

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E810917

GARRY HOLLIMAN

CLAIMANT

**ABF FREIGHT SYSTEM, INC.
(SELF-INSURED)**

RESPONDENT EMPLOYER

ORDER AND OPINION FILED MAY 21, 2007

Hearing before Administrative Law JUDGE LINDA K. MARSHALL.

Claimant represented by the HONORABLE ROBERT M. ABNEY, Attorney at Law, Des Arc, Arkansas.

Respondents represented by the HONORABLE JOHN D. DAVIS, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

The above claim came on for a hearing in Little Rock, Arkansas on April 10, 2007. A prehearing conference was held on January 16, 2007 and a prehearing order was filed the same date. A copy of the prehearing order was marked as Commission Exhibit No. 1 and made a part of the record without objection.

At the prehearing conference, the parties agreed to the following stipulations:

1. There was an August 26, 1998, employer-employee relationship.
2. The compensation rate is the maximum for a 1998 injury.

The claimant contends he is entitled to additional medical benefits.

Respondents contend that the statute of limitations bars the claim for additional benefits pertaining to a 1998 compensable injury. December 17, 2004, was the last payment of benefits.

ISSUES TO BE LITIGATED

1. State of limitations.
2. Additional medical benefits.

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 witnesses and to observe their demeanor, the following findings of fact and conclusions of law are made in accordance with Ark. Code Ann. §11-9-704:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. There was an August 26, 1998, employer-employee relationship.
2. The compensation rate is the maximum for a 1998 injury.
3. The statute of limitations does not bar the claim for benefits.
4. The claimant has proven by a preponderance of the evidence that the additional medical benefits is reasonable and necessary.
5. Respondents are liable for the medical benefits.
6. The claimant's attorney is entitled to the maximum statutory attorney's fee on benefits awarded herein, one-half of which is to be paid by claimant and one-half to be paid by respondents in accordance with Ark. Code Ann. §11-9-715, *Coleman v. Holiday Inn*, 31 Ark. App. 224, 792 S.W.2d 345 (1990) and *Chamness v. Superior Industries*, W.C.C. E019760 (Opinion filed March 4, 1992).

DISCUSSION

The claimant has been employed with the respondent employer for 30 years as a truck driver. In 1998, the claimant was delivering some product and, as he was exiting the truck, he twisted and fell out of the truck with the product falling on him causing a shoulder injury and a back injury. The claim was accepted as compensable and the claimant received medical treatment, medication, physical therapy and a TENS unit. The last office visit paid by the respondents was the 2004 visit to Dr. Steven Cathey. When the claimant saw Dr. Cathey in September 2005 and a MRI was ordered, respondents controverted the claim. The claimant testified that he saw Dr. Cathey on July 22, 2002, September 30, 2003 and September 14, 2004. The claimant contends there has never been a one year period when he did not receive either medical treatment or some medical services were paid by his employer.

The claimant testified that his back was doing pretty good right now and he takes over-the-counter drugs and he has passed his DOT physical and does not have any limitations placed on him by his doctor. The claimant took prescription medicine before the claim was denied. The claimant also described various activities that aggravate his condition.

Roger Osburn, an adjuster for the employer, testified about the payout history for medical regarding the claimant. He specifically highlighted a doctor's visit on November 11, 1999, to Dr. Cathey and the next doctor's visit was December 5, 2000 and the next doctor's visit was November 12, 2001. The payout history revealed the next doctor's visit was July 22, 2002 and the next visit was September 30, 2003. The payments made in between the doctor's visits were payments for medication and TENS unit

supplies.

Respondents contend the statute of limitations bars the claim, while the claimant contends he is entitled to additional medical treatment and benefits.

A claim for additional compensation is 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).

In the present case, respondents contend there were two periods when the claimant went for more than one year without receiving medical treatment. Those periods were November 11, 1999 to December 5, 2000 and again from July 22, 2002 to September 30, 2003. The four dates identified above all represent visits with Dr. Steven Cathey, the treating physician. However, between the first period, the payout history reveals the claimant's providers, MSSC Medical Services was paid \$77.73 on December 14, 1999, and Third Party Solutions was paid \$77.73 on November 15, 1999. This is no proof in the record that these costs represent anything other than medication and supplies. During the second period, there are six separate entries for service to Apollo Enterprise and these bear a code of "09" which was identified by Roger Osburn as the code for prescription drugs.

The issue is whether payments from medicine by a respondent are considered "payment of compensation" for purposes of tolling the statute of limitations.

Compensation is defined in Ark. Code Ann. §11-9-102(5):

'Compensation' means the money allowance payable to the employee or to his or her dependents and includes the allowances provided for in §11-9-509 and funeral expenses;

Ark. Code Ann. §11-9-508 provides:

The employer shall promptly provide for an injured employee such medical, surgical, hospital, chiropractic, optometric, podiatric, and nursing services and medicine . . . as may be reasonably necessary in connection with the injury received by the employee.

It can be concluded that payments for medicine are a part of “compensation” within the meaning of the Arkansas Workers’ Compensation Act and further the Arkansas Supreme Court has interpreted the act accordingly. *Reynolds Metal Co. v. Brumley*, 226 Ark. 388, 290 S.W.2d 211 (1956); *Ragan v. Great American Indemnity Co.*, 224 Ark. 387, 273 S.W.2d 524 (1954).

The instant case seems on point with *Alred v. Jackson Atlantic, Inc.*, 268 Ark. 695, 595 S.W.2d 249 (1980), where the Court held that payments for medicine constitute “payment of compensation” within the meaning of the workers’ compensation act. The Court went on to say that its holding did not mean that a claimant may toll the statute merely by refilling a prescription. The statute specifically says medication which is “reasonably necessary” for the injury suffered. It further held that what is considered “reasonably necessary” will depend on the facts and circumstances of each case. In *Alred*, there was evidence to indicate the claimant may have been receiving medicine during the period in which respondent claims the one year statute of limitations had run uninterrupted. The Court reversed the Commission’s holding that the statute of limitations barred the claim for additional benefits and remanded to determine if the medicine was “reasonably necessary” for treatment of the injury.

The Court of Appeals held in *Evans v. Northwest Tire Service*, 23 Ark. App. 11, 740 S.W.2d 151 (1987), that the furnishing of replacement medicine may toll the running of the statute. On the other hand, if more than one year passes between the furnishing of replacement medicine to the claimant, a claim for additional compensation may well be barred by the statute because such claims are not revived once the statute has run. In *Evans*, the claimant sustained a shoulder injury in 1976 and the last disability payment was made on February 14, 1980. Since 1980, no uninterrupted one year period has passed without the claimant receiving some payments, although from 1983 through 1985, the claimant was furnished with replacement medicine only. In 1985, the claimant asked for additional benefits contending he was permanently and totally disabled. The Court reversed the Commission's holding that the statute of limitations barred the claim and remanded for further proceedings.

When both the *Evans* and *Alred* cases are considered in reconciling whether the statute of limitations bars the instant case, I find that the claim is not barred by the statute of limitations. In the instant case, there was never a one year uninterrupted period of time where the respondents were not furnishing medication, supplies or physician's care. A payment for medication is considered "payment of compensation" within the meaning of Ark. Code Ann. §11-9-102(5). The statute specifically says medication which is "reasonably necessary" for the injury suffered. In the instant case, the claimant had continued to receive medication prescribed by his treating physicians that helped deal with pain and problems associated with his compensable injury. There was no evidence presented that the medication that was continued to be furnished to him was not "reasonably necessary."

For the reasons stated, I find the statute of limitations does not bar the claim. I further find the respondents are responsible for the reasonable and necessary medical and medications the claimant has sought. Dr. Steven Cathey remains the claimant's treating physician and he is the physician who has followed the claimant with the conservative care he has pursued since the initial injury.

ORDER

The statute of limitations does not bar the claim for benefits. The claimant has proven by a preponderance of the evidence that the additional medical benefits is reasonable and necessary. Respondents are liable for the medical benefits.

The claimant's attorney is entitled to the maximum statutory attorney's fee on benefits awarded herein, one-half of which is to be paid by claimant and one-half to be paid by respondents in accordance with Ark. Code Ann. §11-9-715, *Coleman v. Holiday Inn*, 31 Ark. App. 224, 792 S.W.2d 345 (1990) and *Chamness v. Superior Industries*, W.C.C. E019760 (Opinion filed March 4, 1992).

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.

**LINDA K. MARSHALL
ADMINISTRATIVE LAW JUDGE**