BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F006924

SABRINA J. SPENCER, Employee	CLAIMANT
CONAGRA FROZEN FOODS, Employer	RESPONDENT
SEDGWICK CLAIMS MANAGEMENT, Carrier	RESPONDENT

OPINION FILED AUGUST 21, 2024

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Russellville, Pope County, Arkansas.

Claimant represented by JOSEPH H. PURVIS, Attorney, Little Rock, Arkansas.

Respondents represented by JARROD PARRISH, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On August 1, 2024, the above captioned claim came on for hearing at Russellville, Arkansas. A pre-hearing conference was conducted on May 22, 2024 and a pre-hearing order was filed on that same date. A copy of the pre-hearing order has been marked as Commission's Exhibit #1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.

2. The claimant sustained a compensable injury to her right arm on June 12, 2000.

3. Claimant was earning an average weekly wage of $460.50 which would entitle her to compensation at the weekly rates of $307.00 for total disability benefits and

$230.00 for permanent partial disability benefits.

4. Respondents accepted and paid permanent partial disability benefits based on a 76% rating to the right upper extremity.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Statute of limitations.

2. Claimant's entitlement to continued medical treatment.

At the time of the hearing counsel for claimant also requested payment for the cost of taking the deposition of Dr. Kelly.

The claimant contends that the respondents wrongfully terminated medical and other benefits for the claimant, and that the claimant's benefits should be reinstated in full.

The respondents contend that the statute of limitations has run with regard to this matter. There was a gap in benefits from January 18, 2008 through October 23, 2012. It is respondents' position that the statute of limitations ran at that time and their liability for benefits in this matter ceased.

From a review of the record as a whole, to include medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witness and to observe her demeanor, the following findings of fact and conclusions of law are made in accordance with A.C.A. §11-9-704:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at a pre-hearing conference conducted on May 22, 2024 and contained in a pre-hearing order filed that same date are hereby

accepted as fact.

2. Claimant's claim for additional medical benefits is not barred by the statute of limitations.

3. Claimant has proven by a preponderance of the evidence that she is entitled to additional medical treatment for her compensable injury from Dr. Kelly.

4. Respondent is liable for payment of the expense and cost of reporting and transcribing the deposition. Respondent is not liable for payment of the witness fee of Dr. Kelly for attending that deposition.

FACTUAL BACKGROUND

The claimant suffered a horrific injury to her right arm on June 12, 2000 when her right arm and hand were pulled into a machine. This resulted in her arm being amputated in two places between the elbow and the wrist. Claimant was taken to Fort Smith where Dr. James Kelly miraculously attached her arm in both places. Since that time claimant has continued to treat with Dr. Kelly for various issues relating to her compensable injury. This treatment has included additional procedures and the use of medication for pain caused by cold temperatures in the winter.

Claimant's treatment from Dr. Kelly continued until respondent sent claimant a letter dated April 14, 2022, indicating that since claimant did not receive medical treatment for her work-related injury from January 18, 2008 through September 24, 2014 the statute of limitations had run and that absent evidence that she had received treatment or benefits during that time period no further benefits would be paid by respondent. Subsequently, respondent filed Form AR-2 indicating that without waiving any defenses, including the

statute of limitations, respondent was agreeable to paying ongoing medical benefits for this claim.

Thereafter, in a letter dated December 19, 2022, respondent again indicated that since claimant did not receive medical treatment for her compensable injury from January 18, 2008 through September 24, 2014, no further payments would be made in her claim. Respondent has since amended the period for which claimant did not receive any medical treatment to be January 18, 2008 through October 23, 2012.

In response to respondent's decision to terminate payment of medical benefits, Attorney Purvis on April 3, 2024 filed a Motion to Request a Pre-Hearing Conference in this matter. A pre-hearing conference was conducted on May 22, 2024, and a hearing scheduled on the issue of whether the statute of limitations had run and claimant's entitlement to continued medical treatment.

ADJUDICATION

Initially, I note that in a letter to the Commission following the hearing on August 1, 2024, Attorney Purvis indicated that claimant is not requesting additional medical treatment, but rather asserts "that the employer and its carrier and third-party administrator had wrongfully terminated her original medical payments." (Emphasis added.) With respect to this issue, I note that there has not been a previous opinion filed in this case ordering respondent to pay medical benefits. Furthermore, claimant has not cited any statutory law or case law regarding "wrongful termination" of medical benefits. If respondent chooses not to pay additional medical benefits, claimant's remedy is to request payment of additional benefits. Indeed, that is the issue set forth in the May 22,

2024 pre-hearing order – "2. Claimant's entitlement to continued medical treatment", and that is the issue that will be addressed in this opinion.

Claimant has the burden of proving by a preponderance of the evidence that medical treatment is reasonably necessary. *Stone v. Dollar General Stores*, 91 Ark. App. 260, 209 S.W. 3d 445 (2005). What constitutes reasonably necessary medical treatment is a question of fact for the Commission. *Wright Contracting Company v. Randall*, 12 Ark. App. 358, 676 S.W. 2d 750 (1984).

A review of the deposition testimony of Dr. Kelly indicates that in his opinion claimant remains in need of continued medical treatment for her right arm injury. In fact, Dr. Kelly testified that claimant would probably need periodic treatment for the rest of her life or risk the loss of her arm.

> Q Realistically, would you say that you're looking at, at least periodically, checking on her probably for the rest of her life?
>
> A I think that's reasonable. Because if she were to be left without regular followup care, at least with someone with some micro-experience, she could lose the arm.

With respect to this issue, I note that respondent has not really contended that Dr. Kelly's medical treatment is not reasonable and necessary. Instead, respondent contends that claimant's claim for additional medical treatment from Dr. Kelly is barred by the statute of limitations.

The time for filing a claim for additional compensation benefits is codified at A.C.A. §11-9-702(b)(1) which states:

> 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.

Claimant does have the burden of proving that she acted within the time allowed for filing a claim for additional compensation benefits. *Kent v. Single Source Transportation*, *Inc.*, 103 Ark. App. 151, 287 S.W. 2d 619 (2008).

In this particular case, respondent contends that claimant did not receive any payment of medical benefits from January 18, 2008 through October 23, 20012. Therefore, the statute of limitations bars claimant's current claim for additional compensation benefits. Respondent also correctly notes that even thought it paid additional benefits after October 23, 2012, those payments do not revive a claim to which the statute of limitations has already run. *Slaughter v. City of Fayetteville*, 2022 Ark. App. 139, 643 S.W. 3d 809.

In support of its contention that claimant did not receive any medical treatment during the disputed period of time, respondent has offered payment records which does not show any payments of benefits during that period of time. In response to respondent's contention that she did not receive any medical treatment from January 18, 2008 through October 23, 2012, claimant testified that she received medical treatment multiple times a year and that she has never gone more than one year without seeking additional medical treatment from Dr. Kelly.

Dr. Kelly also testified that he had seen claimant for medical treatment on a yearly basis. With respect to this issue, Dr. Kelly testified that his office began using electronic

records in 2012. Prior to that time, the records were on paper and were periodically sent to a storage facility in Fort Smith. After a ten-year period of time, the records would be destroyed. Although he was continuing to see claimant for her compensable injury, it was his testimony that claimant's paper records before 2012 were destroyed. Therefore, Dr. Kelly does not have any medical records for the period of time from 2008 through October 23, 2012. Obviousy, the medical records or payment records from Dr. Kelly would be the best evidence that claimant actually received medical treatment during the disputed period of time. However, those records are no longer available for reasons discussed by Dr. Kelly. Perhaps the medical records would have been available if respondent had not waited almost eight years later to raise the statute of limitations.

Be that as it may, Dr. Kelly specifically testified that he had not gone more than one year without providing medical treatment to claimant.

> Q Have you - - have you ever gone more than a year without seeing this lady?
>
> A No.
>
> ***
>
> A At least once, or not twice a year. Because as I mentioned, in the ongoing care of her hand, she had - - usually, she would get Gabapentin or something come winter, so I would always see her whenever she was being symptomatic.
>
> Q Right.
>
> A And usually, that's all we'd - - we'd treat her; put her on the medication. I'd bring her back to make sure it was doing okay, and then she would wean herself off of it come spring. And that has to do with cold, you know, cold and things like that. So that was going on right - - almost every year, I'd see her for that.

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Q And I understand you don't have any reports on hand before 2012, but you've testified pretty confidently that you saw at least once a year - -

A At least.

Q - - between - -

A And we did procedures on her during that period of time.

Q Okay. And - - and even with that recollection, do you have any independent knowledge or evidence or proof that Conagra or Sedgwick were informed of those procedures or billed for those procedures?

A I'm sure they were billed for them, and I'm sure we got paid for them because we've never had an issue on her record.

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Q You can't state, under oath, "I remember seeing her between 2008 and 2012"?

A Oh, I can tell you I saw her.

Q Okay.

A Without a doubt.

Q And do you have a specific recollection of a visit or a date when you saw Ms. Spencer?

A I can't give you - - I can't give you an exact date, but I know that I had seen her multiple times through that period.

Q Okay.

A Mostly for cold intolerance. That was the most issue.

Q Okay. Are you basing that on anything other than your history with her and the pattern of symptoms that she displayed?

> A Well, I mean, here is a documentation from 2012 where I saw her and said that she presents with the typical pain she gets in wintertime activity and she was seen multiple times in the past for it.
>
> Q Okay.
>
> A So that kind of tells you that I saw her previous years, which would be your 2008 to 2012.
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> ***
>
> Q One last time. Doctor, you're - - as I understand it, you're quite positive you never went more than a - - you never went a year without seeing this lady?
>
> A Absolutely.
>
> Q And multiple times every year over the last 23 years?
>
> A Yeah. At least - - it - - I've seen her at least every year for something; sometimes multiple times.

Thus, while Dr. Kelly no longer has documentary evidence of the treatment he provided and does not have any independent recollection of particular visits, it is his testimony that he did not go more than one year without treating claimant for her compensable injury during the time in question. I find the opinion of Dr. Kelly to be credible and entitled to great weight.

Based on the testimony of the claimant, which I also find to be credible, and the testimony of Dr. Kelly, I find that claimant did not go more than one year without receiving medical treatment from January 18, 2008 through October 23, 2012. In addition, since that time she has continued to receive medical treatment on at least a yearly basis and therefore her request for additional medical treatment is not barred by the statute of

limitations.

I also find that the decision in *Plante v. Tyson Foods*, 319 Ark. 126, 890 S.W. 2d 253 (1994) is applicable to this claim. In *Plante* the respondent also contended that the statute of limitations had run because the claimant for additional benefits was filed more than one year after the date of last payment of compensation. In response, claimant offered proof of two visits to her treating physician during the period of time in dispute. Respondent contended that it was not aware of these two visits, either by the way of a bill from the physician or otherwise. The Court first noted that employers or carriers must have actual knowledge or constructive knowledge that medical services are being provided before they are deemed to have furnished medical services. (Citing *McFall v. United States Tobacco Company*, 246 Ark. 43, 436 S.W. 2d 838 (1969).) The Court noted that the better practice in that case would have been for the respondent to have been actually notified of the follow-up visits "although the better practice is not what is required by the statute." *Plante* at 256. The Court then found that "payment of compensation" was made by virtue of the medical services that were furnished within the limitations period and "for which the respondent had reason to know would be furnished." *Plante* at 256.

Here, I find based upon the testimony of Dr. Kelly that medical services were provided within the limitations period and that respondent had reason to know that these medical services would be provided. The last written medical record prior to January 18, 2008 and submitted into evidence at the hearing is dated December 13, 2006 from Dr. Kelly. At that time claimant was continuing to complain of pain in the winter caused by cold temperatures. Dr. Kelly indicated that Lyrica he had prescribed had helped this

condition, but claimant was still having quite a bit of pain. He indicated that he would contemplate another procedure to redo neurolysis and wrap the nerve with a neural tube to prevent adhesion formation. This medical report certainly indicates that further medical treatment would be provided.

More importantly, in a letter dated April 17, 2019, addressing potential issues regarding claimant's medical treatment, Dr. Kelly indicated that he had originally informed Conagra that claimant's injury would be a "lifelong" issue that would require medical intervention.

> I guess the question you had had is as to whether this is ever going to resolve and what I have explained to Sabrina as well as the original involvement with Conagra at the time of her injury that this will be a lifelong issue, that she may from time to time have issues with this arm that will require intervention.

As previously noted, I find Dr. Kelly's testimony to be credible and entitled to great weight. Based on that testimony, I find his statement that he informed Conagra that claimant's injury would be a lifelong issue requiring medical intervention credible as well. Accordingly, based upon this evidence, I find that respondent had reason to know that medical services would be furnished.

In summary, virtually no medical records of Dr. Kelly are available before 2012. However, based on the testimony of the claimant and the testimony of Dr. Kelly, I find that medical services were provided during the period of time from January 18, 2008 through October 23, 2012. In addition, for reasons previously discussed, I also find that respondent had reason to know that medical services would be furnished during this period of time. Therefore, the statute of limitations did not run and claimant's claim for

additional benefits is not barred by the statute of limitations. Claimant has proven that she is in need of additional medical treatment for her compensable injury from Dr. Kelly. I find that respondent remains liable for that continued medical treatment.

The final issue for consideration involves Attorney Purvis' request for payment by respondent for the cost of Dr. Kelly's deposition. The deposition of Dr. Kelly was taken on November 27, 2023, after respondent controverted claimant's entitlement to any payment of additional medical benefits based upon its contention that the statute of limitations barred claims for additional benefits. Pursuant to Commission Rule 099.20, the expense and cost of reporting and transcribing depositions are to be borne by the respondents except in certain circumstances. Those circumstances are not applicable in this case. Since Dr. Kelly's deposition was taken as an evidentiary deposition for purposes of submitting into evidence in this case, I find that respondent is liable for payment of the expense and cost of reporting and transcribing the deposition. Respondent is not liable for payment of the witness fee of Dr. Kelly for attending that deposition.

AWARD

Claimant's claim for additional medical benefits is not barred by the statute of limitations. Claimant has proven by a preponderance of the evidence that she is entitled to additional medical treatment for her compensable injury from Dr. Kelly. Finally, respondent is liable for payment of the preparation of the transcript of the deposition of Dr. Kelly.

Respondent is liable for payment of the court reporter's fee for preparation of the

hearing transcript in the amount of $705.60.

IT IS SO ORDERED.

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GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE