

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F204535

CURTIS GARDNER	CLAIMANT
BEVERLY ENTERPRISES	RESPONDENT
CONSTITUTION STATES INSURANCE COMPANY, INSURANCE CARRIER	RESPONDENT

OPINION FILED **JULY 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 represented by J. LESLIE EVITTS, III, Attorney, Fort Smith, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on April 29, 2008, in Fort Smith , Arkansas. The deposition of the claimant was taken on February 22, 2008, and has been admitted as Respondents' Exhibit No. 2.

A pre-hearing order was entered in this case on December 12, 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 stipulation was offered by the parties and is hereby accepted:

1. The Opinion of October 27, 2004, has become final and is res judicata of all issues raised and addressed therein.

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 medical services.

2. Whether this claim for additional benefits is barred by Ark. Code Ann. §11-9-702(b).

In regard to these issues, the claimant contends:

"a. The claimant contends that Dr. Charles Jennings is the claimant's authorized treating physician and that he referred the claimant to Dr. Arthur Johnson who has performed surgery on the claimant.

b. The claimant contends that treatment by Dr. Jennings as well as treatment by any physicians to whom the claimant was referred by Dr. Jennings is reasonably necessary and therefore the liability of the respondents.

In regard to these issues, the respondents contend:

"The respondents contend that all medical benefits and all indemnity benefits to which the claimant is entitled have been paid. The respondents' contend that from and since November 2002, the claimant has not worked for the respondents. Additionally, the respondents state that no compensable event is the major cause of the claimant's current disability or need for medical treatment. Additionally, the respondents state that any additional medical treatment sought by the claimant is not reasonable or necessary as a result of a compensable injury. The respondents further contend that the medical treatment sought by the claimant is not authorized, reasonable or necessary as a result of a work related injury. In the alternative, the respondents plead the affirmative defense that the statute of limitations bars the respondents' liability as to any benefits which the claimant contends are due and owing on this claim."

## DISCUSSION

### I. STATUTE OF LIMITATIONS

The first issue to be addressed concerns the respondents' contention that any additional benefits are barred by the expiration of the statute of limitations. In the present case, it is apparent that considerable compensation had been previously voluntarily paid by the respondents on account of the claimant's

compensable back injury of February 21, 2002. Additional compensation was paid by the respondents pursuant to the previous Opinion of this Commission. Thus, the present claim would appear to be a claim for additional benefits, and would be controlled by the provisions of Ark. Code Ann. §11-9-702(b).

This subsection provides that claims for additional benefits must be filed within two years from the date of injury or one year from the date of the last payment of compensation, whichever is greater. It further provides that there is no statute of limitations on certain medical benefits, specifically, the replacement of medicine, crutches, ambulatory devices, artificial limbs, eyeglasses, contact lenses, hearing aids, and other apparatus permanently or indefinitely required by the compensable injury. However, this subsection also expressly provides that these exempt medical services can not be considered as the payment of compensation, so as to toll the statute of limitations.

The first matter to be addressed is whether the present action may be only for enforcement of the Commission's previous Order of October 27, 2004. Rather than a claim for additional benefits, applicable case law provides that actions to enforce prior Orders are not controlled by the statute of limitations, as contained in Ark. Code Ann. §11-9-702. See Helena Contracting Company v. Williams, 45 Ark. App. 137, 872 S.W. 2d 423 (1994), Joe Brennan General Contracting v. Adair, 62 Ark. App. 240, 971 S.W. 2d 798(1998).

A claim for additional benefits was previously filed by the claimant in 2004. In this claim, he sought additional medical services and permanent disability benefits for permanent functional disability or loss of wage-earning capacity. A hearing was held in this claim on August 17, 2004. On October 24, 2004, an Opinion was entered in regard to this claim for additional benefits .

In this prior Opinion, the claimant was awarded an additional 10 percent permanent partial disability to the body as a whole for permanent functional disability or loss of wage-earning capacity. In addition, the claimant was awarded additional medical services. The Opinion of October 27, 2004, stated:

“The respondents shall be liable for the expense of the medical services provided to the claimant for his compensable injury by and at the direction of Dr. Charles Jennings, which includes an office visit in December of 2003 and replacement medication subsequently prescribed by Dr. Jennings.”

Finally, a controverted attorney’s fee was awarded to the claimant’s attorney on the controverted permanent partial disability benefits award.

At this point, it should be noted that Dr. Jennings is a general practitioner or family medicine specialist and the claimant’s family physician. The claimant had previously been referred to Dr. Jennings for treatment of the chronic complaints from his compensable injury by Dr. Keith Holder, one of the claimant’s initial authorized treating physicians for the compensable lumbar injury. This fact was recognized in the prior Opinion, wherein Dr. Jennings was clearly found to be an “authorized” treating physician.

After the October 27, 2004 Opinion had become final, the claimant returned to Dr. Jennings. This visit took place on February 18, 2005. At the time of this visit, Dr. Jennings was clearly of the opinion that the claimant required medical services beyond the mere monitoring and prescribing of the medications indefinitely required for the claimant’s chronic difficulties. Dr. Jennings recommended that another lumbar MRI be performed and that the claimant be evaluated and possibly treated by a neurologist, Dr. Margaret Trimwell, and a chronic pain management specialist, Dr. Cygnet Schroeder.

The respondents immediately refused to authorize or pay for the MRI or the evaluations by Dr. Trimwell and Dr. Shroeder. In fact, it appears that the respondents refused to authorize or pay for any additional evaluations by Dr. Jennings after the December 2003 visit that was expressly awarded in the prior Opinion or even refused to pay the cost of replacing the previously awarded medications.

The medical benefits that had been awarded in the Opinion of October 27, 2004, were specific. The claimant was awarded the expense of the evaluation of Dr. Jennings in December of 2003 and the prescribing by Dr. Jennings of any indefinitely required oral medications. This Opinion did not make an open end award of any and all medical services that Dr. Jennings might eventually provide or recommend. The additional medical services subsequently recommended by Dr. Jennings, in the form of an additional MRI and evaluation and treatment by other medical specialists, were clearly new medical services that were not considered or even contemplated at the time of the October 27, 2004 Opinion and Award. Thus, these services could not have been included in the benefits awarded in the Opinion.

In regard to these new benefits, the factual situation differs from the facts in Helena Contracting Company v. Williams, 45 Ark. App. 137, 872 S.W.2d 423 (1994) and Carroll Electrical Cooperative v. Pack, 85 Ark. App. 293, 151 S.W. 3d 324 (2004). The record in this case also shows that the respondents did pay most of the benefits which were actually awarded in the October 27, 2004 Opinion. These benefits include the permanent partial disability benefits for permanent functional disability, the attendant attorney's fees, and the expense of the December 2003 visit with Dr. Jennings. However, the respondents have

apparently not paid for the expense of continuing medication for the claimant's chronic symptoms.

It is my opinion that the claim filed on August 14, 2006, represents both a claim for additional benefits and a claim seeking enforcement of a previous award of benefits. However, this claim represents a claim seeking enforcement of a previous award only in regard to the replacement of the indefinitely required medications.

Next, it becomes necessary to address the matter of whether the timely filed claim for additional benefits, which gave rise to the prior hearing and Opinion of October 27, 2004, may have acted to toll the statute of limitations in regard to the present claim for additional benefits, see Sisney v. Leisure Lodges, Inc. 17 Ark. App. 96, 704 S.W. 2d 173 (1996), AP&L v. Giles, 20 Ark. App. 154, 725 S.W. 2d 583(1987). The Arkansas Court of Appeals has recognized that when there was a final determination of the prior claim, the prior claim ceases to toll the statute of limitations, Eskola v. Little Rock School District, 93 Ark. App. 250, 218 S.W. 3d 372 (2005); Spencer v. Stone Container Corporation, 72 Ark. App. 450, 38 S. W. 3d 309(2001); Bledsoe v. Georgia-Pacific Corporation, 12 Ark. App. 293, 675 S.W. 2d 849(1984).

Clearly, in the prior claim, the claimant was seeking additional medical services, as well as permanent functional disability benefits. At the time of the prior hearing and Opinion, the medical services sought by the claimant for his compensable injury consisted of only oral medications, in the form of muscle relaxers and pain relievers, for medical management of his chronic symptoms and complaints. At that time, there was no evidence that any other medical services were recommended or even suggested by any of the claimant's various

physicians. In the prior Opinion, the claimant was awarded essentially all of the benefits that he requested.

I find that the Opinion of October 27, 2004, addressed and resolved all pending claims for additional benefits in existence at that time. Therefore, the previously filed claim giving rise to the Opinion of October 27, 2004, did not act to toll the statute of limitations after the date that Opinion became final.

Ark. Code Ann. §11-9-702(b) provides that additional benefits for a compensable injury (except the replacement of medication and prosthetic devices) must be filed within two years of the date of the compensable injury or one year of the last payment of compensation. The burden rests upon the claimant to act within the time provided by this subsection, Minnesota Mining Manufacturing v. Baker, 337 Ark. 94 (1999), Plunkett v. St. Frances Valley Lumber Company, 25 Ark App. 195, 755 S.W. 2d 240 (1988).

As previously indicated, the claimant saw Dr. Jennings on February 18, 2005 and again on March 29, 2005, for his chronic complaints. At that time, the claimant was seeking follow up medical services from physicians previously authorized to provide such services. However, on those dates, Dr. Jennings recommended a new and differing course of treatment, in the form of another MRI and a referral to Dr. Trimwell and Dr. Schroeder for evaluation and possible treatment. He also performed a general examination of the claimant and continued the previously prescribed oral medications, a muscle relaxer and narcotic pain reliever.

In regard to the statute of limitations, applicable case law holds that, when a respondent has been furnishing medical services and has actual notice or has reason to know that such medical services will continue, the respondents are deemed to have furnished the continuing medical services, until the

claimant is advised that such services will no longer be provided, Plante v. Tyson Foods, Inc., 319 Ark. 126, 890 S.W.2d 253 (1994); Pennington v. Gene Cosby Floor Carpet, 51 Ark. App. 128, 911 S.W.2d 600 (1995). Thus, the claimant's visit with Dr. Jennings on February 18, 2005, and March 29, 2005, would be considered to have been provided by the respondents and would represent the payment of compensation, even though the respondents subsequently refused to pay for these services.

However, by March 29, 2005, the claimant had been made aware that the respondents were not accepting liability for the new medical services recommended by Dr. Jennings. Shortly thereafter, he was made aware that the respondents were even refusing to pay for the February 18 and March 29, 2005 visits with Dr. Jennings and the expense of his continuing medication. Thus, the claimant had one year from that date to file a claim with this Commission to compel the payment of these disputed medical services. This he simply did not do.

Further, the evidence presented shows that between March 29, 2005, and August 14, 2006, the claimant neither sought or received any medical services by Dr. Jennings or any other physician that could have acted to toll the statute of limitations. The only medical services, received by the claimant between March 29, 2005 and August 14, 2006, were services directed solely toward the replacement of medications, which were indefinitely required for his compensable injury. As such, these services are expressly prohibited from constituting the payment of compensation sufficient to toll the statute of limitations, Ark. Code Ann. §11-9-702(b)(2).

The additional 10 percent permanent partial disability awarded by the Opinion of October 27, 2004, would have resulted in the claimant receiving

another 45 weeks of indemnity benefits. These benefits would have commenced to accrue immediately after the claimant received his last payment of permanent partial disability benefits for the 10 percent permanent physical impairment. This would have been 45 weeks after his rating by Dr. Armstrong on July 8, 2002. The prior Opinion directed that the additional permanent partial disability benefits awarded that had already accrued were to be paid in a lump sum without discount. Thus, these payments would have been due in a lump sum.

For the purpose of tolling the statute of limitations, prepaid indemnity benefits are counted from the date they would have accrued, if paid in proper installments, Southern Cotton Oil Company v. Friar, 247 Ark.98, 444 S. W. 2d 556 (1969). However, when indemnity benefits are paid late, the statute commences to run from the date the benefits were actually paid rather than from the date the benefits accrued, Myles v. Paragould School District, 28 Ark. App. 81, 770 S. W. 2d 675 (1989).

The claimant acknowledged that he has actually received all of the additional permanent partial disability benefits awarded. It further appears from his testimony that these benefits were paid in a lump sum. This payment would have been made within 45 days of the respondents' receipt of the October 27, 2004 Opinion. This payment would not extend the expiration of the statute of limitations beyond December of 2005.

After consideration of the evidence presented, it is my opinion that the last payment of compensation was made and the statute of limitations for the filing of any claims for additional benefits began to run in this case on March 29, 2005. The burden clearly rests upon the claimant to act within one year from this date. Thus, the statute had run for the filing of claims for additional

benefits on March 30, 2006. Once the statute of limitations for the filing of claims for additional benefits ran in this case, the claimant's return to Dr. Jennings, on August 14, 2006, cannot act to revive or restart the running of statute of limitations.

In summary, I find that any claim for additional benefits, including any additional medical services recommended by Dr. Jennings and even the visits with Dr. Jennings after December of 2004, are barred by the statute of limitations provided by Ark. Code Ann. §11-9-702(b). The present claim for these benefits must be denied and dismissed. However, the claim for the replacement of the medications indefinitely required for the claimant's compensable injury is not barred by Ark. Code Ann. §11-9-702(b).

## II. BENEFITS

The express provisions of Ark. Code Ann. §11-9-702(b) expressly provide that the replacement of medication, indefinitely required for the claimant's compensable injury cannot be barred by this statute of limitations. The claim for these particular benefits would also not represent a claim for additional benefits. Rather, this would be a claim to seek enforcement of the benefits awarded in the prior Opinion. However, the continuation of these particular medical services must still be shown by the claimant to constitute "reasonably necessary" treatment for the compensable injury, under Ark. Code Ann. §11-9-508.

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

Clearly, one recognized purpose or goal would be the reduction or alleviation of chronic symptoms, including pain.

After consideration of all the evidence presented, it is my opinion that the continuing replacement of the claimant's oral medications, in the form of muscle relaxers and pain relievers, is clearly related to or necessitated by his compensable injury. The evidence further shows that these medications have continued to be successful in providing the claimant with some symptomatic relief of his chronic symptoms. Therefore, the continuation of these medications would represent reasonably necessary medical services under Ark. Code Ann. §11-9-508.

As the claimant's entitlement to these indefinitely required replacement medications is unaffected by the expiration of the statute of limitations, the respondents remain liable for the expense of these specific medical services. However, this liability remains subject to the medical fee schedule that has been established by this Commission.

#### FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

2. On February 21, 2002, the relationship of employee-employer-carrier existed between the parties.

3. On February 21, 2002, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$425.00 for total disability and \$319.00 for permanent partial disability.

4. On February 21, 2002, the claimant sustained a compensable injury to his back.

5. On October 27, 2004, an Opinion was entered that resolved all disputed issues, which were before the Commission at that time. Thus, the prior claim, which gave rise to the Opinion on October 27, 2004, was finally adjudicated and did not continue to toll the statute of limitations.

6. The last indemnity benefit was actually paid to the claimant prior to March 29, 2005.

7. The last payment of compensation was made on March 29, 2005. This compensation was in the form of medical services provided to the claimant by Dr. Charles Jennings, an authorized treating physician. By that date, the claimant was also aware that the new or additional medical services that had been recommended by Dr. Jennings were denied by the respondents. Shortly thereafter, the claimant should have reasonably been aware that the respondents had denied this entitlement to any continuing medical services by or at the direction of Dr. Jennings. After March 29, 2005, the claimant neither sought or even received any medical services that could possibly toll the statute of limitations until August 14, 2006.

8. On August 14, 2006, a claim was filed on behalf of the claimant with this Commission. In this claim the claimant sought additional medical services that have been provided or recommended by Dr. Jennings, and the expense of the evaluations by Dr. Jennings on and after February 18, 2005. The claim for these benefits represented a claim for additional benefits, as that term is used by Ark. Code Ann. §11-9-702(b). This claim also sought the payment of the expense of medications that had been prescribed by Dr. Jennings since December of 2004. The claim for these benefits would not come under the provisions of Ark. Code Ann. §11-9-702(b). Further, the claim for these benefits would be a claim for the replacement of medication indefinitely

required for the claimant's compensable injury and would be expressly excluded from the provisions of Ark. Code Ann. §11-9-702(b).

9. The portion of the claim, which was filed on August 14, 2006, that represent a claim for additional benefits was not timely filed and is barred by the provisions of Ark. Code Ann. §11-9-702(b).

10. The portion of the claim, which was filed on August 14, 2006, that seeks the payment of expenses incurred for medication indefinitely required for the claimant's compensable injury is not controlled by the statute of limitations provided by Ark. Code Ann. §11-9-702(b) and is not barred. Further, this medication continues to represent reasonably necessary medical services under Ark. Code Ann. §11-9-508.

11. Pursuant to Ark. Code Ann. §11-9-508 and Ark. Code Ann. §11-9-702(b)(2), the respondents are liable for the expense incurred for the continuation of the claimant's oral medications, which are indefinitely required for his compensable injury. This liability is subject to the medical fee schedule established by this Commission.

12. The respondents have controverted the claimant's entitlement to any additional medical services, which were unpaid as of the date of hearing.

13. As no controverted benefits have been awarded directly to the claimant, no controverted attorney's fee can be awarded to his attorney.

#### ORDER

The respondents are liable for the expense of the replacement of medications indefinitely required for the claimant's compensable back injury. This liability is subject to the medical fee schedule established by this Commission.

For the reasons heretofore stated in this Opinion, any claim made for any other medical services must be denied and dismissed in its entirety.

All benefits herein awarded, which have heretofore accrued, are payable in a lump sum without discount.

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

IT IS SO ORDERED.

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MICHAEL L. ELLIG  
ADMINISTRATIVE LAW JUDGE