist, Dr. David N. Collins, independently examined the claimant on February 21, 2001:

The date of injury was 8/22/95. The patient was apparently a truck driver and was involved in a wreck when a cow ran into the 18-wheeler. This resulted in left shoulder and neck injuries for which he has had surgical treatment including subacromial decompression, distal clavicle excision and cervical nerve root decompression and disc work. He is working his regular job....There have been no new re-injuries....He underwent decompression in June 1997....

In my opinion the patient has long been at maximum medical improvement following the work related injury....Permanent partial impairment as related to the work related injury is on the basis of the injury to the acromioclavicular joint, distal clavicle excision and alteration of the coracoacromial archway. This is equal to 15% to the upper extremity, equal to 9% to the body as a whole. The patient is working without restrictions and should continue to do so.

Unfortunately Mr. Kent has significantly advanced glenohumeral arthritis and will at some point be a candidate for total shoulder arthroplasty. In my

opinion this bears no relationship to his work related injury, as it was present at the time of the acute event. The progression has not been accelerated by his work related event.

The parties stipulated that the respondents accepted and paid impairment ratings of 13% for the neck and 9% for the shoulder.

The record contains a Form AR-C, Claim For Compensation, signed by the claimant on March 12, 2001. The claimant checked spaces on the form for the additional benefits of Additional Medical Expenses and Attorney Fees.

The record contains an Order Of Dismissal Filed December 13, 2001:

Now on this 13th day of December, 2001, comes for consideration the Motion of respondents to dismiss claimant's claim for benefits for failure to prosecute. The Commission, upon a review of the Commission's file as well as being well and sufficiently advised of these and other premises, finds that respondents' Motion should be and hereby is granted. It is therefore considered, ordered and adjudged that claimant's claim for benefits is hereby dismissed.

On March 13, 2002, the claimant sought treatment for his left shoulder with Dr. Gregory; Dr. Gregory continued scheduling six-month followup appointments. Dr. Gregory noted on February 26, 2003, "Shoulder x-rays show progression of his arthritic problems." The claimant

requested a prescription for medication from Dr. Gregory on June 9, 2003.

Dr. Gregory noted on August 16, 2004, "He is leaning towards having surgery the first part of December. He'll call a couple of weeks ahead of time and schedule a preop visit."

The claimant testified that he woke up with a hurting neck one morning in 2005.

Dr. Contreras arranged an MRI of the claimant's cervical spine, which was taken on February 21, 2005 with the following impression:

- 1) Findings of disc space narrowing and degenerative change most evident at the C5-6 and C6-7 levels. At these levels there was a previous discectomy performed. No definite bone graft material or screw plate fixation device is in place. No abnormal alignment is noted.
- 2) Degenerative disc disease is seen elsewhere within the cervical spine but most evident in the C4-5 level where generalized disc bulging is present. This generalized disc bulging does appear to produce mild spinal canal stenosis and mild right neuroforaminal stenosis.

Dr. Contreras noted on March 1, 2005:

Mr. Kent comes in today. I reviewed his cervical spine MRI with him. We talked about the need for a possible myelogram and he pretty much says that he absolutely hates the myelograms and would love to do anything to avoid that.

On review of his current MR, it looks as if he does not have the most solid fusion at 5-6 and 6-7. His subarachnoid space is clearly decompressed at these levels, but I do not see one nice solid mass of bone. He now has significant disk and osteophyte complexes at both 3-4 and 4-5.

I have indicated to him that his symptoms may or may not be related to the disk disease at 3-4 and 4-5. We talked about the need for a myelogram, but again he reiterated that he did not wish to pursue that. I explained to him that surgical intervention with regards to the 3-4 and 4-5 disks may yield no improvement in his symptoms. We also discussed the fact that he is a heavy smoker and that he previously has not healed satisfactorily, and that this may also be a problem.

All-in-all, though, the long-and-short of it was that he wants to pursue surgery. The planned procedure, specifically an ACD at 3-4 and 4-5 with placement of Graftech ACF spacers and a Synthes anterior cervical plate, was discussed and reviewed with him in detail....

On April 18, 2005, Dr. Contreras performed an anterior cervical diskectomy at C3-4 and C4-5. Dr. Contreras' preoperative and postoperative diagnoses were "1) Cervical spondylosis, C3-4. 2) Cervical spondylosis, C4-5."

Dr. Contreras signed an Attending Physician's Statement on April 28, 2005. Dr. Contreras checked a box on the Statement indicating that the injury arose out of the claimant's employment and explained: "Patient's initial injury of 8-22-95 resulted in Anterior Cervical Diskectomy C-5-6, C-6-7 being performed. The patient did not attain a

solid fusion. This surgery changed the mechanics of his spine, resulting in the symptoms causing the surgery on 4-18-05."

Following the second surgery, the claimant testified, "I don't have the pain or anything like that, as opposed to before. I can turn my neck but I don't have full range but I can at least still turn it and I don't have the popping and grinding."

On a Disability Certificate dated May 31, 2005, Dr. Contreras indicated that the claimant could return to work on June 7, 2005.

A prehearing order was filed on June 13, 2005. The claimant contended that he was entitled to "additional medical benefits associated with this claim; that specifically, he is entitled to payment of benefits for a surgery performed by his authorized treating physician; that he requests reimbursement for any out-of-pocket expenses, satisfaction of all subrogation interests, payment of any outstanding balances, and payment of mileage; that he is entitled to temporary total disability benefits from April 18, 2005, through a date yet to be determined; and that he is entitled to the appropriate attorney's fee for recovery

of medical benefits and for temporary total disability benefits."

The respondents contended that "all appropriate benefits have been and are being paid associated with the claimant's left shoulder injury; that they deny any benefits associated with the claimant's neck as the same are not reasonable and necessary and are likely barred by the statute of limitations."

The parties agreed that the issues for determination were "whether additional medical treatment is reasonably necessary in connection with the compensable injury; whether the claimant is entitled to additional temporary total disability benefits; whether the statute of limitations bars this claim; and controversion and attorney's fees."

The administrative law judge found, in pertinent part:

3. The present claim is not barred by the statute of limitations.
4. The claimant has proven by a preponderance of the evidence that his neck surgery of April 2005 was a natural and probable result of his compensable injury, and that his neck surgery of April 2005 was reasonably necessary in connection with the compensable injury.
6. The claimant has proven ... that he is entitled to temporary total disability benefits from April 18, 2005, through June 7, 2005.

The respondents appeal to the Full Commission.

II. ADJUDICATION

A. Medical Treatment

The employer shall promptly provide for an injured employee such medical treatment as may be reasonably necessary in connection with the injury received by the employee. Ark. Code Ann. §11-9-508(a). A claimant must prove by a preponderance of the evidence that he is entitled to additional medical treatment. *Wal-Mart Stores, Inc. v. Brown*, 82 Ark. App. 600, 120 S.W.3d 153 (2003). What constitutes reasonably necessary medical treatment is a question of fact for the Commission. *DeBoard v. Colson Co.*, 20 Ark. App. 166, 725 S.W.2d 857 (1987).

B. Statute of Limitations

Ark. Code Ann. §11-9-702(b) provides:

- (1) In cases where 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.
- (c) A claim for additional compensation must specifically state that it is a claim for additional compensation. Documents which do not specifically request additional benefits shall not be considered a claim for additional compensation.
- (d) If, within six (6) months after the filing of a claim for additional compensation, no bona fide request for a hearing has been made with respect

to the claim, the claim may, upon motion and after hearing, if necessary, be dismissed without prejudice to the refileing of the claim within the limitation period specified in subsection (b) of this section.

The administrative law judge found in the present matter, "The present claim is not barred by the statute of limitations." The Full Commission affirms this finding. The claimant sustained a compensable injury to his left shoulder and neck in August 1995. The claimant was assigned an impairment rating in February 2001, and he claimed entitlement to additional worker's compensation in March 2001. We recognize that the respondents obtained an Order Of Dismissal in December 2001. Nevertheless, the claimant continued to seek medical treatment related to his compensable injuries. Pursuant to Ark. Code Ann. §11-9-702, the claimant kept the claim open by continuing to receive timely medical treatment in connection with his compensable injuries. It is well-settled that the furnishing of medical services constitutes "payment of compensation" within the meaning of the limitations statute and that such payment of compensation or furnishing of medical services tolls the running of the time for filing a claim for additional compensation. The one-year limitations period begins to run

from the last payment of compensation, which the Arkansas Supreme Court has held means from the date of the last furnishing of medical services. *Plante v. Tyson Foods, Inc.*, 319 Ark. 126, 890 S.W.2d 253 (1994).

The present claimant obtained treatment for his left shoulder within one year of the December 2001 Order Of Dismissal. The authorized surgeon, Dr. Contreras, began treating the claimant's neck in February 2005. Dr. Contreras performed surgery in April 2005. The claimant claimed entitlement to additional worker's compensation in June 2005, plainly within one (1) year of the last furnishing of medical services. The Full Commission therefore affirms the administrative law judge's finding that the statute of limitations does not bar the claim.

The Full Commission also affirms the administrative law judge's finding that the claimant proved he was entitled to surgery performed by Dr. Contreras in April 2005. The claimant sustained a compensable injury to his neck in August 1995, and the claimant testified that he underwent neck surgery in 1996. The claimant began treating with Dr. Contreras in May 1998. In February 2005, Dr. Contreras noted that the claimant had previously undergone surgery at

C5-6 and C6-7. Dr. Contreras subsequently performed surgery at C3-4 and C4-5. Dr. Contreras opined in April 2005 that the compensable injury changed the mechanics of the claimant's cervical spine and caused the need for surgery at C3-4 and C4-5. The Commission is authorized to accept or reject a medical opinion and is authorized to determine its probative value. *Poulan Weed Eater v. Marshall*, 79 Ark. App. 129, 84 S.W.3d 878 (2002). We find that Dr. Contreras opinion on causation in the present matter is entitled to significant weight. We also note that the claimant reported post-surgical improvement. Post-surgical improvement is a relevant consideration in determining whether surgery was reasonably necessary. *Winslow v. D&B Mech. Contrs.*, 69 Ark. App. 285, 13 S.W.3d 180 (2000).

Based on our *de novo* review of the entire record, the Full Commission finds that the claimant proved the statute of limitations did not bar the claim. The Full Commission finds that the claimant proved he was entitled to additional medical treatment, including surgery performed by Dr. Contreras in April 2005. We find that the claimant proved he was within his healing period and was totally incapacitated from earning wages from April 18, 2005 through

June 7, 2005. The Full Commission therefore affirms the opinion of the administrative law judge. The claimant's attorney is entitled to fees for legal services pursuant to Ark. Code Ann. §11-9-715(Repl. 2002). For prevailing on appeal to the Full Commission, the claimant's attorney is entitled to an additional fee of five hundred dollars (\$500), pursuant to Ark. Code Ann. §11-9-715(b)(2)(Repl. 2002).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

SHELBY W. TURNER, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I must respectfully dissent from the majority opinion. This claim is barred by the statute of limitations pursuant to Ark. Code Ann. §11-9-702. The claimant sustained his compensable injury on August 22, 1995. Medical benefits were paid through November 21, 2000. The

claimant underwent an IME on January 23, 2001, which was paid by the respondents. The claimant filed an AR-C on March 12, 2001, thus tolling the statute of limitations. After this filing, the claimant received one final payment from the respondents in the amount of \$104.16, for the date March 21, 2001. But for this tolling, the statute of limitations would run on March 21, 2002, one year from the last payment of compensation. An Order of Dismissal was entered on December 14, 2001. Accordingly, when the Order of Dismissal was entered, the tolling of the statute of limitations was lifted, leaving the statute of limitations to run March 21, 2002, unless additional payment of benefits are made. The majority opinion does not address these dates. Rather the majority finds that the claimant sought medical treatment on March 13, 2002, from Dr. Gregory, within one year of the December 2001 Order of Dismissal. The majority does not address last date of payment. There is no provision within the law that grants the claimant a one year grace period for "reviving" a claim that has been dismissed. It is well settled that the Savings Statute does not apply to workers' compensation claims. Boston v. Hickory Hills Property Assoc., F.C. opinion filed Jan. 9,

1991 (D804013). Although previous Commission opinions have alluded to such a right -- this right does not exist in the Workers' Compensation Act. We are statutorily mandated to strictly construe the Workers' Compensation chapter. Ark. Code Ann. §11-9-704(b)(3). The majority opinion oversteps this mandate.

Although the claimant sought medical treatment from Dr. Gregory on September 12, 2001, March 12, 2002, August 28, 2002, February 26, 2003, and August 13, 2003, the claimant has failed to put forth any evidence to prove by a preponderance of the evidence that the respondent knew of or should have known of this medical treatment. The only credible evidence reveals that the respondents did not pay for Dr. Gregory's treatment from November 21, 2000, through February 4, 2004. Thereafter, the record reflects that the last payment made by the respondent carrier to Dr. Gregory for treatment of the claimant's shoulder condition was for the August 16, 2004, appointment.

The claimant filed an AR-C for additional benefits on March 12, 2001. This claim was dismissed through an Order of Dismissal on December 13, 2001. As the respondent correctly asserts, here the claimant's claim was not re-

filed or recommenced until nearly three and a half years after the filing of his original Form AR-C, and a little over three years after an order dismissing this claim was filed by an Administrative Law Judge.

This claim is clearly distinguishable from Dillard v. Benton County Sheriff's Office, ___ Ark. App. ___, ___ S.W.3d ___ (2004), because, whereas the claimant in Dillard resumed his pursuit of additional benefits within the statutorily prescribed period of time after his claim was dismissed without prejudice, the claimant in the present case did not take any such action. It was not until after he sought medical treatment for his neck in February of 2005 that the claimant pursued additional medical benefits for that condition. In its discussion of claims for additional benefits, the Dillard court stated:

Further, a hearing request must be made within six months of the filing, or the claim may, upon motion and after hearing, if necessary, be dismissed without prejudice. Once a claim is dismissed, the claim is considered to have never been filed, unless a new claim is filed within the statutory period of time allowed by section 11-9-702, the statute of limitations will bar any subsequent claims.

In the present claim, there is no dispute as to which type of claim the claimant filed in March of 2001. A review of this claim shows that claimant was clearly seeking additional medical compensation for his neck and shoulder. Once the Administrative Law Judge dismissed this claim in December of 2001 for lack of prosecution, it was as if the claim had never been filed.

The claimant contends that his periodic follow-up appointments for his shoulder condition constitute continuing medical services for purposes of Ark. Code Ann. §11-9-702(b). Further, citing Plante v. Tyson Foods, Inc., 319 Ark. 126, 890 S.W.2d 253 (1994), as his authority, the claimant contends that a letter to the respondent carrier from Dr. Gregory dated November 6, 2000, provides not only evidence of continuing medical treatment pursuant to his 1995 injury, but actual or, at least, constructive knowledge to the respondent employer of his continuing medical treatment. According to Plante, it is well settled that the furnishing of medical services constitutes "payment of compensation" within the meaning of the limitations statute, and that such payment of compensation or furnishing of medical services tolls the running of the time for filing a

claim for additional compensation. Plante, supra; citing, Heflin v. Pepsi-Cola Bottling Co., 244 Ark. 195, 424 S.W.2d 365 (1968). The one-year limitations period begins to run from the last payment of compensation, which the Arkansas Supreme Court has held means from the date of the last furnishing of medical services. Plante, supra; citing, Superior Federal Savings and Loan Ass'n v. Shelby, 265 Ark. 599, 580 S.W.2d 201 (1971). However, the court has also stated that **employers and carriers must have either actual or constructive knowledge that medical services are being provided before they are deemed to have furnished medical services.** Plante, supra; citing, McFall v. United States Tobacco Co., 246 Ark. 43, 436 S.W.2d 838 (1969) (**emphasis added**). In the present claim, it is true that the claimant continued to receive intermittent medical treatment for both his shoulder and his neck until November of 2000. As previously discussed, the record reflects that the respondent carrier continued to pay Dr. Gregory for medical services through November 21, 2000, and commenced paying for those services again for treatment rendered by Dr Gregory in February of 2004. There is no evidence upon which we can rely to find that the carrier had either active or

constructive knowledge of any medical treatment between November 2000, and February 2004. Clearly, an employer does not have the burden of determining whether medical treatments are continuing; to the contrary, the burden remains on the claimant to act within the time allowed. Spencer v. Stone Container Corp., 72 Ark. App. 450, 38 S.W.3d 909 (2001). Even if the claimant did seek medical treatment from Dr. Gregory within one-year from the last payment of benefits on March 21, 2001, which would have kept the statute of limitations from running, the claimant has failed to prove that the respondents "furnished" this treatment through either active or constructive knowledge of its existence.

A review of the payment ledger contained within the record reveals that there was a gap in payment of benefits of any kind to the claimant, including medical services rendered on the claimant's behalf, from March 21, 2001, through at least June 20, 2003. Moreover, it must be noted that three entries in the payment ledger dated 6/20/03; 12/31/03; and 12/31/03 have been redacted so that it is impossible to know the details of those payments, i.e., who was paid and why. Given the paycodes, however, it

may be surmised that the June 20, 2003, and one of the December 31, 2003, payments were for attorney's fees, and one of the December 31, 2003, payments was for medical treatment. However the actual provider and date of service for this medical treatment has been redacted. The next payment registered in this ledger that can be specifically identified as payment for medical services rendered on the claimant's behalf, is a payment to Dr. Gregory made on January 13, 2005, for medical services rendered on February 4, 2004. It is the claimant's burden to prove that the entries made between June 20, 2003, and January 13, 2005 were for benefits paid directly on his behalf, and he has failed to do so. While the claimant may argue that the respondents redacted the information, there is no evidence that the claimant filed a motion to compel discovery to have the respondents provide them with a complete, unredacted exhibit.

Moreover, while the payment ledger reflects that respondents paid for the claimant's February 4, 2004 treatment by Dr. Gregory in 2005 for services rendered in 2004, the respondents could not revive the claim by the provision of additional benefits or treatment once the

statute of limitations has run. Woodard v. ITT Higbie Manufacturing Co., 271 Ark. 498, 609 S.W.2d 115 (Ark. App. 1980); Evans v. Northwest Tire Serv., 23 Ark. App. 11, 740 S.W.2d 151 (1987), *aff'd on other grounds*, Northwest Tire Serv. v. Evans, 295 Ark. 246, 748 S.W.2d 134 (1998).

Accordingly, for all the reasons stated herein, I must respectfully dissent from the majority's opinion.

KAREN H. MCKINNEY, Commissioner