

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NUMBER E310658 & E706812**

<b>ALVIN R. WHITE, EMPLOYEE</b>	<b>CLAIMANT</b>
<b>GREGG AGRICULTURAL ENTERPRISES, EMPLOYER CIGNA INSURANCE COMPANIES, CARRIER</b>	<b>RESPONDENT #1</b>
<b>MICRO PLASTICS, EMPLOYER TRAVELERS INSURANCE COMPANY, CARRIER</b>	<b>RESPONDENT #2</b>
<b>SECOND INJURY FUND</b>	<b>RESPONDENT #3</b>

**OPINION FILED SEPTEMBER 10, 2004**

The hearing in this matter was conducted on June 16, 2004, before ADMINISTRATIVE LAW JUDGE D. FRANKLIN AREY III, at Mountain Home, Baxter County, Arkansas.

Claimant was represented by Frederick Spencer, Attorney at Law, Mountain Home, Arkansas.

Respondent #1 was represented by E. Diane Graham, Attorney at Law, Fort Smith, Arkansas.

Respondent #2 was represented by Robert Montgomery, Attorney at Law, Little Rock, Arkansas.

Respondent #3 was represented by Terry Pence, Attorney at Law, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

On June 16, 2004, the above-captioned claim came on for a hearing at Mountain Home, Arkansas. A prehearing conference was held on February 3, 2004, and a Prehearing Order was filed on February 4, 2004.

The parties agreed to four stipulations: the first and fourth stipulations are set forth in the Prehearing Order and were confirmed by the parties at the hearing, while the

second and third stipulations were agreed to at the hearing. The stipulations that follow are hereby accepted:

1. All previous opinions, transcripts of testimony, and exhibits are made a part of the record herein.

2. Respondent #1 last paid medical expenses on behalf of Claimant on February 5, 1997, for treatment rendered on December 11, 1996, and last paid indemnity benefits (the 2% impairment rating) on June 25, 1999.

3. At the August 21, 1996 hearing in this matter, involving Respondent #1, Respondent #3, and Claimant, the issue of permanency of wage-loss disability was reserved.

4. The Second Injury Fund is excused from the hearing in this issue of medical treatment.

At the June 16, 2004 hearing, the parties discussed the issues set forth in the Prehearing Order. As modified at the start of the hearing, and as agreed upon by the parties, the issues to be litigated and resolved are limited to the following:

1. Is Claimant entitled to additional medical benefits (treatment from Dr. Foster, including an MRI and fusion surgery)? If so, which Respondent is responsible for the treatment?

2. With regard to Respondent #1, is Claimant's claim for medical treatment barred by the Statute of Limitations?

Claimant contends that he is entitled to reasonable and necessary medical treatment, including, but not limited to, fusion surgery as prescribed by Dr. Foster. Claimant also seeks payment of his unpaid medical bills. Respondent #1 denies liability

for medical benefits; similarly, Respondent #2 denies liability for medical benefits. Respondent #1 alleges that any claim for medical treatment is barred by the Statute of Limitations. Respondent #2 states that it paid benefits due to the compensable 1997 injury.

### **THE RECORD**

As noted above, the parties stipulated that all previous opinions, transcripts of testimony, and exhibits are made a part of the record herein. At the hearing on June 16, 2004, the parties agreed that Rick Spencer's September 8, 2003 letter to the Commission should be made a part of the record. Respondent #1 requested that the Commission specifically review certain exhibits; Respondent #1 was directed to supply copies of those exhibits to the Commission and all parties, so as to give any of the other parties an opportunity to object to consideration of those exhibits. Respondent #1 submitted these exhibits, as well as Rick Spencer's September 8, 2003 letter, under cover of a letter dated June 21, 2004, to the Commission. No objections were received.

Therefore, based upon the agreement of the parties and the stipulation concerning the record, the following items are hereby made a part of the record and will be blue-backed:

1. A set of documents headed "Supplemental Documentary Evidence Index," consisting of a cover sheet and six additional pages.
2. A set of documents headed "Documentary Evidence Index," consisting of a cover sheet and thirty-eight additional pages.
3. Dr. Robert Foster's February 9, 1994 letter to Rick Spencer.
4. Administrative Law Judge C. Michael White's June 16, 2003 Order.

5. Rick Spencer's September 8, 2003 letter to Faydeane Gray of the Arkansas Workers' Compensation Commission.

6. Administrative Law Judge Don N. Curdie's February 4, 2004 Prehearing Order.

## **DISCUSSION**

### **A. Statute of Limitations**

Respondent #1 argues that Claimant's request for additional medical benefits is barred by the statute of limitations. Claimant suffered a compensable injury in 1993 while employed by Respondent #1. The parties stipulated that Respondent #1 last paid medical expenses on behalf of Claimant on February 5, 1997, for treatment rendered on December 11, 1996; and last paid indemnity benefits on June 25, 1999.

On August 19, 1998 (prior to Respondent #1's last payment of benefits), Claimant initiated a claim against Respondent #2. Claimant's two claims apparently became consolidated for the purposes of hearing. For reasons explained in his Order, on June 16, 2003 Administrative Law Judge C. Michael White granted Claimant's request for a nonsuit and dismissed Claimant's claim without prejudice.

By letter dated September 8, 2003, Claimant asked to "reopen" his prior claims. Respondent #1 objects, arguing that the statute of limitations in Ark. Code Ann. § 11-9-702(b) applies. Respondent #1 notes that Claimant's September 8, 2003 request is more than two years after Claimant's 1993 injury, and more than one year after Respondent #1 last paid benefits in 1999.

The Commission has summarized the applicable law as follows:

Ark. Code Ann. § 11-9-702(b)... 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. 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.

Cooper v. Cleo, Inc., Full Workers' Compensation Commission Opinion filed March 29, 2000 (E518275) (citations omitted).

[T]he Commission has previously found on several occasions that 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, and the claimant then has one year in which to file another claim for additional benefits.

Brake v. The Kroger Company, Full Workers' Compensation Commission Opinion filed March 7, 2003 (E702191) (citations omitted).

I am constrained by Commission precedent interpreting section 11-9-702(b) to find that Claimant's claim for additional medical benefits is not barred by the statute of limitations. This finding is compelled on two alternative grounds.

First, the Commission has apparently determined that a dismissal without prejudice does not constitute a final order ending the litigation. See Sexton v. Atlas Carriers, Inc., Full Workers' Compensation Commission Opinion filed October 13, 2003 (E510879). In Sexton, the dissenting Commissioner offered a view similar to Respondent #1's argument in this case:

[W]hile a dismissal without prejudice is normally a non-appealable order, I find that in the present claim, the October 17, 2000, Order of Dismissal operated to permanently bar the claimant's claim since it was entered after the statutory period for filing a claim pursuant to A.C.A. § 11-9-702(b), and would thus have been a final and appealable order.

....  
Since I find that the October 17, 2000, Order of Dismissal was a final and

appealable order, I further find that this claim is barred by the Statute of Limitations.

Sexton, supra (Commissioner Karen H. McKinney, dissenting). While the dissenting Commissioner's reasoning is appealing, that obviously was not the position adopted by the majority. The Full Commission did not agree that the dismissal order "acted to 'decide' or 'resolve' the claim," so it "reverse[d] the Administrative Law Judge's determination that his October 2000 dismissal acted as a bar to further benefits." In light of Sexton, I do not believe the June 16, 2003 dismissal without prejudice can be treated as barring Claimant's request for additional medical benefits.

In the alternative, even if the June 16, 2003 dismissal without prejudice constitutes a final order, then under Brake, supra, and Cooper, supra, Claimant had one year in which to file another claim for additional benefits. Claimant initiated such a claim on September 8, 2003, well within one year after the June 16, 2003 Order. Therefore, Claimant's claim is not barred by the statute of limitations.

## **B. Entitlement to Medical Benefits**

Claimant seeks medical benefits from Respondents #1 and #2. An employer shall promptly provide for an injured employee such medical treatment as may be reasonably necessary in connection with the injury received by the employee. Ark. Code Ann. § 11-9-508(a). The claimant must prove by a preponderance of the evidence that the medical treatment is reasonably necessary in connection with his compensable injury. Cox v. Aeroquip, Full Workers' Compensation Commission Opinion filed September 10, 2003 (F010474). "Preponderance of the evidence" means evidence of greater convincing force; the term does not mean preponderance in amount, but implies an over-balancing

in weight. Smith v. Magnet Cove Barium Corp., 212 Ark. 491, 496-97, 206 S.W.2d 442, \_\_\_ (1947).

### **1. Liability of Respondent #1**

Claimant underwent fusion surgery at C5-6 and C6-7 in 1989. In treating Claimant's 1993 compensable injury sustained while in Respondent #1's employment, Dr. Robert Foster determined that Claimant's previous surgery at C5-6 did not succeed. On May 14, 1993, Dr. Foster wrote: "He underwent anterior cervical discectomy and fusion of C5-C6 and C6-C7 and failed to fuse at C5-C6."

In June, 1993 Dr. Foster successfully performed a second fusion of Claimant at level C5-6. On February 9, 1994, Dr. Foster wrote that Claimant "is healed and he is medically maximized." In that same letter Dr. Foster assigned Claimant an impairment rating. In his February 7, 1996 deposition, Dr. Foster confirmed that he was not aware of any medical or physical reason that Claimant could not work full time in the job he then held. Dr. Foster also opined that Claimant would not need any subsequent treatment because "at this time he is medically maximized."

Claimant left Respondent #1's employment in February, 1994; he began to work for Respondent #2 on June 2, 1994, and alleges that he was injured while in Respondent #2's employment on May 21, 1997. At the June 16, 2004 hearing, Claimant confirmed that the C6-7 fusion performed in 1989 had fused properly, and that he got a good result from Dr. Foster's treatment at the C5-6 level. Claimant testified that after Dr. Foster's June, 1993 surgery and Claimant's return to work, he was pain free "[f]or a short period of time. It didn't last a long time, but I was for a short period." Claimant's January 3, 2003 deposition sheds more light on his status between the time he left Respondent

#1's employment and the time he left Respondent #2's employment.

Q. During that five year period of time, Mr. White, can you remember, did your neck and back problems, did they get worse during that period of time, were they staying about the same, roughly, or do you remember at all?

A. They got, they got a lot better after I had the surgery and got over, convalescent time over the, the period that I got through with the surgery and went back to Gregg and then went to Micro and in between that time. They got a lot better. I didn't have any trouble at all working for Micro for a long time.

\_\_\_\_\_ Claimant underwent an MRI of his cervical spine on March 27, 2003. The Radiology Consultation Report of that same date states in part:

This patient has apparently had previous cervical fusion at C5-C6 and C6-C7. The fusion appears excellent, with no subluxation. This appears to be healing well. ... The C4-C5 level demonstrates the small central disc herniation. C7-T1 demonstrates disc bulging and osteophyte formation. The levels of surgical fusion show no significant defect.

It appears that Dr. Foster interpreted this MRI in a letter dated June 9, 2003. Dr. Foster noted that Claimant "has developed significant degenerative disc disease at C4/5 above the level of his fusion as well as at C7/T1 below the level of his fusion." Dr. Foster opined that Claimant could either live with his condition and undergo pain management, "or consider a cervical fusion or extension of his fusion which could improve his symptomology somewhat...."

In the course of his January 29, 2003 deposition Dr. Foster explained why Claimant should undergo another MRI. He acknowledged that "everybody by the time you get to Alvin's age has some component of degenerative arthritis." However, Dr. Foster was particularly interested in whether an MRI would reflect any change in the level of Claimant's degenerative arthritis below his fusion.

Q. Why would that be significant to you, the change of the level below?

A. I think the change in the level below should probably - I'm asked to answer a difficult question. And I would anticipate that any degenerative changes that occur below his level of his fusion, at that level probably to be the result of the fusion itself. And any degenerative changes in C4-5 which is certainly a more mobile and unprotected level, to probably reflect some aspect of degenerative changes from his activities as well as just being around.

Dr. Foster added: "[T]his is not anything that's, it's not an exact science, particularly five years out."

I find that Claimant has failed to sustain his burden of proving by a preponderance of the evidence that Respondent #1 must provide medical benefits under § 11-9-508(a). Claimant's testimony and the medical evidence both demonstrate that his June, 1993 surgery at C5-6 was successful. Dr. Foster declared Claimant at maximum medical improvement after the surgery; Claimant testified that his problems "got a lot better" and that he "didn't have any trouble at all working for [Respondent #2] for a long time." This proof demonstrates the absence of a causal connection between the compensable injury Claimant sustained in Respondent #1's employment and his current need for medical treatment.

Dr. Foster's January 29, 2003 deposition should be addressed. Dr. Foster did not see a connection between Claimant's earlier injury and surgery, and his degenerative changes at C4-5. Instead, Dr. Foster believed these changes "probably reflect some aspect of degenerative changes from his activities as well as just being around." Dr. Foster did state that the lower level problem at C7-T1, would "probably... be the result of the fusion itself." On the other hand, Dr. Foster stated that everyone at Claimant's age has some component of degenerative arthritis; he also noted that the passage of time created some uncertainty: "[I]t's not an exact science, particularly five

years out.” Balancing this testimony against Claimant’s testimony of his own condition, Dr. Foster’s earlier statements, and the March 27, 2003 Radiology Consultation Report, I find that the evidence of greater convincing force fails to demonstrate the necessary causal connection between the 1993 compensable injury and Claimant’s current need for medical treatment.

## **2. Liability of Respondent #2**

As noted above, Claimant appears to have become relatively asymptomatic after his June 1993 surgery. On February 9, 1994, Dr. Foster wrote that Claimant “is healed and he is medically maximized.” In his January 3, 2003 deposition, Claimant testified that his physical condition improved between leaving Respondent #1's employment in February 1994 and starting to work for Respondent #2 in June 1994. Claimant also testified that he experienced less pain during this time. Claimant recalled that he was not on any pain medication between February, 1994 and May 21, 1997, the date he was injured while in Respondent #2's employment; Claimant explained that he did not need any kind of medication in that time period because he “wasn’t hav[ing] any trouble.”

At the June 16, 2004 hearing, Claimant testified that some of his job duties for Respondent #2 included lifting; this lifting caused him to begin to experience pain again. On the evening of May 21, 1997, Claimant was engaged in lifting heavy items, causing pain in his neck and lower back. Claimant sought medical treatment and was ultimately referred to Dr. Foster. A note signed by Dr. Foster, dated March 10, 1999, gives his opinion of Claimant’s subsequent condition:

I believe that Mr. White has been unable to work from the date of his injury on May 21, 1997 through November 11, 1997 when he was released to restricted duties of 1 pound[ ] lifting restriction and that he worked then until

May 20, 1998 at which time as a result of his injury and work in excess of his limitations, he became permanently and totally unable to work. ... These opinions are based upon a reasonable degree of medical certainty.

Claimant has been taking medications since he left Respondent #2's employment in May of 1998, including for pain management. Claimant testified at his January 3, 2003 deposition that he believes that he is unable to work due to his May, 1997 injury.

In a letter dated June 9, 2003, Dr. Foster opined that Claimant could either "live with this and undergo pain control as he is doing or consider a cervical fusion or extension of his fusion which could improve his symptomology somewhat...." Claimant would like to have the surgery; he believes that his condition is worsening, and he testified to constant pain. Claimant also testified that certain medical bills are unpaid and need attention.

I find that Claimant has sustained his burden of proving by a preponderance of the evidence that Respondent #2 must provide reasonably necessary medical benefits. The evidence of greater convincing force establishes that Claimant was asymptomatic prior to his employment with Respondent #2; he was injured while in Respondent #2's employment on May 21, 1997; and he has required care since that date. Indeed, Respondent #2 has provided some medical benefits. Claimant's need for treatment and other medical benefits is connected to his injury sustained while in Respondent #2's employment.

\_\_\_\_\_ **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

\_\_\_\_\_ 1. The stipulations agreed upon by the parties are reasonable and are approved.

2. All previous opinions, transcripts of testimony, and exhibits are made a

part of the record herein.

3. Respondent #1 last paid medical expenses on behalf of Claimant on February 5, 1997, for treatment rendered on December 11, 1996, and last paid indemnity benefits (the 2% impairment rating) on June 25, 1999.

4. At the August 21, 1996 hearing in this matter, involving Respondent #1, Respondent #3, and Claimant, the issue of permanency of wage-loss disability was reserved.

5. The Second Injury Fund is excused from the hearing in this issue of medical treatment.

6. Claimant's request for additional medical benefits is not barred by the Statute of Limitations.

7. Claimant did not sustain his burden of proving by a preponderance of the evidence that Respondent #1 must provide medical benefits. Claimant's testimony and the medical evidence both demonstrate that his June, 1993 surgery at C5-6 was successful; therefore, the proof of greater convincing force fails to indicate a causal connection between the compensable injury Claimant sustained in Respondent #1's employment and his current need for medical treatment.

8. Claimant did sustain his burden of proving by a preponderance of the evidence that Respondent #2 must provide medical benefits. Claimant was asymptomatic prior to his May 21, 1997 injury while in Respondent #2's employment; since that date, Claimant has been symptomatic. Claimant's testimony and the medical evidence demonstrate a causal connection between the injury Claimant suffered while in Respondent #2's employment and his current need for medical treatment.

**AWARD**

Respondent #2 is directed to pay benefits in accordance with the Findings of Fact and Conclusions of Law set forth herein.

**IT IS SO ORDERED.**

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D. FRANKLIN AREY, III,  
Administrative Law Judge

DFA/ml