

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F304732

SUSAN CURTIS,  
EMPLOYEE

CLAIMANT

BIG LOTS INC.,  
EMPLOYER

RESPONDENT

SENTRY INSURANCE COMPANY,  
INSURANCE CARRIER

RESPONDENT

OPINION FILED APRIL 22, 2008

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

Claimant represented by the HONORABLE J. RANDOLPH SHOCK,  
Attorney at Law, Fort Smith, Arkansas.

Respondent represented by the HONORABLE MICHAEL L. WRIGHT,  
Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

The respondents appeal an administrative law judge's  
opinion filed September 5, 2007. The administrative law  
judge found that the claimant proved her claim for  
additional benefits was not barred by the statute of  
limitations. After reviewing the entire record *de novo*, the  
Full Commission reverses the opinion of the administrative

law judge. 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 her upper spine, left shoulder, and left upper extremity on August 8, 2002. Dr. J. Michael Standefer subsequently reported that he planned to perform a cervical discectomy with fusion, and the claimant testified that she underwent surgery on December 17, 2004. The claimant followed up with Dr. Standefer on June 28, 2005: "From my viewpoint, the patient is doing well. I have advised her of this. We will plan to release her from clinic as of today....No specific restriction need be applied. Permanent impairment rating is felt to be 9% as regards the body as a whole." The parties stipulated that the respondents accepted a 9 percent impairment to the whole body.

The claimant testified on direct examination:

Q. On May 24, 2006, our documentary exhibit is showing that you had a prescription done by Dr. Standefer for Cyclobenza - for a drug.

A. For Flexeril....

Q. What type of a drug is that?

A. It's a pain reliever and a muscle relaxer.

Q. And how is it that on May 24<sup>th</sup>, 2006, you attained that prescription from Dr. Standefer? Why did you -

A. It was on a refill....

Q. And is it something that you get - you ask for when you've had a particularly bad spell in your neck?

A. Yeah. When I asked for pain medicine, that's what Dr. Standefer prescribed me.

Q. And on May 24, 2006, did you ask for pain medication for your neck from Dr. Standefer and did he give you a scrip (sic)?

A. Yeah.

Q. And our financial log exhibit on Page 2 indicates that, in fact, that prescription and medical bill were paid for from those dates by the workers' comp insurer. Is that your understanding?

A. Yes, sir.

Q. In fact, you never paid for those drugs?

A. No. When I went to the pharmacy, I told them it was workmen's comp. They have me on file there.

Q. All right. Now, this spring we've alleged that you had an appointment scheduled with Dr. Standefer for March 27, 2007; is that correct?

A. Yes.

Q. Why had you called to make an appointment with Dr. Standefer?

A. I was just getting the pain down my arm again, tingling in my hand, pain in my neck. It was just - it's like the symptoms were coming back.

Q. The original symptoms from the injury were present again?

A. Yeah.

Q. All right. And did you go - were you able to keep that appointment with Dr. Standefer March 27, 2007?

A. No, sir. They called me the morning of the appointment and told me that workmen's comp had closed my case.

Q. Okay. At that point did you contact me?

A. Yes, sir.

Q. And on approximately April 8 - or excuse me - approximately April 3, 2007, we have a certificate of service on our response to prehearing questionnaire asking to come back to court to get you this additional treatment.

A. Uh-huh.

A pre-hearing order was filed on May 9, 2007. The claimant contended that the respondents "refused to authorize examination and treatment by the authorized treating physician, Dr. Standefer, scheduled for March 27, 2007." The respondents contended that the claimant's request for additional benefits was "barred by the statute of limitations, specifically more than two years after date of the injury and more than one year after the last receipt

of benefits. In this regard, respondents contend the claimant's 9 percent impairment rating was paid out as of August 27, 2005. Specifically, respondents contend that even though the impairment rating was not received until June 28, 2005, respondents were obligated to initiate and pay the permanent partial disability benefits effective the date the claimant reached maximum medical improvement and returned to work without limitations which occurred on or about February 13, 2005. Respondents, therefore, made an initial payment bringing current the accrued permanent partial disability benefits and continued thereafter to pay out the 9 percent impairment rating (40.5 weeks) which ended on or about August 27, 2005."

The parties agreed to litigate the following issues:  
"1. Additional medical. 2. Statute of limitations defense."

A hearing was held on August 16, 2007. At that time, counsel for the respondents agreed that the claimant was entitled to additional medical treatment if the statute of limitations did not bar the claim. The administrative law judge found, in pertinent part:

5. The claimant has proven by a preponderance of the evidence that her claim for additional

benefits is not barred by the statute of limitations. See discussion above. Also see Ark. Code Ann. §11-9-702.

6. The claimant has proven by a preponderance of the evidence that she is entitled to additional medical treatment for her compensable injury.

The respondents appeal to the Full Commission.

## II. ADJUDICATION

Ark. Code Ann. §11-9-702 (Repl. 2002) provides:

(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.

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

In the present matter, the claimant sustained a compensable injury on August 8, 2002. The parties on appeal agree that indemnity benefits were paid through November 21, 2005. The claimant therefore had until November 21, 2006 to file a claim for additional benefits. Ark. Code Ann. §11-9-702(b)(1). The claimant did not file a claim for additional

benefits until April 3, 2007, well outside the relevant statutory time period. The claimant argues that she actually received medical treatment from Dr. Standefer on May 24, 2006. The record indicates, however, that the claimant received a replacement of medicine on May 24, 2006 and did not see Dr. Standefer on that date. Replacement of medicine does not toll the running of the statute of limitations. Ark. Code Ann. §11-9-702(b)(2).

The claimant on appeal states for the first time that she actually filed a claim for additional benefits on May 12, 2003, and that this filing tolled the running of the statute of limitations. The respondents have submitted an Agreed Order signed by the administrative law judge on November 3, 2003 and assented to by counsel for both parties. The respondents contend that the claimant's May 12, 2003 request for additional benefits "was adjudicated and resolved" by effect of the November 3, 2003 Agreed Order. The Full Commission agrees with the respondents. The timely filing of a claim for additional benefits tolls the statute of limitations until the claim is decided. *Arkansas Power & Light Co. v. Giles*, 20 Ark. App. 154, 725 S.W.2d 583 (1987). The November 3, 2003 Agreed Order was

effectively an adjudication of the claimant's May 12, 2003 claim for additional benefits. The statute of limitations in the present matter was no longer tolled after entry of the November 3, 2003 Agreed Order.

Based on our *de novo* review of the entire record, the Full Commission finds that the statute of limitations bars the instant claim for additional benefits. We therefore reverse the decision 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

I must respectfully dissent from the majority's opinion. The majority, by reversing the Administrative Law Judge, finds that the statute of limitations bars the claimant's entitlement to additional benefits. Based upon a de novo review of the

record, I find that the statute of limitations does not bar the claimant's entitlement to additional benefits, and therefore, I must respectfully dissent.

The statute of limitations for additional benefits is contained in Ark. Code Ann. §11-9-702(b):

In cases in which any compensation, including disability or medical has been paid on account of injury, a claim for additional compensation shall be barred unless filed with the commission within one (1) year from the date of the last payment of compensation or two years from the date of the injury, whichever is greater.

Here, the claimant sustained a compensable injury on August 8, 2002. A claim for additional benefits was filed on May 12, 2003, within one year from the date of injury. The timely filing of a claim for additional benefits tolls the statute of limitations until the claim is decided. Arkansas Power & Light Co. v. Giles, 20 Ark. App. 154, 725 S.W. 2d 583 (1987); Spencer v. Stone Container Corp., 72 Ark. App. 450, 38 A.W. 3d 309 (2001). While a dismissal of a claim pursuant to Ark. Code Ann. §11-9-702 (d) has been ruled to "untoll" the statute of limitations, Dillard v. Benton County Sheriff's Office, 87 Ark. App. 379, 192 S.

W. 3d 287 (2004), the Court's holding in Dillard was specifically limited to cases dismissed pursuant to Ark. Code Ann. §11-9-702 (d). This case has not been dismissed pursuant to Ark. Code Ann. §11-9-702 (d), therefore, the majority's conclusion that the statute of limitations was somehow "untolled" by the entry of an Agreed Order on November 3, 2003 is clearly in error.

In VanWagner v. Wal-Mart Stores, Inc., 95 Ark. App. 173, \_\_ S.W 3d \_\_ (2006), a claimant's request for additional benefits was held to toll the applicable statute of limitations when the claim was neither litigated nor dismissed. Here, the November 3, 2003 Agreed Order simply states the following:

On this 3<sup>rd</sup> day of November 2003, the parties have agreed that this is a compensable claim and that respondents will be responsible for the payment of reasonable and necessary medical expenses related to the compensable injury; this includes the medical treatment the claimant sought at St. Edward's emergency room, including an MRI, and the subsequent treatment from Dr. McGraw and his referral to Dr. Standefer. Based upon this Agreed Order, and the execution of same, the Full Hearing scheduled in the matter for November 6, 2003, has been cancelled.

I find that the effect of November 3, 2003 Agreed Order is nothing more than a memorialization of the reasoning behind the cancellation of the November 6, 2003 hearing. The November 3, 2003 Agreed Order clearly did not dispose of all the issues in the claim, and clearly does not reflect either litigation or dismissal of the claimant's request for additional benefits. See VanWagner, Id.

Finally, the majority's conclusion that the statute of limitations was "untolled" by the November 3, 2003 Agreed Order is erroneous because the November 3, 2003 Agreed Order was not a final order. The Commission has previously found on several occasions that the statute of limitations does not commence to run again until there is a final order ending the litigation or adjudication of the claim for additional benefits. See Shelly S. Cooper v. Cleo, Inc. Full Workers' Compensation Commission, Opinion filed March 29, 2000 (E518275); Michelle T. Underwood v. TEC, Full Workers' Compensation Commission Opinion filed April 15, 1992 (D708150); Bernie Barker v. National Transportation, Full Workers' Compensation Commission, Opinion filed

August 19, 1993. To be final, an order must dismiss the parties from the court, discharge them from the action, or conclude their rights as to the subject matter in controversy. Erwin v. Riverside Furniture Corp., 97 Ark. App. 42, \_\_S.W. 3d\_\_ (2006); TEC v. Faulkner, 38 Ark. App. 13, 827 S.W. 2d 661 (1992). As stated above, the November 3, 2003 Agreed Order did not reflect dismissal, discharge or the conclusion of the claimant's rights as to the subject matter in controversy, and therefore, could not have caused the statute of limitations to run from that date.

In conclusion, I find that as the claimant filed a timely request for additional benefits which tolled the statute of limitations, and as the issue of claimant's entitlement to additional benefits has never been litigated nor dismissed, and as the claim has not been dismissed pursuant to Ark. Code Ann. §11-9-702 (d), the statute of limitations has not been "untolled" by the November 3, 2003 Agreed Order. Furthermore, as the parties stipulated that if the claimant's claim is not barred by the statute of limitations she is entitled to additional medical treatment, I find that the

respondents are liable for additional reasonable and necessary medical treatment from the claimant's authorized treating physician.

For the aforementioned reasons I must respectfully dissent.

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PHILIP A. HOOD, Commissioner