

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NOS. E905906 & F002818

DEBRA K. WHEELER, EMPLOYEE	CLAIMANT
CARE MANOR OF BAXTER COUNTY, EMPLOYER	RESPONDENT NO. 1
RISK MANAGEMENT RESOURCES, INSURANCE CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT NO. 3

OPINION FILED APRIL 22, 2008

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

Claimant represented by the HONORABLE FREDERICK S. "RICK" SPENCER, Attorney at Law, Mountain Home, Arkansas.

Respondent No. 1 represented by the HONORABLE MELISSA WOOD, 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 September 21, 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 the within claim.
2. The employee-employer relationship existed at all relevant times, including May 10, 1999 and March 5, 2000.
3. The claimant suffered injuries on May 10, 1999 and March 5, 2000, while working for the respondent.
4. The preponderance of the evidence demonstrates that the claimant is not barred by the statute of limitations from receiving appropriate benefits.
5. The claimant's Motion to Recuse is denied and her constitutional challenges of the Act are found to be without merit pursuant to Long v. Wal-Mart Stores, Inc., Ark. App. ___, ___, S.W.3d ___, (Ark. Ct. App. Feb 21, 2007).

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 21, 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 prior to July 1, 2001, the claimant's attorney's fee is governed by the provisions of Ark. Code Ann. § 11-9-715 as it existed prior to the amendments of 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 \$250.00 in accordance with Ark. Code Ann. § 11-9-715(b) (Repl. 1996).

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 claimant's claim for additional medical treatment 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 additional medical treatment is barred by the statute of limitations.

The claimant sustained admittedly compensable injuries while working for the respondent employer on May 10, 1999, and March 5, 2000. The respondents have paid benefits. The claimant filed a claim for additional benefits and an order was issued by Judge Daniels on April 4, 2001 granting the claimant's request for additional benefits. The Full Commission affirmed the Administrative Law Judge's decision on January 31, 2002. The claimant filed a request for change of physician and it was granted on February 27, 2003. The respondent's last paid for medical services for the claimant on May 28, 2002 for a functional capacity evaluation (FCE). The claimant filed a request for a hearing on October 7, 2003 and again on February 18, 2005. At this time the claimant contended that she was entitled to additional medical treatment for her compensable May 10, 1999 and March 5, 2000 injuries. The respondents contended that the statute of limitations barred the claimant's claim.

The Administrative Law Judge found that the claim was not for additional benefits but it was a request for enforcement of a prior opinion, i.e. Judge Daniels April 4, 2001 award. In my opinion, this claim is barred by the statute of limitations.

Ark. Code Ann. §11-9-702(b) provides:

(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 evidence indicates that the claimant sustained her last injury on March 5, 2000. She filed a Form C on July 19, 2000 that indicated she was making a claim for additional benefits. This was adjudicated on March 7, 2001 before Judge Daniels. He issued an opinion on April 4, 2001. The issues presented at the hearing were whether the claimant suffered a recurrence or a new injury on March 5, 2000, whether the correct compensation rate was being paid, whether the claimant was entitled to additional medical treatment, and an attorney fee. Judge Daniels found that the claimant sustained a recurrence and awarded benefits. The Full Commission affirmed his findings on January 31, 2002. The respondent's last paid benefits on the claimant's behalf in May of 2002 when she underwent a FCE. Two years from the date of injury would be March 5, 2002 and one year from the last payment of benefits would be May of 2003. This claim for additional benefits was filed well after May of 2003.

The evidence indicates that the claimant had been seeing Dr. Burnett prior to obtaining the change of physician to Dr. Burnett in February of 2003. The claimant had been seeing Dr. Burnett as her family physician for a variety of other unrelated medical problems. In fact, by a letter dated May 7, 2003, from

respondent's counsel Carol Worley, the respondent's denied payment for medical expenses. These included the following charges and why they were denied:

5/20/02 - ER visit for pain shot
(not reasonable and necessary as the
claimant has a treating physician
8/21/02 - Unrelated, the claimant
fell down stairs;
8/23/02 - Follow-up from fall, unrelated;
9/2/02 - Follow up from fall, unrelated;
9/4/02 - Whole body scan, unrelated.

The claimant contended that the respondent's had constructive knowledge of the care the claimant received related to her compensable injury after the last payment of benefits. However, my review of the evidence indicates that this knowledge did not exist. The respondent's offered the testimony of Misty Thompson, the claims adjuster on this case. She provided very clear testimony:

Q. When was the last time any physician or physician's office contacted you for any type of authorization for treatment?

A. It would have been in May of 2002 for the authorization for the FCE. And we contacted by the FCE facility as well as Dr. Foster's office.

Q. And that's something you approved?

A. Yes.

Q. When is the last payment of TTD you made on this claim?

A. September 2000.

Q. And then she did get a 2% rating for her shoulder. Is that correct?

A. Yes.

Q. When was your last payment of PPD?

A. May the 21st of 2002.

Q. Now if the judge looks at the printout of benefits that are paid in this matter, there is a payment for medical in May of 2003, the date of service 2001. Is that correct?

A. Yes.

Q. Have you gotten any notification of any liens for Medicare?

A. No. We haven't gotten anything.

Q. Did you have any idea... Ms. Wheeler was treating with Dr. Travis Richardson?

A. No. The first notice we had of any additional treatment since 2002 was in 2006, and we got correspondence from your office which you had received from Mr. Spencer.

Q. Did you approve any treatment with Dr. Richardson?

A. We've never been contacted by Dr. Richardson's office.

Q. Have you approved any treatment for an ankle or a knee?

A. No.

Q. What about sleep apnea?

A. No.

Q. What about osteoporosis?

A. No. But we've never been contacted for approval of it either.

The evidence demonstrates that Ms. Thompson has not been contacted for approval of treatment subsequent to May of 2002 when she gave approval for a FCE. Ms. Thompson also testified that she has experience with Dr. Burnett's office and that his office is normally "really good" about calling and get authorization for treatment. She has not been contacted by Dr. Burnett's office since her last payment of benefits.

The claimant offered the testimony of Mr. Spencer's paralegal, Shirley Luna. Ms. Luna testified that she sends out medical bills and records to opposing attorneys even on controverted claims. Ms. Luna was not aware of the claimant's unrelated fall in 2002. In my opinion, the actions of Ms. Luna of sending out medical bills and records does not toll the statute of limitations.

The claimant requested a hearing on October 7, 2003, on the issue seeking payment for unpaid medical bills. The respondent's attorney responded as noted

above, that these expenses were unrelated to the claimant's compensable injury. No litigation took place and one can only conclude that if there were actually unpaid bills related to her compensable injury the issue would have gone to a hearing. It did not.

In my opinion, for the claimant to now argue that the respondent's had constructive notice that she was receiving medical treatment is incredulous. The respondent's are not responsible for checking in with the claimant to see if she is receiving treatment. The burden is on the claimant to prove her case. Not the respondent's. The claimant's submission of unrelated medical bills and records does not give notice of treatment related to the claimant's compensable injury. Nor does it toll the statute of limitations. The burden is not on the respondent's to check on the claimant after she sought a change of physician and see what treatment, if any, she was receiving. The claimant was treating with Dr. Burnett prior to the change of physician and in fact submitted bills from those prior visits after the change of physician was approved. However, these were for unrelated medical problems and not for treatment of the claimant's compensable injury.

When I consider the fact that the last payment of medical benefits is in May of 2002, and the request

for a hearing was not made until February of 2005, I find that the statute of limitations bars the claimant's claim for additional benefits. Therefore, for all the reasons set forth herein, I must respectfully dissent from the majority opinion.

KAREN H. MCKINNEY, Commissioner