

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E606338

WALTER KENT,  
EMPLOYEE

CLAIMANT

SINGLE SOURCE TRANSPORTATION,  
EMPLOYER

RESPONDENT

CRAWFORD & COMPANY,  
INSURANCE CARRIER

RESPONDENT

OPINION FILED NOVEMBER 16, 2007

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.

Respondent represented by the HONORABLE CAROL LOCKARD  
WORLEY, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

The Arkansas Court of Appeals has reversed and remanded the above-styled matter to the Full Commission. *Single Source Transportation, Inc. v. Kent*, CA06-1376 (June 6, 2007). Based on the remand from the Court of Appeals, and pursuant to our *de novo* review of the entire record, the Full Commission finds that the statute of limitations bars the instant claim for additional benefits.

I. HISTORY

The parties stipulated that the claimant sustained compensable injuries to his neck and left shoulder on August 22, 1995. In correspondence dated January 21, 1999, Dr. Barry M. Green opined that the claimant was at maximum medical improvement as of January 20, 1999. Dr. Freddie L. Contreras noted 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." On March 10, 1999, Dr. Green assigned the claimant a 9% whole-person impairment for the left shoulder. The record contains a Form AR-3, Physician's Report, indicating that the claimant was released from treatment as of March 10, 1999. The parties stipulated that the respondents accepted the injuries as compensable and paid benefits, including impairment ratings of 9% for the shoulder and 13% for the neck.

The claimant signed a Form AR-C, claim for compensation, on March 12, 2001. The claimant indicated on the Form AR-C that he was claiming Additional Medical

Expenses and Attorney Fees. However, an administrative law judge signed an ORDER OF DISMISSAL FILED DECEMBER 13, 2001:

Now on this 13<sup>th</sup> 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.

Dr. Gregory reported on March 13, 2002: "This patient returns today for follow up. He's in for a six month check up. He continues to have the difficulty with his shoulder. He also continues to work and I'm quite surprised that he can drive a truck considering the condition of his left shoulder....We'll see him back at his regular six month appointment or sooner if necessary."

Dr. Contreras operated on the claimant's cervical spine on April 18, 2005.

A pre-hearing order was filed on June 13, 2005. The claimant contended, among other things, that he was entitled to additional medical benefits. The respondents contended that all appropriate benefits had been and were being paid,

and that additional benefits for the claimant's neck were "likely barred by the statute of limitations."

An administrative law judge filed an opinion on October 4, 2005. The administrative law judge found, among other things, that the claimant was not barred by the statute of limitations. The respondents appealed to the Full Commission, which filed an opinion on October 4, 2006. The Full Commission found that the statute of limitations did not bar the claim, that the claimant was entitled to additional medical treatment including surgery by Dr. Contreras, and that the claimant was entitled to a period of temporary total disability.

The respondents appealed to the Arkansas Court of Appeals. The Court of Appeals has reversed and remanded.

## II. ADJUDICATION

The applicable statute of limitations is set out in Ark. Code Ann. §11-9-702(b) (Repl. 2002):

(b) TIME FOR FILING ADDITIONAL COMPENSATION. (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.

In the present matter, the claimant filed a claim for compensation on March 12, 2001. On December 13, 2001, the claimant was dismissed for failure to prosecute. The Court of Appeals notes that once a claim is dismissed for lack of prosecution, "the claim is considered to have never been filed, and unless a new claim is filed within the statutory period of time allowed by Ark. Code Ann. §11-9-702, the statute will bar any subsequent claims." The Court has directed the Commission to enter findings "regarding the time of the last payment of compensation prior to March 13, 2002."

In accordance with the remand from the Court of Appeals, the Full Commission finds that the statute of limitations bars the instant claim for additional benefits. Both parties have briefed the Commission following remand from the Court. The respondents assert that medical benefits were paid through November 21, 2000. A Crawford & Company pay sheet submitted of record indicates that a check was issued to Dr. Gregory on January 30, 2001 for the period ending November 21, 2000. The claimant states that he

received a payment from the respondent dated May 24, 2001. A Pay Sheet submitted into the record indeed shows that the claimant was issued a check for \$104.16 on May 24, 2001. The record therefore shows that the last payment of compensation prior to March 13, 2002 occurred on May 24, 2001.

Nevertheless, the claimant admits that the next payment was not made until September 24, 2004, a gap in payment of over three years. The one-year statute of limitations had expired no later than May 24, 2002. Once a claim has been barred by the passage of time, it cannot be revived by the furnishing of medical services. *See, Woodard v. ITT Higbie Mfg. Co.*, 271 Ark. 498, 609 S.W.2d 115 (1980). Since the instant claimant did not file a claim for additional benefits until, at the earliest, February 2005, his claim falls outside the applicable one-year statute of limitations.

Based on our *de novo* review of the entire record, and in accordance with the remand from the Court of Appeals, the Full Commission finds that the statute of limitations bars the instant claim for additional benefits. We therefore

reverse the opinion of the administrative law judge, and this claim is denied and dismissed.

IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

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KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

DISSENTING OPINION

\_\_\_\_\_The Majority errs in finding that this claim is barred by the statute of limitations. Although this claim was dismissed without prejudice in 2001, the respondent continued to furnish medical treatment through 2005. The respondent had actual, or, at least, constructive knowledge of this continued treatment because it paid for the treatment. The claimant properly re-filed this claim for additional benefits in 2005, well within one year from the last payment of compensation. Therefore, this claim for additional benefits is not barred by the applicable one-year

statute of limitations. As such, I must respectfully dissent.

PROCEDURAL HISTORY

The parties originally stipulated that the claimant suffered compensable injuries to his neck and left shoulder from an accident on August 22, 1995. A hearing was held on September 8, 2005, where the issues presented were 1) whether an additional neck injury was reasonably necessary and in connection with the compensable injuries, 2) whether the claimant was entitled to additional temporary total disability benefits, and 3) whether the statute of limitations would forever bar this claim. The Administrative Law Judge ruled that this claim was not barred by the statute of limitations and that the additional treatment received was reasonable, necessary, and in connection with the accepted injuries. This Commission was asked to review this claim and it affirmed the Administrative Law Judge's ruling. The respondent appealed that decision to the Court of Appeals and the Court of Appeals remanded this claim back to this Commission for further review. The Court of Appeals held that there is

no applicable "savings statute" and that the Order of Dismissal did not toll the statute of limitations. The Court of Appeals remanded this claim back for a finding on the last payment of compensation. Therefore, the single issue presented to this Commission is to determine the last date that compensation was paid.

#### FACTS

The claimant suffered a compensable injury to his neck and left shoulder on August 22, 1995, when the tractor-trailer he was driving crashed into a Black Brangus Bull standing in the middle of the road. The respondent accepted this claim and paid medical and indemnity benefits. The claimant underwent a cervical discectomy and fusion at C5-6 and C6-7, one year after the accident. Dr. Contreras performed the surgery and followed up with the claimant after surgery. The claimant was assigned a 13% impairment rating on January 27, 1999, for his neck injury. Dr. Contreras continued seeing the claimant for his neck injury through November 14, 2000. The claimant returned to Dr. Contreras on February 10, 2005, and eventually had to undergo a second surgery to his neck on April 18, 2005.

Dr. Gregory treated the claimant's left shoulder injury. The claimant originally underwent a surgery for his left shoulder injury on June 3, 1997, and continued regular treatment with Dr. Gregory through 2004. Dr. Collins issued an IME, stating that he believed that the claimant's need for additional treatment was not related to the work-related injury. However, Dr. Gregory stated that the claimant's need for additional treatment was related to the work-related injury. Dr. Gregory stated that, "the accident is the sole cause for his (claimant's) continued difficulty and further development of posttraumatic arthritis." Also, the claimant had no problems with his left shoulder before the accident.

The claimant filed a Form AR-C requesting additional medical expenses for this claim and attorney fees on March 12, 2001. The respondent filed a Motion to Dismiss and received an Order of Dismissal on December 13, 2001. The claimant filed another claim for additional benefits in June of 2005.

ARGUMENT

This Commission was correct when it ruled that this claim was not barred by the statute of limitations. A claim for additional benefits must be filed no more than one year from the last payment of compensation. See Ark. Code Ann. §11-9-702(b). The furnishing of medical treatment is considered payment of compensation and will toll the statute of limitations. Heflin v. Pepsi Cola, 244 Ark. 195, 424 S.W.2d 365 (1968). The treatment received is deemed to have been furnished if the respondent had actual or constructive knowledge of the treatment. Plante v. Tyson, 319 Ark. 126, 890 S.W.2d 253 (1994). However, the treatment furnished must be reasonably, necessary, and in connection with the compensable injuries. Northwest Tire Service v. Evans, 295 Ark. 246, 748 S.W.2d 134 (1988). It is clear that the claimant received continued treatment for his accepted injuries. Therefore, the issues are whether the respondent is deemed to have furnished this continued treatment and whether the treatment was reasonable, necessary, and in connection with the accepted injuries.

The claimant received continued treatment, at least once a year, from 1998 through 2005. The medical records show that the claimant initially saw Dr. Contreras from May 26, 1998, to November 14, 2000. The claimant returned to Dr. Contreras on February 10, 2005. There was a gap in treatment with Dr. Contreras from November 14, 2000, through February 10, 2005. However, the claimant was treating with Dr. Gregory for his left shoulder injury during this gap in treatment with Dr. Contreras. The records show that the claimant continued treating with Dr. Gregory, at least once a year, from September 12, 2001, through August 16, 2004. In fact, the records show that the claimant actually treated with Dr. Gregory, at least once a year, from 1998 through August 2, 2004.

The respondent had actual or, at least, constructive knowledge of the claimant's continued treatment because it paid for the treatment. The respondent produced a payment index of the payments it asserts that it made for this claim. The payment index shows that the respondent initially made payments on this claim, at least once a month, from October 25,

1995, through 2001. The payment index shows that the respondent paid the claimant \$104.16 on May 24, 2001, and then the index claims a three-year gap in any type of payments. This index shows that the next payment was not made until September 24, 2004, to Express Scripts, Inc.

Dr. Gregory's Patient Financial History shows that the respondents made continuous payments on this claim from 1997 through 2004. The Financial History index shows that Dr. Gregory's office received a check for \$108.00 from the respondent on April 22, 2002. This index also references a \$10.00 workers' compensation adjustment for this payment. This is another payment to Dr. Gregory's office from the respondent on October 7, 2002, for \$56.76, with a reference date of October 7, 2002, and a \$1.24 workers' compensation adjustment for the same date. There is another payment on June 19, 2003, and October 30, 2003. The respondent's payment index shows the payment to Express Script, Inc., on September 24, 2004, and October 8, 2004. The next payment is issued to Dr. Gregory on January 13, 2005. This claim for additional benefits was filed in June of

2005, and well within the applicable one year from the last payment of compensation.

Case law has found constructive knowledge with less proof. In the Plante case, the claimant underwent surgery and continued to see the surgeon for follow-up visits. The respondent never received the bills for these follow-up visits. However, the Court ruled that the respondent should have known of this continued treatment because the claimant's surgery had a 20% failure rate. In Spencer v. Stone Container Corp., 72 Ark. App. 450, 38 S.W.3d 909 (2001), the respondent was deemed to have constructive knowledge of the claimant's continued treatment because the respondent had "no reason to believe that treatment would cease." Id. at 912.

There is certainly more evidence that the respondent had actual or constructive knowledge in this claim. The respondent must have been billed for the claimant's additional treatment to his neck and left shoulder, because it paid for the claimant's additional treatment. In fact, the claimant received treatment from Dr. Gregory almost once every month from May of

1997 through August of 2004, and the respondent paid for this treatment. It is difficult to contend that the respondent had no knowledge of continued treatment that it was paying. Also, the respondent had no reason to believe that this treatment would cease, because the treatment was regular and continuous. It is evidence that the respondent had knowledge of this treatment and it continued to furnish treatment from 1995 through 2005.

The next issue is whether the claimant's treatment was reasonably, necessary, and in connection with the accepted injuries. The relevant treatment was for the claimant's left shoulder injury from 2001 through 2004, when the respondent claims a gap in payment. Dr. Gregory's records show that there was no gap in payment. The claimant's left shoulder injury required surgery with a partial claviclectomy, acromiectomy, and repair of the coracoacromial ligament on June 3, 1997. This respondent accepted and paid for this surgery. The claimant continued to see Dr. Gregory after the surgery. Dr. Gregory ordered continued treatment, including manipulations, x-rays, and

injections, through 2004. An IME from Dr. Collins states his opinion that the claimant's need for this additional treatment was not related to the accepted injury. However, the claimant's treating physician, Dr. Gregory, said otherwise. Dr. Gregory stated that:

the accident is the sole cause for his (claimant's) continued difficulty and further development of posttraumatic arthritis.

Also, the claimant testified that he had no difficulty with his shoulder before the accident. The medical records make no mention of left shoulder complaints prior to the accident, and there is no proof to the contrary. Finally, the respondent claims that this treatment was not reasonable, necessary, or in connection with the accepted injury. However, the records show that the respondent continued to pay for Dr. Gregory's treatment. Why would the respondent continue to pay for unrelated treatment?

More importantly, this issue has already been decided and is res judicata. This Commission already ruled that the claimant's additional left shoulder

treatment after 2001 continued to toll the statute of limitations. This Commission stated that:

[t]he present claimant obtained treatment for his left shoulder within one year of the December 2001 Order of Dismissal. . . the statute of limitations does not bar this claim.

The Court of Appeals remanded this claim for a finding on the date of last payment of compensation, and instructed this Commission to use that date instead of the date from the Order of Dismissal. This is simple. The respondent's own payment index shows that it initially made monthly payments for this claim through May 24, 2001, when it issued a check to the claimant for \$104.16. This payment to the claimant was made the very same year as the Order of Dismissal. This Commission has already ruled that the claimant received treatment for his left shoulder injury within one year of 2001 and that this additional treatment continued to toll the statute of limitations. Therefore, this Commission has already ruled that the claimant's continued left shoulder treatment was reasonable, necessary, and in

connection with the claimant's compensable injuries and would toll the statute of limitations.

The Court of Appeals ruled that there is no applicable "savings statute" and that it was incorrect to use the date of the Order of Dismissal as the tolling of the statute of limitations. Pursuant to both public policy concerns and prior Court of Appeals decisions, the Commission and the Court of Appeals have applied the "savings statute." By not allowing the savings statute, the courts are effectively limiting claimants to one additional claim for benefits after payment has ceased. This is at odds with prior workers' compensation laws and with prior opinions of the Court of Appeals. I cannot believe that Kent is to truly stand for such a harsh proposition, and I respectfully ask the Court for guidance.

The Commission has previously determined that an Order of Dismissal would not act as a statutory bar of a claim. See Sexton v. Atlas Carriers, Inc., Full Commission Opinion, Filed October, 13, 2003 (Claim No. E510879) citing Johnson v. Powell Oil Company, Full Commission Opinion, Filed August 26, 1999 (Claim No.

E114843). Both this Commission and the Court of Appeals have held that a claim for additional benefits will toll the statute of limitations, and that a dismissal of the claim without prejudice does not cease the tolling of the statute. Dillard v. Benton County Sheriff's Office, \_\_\_ Ark. App. \_\_\_, \_\_\_ S.W.3d \_\_\_ (September 22, 2004); Sexton, Id. The present case appears to be factually identical to both Dillard and Sexton.

In Dillard, the claimant filed a claim for benefits on June 5, 1998. The claim was dismissed for lack of prosecution in 1999, and the claimant re-filed his claim in 2000 and again in 2002. The Arkansas Court of Appeals held that these later claims were not time barred since the 1998 claim was timely filed, and the dismissal did not bar future action.

In the Sexton case, the claimant filed a timely claim on June 23, 1997, tolling the statute of limitations until that claim was dismissed by an Order filed on October 17, 2000. However, the limitations period had expired by the time that claim was dismissed on October 17, 2000, and the Administrative Law Judge felt that he must find that the statute of limitations

barred the filing of a subsequent claim. We reversed this decision, and ruled that the claim was not time barred or barred by the dismissal, since the first claim was timely filed. Also, we noted that such dismissals without prejudice were not a final appealable Order.

Id. The Order in this case was without prejudice, was filed well within the applicable statute of limitations, and would therefore not be considered a final appealable Order. Furthermore, I cannot believe that the purpose of a dismissal *without prejudice* is to bar future claims (emphasis added). In fact, the very name of the order suggests otherwise.

Additionally, it stands against reason, logic, and public policy that a saving's statute would not apply to Workers' Compensation cases. It is well known that workers' compensation claims may be in litigation for years, as an injured employee may experience additional medical problems following a hearing that may or may not have been addressed during the initial hearing. The savings statute allows the claimant to request additional medical benefits for injuries related to the compensable injury. Pending other litigation,

that would potentially end the claim. To create an across-the-board ban on the savings statute in workers' compensation would essentially limit the claimant to only one request for additional benefits if they were in the middle of litigation. To say that the savings statute does not apply would likely result in a scenario where a claimant has to file a claim for additional benefits despite the fact that pending litigation would end his claim entirely. Certainly if the claimant filed for additional benefits, he would not be ready to litigate and the respondents would simply file for an order of dismissal. If that order were not considered as tolling the statute, then the claimant's claim would end through no fault of his own. As such, it stands against public policy to eliminate the savings statute.

The present claim is not barred by the statute of limitations because it was filed within one year from the last payment of compensation. The records show that the claimant received regular treatment for his injuries through 2005. The respondent had actual knowledge or, at least, constructive knowledge of this treatment, because it continued to pay for the treatment. The

Commission has already ruled that the additional treatment to the left shoulder tolled the statute of limitations, but the Court of Appeals ruled that there is no applicable savings statute and that the Order of Dismissal in 2001 did not toll the statute of limitations. Regardless, the records show that the claimant received treatment paid for by the respondent through 2001 and beyond. Therefore, the statute of limitations does not bar the claimant's benefits.

For the aforementioned reasons, I must respectfully dissent.

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PHILIP A. HOOD, Commissioner