

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E105441

DARRELL J. BRITT,
EMPLOYEE

CLAIMANT

MARTIN CHARCOAL COMPANY,
EMPLOYER

RESPONDENT

UNITED STATES FIRE INSURANCE/
CRUM & FORSTER,
INSURANCE CARRIER/TPA

RESPONDENT

OPINION FILED AUGUST 16, 2007

Upon review before the FULL COMMISSION in Little Rock,
Pulaski County, Arkansas.

Claimant represented by the HONORABLE FREDERICK SPENCER,
Attorney at Law, Mountain Home, Arkansas.

Respondents represented by the HONORABLE WENDY S. WOOD,
Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and
Adopted.

OPINION AND ORDER

Respondent appeals and Claimant cross appeals an
opinion and order of the Administrative Law Judge filed
September 21, 2006. In said order, the Administrative
Law Judge made the following findings of fact and
conclusions of law:

1. The stipulations agreed upon by the
parties are reasonable and are approved.
2. The employee-employer-carrier relationship
existed on March 4, 1991 and at all other
relevant times.

3. Respondents controvert the compensability of Claimant's lung condition and related medical treatment, as well as his need for a heart/lung transplant.

4. The Administrative Law Judge's April 16, 1996 Order and Opinion, and the Commission's November 27, 1996 Opinion and Order, are res judicata and represent the law of the case.

5. Claimant's constitutional challenges will not be considered in this opinion because he failed to produce evidence in support of his arguments.

6. The applicable statute of limitations bars Claimant's claim for a separate lung injury. He alleges that his lungs were injured on March 4, 1991; he did not file a claim for compensation for disability on account of this injury until October of 2003. The interval between those dates exceeds two years from the date of injury. Further, even if Claimant's lung injury can be characterized as a latent injury, he knew or should have known the substantial nature of this injury no later than July of 2000. Again, he did not raise this claim until October of 2003, more than the two year period allowed by the statute.

7. Because Claimant's claim for a separate lung injury is barred by the applicable statute of limitations, the compensability of that claim was not discussed in this opinion.

8. Claimant failed to establish that his lung condition is a compensable consequence of his original compensable heart injury. There is no proof in the record of a causal connection between the compensable heart injury and Claimant's lung condition.

9. Claimant is entitled to reasonably necessary medical treatment, including but not limited to concurrent heart and lung transplants. The relevant medical evidence in the record conclusively demonstrates that he

must undergo a lung transplant as well as a heart transplant to stabilize or maintain his condition following his compensable injury.

We have carefully conducted a de novo review of the entire record herein and it is our opinion that the Administrative Law Judge's decision is supported by a preponderance of the credible evidence, correctly applies the law, and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings of fact made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

Therefore we affirm and adopt the September 21, 2006 decision of the Administrative Law Judge, including all findings and conclusions therein, as the decision of the Full Commission on appeal.

Since the claimant's injury occurred prior to July 1, 2001, the claimant's attorney's fee is governed by the provisions of Ark. Code Ann. § 11-9-715 as it existed prior to the amendments of Act 1281 of 2001. Compare Ark. Code Ann. § 11-9-715 (Repl. 1996) with Ark. Code Ann. § 11-9-715 (Repl. 2002). For prevailing in part on this appeal before the Full Commission, claimant's attorney is hereby awarded an additional

attorney's fee in the amount of \$250.00 in accordance with Ark. Code Ann. § 11-9-715(b) (Repl. 1996).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

Commissioner Hood concurs, in part, and dissents, in part.

CONCURRING AND DISSENTING OPINION

I concur with the principal decision in finding that the respondent is liable for the cost of the lung transplant being sought by the claimant. I wholeheartedly agree that this procedure is an essential part of the heart transplant which is all unquestionably related to the claimant's 1991 cardiac injury. I also agree with the finding that the claimant is entitled to a heart transplant.

However, I disagree with, and dissent from, the Majority's decision that the statute of limitation bars any other consideration of the claimant's entitlement to benefits based upon a lung injury arising from his 1991 job related accident. In my opinion, the applicable statute of limitation has not expired in regard to that claim and the respondent is liable for

all treatment the claimant has received for his lung condition.

The claimant's injury occurred in March 1991. The claimant was employed at the respondent's charcoal plant when he was exposed to a cloud of smoke and fumes coming from a kiln. After breathing in these toxins, he suffered a cardiac spasm which caused a myocardial infarction. The respondent initially accepted liability for this injury, but later controverted the claim in its entirety. After a hearing and an appeal to this Commission, it was found that the claimant had sustained a compensable injury and was entitled to all appropriate benefits.

The respondent has apparently provided all such benefits since the Commission's November 27, 1996 decision affirming and adopting an earlier award of benefits from an Administrative Law Judge. Later, when it became apparent that the claimant was going to require a heart and lung transplant procedure, the respondent controverted his entitlement to such treatment. The present litigation was begun with a claim filed in October 2003.

The applicable statute of limitation provides that a claim for additional benefits must be filed

within two years of the date of the claimant's injury or within one year of the last time that he or she was provided benefits. In finding that the statute of limitation is a bar to this dispute, the Majority merely notes that the claimant sustained his lung injury on March 4, 1991, but did not file a claim until October 2003 and, since the time period between those two dates exceeded two years, the statute of limitation had run.

It is unquestionably true that more than two years elapsed from the time of the claimant's injury until he filed a claim for additional benefits relating to his lung condition. However, in order to resolve the statute of limitation issue, it is necessary to determine when the respondent last voluntarily provided benefits based upon the claimant's lung injury. As indicated above, the respondent initially accepted this claim as compensable. The treatment provided to the claimant during the four years following his injury included not only treatment for his heart injury, but medications intended to improve pulmonary functions, including oxygen. In September 1995, the respondent controverted the claim in its entirety.

After a Commission decision favorable to the claimant, the respondent resumed payment of the

claimant's medical expenses which, according to the medical report generated by the claimant's treating physicians, included treatment of shortness of breath. In fact, in 2000, the claimant was referred for treatment to Dr. James Hargis, a pulmonologist in Springfield, Missouri. The respondent apparently provided the claimant treatment from Dr. Hargis, as well as medications related to the claimant's pulmonary condition, including oxygen. Also, the claimant was evaluated for his heart-lung transplant in 2003, which the respondent also paid for.

Based upon correspondence which was made part of the record, the respondent apparently contacted Dr. Hargis in 2003 soliciting an opinion as to whether the claimant's lung problems were associated with his compensable injury. Consequently, Dr. Hargis authored a letter dated June 24, 2003, directed to the respondent's claim representative, in which he stated that he did not believe that there was an association between the claimant's chronic obstructive pulmonary disease and his myocardial infarction. Subsequent to that letter, Dr. Hargis authored an office note dated August 9, 2003, in which he stated, "The patient called, upset because the letter I wrote indicated that his COPD was not related

to his myocardial infarction. He apparently is going to lose some benefits for oxygen and respiratory treatments such as pulmonary rehab." Dr. Hargis goes on to set out some facts justifying his opinion. In my opinion, the note of August 9, is significant, in that, it indicates that the respondent had stopped providing the claimant oxygen and pulmonary rehabilitation treatment, a service that they had been providing at least up through Dr. Hargis' letter of June 24, 2003.

I believe the Majority is in error in their conclusion that the statute of limitation has expired for benefits related to the claimant's lung condition. It appears, from my review of the medical records, that the claimant received treatment for his lung condition from the date of his injury through September 1995, when the respondent controverted the claim in its entirety. Following the conclusion of that litigation, the respondent resumed paying for the claimant's medical treatment, including that intended to improve his respiratory functions. They did not controvert treatment for the claimant's lungs until some time after June 2003. Since the claim for benefits which began the current round of litigation was made in October 2003, it appears that claim was timely filed, in that, it was

made within one year of the last time the respondent provided benefits for this condition. At no time prior to June 2003 had the respondent ever indicated that the medical treatment the claimant was receiving for his lung condition was in any way separate and apart from that which he was entitled to, based upon his compensable 1991 injury. I believe the record clearly establishes that the respondent did not controvert the claimant's entitlement to medical benefits for his lung condition until June 2003. Since a claim for those disputed benefits was filed less than four months later, I do not see how it can be said that the statute of limitation would bar this claim.

I also note that the statute of limitation defense is an affirmative one and the burden is on the respondent to establish its applicability. Johnson v. Eckart Products Corporation, Full Commission Opinion, March 28, 1995 (D303314). The record indicates that the respondent, except for the times in which they had controverted the claimant's entitlement to all medical benefits, has never stopped providing him medical treatment for his lung condition until after June 2003. Since that is within one year of the filing of his claim, I believe that they have failed to meet their

burden of establishing that the statute of limitation would act as a bar to any aspect of the claimant's treatment for his lung injury.

Since I believe that the statute of limitation is not a bar to the claim for additional medical benefits related to the claimant's lung condition, I must respectfully dissent from the Majority's finding that the respondent is not liable for providing the claimant all requested medical treatment for his lung condition on and after June 2003.

PHILIP A. HOOD, Commissioner

Special Commissioner Wilson concurs, in part, and dissents, in part.

CONCURRING AND DISSENTING OPINION

I respectfully concur, in part, and dissent, in part, from the majority opinion. Specifically, I concur in the majority's finding that the statute of limitation barred the claimant's claim for a separate lung injury and the finding that the claimant failed to establish that his lung condition was a compensable consequence of his original compensable heart injury. However, I must respectfully dissent from the majority's

finding that the claimant proved by a preponderance of the evidence that he was entitled to concurrent heart and lung transplants. In my opinion, the claimant has failed to meet his burden of proof.

The evidence demonstrates that in March of 2003 the claimant was evaluated by doctors at the Barnes Jewish Hospital for a cardiac transplant evaluation. At the time, the claimant was found not to be a candidate for transplantation due to his age exceeding the age criteria. The claimant was seen later in March of 2003 for another evaluation for a cardiac transplantation at Washington University in St. Louis. On May 8, 2003, Dr. Rogers opined that the claimant was not a candidate for cardiac transplantation due to his lung disease, but also primarily because of his age exceeding the age criteria. The claimant had previously been evaluated at St. Louis University for a heart transplant in 1994. The doctors at that time had concluded that the heart transplant was not medically necessary and that it was better to treat the claimant's heart condition aggressively with the claimant's current medical regime. The respondents paid for all three of these evaluations and the claimant was found at all three not to be a proper candidate for a heart transplant.

The medical evidence demonstrates that between 1991 and 2000 the claimant's heart injury resulting from the compensable injury had reached a level of stability which included minimal medical intervention. A heart transplant was specifically ruled out during that time period. It is of note that during this ten-year span the claimant continued to smoke cigarettes against his doctor's orders.

Therefore, when I consider the evidence, I cannot find that a heart/lung transplant is reasonable and necessary medical treatment for the claimant's compensable heart injury. Therefore, for all the reasons set forth herein, I must respectfully dissent from that portion of the majority's opinion awarding the claimant this medical treatment.

MIKE WILSON, Special Commissioner