

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
CLAIM NO.: G005111**

RUBEN PATE, Employee	CLAIMANT
FOOD GIANT SUPER MARKETS, INC., Employer	RESPONDENT NO. 1
FEDERAL INSURANCE COMPANY, Carrier	RESPONDENT NO. 1
CHUBB GROUP, TPA	RESPONDENT NO. 1
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT NO. 2

OPINION AND ORDER FILED SEPTEMBER 8, 2021

Hearing conducted before ADMINISTRATIVE LAW JUDGE TERRY DON LUCY, in Craighead County, Arkansas.

Counsel for the Claimant: HONORABLE SCOTT HUNTER, JR., Attorney at Law, Jonesboro, Arkansas.

Counsel for Respondents No. 1: HONORABLE DAVID C. JONES, Attorney at Law, Little Rock, Arkansas.

Counsel for Respondent No. 2: HONORABLE DAVID PAKE, Attorney at Law, Little Rock, Arkansas.

Statement of the Case

The above-captioned matter came on for a hearing on June 11, 2021, before the undersigned Administrative Law Judge. A pre-hearing Order was entered in this matter on January 27, 2021, which reflected the following stipulations:

- (1) The Arkansas Workers' Compensation Commission has jurisdiction of this claim;
- (2) The employee/employer/carrier/TPA relationship existed at all relevant times, including June 8, 2010, at which time the Claimant sustained a compensable injury to his right knee for which certain benefits have been paid by Respondents No. 1; and,
- (3) The Claimant's average weekly wage at the time of his compensable injury was sufficient to entitle him to compensation rates of \$502.00 and \$377.00 for temporary total and permanent

partial disability benefits, respectively.

The pre-hearing Order also reflected the issues to be adjudicated, as set forth below:

- (1) Whether the Claimant is entitled to additional reasonably necessary medical treatment in association with his initially compensable right knee injury of June 8, 2010; and,
- (2) Whether the applicable statute of limitations bars the Claimant's present claim.

All other issues were reserved. During preliminary discussions, it was noted that Respondent No. 2 had waived its appearance at the hearing and would defer to the outcome of litigation as reflected in the pre-hearing Order of January 27, 2021. (TR 5) Thereafter, the pre-hearing Order of January 27, 2021, was introduced into the record without objection as Commission Exhibit No. 1. (TR 8) In addition, the appearing parties' respective exhibits were likewise introduced into the record without objection. (TR 9-11)

Findings of Fact and Conclusions of Law

- (1) The parties' stipulations are accepted as findings of fact herein, inclusive of the Commission's jurisdiction over this claim;
- (2) The Claimant's present claim is barred by the applicable statute of limitations; and,
- (3) All other issues are rendered moot.

Applicable Law

The party bearing the burden of proof in a workers' compensation matter must establish such by a preponderance of the evidence. See Ark. Code Ann. §§11-9-704(c)(2) and 11-9-705(a)(3).

With respect to limitations issues, Ark. Code Ann. §11-9-702(b) and (c) provide as follows:

(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.

Also, it is long-settled that the questions concerning the credibility of witnesses and the weight to be given their testimony are within the exclusive province of the Commission. (See, for instance, *Yates v. Boar's Head Provisions Co.*, 2017 Ark. App. 133 (2017)). It is further well-settled that determinations of compensability may turn solely upon matters of weight and credibility, particularly when such matters relate to a given claimant's credibility. (See *Yates, supra*. In addition, see *Daniel v. Wal-Mart Stores, Inc.*, 2014 Ark. App. 671 (2014); *Kanu-Polk v. Conway Human Dev. Ctr.*, 2011 Ark. App. 779 (2011); and *Lee v. Dr. Pepper Bottling Co.*, 74 Ark. App. 43 (Ark. App. 2011)). Finally, a claimant's testimony is never considered to be uncontroverted. *Gentry v. Ark. Oil Field Servs.*, 2011 Ark. App. 786 (2011) (citing *Nix v. Wilson World Hotel*, 46 Ark. App. 303 (1994)).

Testimony

Ruben Pate

The Claimant testified that he began working for Respondent Employer in 2004 and was a store manager at the time of his compensable right knee injury of June 8, 2010. On such date, the Claimant suffered a slip-and-fall injury and landed on his right knee. The Claimant duly reported such event on the day of the occurrence and received an evaluation from the designated company physician the following day, upon which he received a referral to Dr. Henry Stroope, an orthopedic surgeon. (TR 14-15)

According to the Claimant, Dr. Stroope suspected a meniscus tear that was apparently confirmed by an MRI scan. (TR 15-16) Dr. Stroope subsequently performed surgery on January 5, 2011. Although the Claimant testified that he was "pretty good" post-operatively, he continued to experience problems and thereafter in 2011 began receiving Synvisc injections every six months at Dr. Stroope's direction and eventually returned to work for a different employer. (TR 16-18) The Claimant further testified that he believed the last injection he received for his right knee was sometime in 2020. (TR 20)

During cross-examination, the Claimant conceded that he had sustained a previous injury to his right knee in 2007 that had also been treated by Dr. Stroope and involved surgical intervention by the latter. (TR 21-22) In addition, the Claimant initially denied any recollection of having fallen down some stairs in 2013; however, when questioned further with respect to a second fall downstairs in 2013, the Claimant stated, "Separate incident, I think." (TR 26-28) Discussion of the remainder of the Claimant's testimony upon cross-examination, though reviewed and taken into account, is not necessary with respect to the findings of fact herein reached.

Medical/Documentary Evidence

I have reviewed the entirety of the medical and documentary evidence presented herein. The most salient and relevant of such reflects that, post-injury, the Claimant underwent an arthroscopy of his right knee on January 5, 2011, performed by Dr. Henry Stroope and which revealed an intact meniscus and no acute changes. (CX 1 at 1) Thereafter, at Dr. Stroope's direction, the Claimant began a series of ongoing Visco Supplementation injections to his right knee on March 17, 2011, which thereafter continued at approximately six-month intervals through August 3, 2016. (CX 1 at 5-27)

On August 23, 2016, the Claimant presented to Dr. Charles Pearce for an Independent Medical Evaluation with respect to his right knee. Dr. Pearce concluded that continued Synvisc injections every six months was reasonable and that, due to his size, the Claimant was not a candidate for knee replacement and had few other options apart from continued injections. (CX 1 at 28-29). Subsequently, the Claimant presented to Dr. Jason Brandt on March 6, 2017, for an additional injection. (CX 1 at 30-31) Apparently, the Claimant did not return to Dr. Brandt until May 22, 2018, at which point he again started to receive Synvisc injections on an approximate six-month basis through February 3, 2020. (CX 1 at 32-42)

It appears that the Claimant had suffered from previous right knee issues addressed by Dr. Stroope in 2007, which ultimately required surgical drainage of a large hematoma/seroma on June 12, 2007. (RX 1 at 1-8) Following the surgery performed by Dr. Stroope on January 5, 2011, in relation to the Claimant's compensable right knee injury of June 8, 2010, Dr. Stroope opined on March 17, 2011, that the Claimant could return to work without restrictions as of April 4, 2011. (RX 1 at 17) It also appears that the Claimant sought medical care on February 14, 2013, with respect to his lower back and right leg following a downstairs fall two weeks prior. (RX 1 at 19)

A similar episode seems to have subsequently occurred on August 23, 2013, when the Claimant presented to St. Bernard's Medical Center and described "right knee and leg pain secondary to falling down 6 stairs...Just prior to arrival." (RX 1 at 30)

According to Claimant's Exhibit No. 2, he was issued mileage reimbursement by the Respondents on October 30, 2020, in the amount he had claimed of \$365.50 for dates of service ranging from August 2, 2016, through September 30, 2020. Notably, the mileage claim is dated, presumably by the Claimant, October 21, 2020. (CX 2 at 3-4)

Respondents' Exhibit No. 2 reflects that the Claimant filed a Form AR-C on his own behalf on February 28, 2019, which specifically requested additional medical benefits. (RX 2 at 1) The remainder of Respondents' Exhibit No. 2 further reflects that payment was made for medical services on the Claimant's behalf beginning with a date of service of June, 2010, through a date of service of December 20, 2018. (RX 2 at 6-26). It appears from the same exhibit that, apart from payments for a peer review issued on August 19, 2019, and March 11, 2020, the Respondents next paid medical benefits on the Claimant's behalf with respect to a date of service of February 3, 2020. (RX 2 at 6)

Adjudication

In addition to the statutory law cited above, there is venerable case law which establishes the date of service for accepted medical care as controlling with respect to the limitations period as opposed to the date of payment for such. *Heflin v. Pepsi Cola Bottling Co.*, 244 Ark. 195, 424 S.W. 365 (Ark. 1968) According to the record, the last date of compensated medical services on the Claimant's behalf took place on February 3, 2020, following his previously last compensated medical services of December 20, 2018. Consequently, there is a gap in treatment in excess of one year with respect to additional compensation. Moreover, I cannot overlook the fact that the

Claimant's self-filed Form AR-C of February 28, 2019, identifies a completely different Respondent Employer than that which is on the risk in the present matter. Accordingly, I decline to find the Claimant's AR-C filing of February 28, 2019, as sufficient to toll the applicable Statute of Limitations. See *Farris v. Express Servs., Inc.*, 2019 Ark. 141.

Given the foregoing discussion, I further decline to find that the Respondents' issuance of payment for the Claimant's mileage on October 30, 2020, for dates of service ranging from August 3, 2016, through September 30, 2020, which apparently had not been previously claimed by the Claimant prior to October 21, 2020, provides any reason for tolling of the applicable Statute of Limitations. In sum, I specifically find that the present claim is time-barred by Ark. Code Ann. §§11-9-702(b).

ORDER

Based on the foregoing discussion, including my observation of the witness and his testimony, review of the hearing transcript, the documentary evidence supplied by the parties, and application of the statutory and case law cited above, I specifically find that the present claim is time-barred and that all other issues are rendered moot.

This claim is respectfully denied and dismissed, and the Respondents are ordered and directed to pay the Court Reporter's fee within thirty days of billing if they have not already done so.

IT IS SO ORDERED.

TERRY DON LUCY
Administrative Law Judge

