

**ARKANSAS COURT OF APPEALS**

DIVISION IV  
No. CA 09-511

CURTIS GARDNER

APPELLANT

V.

BEVERLY ENTERPRISES AND  
CONSTITUTIONAL STATE SERVICES  
APPELLEES

**Opinion Delivered** November 18, 2009

APPEAL FROM THE ARKANSAS  
WORKERS' COMPENSATION  
COMMISSION  
[NO. F204535]

AFFIRMED

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**COURTNEY HUDSON HENRY, Judge**

Appellant Curtis Gardner appeals the decision of the Arkansas Workers' Compensation Commission finding that appellant's claim for medical benefits is barred by the statute of limitations. For reversal, appellant contends that the Commission erred in finding that his claim was one for additional benefits that is barred by the statute of limitations, rather than one to enforce a previous award of benefits that is not time barred. We affirm the Commission's decision.

The record reflects that appellant sustained an admittedly compensable injury to his lumbar spine on February 21, 2002. An MRI taken in March 2002 revealed a large right paracentral disc protrusion at the L5-S1 level. To repair this herniated disc, appellant underwent a right microlaminectomy and medial facetectomy, a lateral release decompression,

a foraminotomy, and an excision of the herniated disc on April 12, 2002. Dr. Larry Armstrong, the neurosurgeon who performed the surgery, released appellant to return to work on June 11, 2002. In a letter dated July 8, 2002, Dr. Armstrong stated that appellant had reached maximum medical improvement, and the doctor released appellant from his care. Dr. Armstrong also assigned a permanent physical impairment rating of ten percent.

Thereafter, appellant filed a claim for additional benefits that became the subject of a hearing before an administrative law judge. According to the law judge's opinion dated October 27, 2004, appellant's claim included a request for permanent partial disability benefits and the payment of "medical services provided the claimant by and at the direction of Dr. Charles Jennings." The opinion further recites that "the disputed medical expenses involve a single visit to Dr. Jennings (in December of 2003) and prescription medications provided him at the direction of Dr. Jennings for the chronic low-back complaints he has continued to experience." The law judge also wrote:

In his deposition and testimony at the hearing, the claimant explained how he came about seeing Dr. Jennings for this medication. He stated that "for quite a while, months and months" after his last visit with Dr. Armstrong (on June 10, 2002), Dr. Armstrong continued to refill his prescription medication. Finally, he was advised by Dr. Armstrong that he needed to have his medication handled by a "regular doctor," such as Dr. Holder. Dr. Holder is a general practitioner and was one of the claimant's initial treating physicians. The claimant testified that he then contacted Dr. Holder's office and was advised by Dr. Holder's office to obtain these services from his family physician. Thus, he consulted Dr. Jennings.

The law judge found reasonable and necessary the medical services rendered to appellant by Dr. Jennings "in the form of an office visit in December 2003, and the replacement of the

claimant's prescription medication for the chronic effects of his compensable back injury." The law judge also awarded appellant permanent partial disability benefits of ten percent for his physical impairment and a ten-percent loss in wage-earning capacity.

Appellant returned to Dr. Jennings on February 18, 2005, and again on March 29, 2005. Between those visits, on March 18, 2005, Dr. Jennings wrote a letter stating that appellant continued to experience significant problems with his back. To address his concerns, Dr. Jennings recommended that appellant have another MRI and that he be evaluated by a neurologist and a physiatrist. Appellees refused to pay for an MRI or the evaluations, and appellant sought no further medical treatment until an August 2006 visit with Dr. Jennings. On August 14, 2006, appellant's attorney submitted a letter to the Commission as a claim for "additional benefits" to include a repeat MRI and an evaluation by a neurologist as recommended by Dr. Jennings earlier in 2005. Appellees contested the claim and argued, among other things, that the statute of limitations barred the claim.

After a hearing, the law judge, who had also decided the previous claim, issued an opinion on July 15, 2008, finding that appellant's present claim for further evaluation and treatment was barred by the statute of limitations. The law judge found that appellees last furnished medical services on March 19, 2005, as they had actual notice of appellant's office visit with Dr. Jennings on that date. The law judge thus concluded that appellant's claim filed on August 14, 2006, exceeded the one-year limitations period. Further, the law judge found that the statute of limitations applied in this case because appellant's claim for medical services

was one for additional benefits and not the enforcement of the previous award of benefits. In this regard, the law judge reasoned that appellant's previous claim encompassed the single visit to Dr. Jennings in December 2003 and that the award did not include any or all medical services that Dr. Jennings might eventually provide or recommend. The law judge also found that Dr. Jennings's recommendations for a repeat MRI and a neurological evaluation were new medical services that were not considered or contemplated at the time of the 2004 opinion.<sup>1</sup>

Appellant appealed this decision to the Commission, which affirmed and adopted the law judge's opinion. On appeal to this court, appellant argues that the Commission erred in ruling that his claim was one for additional benefits and not the enforcement of the previous award.

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 year from the date of the last payment of compensation or two years from the date of the injury, whichever is greater. Ark. Code Ann. § 11-9-702(b)(1) (Supp. 2009). Our oft-stated rule is that, for purposes of this statute, the furnishing of medical services constitutes payment of compensation. *Spencer v. Stone Container Corp.*, 72 Ark. App.

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<sup>1</sup> The law judge found, however, that appellant's claim for replacement medications was not barred by the limitations period, as the 2004 opinion contemplated the provision of medication indefinitely for the treatment of appellant's chronic condition. Appellees have not filed a cross-appeal to contest this aspect of the law judge's decision.

Cite as 2009 Ark. App. 787

450, 38 S.W.3d 909 (2001). Moreover, an employer is deemed to be furnishing such services if it has either actual notice or has reason to know of a claimant receiving medical treatment. *Id.* In *Helena Contracting Co. v. Williams*, 45 Ark. App. 137, 872 S.W.2d 423 (1994), we held that the aforementioned statute of limitations applies to claims for “additional compensation” but not to those claims seeking the enforcement of awards made in a previous order. *See also Carroll Elec. Coop. v. Pack*, 85 Ark. App. 293, 151 S.W.3d 324 (2004).

The issue before us is whether appellant’s present claim is one for additional benefits, in which case it is barred by the statute of limitations, or whether the claim is not barred because it is one to enforce the previous award rendered by the law judge in the October 2004 opinion. We hold that the Commission did not err in concluding that the claim is one for additional benefits that is barred by the statute of limitations. Prior to the October 2004 opinion, appellant had reached maximum medical improvement and had been released from his surgeon’s care. Appellant subsequently filed a claim for additional benefits. The October 2004 opinion is clear that the benefits appellant sought included a single office visit with Dr. Jennings for the purpose of addressing his ongoing need for prescription medication. The law judge’s award required appellee to pay for that office visit and the medication prescribed by Dr. Jennings. Appellant’s present claim encompasses Dr. Jennings’s subsequent recommendation for further testing and evaluation. We must agree with the Commission’s conclusion that these services were not considered or contemplated at the time of the previous opinion. As such, appellant’s present claim is aptly characterized as one for additional

benefits. Accordingly, the Commission did not err in finding that the claim is barred by the statute of limitations.

Appellant's brief also includes the argument that he, as a claimant, should not bear the burden of proving when the last payment of benefits occurred. He then argues, as best we can understand, that the record does not show when the last payment of compensation was made because appellee failed to pay for the replacement medications following the October 2004 order. We simply note that the claimant has the burden of proving that he acted within the limitations period. See *Aluminum Co. of Am. v. Rollon*, 76 Ark. App. 240, 64 S.W.3d 756 (2001); *Spencer, supra*. Otherwise, the record does not indicate that appellant raised this argument below or that the Commission ruled on the issue. It is well settled that we will not consider arguments advanced for the first time on appeal. *Wallace v. W. Fraser S.*, 90 Ark. App. 38, 203 S.W.3d 646 (2005).

Affirmed.

GRUBER and MARSHALL, JJ., agree.