

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E905122

DAVID CHILDRESS		CLAIMANT
C BEAN TRANSPORT SELF INSURED		RESPONDENT
COMPENSATION MANAGERS, TPA	NO. 1	RESPONDENT
SECOND INJURY FUND	NO. 2	RESPONDENT

OPINION FILED **MAY 15, 2008**

Hearing before ADMINISTRATIVE LAW JUDGE MICHAEL L. ELLIG in Fort Smith, Sebastian County, Arkansas.

Claimant represented by EDDIE WALKER, JR., Attorney, Fort Smith, Arkansas.

Respondents No. 1 represented by WALTER MURRAY, Attorney, Little Rock, Arkansas.

Second Injury Fund represented by JUDY RUDD, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held on February 19, 2008, in Fort Smith, Arkansas.

A pre-hearing order had been entered in this case on October 16, 2007. This pre-hearing order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. A copy of this pre-hearing order was made Commission's Exhibit No. 1 to the hearing.

The following stipulations were offered by the parties and are hereby accepted:

1. On April 11, 1999, the relationship of employee-self insured employer-TPA existed between the parties.
2. On April 11, 1999, the appropriate weekly compensation rates were \$319.00 for total disability and \$239.00 for permanent partial disability.

3. On April 11, 1999, the claimant sustained a compensable injury to his low back.
4. There is no dispute over accrued medical expenses for the compensable back injury.
5. There is no dispute over temporary disability benefits for the compensable back injury.

By agreement of the parties, the issues to be litigated and resolved at the present time were limited to the following:

1. The claimant's entitlement to permanent partial disability benefits for permanent physical impairment.
2. Attorney's fees.
3. The claimant's entitlement to continuing medical services for his back.
4. Whether the claimant's entitlement to the above benefits is barred by the Statute of Limitations.

In regard to these issues, the claimant contends:

"a. The claimant contends that at the time he sustained an injury to his shoulder he was still on medication for his back and that the respondents have continued to pay for various medications but it is unclear whether the respondents are taking a position that those medications are solely for the claimant's shoulder or whether they continue to be treatment for his back. The claimant contends that because he has continued to receive treatment for his back that claim remains open although the injury occurred in 1999.

b. The claimant contends that as a result of his 1999 injury he is entitled to a permanent impairment rating as evidence by defects in his discs revealed by a MRI that was performed May 17, 1999. The claimant contends that if a physician does not assess a permanent impairment rating, the Commission should exercise its authority, and duty, and determine the extent of permanent impairment based upon the 4th

Edition of the A.M.A. Guides to Evaluation of Permanent Impairment.

c. The claimant contends that he had multiple medical conditions prior to his December 29, 2004 shoulder injury and that the effects of those pre-existing conditions and his December 29, 2004 shoulder injury cause him to be more disabled than he would have been based upon the effects of the December 29, 2004 injury alone. The claimant contends that his wage loss disability is in excess of the 25 percent for which the Second Injury Fund has accepted liability.

d. The claimant contends that any disability that the claimant is awarded for which the respondents have not already accepted liability has been controverted and that his attorney should receive an appropriate attorney's fee."

In regard to these issues, the respondents contend:

"Respondents believe that claimant has received all appropriate benefits."

DISCUSSION

I. THE EFFECT OF THE STATUTE OF LIMITATIONS

The first issue to be addressed concerns the respondents' contention that any additional benefits for the claimant's compensable back or lumbar injury are barred by the expiration of the Statute of Limitations. This issue is controlled by the provisions of Ark. Code Ann. §11-9-702(b).

The record reveals that the claimant sustained an admittedly compensable injury to his low back or lumbar spine, while he was employed by this respondent on April 11, 1999. He was initially treated by Dr. Keith Holder of the Cooper Clinic Occupational Medicine Department. Dr. Holder diagnosed the claimant's injury as a lumbar strain. He provided the claimant with conservative treatment, which included the use of the oral medications Celebrex and Skelaxin. Although Michelle Burgess, who subsequently handled the claimant's 2004 compensable shoulder injury for the respondent, testified

that she never authorized Dr. Holder to treat the claimant for his compensable back injury. This testimony is of no consequence, as Ms. Burgess was not handling his 1999 compensable back claim. Clearly, the adjustor, who was handling the 1999 claim, initially directed treatment of the claimant for his compensable back injury by Dr. Holder. From past experience with the respondent, Dr. Holder (or, at least, the Cooper Clinic Occupational Medicine Department) acts as the respondents' local company doctor. I would further note that the respondents obviously accepted liability for and paid the expenses incurred for the initial treatment of the claimant for the 1999 back injury by Dr. Holder. Dr. Holder appears to have treated the claimant for his compensable back injury through, at least, May 7, 1999.

The claimant next came under treatment for his compensable back injury by Dr. Jim Moore, a neurosurgeon, in Little Rock, Arkansas. Dr. Moore's report, dated January 12, 2000, indicated that he was seeing the claimant for his compensable back injury, and that the claimant was accompanied by his wife and a Mr. Goode, the claims manager for the 1999 back injury. Dr. Moore stated in this report that he had been treating the claimant's compensable back injury with conservative measures. This treatment consisted of the use of epidural steroid injections, a TENS unit, and oral medication. One of the oral medications employed was Skelaxin, which had been initially prescribed by Dr. Holder.

From Dr. Moore's records and reports, it is his expert opinion that the claimant's compensable low back or lumbar injury was in the form of a non surgical herniated disc. This diagnosis is supported by the MRI of the claimant's lumbar spine that was taken on May 17, 1999. I find Dr. Moore's diagnosis to be accurate.

In a report dated April 26, 2000, Dr. Moore opined that the claimant had reached maximum healing of the actual physical damage caused by the actual back injury and assessed a permanent physical impairment of approximately 7 percent to the body as a whole. He further placed permanent restrictions on the claimant's potential employment activities. However, he expressly stated that the claimant should continue taking the Skelaxin. Throughout this period of active medical treatment of the actual physical damage caused by the compensable injury, Dr. Moore kept the respondents' case manager informed of his treatment and conclusions, and it appears that the respondents voluntarily paid the expense of this treatment.

After Dr. Moore concluded that the physical damage caused by the compensable back injury had stabilized, he continued to provide the claimant with medical services directed toward the management of the claimant's chronic symptoms from the compensable injury. In his report of July 5, 2000, Dr. Moore advised the respondents, including the claims manager and the nurse case manager, that the claimant would indefinitely require the use of various oral medication to manage his chronic symptoms from the compensable back injury, particularly the medication Skelaxin. He also advised the respondents that periodic follow up visits would be required to monitor the claimant's status. From the actual reports of Dr. Moore that were introduced and the prescription dates shown on the medication records (Claimant's Exhibit No. 2), Dr. Moore continued to see the claimant in follow up on a regular basis through November 12, 2004. During this time, no one year interval elapsed between these visits. The record reveals that the respondents accepted liability for and voluntarily paid the expense of the program of medical monitoring and

maintenance provided the claimant by Dr. Moore for his compensable low back injury.

On October 25, 2005, the claimant was seen by Dr. Reginald Rutherford at Arkansas Specialty Care Center. Ms. Burgess had testified that prior to this date, she had sent the claimant to Dr. Holder for evaluation and treatment of his compensable 2004 shoulder injury and Dr. Holder was the one that referred the claimant to Dr. Rutherford for treatment. However, Dr. Rutherford's October 25, 2005 report indicates otherwise. In this report, Dr. Rutherford specifically states:

"Mr. Childress was seen at the request of Nick Jones from Compensation Managers regarding pain management."

Compensation Managers, Inc., was the third party administrator for the respondent employer at the time of his 1999 compensable back injury.

It is further apparent from the October 25, 2005 report of Dr. Rutherford that the claimant had not been referred to him solely for treatment of his 2004 compensable shoulder injury. In this report, Dr. Rutherford specifically mentioned both the compensable 1999 back injury and the compensable 2004 right shoulder injury. He also noted that the claimant had been receiving a program of medical management for his chronic low back complaints by Dr. Moore and that Dr. Moore had recently retired. Thus, it is apparent that Dr. Rutherford understood that he was to treat all of the claimant's chronic pain complaints, even though the claimant's "more significant problem" at that time was with his right shoulder. A review of Dr. Rutherford's records and the record of prescription medication (Claimant's Exhibit No. 3) reveal that Dr. Rutherford continued to prescribe essentially the same medication for the claimant's chronic pain complaints that had previously been prescribed by Dr. Moore.

Dr. Rutherford continued to monitor the claimant and treat his chronic pain complaints through at least June 6, 2007. Further, in his report of that date, Dr. Rutherford indicated that he would see the claimant again for medication supervision in three months. The medication records from Wal-Mart pharmacy show that the claimant continued to obtain the medication prescribed by Dr. Rutherford through at least January 2, 2008 (Claimant's Exhibit No. 3). Again, the record shows that the respondents voluntarily accepted liability for and paid for the expense of both the visits with Dr. Rutherford and the medication he prescribed.

The current claim for additional benefits attributable to the claimant's low back injury, was filed with this Commission on June 29, 2007. After consideration of all the evidence presented, it is my opinion that this claim was filed within one year from the last payment of compensation for the compensable low back injury of April 11, 1999. Thus, the present claim for additional benefits is not barred by the Statute of Limitations provided by Ark. Code Ann. §11-9-702(b)(1).

In reaching this decision, I recognize that Ark. Code Ann. §11-9-702(b)(2) expressly provides that replacement medicine, which is permanently or indefinitely required by a compensable injury, does not constitute a payment of compensation so as to toll the running of the Statute of Limitations. However, under the legislative mandated of strict interpretation this exclusion would be limited only to the actual replacement of medicine. To extend this exclusion to indefinitely require follow up visits to a physician, which are necessary to monitor the stability or level of healing achieved for a compensable injury, simply because replacement medication is also prescribed, would constitute a prohibited judicial expansion of the clear wording of this

Section. In the present case, it is not the actual payment for the medication, itself, that has tolled the Statute of Limitations, but rather it is the medical services provided the claimant to monitor his compensable low back injury by Dr. Holder, Dr. Moore, and Dr. Rutherford that has tolled the Statute.

II. PERMANENT PARTIAL DISABILITY FOR PERMANENT PHYSICAL IMPAIRMENT

The next issue concerns the claimant's entitlement to permanent partial disability for the permanent physical impairment from his compensable lower back injury. The burden rests upon the claimant to prove the existence and extent of this permanent physical impairment.

Dr. Moore diagnosed the claimant's injury to be in the form of a non surgical herniated disc. The presence of such a herniated disc at L5-S1 is objectively supported by the MRI study, which was performed on May 17, 1999. In his report of April 26, 2000, Dr. Moore concluded that the actual physical damage that was caused by the compensable injury had stabilized and been assigned a 7 percent permanent partial rating for this permanent physical damage. This assessment would clearly conform to the rating assigned for such a defect in the Commission's official rating guide, The American Medical Association's Guides to the Evaluation of Permanent Impairment, fourth edition, table 75 II (C), page 113. Dr. Moore is a highly competent neurosurgeon with vast experience in the diagnosis and treatment of spinal injuries. I find his opinion to be convincing.

Therefore, I find that the claimant has proven by the greater weight of the credible evidence that his compensable low back or lumbar injury of April 11, 1999, was the "major cause" of a permanent physical impairment of 7 percent to the body as a whole. He has further proven that this degree or percentage of permanent physical impairment is based upon objective findings

and was calculated in a manner that conforms with the Commission's official rating guide.

Thus, the permanent partial disability benefits for permanent physical impairment would have commenced to accrue on April 6, 2000. The claimant's entitlement to benefits for this permanent physical impairment would have been unaffected by the fact that he had actually returned to employment with the respondent and had, at that time, experienced no actual wage loss or functional disability. All of these benefits would have accrued by December 3, 2000. Thus, had the respondents timely paid such benefits, the claimant would have received all of these benefits by that date. The evidence fails to indicate why such benefits were not voluntarily paid, in the same manner as were all the other appropriate benefits.

In 2004, while the claimant was still employed by the respondent, he sustained a second compensable injury. This injury either in and of itself or combined with his prior compensable back injury has apparently resulted in permanent total disability.

However, I find that this does not relieve the respondent employer, herein, from liability for permanent partial disability benefits for the permanent physical impairment caused by the claimant's compensable low back or lumbar injury of April 11, 1999. Had the respondents paid the benefits in a timely manner, all of these benefits would have been paid long before the second compensable injury to the claimant's right shoulder in 2004. There is simply no reason to allow the respondents to benefit from its failure to timely pay these benefits, simply because the claimant was unfortunate enough to experience a second injury in 2004 that led to permanent total disability.

III. ADDITIONAL MEDICAL SERVICES FOR THE CLAIMANT'S COMPENSABLE BACK OR LUMBAR INJURY

_____The final issue concerns the claimant's entitlement to additional medical services for his compensable back or lumbar injury. The burden rests upon the claimant to prove that any additional medical services he seeks represent "reasonably necessary medical services" for his compensable low back or lumbar injury.

In order to represent "reasonably necessary medical services", the medical services in question must be necessitated by or connected with the compensable injury. Further, these services must have a reasonable expectation of accomplishing the purpose or goal for which they are intended.

In the present case, the only additional medical services that satisfy this criteria are in the form of medical management of the claimant's chronic symptoms and monitoring the stability of the level of healing achieved. This would include periodic follow up visits with Dr. Rutherford and a continuation of the same regimen of oral medication that has been provided consistently since 1999.

I would further note that even if the present claim was barred by the Statute of Limitations, the claimant would be entitled to a continuation of the regimen of oral medication that has been ongoing since 1999, under the provisions of Ark. Code Ann. §11-9-702(b)(2). Clearly, the continuation of this regimen would constitute the replacement of medicine permanently or indefinitely required.

FINDINGS OF FACT & CONCLUSIONS OF LAW

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

2. On April 11, 1999, the relationship of employee-self insured employer-third party administrator existed between the parties.

3. On April 11, 1999, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$319.00 for total disability and \$239.00 for permanent partial disability.

4. On April 11, 1999, the claimant sustained a compensable injury to his low back or lumbar spine, which was in the form of a herniated disc.

5. There is no dispute, at present, over accrued medical expenses for the claimant's compensable low back or lumbar injury.

6. Continued periodic evaluations by Dr. Rutherford and a continuation of the claimant's conservative regimen of oral medication represent reasonable necessary medical expenses for his compensable back or lumbar injury. Pursuant to Ark. Code Ann. §11-9-508, the respondents are liable for the expense of these services, subject to the medical fee schedule established by this Commission.

7. There is no dispute, at the present time, over the claimant's entitlement to temporary disability benefits for his compensable back or lumbar injury.

8. The claimant's healing period from the effects of his compensable back or lumbar injury ended on April 26, 2000.

9. The claimant has experienced a permanent physical impairment of 7 percent to the body as a whole, as a result of the permanent effects of his compensable back or lumbar injury. Specifically, he has proven by the greater weight of the credible evidence that his compensable injury of April 11, 1999, was the major cause of this degree or percentage of disability, that this degree or percentage of disability is based upon objective and measurable physical

findings, and that this degree or percentage of permanent physical impairment was calculated in a manner that conforms with the Commission's official rating guide. The respondents are liable to the claimant for permanent partial disability benefits attributable to this permanent physical impairment.

10. The claimant is not barred from receiving additional medical services for his compensable lumbar injury, as heretofore set out in this Opinion, by the Statute of Limitations provided by Ark. Code Ann. §11-9-702(b)(1).

11. The claimant is not barred from receiving benefits for a permanent partial disability of 7 percent to the body as a whole for payment physical impairment by the provisions of Ark. Code Ann. §11-90-702(b)(1). Specifically, the evidence presented shows that the claim for these additional benefits was filed within one year from the last payment of compensation by the respondent.

12. The respondents have controverted the claimant's entitlement to any permanent partial disability benefits for permanent physical impairment from his compensable back or lumbar injury and his entitlement to any continuing medical services for his compensable back or lumbar injury, which were unpaid as of the date of hearing.

13. As the claimant's compensable injury occurred prior to July 1, 2001, the claimant's attorney is entitled to the maximum statutory attorney's fee on all controverted benefits herein awarded, to be calculated in accord with the provisions of Ark. Code Ann. §11-9-715 as it existed at the time of the claimant's compensable injury.

ORDER

The respondents shall pay to the claimant permanent partial disability benefits for a permanent physical impairment of 7 percent to the body as a whole. Such benefits commenced to accrue on April 26, 2000.

The respondents shall be liable for continued reasonably necessary medical services provided to the claimant for his compensable back or lumbar injury by and at the direction of Dr. Reginald Rutherford, including continued oral medication. This liability is subject to the medical fee schedule established by this Commission.

The respondents shall pay to the claimant's attorney the maximum statutory attorney's fee all controverted benefits herein awarded to be calculated, in the manner provided by Ark. Code Ann. §11-9-715 as it existed at the time of the claimant's compensable injury. One-half of this fee is the obligation of the respondents in addition to such benefits. The remaining one-half of this attorney's fee is to be withheld by the respondents from benefits herein awarded to the claimant.

All benefits awarded, which have heretofore accrued, are payable in a lump sum without discount. This specifically includes all of the permanent partial disability benefits herein awarded.

This award shall bear the maximum legal rate of interest until paid.

IT IS SO ORDERED.

MICHAEL L. ELLIG
ADMINISTRATIVE LAW JUDGE

May 15, 2008

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Re: David Childress v. C Bean Transport
WCC File: E905122

Gentlemen and Ms. Rudd:

Enclosed please find a copy of an Opinion rendered this date, together with a copy of Appeal procedure.

Yours truly,

MICHAEL L. ELLIG
Administrative Law Judge

MLE:dg
Enclosure
Certified Mail
Return Receipt Requested
c:
David Childress
35528 Sanders Hill Rd
Poteau, OK 74953