

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F400639

ALICE KENT, EMPLOYEE	CLAIMANT
WAL-MART STORES, INC., SELF-INSURED EMPLOYER	RESPONDENT

OPINION FILED FEBRUARY 26, 2008

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

Claimant represented by the HONORABLE EVELYN BROOKS, Attorney at Law, Fayetteville, Arkansas.

Respondents represented by the HONORABLE CURTIS NEBBEN, Attorney at Law, Fayetteville, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

Respondents appeal an opinion and order of the Administrative Law Judge filed September 4, 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. On September 24, 2003, the relationship of employee-self insured employer-third party administrator existed between the parties.

3. On September 24, 2003, the claimant sustained a compensable injury to her right foot.
4. All medical expenses for the claimant's compensable injury, which have been incurred to date, have been paid.
5. An evaluation of the claimant's right foot difficulties by an orthopedic specialist in the area of her current residence, represents a reasonably necessary medical service, under Ark. Code Ann. §11-9-508. Pursuant to the provisions of this subsection, the respondent is obligated to provide the claimant with such services at the respondent's expense. It is the right and obligation of the respondent to select or obtain such an appropriate medical provider.
6. For the reasons heretofore stated in this Opinion, the current claim for additional medical services is not barred by the statute of limitations that is contained in Ark. Code Ann. §11-9-702(b). Specifically, this claim was timely filed and the respondent is estopped from raising the statute of limitations.
7. The respondent has controverted the claimant's entitlement to any additional benefits.
8. As no controverted benefits have been herein awarded to the claimant, no controverted attorney's fee can be awarded to her attorney.

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 September 4, 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's finding that the claimant's claim for benefits was not barred by the statute of limitations. Based upon my de novo review of the record, I find that the claimant's claim for benefits is barred by the statute of limitations.

The claimant sustained an admittedly compensable injury to her right foot on September 24, 2003. The respondent paid all the claimant's medical expenses through her last visit with Dr. Jason Pleimann on January 26, 2005. In the early part of 2005, the claimant filed a claim for additional benefits with the Commission. The respondent's filed a motion to dismiss which was granted after a hearing on the motion was held on August 29, 2005. The order of dismissal without prejudice was not appealed. By letter dated September 8,

2005, the claimant requested the Commission's help in obtaining medical treatment in Florida. The claimant had subsequently moved to Florida. The letter was forwarded to the Commission's Medical Cost Containment Division as it appeared to be a request for a change of physician. By a letter dated September 19, 2005, Pat Hannah advised the claimant's attorney that she did not consider this to be a situation where a change of physician was necessary or appropriate. She directed the claimant to seek authorization from the respondent. The respondent was copied on the letter. On October 11, 2005, the respondent conditionally authorized Dr. Ted Northrup to provide treatment to the claimant. On November 18, 2005, Dr. Northrup advised the respondent that he would not abide by the Arkansas medical fee schedule therefore he would not treat the claimant. The claimant was advised of this and filed a claim for additional benefits on September 28, 2006. The respondent's contended that the claim was barred by the statute of limitations and I agree.

A review of the relevant statutes and case law demonstrates that the statute of limitations bars the claimant's claim for benefits. Ark. Code Ann. §11-9-702 provides in pertinent part:

(b) TIME FOR FILING ADDITIONAL
COMPENSATION.

(1) 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 (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, when 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.

(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.

The Court of Appeals has stated 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." Kent v. Single Source Transportation, Ark. App. , S.W.3d (2007). Further, the filing of a claim for additional benefits tolls the running of the statute of limitations. Spencer v. Stone Container Corp., 72 Ark. App. 450, 38 S.W.3d 909 (2001).

Ark. Code Ann. §11-9-702(c) provides that any claim for additional compensation must be specific or it will not be considered. The question presented to the Commission is whether or not the claimant's request sent in September of 2005 was tantamount to a claim for a change of physician, which can be a claim for additional benefits according to Spencer. In my opinion, this letter was not a request for a change of physician and therefore did not toll the statute. The statute of limitations very clearly barred the claimant's claim for additional benefits filed in September of 2006, as January 26, 2006, was one year from the date she last received medical treatment.

The letter the claimant sent to the Commission was NOT considered by the Commission's Medical Cost Containment Division to be a request for a change of physician. In fact, Pat Hannah, director of the Division, stated in her response to the claimant dated September 19, 2005:

We have received your recent request for a change of physician for Ms. Kent. However, like you, we do not consider a change necessitated by relocation to be an actual change of physician. A claimant has the right to change her residence and the respondents have the obligation to provide her with all reasonable and necessary treatment for her work related injury...

It is obvious from this letter that the claimant's attorney did not consider this to be a request for a change of physician. Further, this request can not be considered a request for additional benefits. The statute clearly states that any claims for additional compensation must be specifically stated.

Moreover, the claimant was informed by respondent well in advance of January that Dr. Northrup would not adhere to the Arkansas medical fee schedule. The claimant still had two months before the statute of limitations expired to file a claim for additional benefits but instead did nothing for almost ten months. The respondents made every effort to arrange for medical treatment for the claimant when she moved to Florida. When they were unsuccessful, counsel for the claimant was informed. The claimant's counsel advised the respondents that it would no longer be necessary since the claimant was moving to the Atlanta area. The burden

is not on the carrier to find out whether medical treatments are needed or continuing. The burden is on the claimant to act within the time allowed. Superior Fed. Sav. & Loan Ass'n v. Shelby, 265 Ark. 599, 580 S.W.2d 201 (1979). The claimant clearly failed to act within the time allowed. Therefore, for all the reasons set forth herein, I must respectfully dissent from the majority finding that the statute of limitations did not bar the claimant's claim.

KAREN H. MCKINNEY, Commissioner