

**NOT DESIGNATED FOR PUBLICATION**

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F204535

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

**OPINION FILED FEBRUARY 13, 2009**

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

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

Respondent represented by HONORABLE J. LESLIE EVITTS, III  
,Attorney at Law, Fort Smith, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

The claimant appeals from a decision of the  
Administrative Law Judge filed July 15, 2008.

The Administrative Law Judge entered the following  
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 provision 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 reasonable necessary medical services under Ark. Cod 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.

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.

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

IT IS SO ORDERED.

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A. WATSON BELL, Chairman

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KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

**DISSENTING OPINION**

\_\_\_\_\_I must respectfully dissent from the majority opinion. The majority, by affirming and adopting the Administrative Law Judge finds that the statute of limitation acts as a bar to the claim for actual medical treatment, and any temporary or permanent disability benefits arising from that medical treatment, but that the statute of limitation does not prohibit the claimant from receiving additional medication which would be indefinitely

needed. Based on a de novo review of the record, I find that because this action is one to enforce a previous award and not a claim for additional benefits, the statute of limitation does not apply to any aspect of the present claim, and therefore I must respectfully dissent.

This claim arose from an accident which occurred on February 21, 2002, which has previously been held to be compensable. As a result of prior adjudication, the respondent has paid the claimant a substantial amount of medical and disability benefits. The current dispute arose when the respondent refused to provide the claimant certain additional medical treatment, contending it was not reasonable and necessary or related to the claimant's original compensable injury. After the claimant filed a claim seeking to have the respondent required to pay for the disputed medical treatment, the respondent raised the affirmative defense of the statute of limitation. While the claimant does not dispute that the claim was filed more than one year from the last time compensation was provided, he argues the statute of limitation does not apply because his action is one to enforce a previous award and not a claim for additional benefits.

Ark. Code Ann. §11-9-702 (b) sets out a limitation on when a claimant can file a claim for additional benefits. It requires the claim be filed within two years from the date of injury or one year from the last time the claimant was provided compensation. As indicated above, the claimant does not contend he filed a claim within the time period set out by the statute. Rather, the claimant argues the present action is intended to enforce an earlier order, and as such, the statute of limitation does not apply.

The order in question was handed down on October 27, 2004. According to the order, one of the issues for determination was the respondent's liability for expenses incurred for medical services provided to the claimant by and at the direction of Dr. Charles Jennings. In discussing this issue, the Administrative Law Judge noted that Ark. Code Ann. §11-9-508 explicitly entitles a claimant to receive all reasonable and necessary medical services for a compensable injury at the respondent's expense. He then concluded the claimant had met his burden of establishing his entitlement to further medical treatment from Dr. Jennings. Later in the Opinion, the following award was made:

"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."

The claimant first sought medical treatment after the award on February 18, 2005, when he saw Dr. Jennings. In a treatment note of that date, Dr. Jennings stated he was seeing the claimant for a follow-up examination due to back pain. The doctor said the claimant's lumbar pain had persisted and he was complaining of radicular symptoms. As a result of these complaints, Dr. Jennings directed the claimant undergo an MRI scan and to obtain follow up treatment from other physicians. Shortly thereafter, the respondent refused to provide the claimant any further medical treatment from Dr. Jennings, including his referral to other physicians, his direction that the claimant undergo an MRI scan, or any medication the claimant was prescribed by the doctor. After the respondent's refusal, the claimant provided himself this treatment using his own resources. However, it became increasingly difficult for the claimant to bear the expense of not only his medication, but

expensive diagnostic testing and visits with neurosurgical specialists.

The claimant eventually contacted his attorney about instituting an action to enforce the medical benefits he was previously awarded. Since the respondent asserted that the request for these benefits was filed outside the applicable statute of limitations, they refused to provide the claimant any additional benefits. However, the claimant argued the statute of limitation does not apply in this case since it is an attempt to enforce a previous order.

The basis of the claimant's argument was set out by the Court of Appeals in at least two prior decisions. The first of those was Helena Contracting Company v. Williams, 45 Ark. App. 137, 872 S.W.2d 423 (1994). The claimant in that case sustained an admittedly compensable injury in 1983. A dispute arose over his entitlement to additional medical and disability benefits and a claim was filed in 1985. In 1986, the claimant was awarded the requested benefits. However, in 1988, the respondent refused to provide the claimant further disability benefits or medical treatment. A claim seeking the resumption of those benefits was not filed until 1990. The Commission eventually

determined the statute of limitation was not a bar to the claim.

On appeal, the Court of Appeals, after considering the respondent's arguments as to the statute of limitation, stated:

There is nothing in the record before us to show that the award of compensation made pursuant to the Commission's order of February 4, 1986, had expired, or that the cessation of benefits by the appellants was sanctioned in any form.

Instead, it is clear from the record that the appellants simply refused to continue the payment of benefits previously awarded by the Commission pursuant to its order of February 1986. Furthermore, it is clear that the order appealed from merely awarded temporary total disability and medical benefits related to the compensable injury. Given that the appellee was already entitled to those benefits by virtue of the Commission's 1986 order, we think that the Commission erred in concluding that the appellee's claim was one for "additional" compensation so as to be subject to the limitations periods provided for in 11-9-702 (b). Instead, we regard the appellee's claim as one for enforcement of the Commission's previous order, rather than a request for additional compensation, and we hold that the claim was therefore not barred by 11-9-702 (b).

The situation described in Helena Contracting, appears to be virtually identical to the one here. In both cases, the respondents accepted a job-related accident as compensable and paid benefits. A dispute arose as to the claimant's additional medical and disability benefits, and the dispute resulted in an order directing the respondent to provide the requested benefits. When the respondent later refused to provide the benefits awarded, a subsequent claim was filed asking for the first order to be enforced. In Helena Contracting, the Court specifically held under those circumstances the statute of limitation would not act as a bar to the claim.

Another case relied upon by the claimant is Carroll Electric Cooperative v. Pack, 85 Ark. 293, 151 S.W.3d 324 (2004). That case also involved a claim which was originally accepted as compensable but, because of a dispute, a Commission order was entered awarding the claimant additional medical and disability benefits. The respondent paid those benefits for a number of years but eventually terminated payment both for the claimant's disability and medical treatment. A subsequent claim was clearly outside the applicable statute of limitations, but

the Commission held the claim was not one for additional benefits but was, rather, an attempt to enforce the prior order and the statute of limitation did not, therefore, apply. The Court of Appeals affirmed the Commission in all respects. As in the Helena Contracting case, the Court held the respondent had no basis for terminating the benefits they had been providing to the claimant pursuant to the Commission's previous order, and the action by the claimant was, therefore, not for additional benefits; but one to obtain benefits already awarded.

Although the majority, by affirming and adopting the Administrative Law Judge, has dismissed the above-cited cases, having reviewed the facts of those cases and the one at bar, I fail to see what significant differences exist. In all three cases, a claimant sustained an admittedly compensable injury and, because of a dispute, he obtained an award of additional medical and disability benefits. Later, the respondent arbitrarily refused to provide the claimant medical and disability benefits, and after a claim was filed, the respondent argued the statute of limitation acted as a bar to any benefits. In both Helena Contracting and Carroll Electric Cooperative, this argument was found to be

unpersuasive and the claim was found to be one to enforce a prior order.

The only basis advanced by the respondent for not following the above precedent, is their assertion that the 2004 order only contemplated the claimant receiving additional medical treatment in the form of replacement medication from Dr. Jennings. However, the respondent's argument is clearly contrary to the express wording of the original order. As quoted above, that order required the respondent to pay for the expense of the medical services, "for his compensable injury by and at the direction of Dr. Charles Jennings. . . ." While it did go on to specifically include replacement medication, the wording clearly did not limit it to only that. In fact, the 2004 Opinion begins by stating the claimant was seeking payment for medical services rendered by and at the direction of Dr. Charles Jennings. The Opinion went on to discuss the meaning of reasonable and necessary medical treatment in the context of the benefits being sought by the claimant, and stated he would be entitled to all reasonable and necessary medical services for his compensable injury.

The award made in 2004 did not limit itself only to certain types of medical treatment. Instead, the original Opinion specifically provided that it included medical services for the claimant's compensable injury "by and at the direction of Dr. Charles Jennings." Obviously, that language included the possibility that Dr. Jennings would need to refer the claimant to another physician for additional treatment. That could only happen if the claimant needed something more than refills of prescription medication.

In any event, the respondent admittedly refused to provide the claimant any sort of medical treatment as soon as he attempted to obtain it from his treating physician. For them now to argue they were only obligated to provide him certain types of medical treatment is clearly outside the spirit of the Workers' Compensation Act and not in compliance with the 2004 order.

This case is squarely in point with Helena Contracting and Carroll Electric Cooperative. The key similarity in those cases and the present claim are that the claimant was previously awarded nothing more specific than additional medical treatment, and the respondent refused to

provide any additional treatment. In the 2004 decision, the respondent was ordered to pay reasonable and necessary medical treatment provided by Dr. Jennings including replacement of medicines. The respondent refused to provide any treatment from Dr. Jennings almost immediately upon the claimant attempting to obtain it. The respondent's refusal included not only the medications prescribed by Dr. Jennings, but additional diagnostic testing and medical referrals, by and at his direction. Both of those items were benefits the respondent was directly ordered to pay in the prior hearing. They have simply, without cause, refused to do so. Clearly, the action currently pending before the Commission was an attempt to require the respondent to carry out their legal obligations.

The majority, by affirming and adopting the Administrative Law Judge concludes that the claimant's action was, in part, an attempt to enforce the award and, in part, was not. I do not believe it is possible to separate the requirements set out in the 2004 order so that some of the request is barred by the statute of limitation and some is not. As indicated above, the original order required the respondent to provide treatment by and at the direction of

Dr. Jennings, including any replacement medication he might prescribe. I do not believe the portion of the award providing treatment for the claimant's compensable injury "by or at the direction of Dr. Jennings" can be simply ignored. To attempt to only obey half of the award is both illogical and inconsistent.

For the aforementioned reasons I must respectfully dissent.

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PHILIP A. HOOD, Commissioner