

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F201657

JESSE HENDERSON, EMPLOYEE	CLAIMANT
POOL FISHERIES AIR FREIGHT, INC., EMPLOYER	RESPONDENT
AMERICAN HOME ASSURANCE COMPANY, c/o AIG CLAIM SERVICES, (TPA), INSURANCE CARRIER	RESPONDENT

OPINION FILED FEBRUARY 21, 2008

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

Claimant appeared pro se.

Respondents represented by the HONORABLE CAROL L. WORLEY, 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 August 3, 2007. 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. The employer/employee/carrier relationship existed on February 4,

2002, when claimant sustained bilateral compensable injuries to his elbows.

3. The claimant's earnings were sufficient to entitle him to a compensation rate of \$425.00 for temporary total disability and \$319.00 for permanent partial disability benefits.
4. The claimant received a 7% permanent partial impairment rating to his left arm which rating was accepted and paid by the respondents.
5. The last payment of permanent partial disability benefits was on October 9, 2002.
6. The hearing request for additional benefits was submitted on December 13, 2006.
7. One year from the last payment of benefits would have been October 9, 2003.
8. Based on the preponderance of the evidence, I find that the claim for a medical evaluation and replacement radial head procedures are not barred by the statute of limitations.
9. Based on the preponderance of the evidence, I find that the respondents are estopped from asserting the statute of limitations to preclude the treatment sought by claimant.

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 August 3, 2007, 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 after July 1, 2001, the claimant's attorney's fee is governed by the provisions of Ark. Code Ann. § 11-9-715 as amended by 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 \$500.00 in accordance with Ark. Code Ann. § 11-9-715(b) (Repl. 2002).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

PHILIP A. HOOD, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I must respectfully dissent from the majority opinion finding that the respondents are estopped from asserting a statute of limitations defense. The claimant sustained an admittedly compensable injury to both his arms on February 4, 2002. Claimant's right arm was minimally displaced and was treated with a cast. However, claimant's left arm was comminuted and dislocated which required surgery for a radial head replacement. After undergoing successful treatment and healing, the claimant was released with a 7% permanent partial impairment to the left arm on August 1, 2002. The last payment for permanent partial disability benefits was made on October 9, 2002.

Upon questioning by the Administrative Law Judge, the claimant testified that after receiving the

check for his impairment rating he called the workers' compensation carrier about the "settlement" and was told that the radial head replacement was no longer their responsibility and that he could seek payment for its replacement from his regular health care insurance. The claimant did not identify the adjuster with whom he spoke nor did he produce any type of documentation to verify this alleged conversation. When asked by the Administrative Law Judge what he would have done had the adjuster not told him that, the claimant stated:

I probably would have contacted an attorney and made sure that this claim stayed open so I would be covered down the road. I would not have accepted their check.

But they did tell me at that time that that check was not - - that was just to cover a certain percentage of permanent disability. It wasn't like a settlement check to close the claim.

On cross-examination, the claimant agree that it was possible that the adjuster simply told him that since he had been rated and did not require any additional medical treatment, his file was closed; and that in the event he should have any problems with his arm, that he should turn those over to his private health insurance.

First, I find that the claimant has failed to prove by a preponderance of the evidence that the respondents are estopped from asserting a statute of limitations defense. I note that the claimant did not claim the estoppel defense. Rather the record reveals that the Administrative Law Judge brought up this affirmative defense on behalf of the claimant during the hearing. As such, the respondents were denied the right to investigate and defend against this affirmative defense in a proper manner. Nevertheless, even if one were to consider this defense, the claimant has failed to prove by a preponderance of the evidence the elements necessary to establish estoppel.

Southern Hospitalities v. Britain, 54 Ark. App. 318, 925 S.W.2d 81(1996) provides:

The necessary elements of estoppel are:

(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 a right to believe the other 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.

The claimant did not assert estoppel on his own behalf. Nevertheless, he has failed to prove the actual subject of his alleged conversation with the unnamed representative from the workers' compensation carrier. Claimant's own admissions regarding this alleged conversation are confusing. The claimant testified that had he been told something different, he would not have cashed the check and settled his claim; yet he admits that he was told that the check was not a settlement check, but rather a payment on a disability rating. The claimant, therefore, knew or should have known, that his claim was not settled and closed. It was unknown when or whether the claimant was to require any additional medical treatment and it is customary to advise a claimant upon closing a workers' compensation file, that they can seek treatment from their private health insurance. This is not to say that the claimant was advised that he could not file a claim or seek additional benefits from the workers' compensation carrier. At one point, when questioned by the Administrative Law Judge, the claimant testified that he was told that his radial head replacement was no longer the workers' compensation carriers responsibility and that "a durable medical prosthesis is covered under your regular health care insurance." I simply do not find

that there is sufficient evidence to establish that this specific conversation occurred. Moreover, this statement is so outlandish as there would be no way for the workers' compensation adjuster to know what is or is not covered under the claimant's private health care policy. The claimant was only six months out from surgery and had been assigned a 7% permanent impairment rating when he alleges that some unnamed representative made this statement. We have not been provided with the date of this alleged conversation nor the name of the representative. Moreover, this alleged conversation was sprung on the respondents at the hearing, denying them the opportunity to research their claim records to determine with whom the claimant allegedly spoke.

Accordingly, I find that the claimant has failed to prove that the respondents intended for the claimant to let the statute of limitations run on his claim by misleading him into believing that his treatment would be covered by private health insurance. Therefore, I find that the respondents are not estopped from asserting a statute of limitations defense.

With regard to additional medical treatment. The claimant did not feel the need to seek any additional treatment until December of 2006 when he wanted to have his elbow looked at and x-rayed. To date,

the claimant has not received any treatment since his treating surgeon's office advised him that the workers' compensation carrier would not pay for any further treatment because the statute of limitations had run. The claimant testified that rather than pay for treatment on his own, he filed a request for a hearing on December 13, 2006.

Arkansas Code Annotated § 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 last payment of compensation or two (2) years from the date of 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.

The burden of proof rests upon the claimant to prove his 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 his 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).

The record reveals that the claimant sustained his compensable injury on February 4, 2002, and that he last received benefits on October 9, 2002. Accordingly, pursuant to A.C.A. § 11-9-702(b), the last date to file a claim for additional benefits was February 4, 2004. The claimant did not file his claim until December 13, 2006. Therefore, the statute of limitations ran on the filing of additional claims prior to the claimant's December 13, 2006, request for additional benefits ever being filed with the Commission. Accordingly, I find

that this claim for additional medical benefits is barred by the statute of limitations.

This is not to find, however, that the claimant may not receive additional medical treatment to replace the radial head of his left elbow. Although the statute of limitations has run on all indemnity and medical benefits, A.C.A. § 11-9-702(b)(2) operates to allow the claimant the specific benefit of replacement of an "artificial limb" or "other apparatus permanently or indefinitely required as a result of a compensable injury...." Accordingly, should the claimant ever require that his prosthesis be replaced, this subsection prevents the statute of limitations from closing out this replacement benefit. However, as we are required to strictly construe the act, and are prohibited from liberalizing, broadening, or narrowing the scope of the workers' compensation statutes, I find that subsection (b)(2) does not allow for medical maintenance benefits only replacement costs. A.C.A. §§ 11-9-704(c)(3) and 11-9-1001.

Accordingly, I find that the decision of the Administrative Law Judge finding that the statute of limitations does not bar the claimant's present claim for benefits must be reversed, as the claim was not filed until after the statute of limitation had run.

Therefore, for all the reasons set forth herein, I must respectfully dissent from the majority opinion.

KAREN H. MCKINNEY, Commissioner