

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. C162499

WILFORD PENDERGRASS, Employee	CLAIMANT
JONES TRUCK LINES, INC., Employer	RESPONDENT
TRANSPORT INSURANCE COMPANY, Carrier	RESPONDENT

OPINION FILED FEBRUARY 10, 2004

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Springdale, Washington County, Arkansas.

Claimant represented by JASON WATSON, Attorney, Fayetteville, Arkansas.

Respondents represented by ROBERT J. DONOVAN, Attorney, Marianna, Arkansas.

STATEMENT OF THE CASE

On January 7, 2004, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on August 13, 2004, and a pre-hearing order was filed on August 14, 2003. A copy of the pre-hearing order has been marked 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 relationship of employee-employer existed between the parties at all relevant times.
3. The claimant sustained a compensable injury to his knee on December 1, 1971.
4. The claimant was earning sufficient wages to entitle him to compensation at the maximum rate of \$49.00 per week.

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

1. Claimant's entitlement to additional medical, including knee replacement surgery.

2. Temporary total disability benefits from August 4, 2003 through a date yet to be determined.

3. Attorney fee.

4. Statute of limitations and laches.

At the time of the hearing the claimant modified his request for temporary total disability benefits to include August 4, 2003 through October 27, 2003. In addition, the parties also agreed to litigate claimant's entitlement to permanent partial disability benefits based upon a 50% rating to the left lower extremity.

The claimant contends that he has worn out his knee replacement which was done on or about December 14, 1974. That further, claimant was rated a 25% permanent impairment rating but did not cash the check for fear that he might close his workers' compensation case. That a claim for compensation was requested as well as a hearing which never took place, and therefore there is no statute of limitations problem.

The respondents contend the claimant is not entitled to any additional benefits resulting from the occurrence of December 1, 1971, because of statute of limitations, waiver, estoppel and laches.

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 his 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 the pre-hearing conference conducted on August 13, 2003, and contained in a pre-hearing order filed August 14, 2003, are hereby accepted as fact.

2. Claimant's claim for additional compensation benefits is not barred by the

statute of limitations or by the doctrine of laches, estoppel or waiver.

3. Claimant has met his burden of proving by a preponderance of the evidence that he is entitled to additional medical treatment as a result of his compensable injury. This includes surgery performed by Dr. Coker.

4. Claimant has proven by a preponderance of the evidence that he is entitled to permanent partial disability benefits in an amount equal to 50% to the left lower extremity as a result of his compensable injury.

5. Respondent has controverted claimant's entitlement to additional medical treatment and to permanent partial disability benefits in the amount of 15% to the left lower extremity.

FACTUAL BACKGROUND

_____ At the time of the hearing the claimant was a 71-year-old man with an eighth grade education whose primary occupation throughout life has been as a truck driver. The claimant worked for Jones Truck Lines as a driver from 1968 until 1989. The claimant currently drives as an independent driver.

Claimant suffered a compensable injury on December 1, 1971 when he was struck by a crate weighing approximately 4500 pounds while it was being unloaded. As a result claimant injured various parts of his body, including a fracture just below his left knee.

As a result of his compensable injury the claimant came under the care of Dr. Tom Phillip Coker, an orthopaedic surgeon, who performed a lateral meniscectomy on December 1, 1972. In a report dated December 3, 1973, Dr. Coker assigned the claimant a permanent physical impairment rating in an amount equal to 25% to the left lower extremity. Dr. Coker noted in his report that claimant's problems with his left knee would increase with time and that he would probably need a joint replacement if his difficulty continued. Claimant's difficulty with his left knee did continue and Dr. Coker performed

an arthroplasty to replace the claimant's knee joint on December 4, 1974. Following that surgical procedure the claimant continued to be evaluated by Dr. Coker. On February 12, 1976, Dr. Coker assigned the claimant a total impairment rating in the amount of 35% to the left lower extremity. Dr. Coker noted that the life of the arthroplasty was unknown and recommended that claimant follow up for the duration of his life to determine whether further treatment was necessary.

It is unclear how often claimant actually followed up with Dr. Coker subsequent to that visit in February 1976. The medical evidence does indicate that claimant returned to Dr. Coker for a follow-up evaluation on January 2, 1986. The next medical record is a visit with Dr. Tom Patrick Coker, the son of Dr. Tom Phillip Coker, on June 16, 2003. Following his evaluation of claimant on that date Dr. Coker noted that the claimant's knee had gotten loose and that the polyethylene which had been inserted during a procedure in 1974 had worn through. On July 28, 2003, Dr. Coker performed a total knee arthroplasty to repair the prior arthroplasty. Following that surgery Dr. Coker released claimant as of October 27, 2003 and in a letter report dated December 30, 2003, assigned the claimant a permanent physical impairment rating in the amount of 50% to the left lower extremity.

Claimant's injury was accepted by the respondent as compensable and compensation benefits were paid. Indeed, it appears that respondent even attempted to pay the initial 25% permanent impairment rating and the subsequent increase to 35% assigned by Dr. Tom Phillip Coker. For reasons which will be discussed later, these checks were not cashed by the claimant. Nevertheless, on January 27, 1974, the claimant filed an A-7 requesting compensation benefits from the Arkansas Workers' Compensation Commission. Claimant's claim was apparently placed on hold for a period of time while settlement negotiations were discussed by the parties. The documentary evidence submitted into the record indicates that claimant's claim for compensation benefits was referred to Commission referees on two occasions for hearings, but that on both of these

occasions the hearings were postponed at the parties' request. In 1976 the claimant's claim was returned to Little Rock and placed on inactive status.

Claimant has filed this claim contending that he is entitled to additional medical treatment as a result of his compensable injury. Specifically, claimant seeks payment for the surgical procedure performed by Dr. Tom Patrick Coker. Claimant also seeks payment of temporary total disability benefits beginning August 4, 2003 and continuing through October 27, 2003, permanent partial disability benefits in an amount equal to 50% to the left lower extremity, as well as a controverted attorney fee.

ADJUDICATION

STATUTE OF LIMITATIONS.

The initial issue for consideration involves whether claimant's claim for compensation benefits is barred by the statute of limitations. Respondent contends that claimant's claim for compensation benefits was not filed within one year from the date of last payment of compensation or two years from the date of injury as required by Ark. Stat. Ann. §81-1318 which was in effect at the time of claimant's injury. The statute is now codified at A.C.A. §11-9-702(b). Claimant contends that the statute of limitations was tolled by the filing of his claim for compensation benefits in January 1974 because there was no final adjudication of that particular claim.

The law regarding the tolling of the statute of limitations was discussed by the Commission in *Shelly S. Cooper v. Cleo, Inc.*, Full Commission opinion filed March 29, 2000 (E518275). In that decision, the Commission cited prior decisions from the Arkansas Supreme Court and the Arkansas Court of Appeals governing the tolling of the statute of limitations and the circumstances under which the time would begin running again:

Ark. Code Ann. §11-9-702(b) (Repl. 1996) provides that a claim for additional compensation must be filed within one year from the last payment of compensation or two years from the date of injury, whichever is greater. The

timely filing of a claim for additional benefits tolls the statute of limitations until the claim is decided. Bledsoe v. Georgia-Pacific Corp., 12 Ark. App. 293, 675 S.W. 2d 849 (1984); Arkansas Power & Light Co. v. Giles, 20 Ark. App. 154, 725 S.W. 2d 583 (1987); Sisney v. Leisure Lodges, Inc., 17 Ark. App. 96, 704 S.W. 2d 173 (1886). The statute of limitations does not commence to run again until there is a final order ending the litigation or adjudication of the claim for additional benefits. See Michelle T. Underwood v. TEC, Full Commission Opinion filed April 15, 1992 (D708150); Bernie Barker v. National Transportation, Full Commission Opinion filed August 19, 1993 (D803687).

In this particular case the claimant timely filed a claim for additional benefits in January 1974. Claimant had previously received compensation benefits and filed the A-7 with the Commission requesting benefits over and above those previously paid. This filing was within one year of the date of last payment of compensation. Respondent had paid compensation benefits through 1973 and continued to pay them in 1974, 1975, and 1976. Accordingly, I find that claimant timely filed a claim for additional benefits in January 1974.

Furthermore, the courts have held that the statute of limitations does not begin to run again until there is a final order ending the litigation or adjudication of the claim for additional benefits. In this particular case, a hearing was never conducted on claimant's request for additional benefits. Although hearing were set on the claimant's claim, those hearings were subsequently canceled and the claimant's claim was returned to the Little Rock office and placed on inactive status in 1976. Thus, there has been no final order ending the litigation or adjudication of the January 1974 claim for compensation benefits.

In reaching this decision, I believe it is also important to note the decision in *Spencer v. Stone Container Corporation*, 72 Ark. App. 450, 38 S.W. 3d 909 (2001). In that case the claimant had been injured on September 26, 1991 and had been paid some compensation benefits. She filed a claim for additional compensation benefits on December 26, 1991; received a last payment of benefits on March 11, 1996; and then made another claim for additional benefits on December 22, 1997. Relying on prior

decisions the Court of Appeals held that the 1991 filing tolled the statute of limitations. The Court noted that despite the passage of six years the matter was governed by prior holdings, including *Sisney v. Leisure Lodges, Inc.*, 17 Ark. App. 96, 704 S.W. 2d 173 (1986).

While only six years passed between the filing and the request for additional benefits in *Spencer*; more than 30 years have passed in this particular claim. However, I have no authority to find that a longer passage of time overcomes prior court rulings. In short, despite the passage of more than 30 years, I am bound by the decisions which state that a timely filing of a claim for additional benefits tolls the statute of limitations until the claim is decided and that it does not begin to run again until there is a final order ending the litigation or adjudication of the claim for additional benefits. Here, claimant's claim in 1974 was timely filed and tolled the statute of limitations which did not begin to run again because there was no final order ending litigation or adjudication of the claim for additional benefits. Therefore, this claim is not barred by the statute of limitations.

Furthermore, I also believe that there is a second reason why claimant's claim for additional benefits relating to the surgical knee replacement is not barred by the statute of limitations. Ark. Stat. Ann. §81-1318(b) as it existed in 1971 stated in pertinent part:

The time limitations of this subsection shall not apply to claims for replacement of medicine, crutches, artificial limbs, and other apparatus permanently or indefinitely required as a result of a compensable injury, where the employer or carrier previously furnished such medical supplies.

The procedure performed by Dr. Coker in July 2003 was to repair and replace the prior arthroplasty which had been inserted by his father during a surgical procedure in 1974. Claimant's artificial knee joint was an apparatus which was permanently or indefinitely required as a result of his compensable injury. The medical reports of Dr. Tom Phillip Coker indicate that the life of the arthroplasty was unknown. For that reason, in

1976 he recommended that the claimant receive follow-up treatment for the rest of his life to determine whether replacement was necessary. In fact, documentary evidence submitted in this case reflects that even respondent was aware that a future operation was likely and that the time limitation would not apply to that replacement. See letter from Attorney Michael Mashburn dated March 11, 1976.

Thus, even if claimant's claim in January 1974 did not toll the statute of limitations, I find that the statute of limitations would not apply to replacement of the knee joint pursuant to Arkansas Stat. Ann. §81-1318(b).

Finally, respondent has also raised as a defense the doctrines of laches. The doctrine of laches was discussed by the Court in *Goforth v. Smith*, 338 Ark. 65, 991 S.W. 2d 579 (1999):

The doctrine of laches is based on a number of equitable principles that are premised on some detrimental change in position made in reliance upon the action or inaction of the other party. *Andarko Petroleum v. Venable*, 312 Ark. 330, 850 S.W. 2d 302 (1993). It is based on the assumption that the party to whom laches is imputed has knowledge of his rights and the opportunity to assert them, that by reason of his delay some adverse party has good reason to believe those rights or worthless or have been abandoned, and that because of a change of conditions during this delay it would be unjust to the latter to permit him to assert them. *Self v. Self*, 319 Ark. 632, 893 S.W. 2d 775 (1995). Laches requires a demonstration of prejudice to the party alleging it as a defense resulting from a plaintiff's delay in pursuing a claim. *Swink v. Griffin*, 333 Ark. 400, 970 S.W. 2d 207 (1998).

After reviewing the evidence in this case, I find that the doctrine of laches is not applicable. Certainly, the passage of time has somewhat prejudiced the respondent's ability to defend this claim. However, I do not find that this delay was the result of the claimant having been aware of his rights and failing to assert them. The benefit which claimant is requesting is additional medical treatment relating to the replacement of his

knee which did not occur until 2003. Although claimant had filed a claim for additional compensation benefits in 1974, this particular issue could not have been litigated at that time. Furthermore, as previously noted, documentary evidence indicates that respondent was aware that claimant was concerned about his future medical benefits, that a replacement procedure might be necessary in the future, and that respondent would be responsible for that procedure. For these reasons, I do not find that the doctrine of laches is applicable to this claim.

I also find no merit to respondent's argument that this claim is barred by waiver or estoppel. I find no evidence that claimant waived his right to a hearing on additional benefits or that the respondent has changed its position to its detriment as a result of the claimant's conduct which would be required for estoppel to apply. Here, as previously noted, both parties were aware in the 1970s that the knee replacement performed in 1974 might be temporary in nature and need replacement at some point in the future. This did not occur until 2003. I find no evidence that claimant waived his entitlement to replacement of his knee joint or that claimant's conduct caused the respondent to change its position to its own detriment. Therefore, I find that waiver and estoppel does not bar this claim.

MEDICAL TREATMENT.

Having found that this claim is not barred by the statute of limitations, I find that claimant has met his burden of proving by a preponderance of the evidence that he is in need of additional medical treatment as a result of his compensable injury. I also find that claimant has met his burden of proving by a preponderance of the evidence that the treatment provided by Dr. Tom Patrick Coker was reasonable and necessary and causally related to his original compensable injury. As previously noted, the claimant underwent an arthroplasty procedure which was performed by Dr. Tom Phillip Coker on December 4,

1974. In a report dated February 12, 1976, Dr. Coker noted that the life of the arthroplasty was unknown and recommended that claimant receive follow-up evaluations for the duration of his life to determine whether further treatment would be necessary. Following the retirement of Dr. Tom Phillip Coker, claimant sought additional medical treatment from Dr. Tom Patrick Coker on June 16, 2003. In his report of that date Dr. Coker notes that the claimant's knee is loose and that the polyethylene which had been installed during the surgery in 1974 had worn through. As a result, Dr. Coker performed an arthroplasty procedure to replace the worn knee joint in July 2003. This surgery was performed to replace the prior knee joint which was worn out. Given this evidence, I find that claimant has met his burden of proving by a preponderance of the evidence that he was in need of additional medical treatment for his original compensable injury, that the treatment provided by Dr. Coker was reasonable and necessary, and that it was causally related to claimant's original compensable injury.

Accordingly, respondent is liable for payment of additional medical treatment, including the surgical procedure provided by Dr. Coker.

Respondent has controverted claimant's entitlement to all unpaid medical treatment; including surgery performed by Dr. Tom Patrick Coker.

TEMPORARY TOTAL DISABILITY BENEFITS.

Claimant contends that he is entitled to temporary total disability benefits beginning August 4, 2003 and continuing through October 27, 2003. The injury to claimant's knee is a scheduled injury. An employee who suffers a scheduled injury is entitled to receive temporary total disability benefits during their healing period or until they return to work, whichever occurs first. *Wheeler Construction Company v. Armstrong*, 73 Ark. App. 143, 41 S.W. 3d 822 (2001). Here, I find that claimant remained within his healing period and that he had not returned to work between August 4, 2003 and October 27, 2003. Claimant

underwent the surgical procedure by Dr. Coker on July 31, 2003. It was not until October 27, 2003 that Dr. Coker released claimant from his care with instructions to return only as needed. Furthermore, claimant testified that he did not return to work during this period of time.

Accordingly, I find that claimant has met his burden of proving by a preponderance of the evidence that he is entitled to temporary total disability benefits beginning August 4, 2003 and continuing through October 27, 2003. Respondent has controverted claimant's entitlement to temporary total disability benefits.

PERMANENT PARTIAL DISABILITY BENEFITS.

Following the initial meniscectomy in December 1972, Dr. Coker assigned the claimant a permanent physical impairment rating in an amount equal to 25% to the left lower extremity. Following the assignment of this 25% impairment rating respondent made an effort to pay claimant permanent partial disability benefits in an amount equal to \$2,143.75 with a check dated December 26, 1973. Believing that his cashing of this check would end his case and on the advise of his attorney, claimant did not negotiate this check.

Furthermore, following claimant's arthroplasty in 1974 Dr. Coker assigned the claimant a total permanent physical impairment rating in an amount equal to 35% to the left lower extremity. Following the assignment of this impairment rating respondent apparently sent checks made payable to claimant and his attorney at that time, James Gallman. A check was sent made payable to both of these parties for the attorney fee of \$600.12 and for the permanent physical impairment rating in the amount of \$2,401.13. Claimant testified that he never received a check and never endorsed a check made payable to either himself or both he and his attorney, James Gallman. The parties in this case have attempted to determine whether these checks were ever negotiated through either the FDIC or the bank itself. There is no proof that the checks were ever negotiated.

After having had the opportunity to observe the claimant and his demeanor at the hearing and after consideration of his testimony, I find that his testimony is entitled to great weight. Claimant testified that he did not receive payment for this impairment rating and did not negotiate the checks in 1977.

Accordingly, I find that claimant has not received payment of any permanent partial disability benefits, even though respondent did in fact send two checks to the claimant. Based upon the opinion of Dr. Tom Patrick Coker, which I find to be credible and entitled to great weight, I find that claimant has a total permanent physical impairment in an amount equal to 50% to the left lower extremity. Therefore, I find that claimant is entitled to permanent partial disability benefits in the amount of 50% to the left lower extremity.

Although I have found that claimant is entitled to permanent partial disability benefits in an amount equal to 50% to the left lower extremity, I find that respondent has controverted permanent partial disability benefits only in the amount of 15% to the left lower extremity. As previously noted, respondent attempted to make payment following the assignment of the 25% impairment rating in 1973 and the 35% impairment rating in 1976. For reasons which have previously been discussed, these checks were not cashed by the claimant. Nevertheless, respondent did attempt to make payment for permanent partial disability benefits in the amount of 35% to the left lower extremity. Accordingly, I find that respondent has only controverted claimant's entitlement to permanent partial disability benefits in an amount equal to 15% to the left lower extremity.

AWARD

Claimant's claim for compensation benefits is not barred by the statute of limitations, the doctrine of laches, estoppel or waiver. Claimant has met his burden of proving by a preponderance of the evidence that he is entitled to additional medical treatment for his compensable injury. Claimant has also proven by a preponderance of the evidence that

the medical treatment is reasonable and necessary and causally related to his original compensable injury. This includes surgery performed by Dr. Tom Patrick Coker. Claimant has also proven by a preponderance of the evidence that he is entitled to temporary total disability benefits from August 4, 2003 through October 27, 2003. Claimant has also proven by a preponderance of the evidence that he is entitled to permanent partial disability benefits in an amount equal to 50% to the left lower extremity.

Respondent has controverted claimant's entitlement to additional medical treatment, temporary total disability benefits, and permanent partial disability benefits in an amount equal to 15% to the left lower extremity.

The claimant's attorney is entitled to the maximum statutory attorney's fee on benefits awarded herein, one-half to be paid by the claimant and one-half to be paid by the respondents. The respondents are to withhold the claimant's portion of the attorney's fee from the claimant's award and to pay the attorney's fee directly to the claimant's attorney.

All sums herein accrued are payable in a lump sum without discount and this award shall bear interest at the maximum legal rate until paid.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE