

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E606338

WALTER W. KENT, EMPLOYEE	CLAIMANT
SINGLE SOURCE TRANSPORTATION CO., EMPLOYER	RESPONDENT
CRAWFORD & CO., TPA	RESPONDENT

OPINION FILED OCTOBER 4, 2005

Hearing before Administrative Law Judge J. Mark White on September 8, 2005, in Texarkana, Miller County, Arkansas.

Claimant represented by Mr. Aaron L. Martin, Attorney at Law, Fayetteville, Arkansas.

Respondents represented by Ms. Carol L. Worley, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

On September 8, 2005, the above-captioned claim came on for a hearing in Texarkana, Arkansas. A pre-hearing conference was conducted on June 13, 2005, and a Prehearing Order was entered that same day. A copy of the June 13, 2005, Prehearing Order has been marked as Commission Exhibit No. 1 and made a part of the record herein without objection. At the hearing, the parties confirmed that the stipulations, issues, and respective contentions, as amended, were properly set forth in the Prehearing Order.

The parties stipulated that the Arkansas Workers' Compensation Commission has jurisdiction of this claim; that the employee/employer/carrier

relationship existed at all relevant times, including August 22, 1995; that on August 22, 1995, the claimant sustained compensable injuries to his neck and left shoulder; that respondents accepted the injuries as compensable and paid benefits, including impairment ratings of 9% for the shoulder and 13% for the neck; that the claimant earned wages sufficient to entitle him to a compensation rate of \$270 for total disability benefits and \$203 for permanent partial disability benefits; and that the respondents have controverted the claimant's request for additional medical treatment for his neck.

The parties agreed that the issues to be presented were whether additional medical treatment is reasonably necessary in connection with the compensable injury; whether the claimant is entitled to additional temporary total disability benefits; whether the statute of limitations bars this claim; and controversion and attorney's fees.

The claimant contends that he is entitled to additional medical benefits associated with this claim; that specifically, he is entitled to payment of benefits for a surgery performed by his authorized treating physician; that he requests full reimbursement for any out-of-pocket expenses, satisfaction of all subrogation interests, payment of any outstanding balances, and payment of mileage; that he is entitled to temporary total disability benefits from April 18, 2005, through a date yet

to be determined; and that he is entitled to the appropriate attorney's fee for recovery of medical benefits and for temporary total disability benefits.

The respondents contend that all appropriate benefits have been and are being paid associated with the claimant's left shoulder injury; that they deny any benefits associated with the claimant's neck as the same are not reasonable and necessary and are likely barred by the statute of limitations. At the hearing, the respondents further contended they are entitled to credit for short-term disability benefits received by the claimant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing 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 claimant and to observe his demeanor, the following findings of fact and conclusions of law are hereby made in accordance with Ark. Code Ann. § 11-9-704:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The stipulations agreed to by the parties are reasonable and are hereby accepted as fact.

3. The present claim is not barred by the statute of limitations.
4. The claimant has proven by a preponderance of the evidence that his neck surgery of April 2005 was a natural and probable result of his compensable injury, and that his neck surgery of April 2005 was reasonably necessary in connection with the compensable injury.
5. The claimant has proven by a preponderance of the evidence that he was within his healing period and totally incapacitated from earning wages from April 18, 2005, through June 7, 2005.
6. The claimant has proven by a preponderance of the evidence that he is entitled to temporary total disability benefits from April 18, 2005, through June 7, 2005.
7. The respondents are entitled to credit for group disability benefits previously paid to the claimant, per Ark. Code Ann. § 11-9-411.
8. The respondents have controverted all benefits sought herein.

DISCUSSION

I. History

The claimant sustained compensable injuries on August 22, 1995, to his neck and left shoulder as a result of a motor vehicle accident. The respondents accepted

the injuries as compensable and paid benefits. The claimant continues to receive treatment for his left shoulder, but the parties agree that the left shoulder is not at issue herein. The claimant seeks additional benefits, and the respondents controvert additional benefits, only in regards to the neck.

The claimant's treating physician, Dr. Freddie Contreras, performed an anterior cervical decompression at C5-6 and C6-7 in either 1996 or 1997. Dr. Contreras released him from care on October 7, 1998, but the claimant continued to visit Dr. Contreras on occasion through November 14, 2000. As of that date, Dr. Contreras noted the claimant was still having "intermittent neck pain usually whenever he overdoes it. All in all, though, he does not feel like he is substantially worse."

The claimant testified that at some point in 2005 he awoke with recurring pain in his neck. He testified:

I went to bed and woke up one Sunday morning and it was just like I couldn't - it was just like when I had had the accident, the pain and I couldn't turn it to the left. It'd just lock upon [sic] me. And I couldn't - I was trying to figure out what I had done, if I had done something to cause it, because I sure didn't want to do it again. I couldn't come to any conclusion of anything that I had done physically to cause it to be that way so I made an appointment with Dr. Contreras.

The claimant saw Dr. Contreras on February 10, 2005, with what the doctor

described as “a recurrence of his neck pain. This pain has progressed to the point where he desperately wants to get it evaluated.” An MRI performed February 21 found “no clear evidence” of the prior surgery. The MRI also found degenerative changes from C4-5 through C6-7, including generalized disc bulging and mild canal stenosis at C4-5. When Dr. Contreras reviewed the MRI films, he opined that the claimant did “not have the most solid fusion at 5-6 and 6-7.” Dr. Contreras noted that the claimant’s smoking may have contributed to the failure to heal. Dr. Contreras performed a second surgery on April 18, 2005, an anterior cervical decompression at C3-4 and C4-5. The claimant testified that his condition was significantly improved after the surgery.

On May 31, Dr. Contreras issued a work release allowing the claimant to return to work on June 7. Dr. Contreras saw the claimant again on June 16 and allowed him to “increase his activities.”

II. Adjudication

A. Statute of Limitations

The respondents contend this claim is barred by the statute of limitations. Arkansas law limits the time in which a claim for additional compensation may be filed. The relevant statute of limitations states in pertinent part:

In cases where 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 injury, whichever is greater.

ARK. CODE ANN. § 11-9-702 (b)(1). A timely-filed claim for additional benefits will toll the statute of limitations until the claim is decided. *Bledsoe v. Georgia-Pacific Corp.*, 12 Ark. App. 293, 675 S.W.2d 849 (1984). It is the burden of the claimant, not respondents, to prove that a claim for additional compensation has been timely filed. *Aluminum Comp. Of America v. Rollon*, 76 Ark. App. 240, 64 S.W.3d 756 (2001).

The medical and payment records submitted into the record herein reflect that the statute of limitations was tolled by payment of benefits for the claimant's compensable injury through at least November 14, 2001 (one year after the claimant's final visit with Dr. Contreras). The claimant filed a Form AR-C Claim for Compensation with the Commission on March 21, 2001, still within the limitation period of Ark. Code Ann. § 11-9-702 (b)(1). On December 31, 2001, an Administrative Law Judge entered an "Order of Dismissal" dismissing the claim. The Order does not specify whether the dismissal was with or without prejudice, but I note the Commission has frequently expressed its preference for dismissals without prejudice. *See, e.g., Paskell v. S & C Operating*, A.W.C.C. E702685 (July 28, 1999). The present claim for benefits for the neck was not filed until sometime in

2005, well outside the limitation period of Ark. Code Ann. § 11-9-702 (b)(1).

Both the Full Commission and the Court of Appeals have held that a claim for additional benefits will toll the statute of limitations, and that a dismissal of the claim without prejudice does not cease the tolling of the statute. *Dillard v. Benton County Sheriff's Office*, __ Ark. App. __, __ S.W.3d __ (Sept. 22, 2004); *Sexton v. Atlas Carriers, Inc.*, A.W.C.C. E510879 (Oct. 13, 2003). The present case appears to be factually identical to both *Dillard* and *Sexton*, in that a claim for additional benefits was filed, then dismissed, and then refiled outside the limitation period of Ark. Code Ann. § 11-9-702 (b)(1). Therefore, even though the present claim was filed outside the limitation period established by statute, I am constrained to conclude that the statute of limitations remains tolled and that the present claim is not barred by the statute of limitations.

B. Additional Medical Treatment

An employer must 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). What constitutes reasonably necessary medical treatment is a question of fact. *Ark. Dept. of Correction v. Holybee*, 46 Ark. App. 232, 878 S.W.2d 420 (1994). The test for determining whether a subsequent episode is a recurrence or an aggravation is whether the subsequent episode was a

natural and probable result of the first injury or if it was precipitated by an independent intervening cause; if there is a causal connection between the primary and the subsequent disability, there is no independent intervening cause unless the subsequent disability is triggered by activity on the part of the claimant which is unreasonable under the circumstances. *Georgia-Pacific Corp. v. Carter*, 62 Ark. App. 162, 969 S.W.2d 677 (1998).

At first glance, there appears to be no causal connection between the claimant's compensable injuries and his 2005 neck surgery, in that the 2005 surgery was performed at C3-4 and C4-5, whereas his original surgery had been performed at C5-6 and C6-7. Nonetheless, Dr. Contreras explicitly opined on a disability form that the 2005 surgery was related to the original compensable injury. He wrote that after the 1996/97 surgery, the claimant "did not attain a solid fusion. This surgery changed the mechanics of his spine, resulting in the current symptoms that led to the surgery on 4-18-05." I can find no evidence in the record to contradict Dr. Contreras' stated opinion.

Given the above evidence, I find that the claimant has proven by a preponderance of the evidence that his neck surgery of April 2005 was a natural and probable result of his compensable injury, and that his neck surgery of April 2005 was reasonably necessary in connection with the compensable injury.

C. Additional Temporary Total Disability Benefits

An employee who suffers a compensable unscheduled injury is entitled to temporary total disability compensation for that period within the healing period in which he suffers a total incapacity to earn wages. *Arkansas State Highway & Transportation Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981). The healing period ends when the underlying condition causing the disability has become stable and nothing further in the way of treatment will improve that condition. *Mad Butcher, Inc. v. Parker*, 4 Ark. App. 124, 628 S.W.2d 582 (1982).

The claimant was off work following his April 18, 2005, surgery, and Dr. Contreras allowed him to return to work as of June 7, 2005. Given my findings above, I find that the claimant has proven by a preponderance of the evidence that he was within his healing period and totally incapacitated from earning wages from April 18, 2005, through June 7, 2005. I therefore conclude that the claimant has proven by a preponderance of the evidence that he is entitled to temporary total disability benefits from April 18, 2005, through June 7, 2005.

AWARD

The claimant has proven by a preponderance of the evidence that his neck surgery of April 18, 2005, was reasonably necessary in connection with his compensable injury; and that he was entitled to temporary total disability benefits

from April 18, 2005, until June 7, 2005. The respondents are hereby directed and ordered to pay benefits in accordance with the findings of fact and conclusions of law set forth herein. The respondents are entitled to credit for group disability benefits previously paid to the claimant, per Ark. Code Ann. § 11-9-411.

The claimant's attorney, Mr. Aaron Martin, is hereby awarded the maximum statutory attorney's fee on the entire Award pursuant to Ark. Code Ann. § 11-9-715 as it applies to injuries sustained prior to July 1, 2001.

All accrued sums shall be paid in a lump sum without discount, and this award shall earn interest at the legal rate until paid pursuant to Ark. Code Ann. § 11-9-809.

IT IS SO ORDERED.

HON. J. MARK WHITE
Administrative Law Judge