

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F511713, F610180, & F811859

WALTER AYLOR, EMPLOYEE	CLAIMANT
BRYANT SCHOOL DISTRICT, EMPLOYER	RESPONDENT NO. 1
RISK MANAGEMENT RESOURCES, INSURANCE CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2

OPINION FILED JUNE 18, 2010

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

Claimant represented by the HONORABLE J. MARK WHITE,
Attorney at Law, Bryant, Arkansas.

Respondents No. 1 represented by the HONORABLE CAROL LOCKARD
WORLEY, Attorney at Law, Little Rock, Arkansas.

Respondents No. 2 represented by the HONORABLE DAVID L.
PAKE, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed.

OPINION AND ORDER

The claimant appeals and the respondents cross-appeal
an administrative law judge's amended order and opinion
filed October 21, 2009. The administrative law judge found
that additional medical treatment for the claimant's left
arm was reasonably necessary, and that the statute of

Aylor - F511713, F610180, 2
& F811859

limitations did not bar the claim for additional medical treatment. The administrative law judge found that the claimant did not prove he was entitled to benefits in accordance with Ark. Code Ann. §11-9-505(a). After reviewing the entire record *de novo*, the Full Commission affirms the administrative law judge's opinion.

I. HISTORY

The testimony of Walter A. "Sonny" Aylor, age 63, indicated that he began working for Bryant School District in approximately 2001. Mr. Aylor testified that he worked in maintenance and drove a school bus. The claimant agreed on cross-examination that he drove a bus in the afternoons only, for generally one hour per day. The parties stipulated that the claimant sustained a compensable right shoulder injury on August 25, 2005. The claimant testified that he injured his shoulder while working at a sewer plant. The claimant was assessed with "1. Rotator cuff tendonitis" on September 12, 2005.

Dr. Larry L. Nguyen noted on October 12, 2005, "He was pulling some weeds out of a sewer on 09/28/05, a maintenance man and bus driver, and complains of right shoulder pain....X-rays of the right shoulder show a mildly

Aylor - F511713, F610180, 3
& F811859

diminished supraspinatus interval of 6 mm with type 2 acromial spurring." Dr. Nguyen's impression was "Right shoulder rotator cuff syndrome....We'll limit him to light duty, no lifting more than 20 pounds with the right arm in the meantime." Dr. Nguyen assigned work restrictions on October 12, 2005: "Class II Medium manual activity - NO lifting greater than 20 pounds. R arm."

Dr. Nguyen performed an operation on April 25, 2006: "Right shoulder arthroscopy, abrasion chondroplasty, labral debridement, rotator cuff debridement, acromioplasty, and On-Q pain pump." The post-operative diagnosis was "Right shoulder degenerative joint disease, rotator cuff syndrome, and labral tear." Dr. Nguyen's impression on August 10, 2006 was "Right shoulder arthroscopy, labral debridement, DJD, status post arthrofibrosis and manipulation." Dr. Nguyen assigned a 2% anatomical impairment rating. The parties stipulated that the respondents accepted "a 2% body as a whole rating for the right shoulder."

The parties stipulated that the claimant sustained a compensable injury to his left upper extremity on August 16, 2006. The claimant testified that "something kind of popped" in his left arm after lifting a bag overhead. A

Aylor - F511713, F610180, 4
& F811859

physician noted on September 8, 2006, "Patient was at work on the 16th of August. He was throwing trash bags and he felt a slight pain in his left arm muscle....ASSESSMENT: 1. Ruptured left distal biceps muscle tendon....I did keep him off work because he also drives a school bus and I did not think he needed to be doing this with only one arm."

Dr. Nguyen's impression on September 14, 2006 was "Left distal biceps tendon tear/rupture." Dr. Nguyen assigned a Class III work restriction on September 14, 2006: "Slight limitation of functional capacity - capable of light work, NO lifting greater than 20 lbs., no standing more than 4 hrs per day and limited bending, stooping and twisting....Ok to drive bus."

Dr. Nguyen indicated on September 21, 2006 that work restrictions were for the claimant's left arm. Dr. Nguyen performed a "Left distal biceps repair" on October 3, 2006. The post-operative diagnosis was "Left distal biceps muscle tear."

Dr. Nguyen reported on January 10, 2007:

The patient is a follow up patient, a 59 year old white male status post right rotator cuff repair 4/25/06 with subsequent arthrofibrosis manipulation on 06/20/06, follows up now three months status post left biceps distal tendon

Aylor - F511713, F610180, 5
& F811859

repair times three months, has been undergoing physical therapy. He says it is still a little weak in his left arm and his shoulder is occasionally popping and sore at times, a little mildly stiff and comes in today for another evaluation. He hasn't been back to work yet....

At this point, I think for his right shoulder we declared maximum medical improvement back on 08/10/06. The impairment rating would be the same. For the left elbow, he presents back today. He still has some weakness there that will improve over time. He would like to go ahead and resume his work activities. I discussed with him the importance of trying to stay away from heavy lifting activities. We'll go ahead and release him from my care, reaching maximum medical improvement as of today with a permanent partial impairment rating of 5% to the left upper extremity for his muscle weakness of the biceps and musculocutaneous nerve distribution based on AMA GUIDELINES, Fourth Edition, Chapter 3, Tables 12 and 15 and Figure 48, Pages 49, 54 and 55.

Dr. Nguyen's impression was "Follow up, three months, a left distal biceps tendon rupture repair and right shoulder rotator cuff syndrome with arthrosis." The parties stipulated that the respondents accepted "a 5% left arm, upper extremity rating."

The claimant testified that he returned to work in about January 2007 but that he was sometimes physically unable to perform his job. The claimant testified, "My job assignment changed a lot. I would get something that was easy to do, and then I was taken off that....I know at one

Aylor - F511713, F610180, 6
& F811859

point I was changing light bulbs for the school district....I could handle that fine. But then there were other jobs that I couldn't do....If I refused, I got a tongue lashing. So sometimes I just went ahead and did it."

The respondents' attorney cross-examined the claimant:

Q. What were those jobs that you were given that you weren't supposed to do, in your mind?

A. There were quite a few. We were patching the street behind an elementary school, and we had to shovel the asphalt into the hole and take a big heavy packer and pound that asphalt into the hole....I tried it, but my shoulder just wouldn't hold up to it....

Q. What were those jobs that you specifically refused to do?

A. Putting that blower - strapping it onto my shoulders. It weighed about 75 pounds, and I couldn't - when I strapped it on my shoulders, it hurt, so I refused to - Well, I just told Randy - I said, "I can't do the blower."

In June 2007, the claimant testified, Bob Padgett transferred him from the maintenance crew to the mowing crew. Dr. Nguyen provided a Work Status Report on July 18, 2007: "Class II - Medium manual activity - NO lifting greater than 40 pounds." Dr. Nguyen added, "R/arm permanent....limited overhead. Regular maintenance - OK."

Aylor - F511713, F610180, 7
& F811859

Dr. S. D. Taggart filled out a School Bus Driver Physical Examination Form on August 8, 2007. Dr. Taggart indicated that the claimant was physically qualified to drive a bus. Dr. Nguyen indicated on August 27, 2007 that the claimant could return to light duty effective August 29, 2007, with the restrictions, "Limited repetitive activity (B) arms for no more than one hour at a time."

The claimant followed up with Dr. Nguyen on August 29, 2007:

He saw me last month when he injured his right shoulder, irritated it again. We put a steroid shot in there. It helped some. He says there are periods where it feels good but then days where they make him work shoveling and outside construction type of activities it flares up and is quite sore for several days afterward. He might have felt a little pop in his left elbow with some bruising and swelling. It has since gotten better over the past week....

At this point I think he has some rotator cuff tendinosis/partial tearing and left biceps tendinosis/partial tearing. I discussed with him he is 60 years old. These tendons are a little bit degenerated. Working heavy activities like he has been, it is going to flare up from time to time. I recommend over-the-counter anti-inflammatory. Perhaps his employer can work with him to tolerate his regular maintenance job. It is the heavy things that bother him. He will continue his light duty work. No lifting more than 30 pounds with limited repetitive activities.
I

Aylor - F511713, F610180, 8
& F811859

will see him in six weeks for another clinical evaluation. If it continues to be sore, we may need to consider a partial impairment of a partial class C evaluation for permanent restrictions. Will consider these.

The claimant contended at hearing that his employment was terminated on September 12, 2007. The claimant testified on direct examination:

Q. Now let's talk about your last day of work for the school district. Tell us what happened that day.

A. I came in Monday morning and clocked in. Randy Welch told me to get in the truck and go with him to Collegeville....We got to Collegeville School, and Randy had already been there. And he had a backback blower, a weed eater, and a lawn mower sitting there....I had just come back from the doctor, and, you know, I had restrictions. I wasn't supposed to be lifting again....I said, "Randy, I just feel like I can't do any of the three of them."

The claimant testified that he was transported to the assistant superintendent's office, and that the assistant superintendent sent him home without pay. Don McGohan, Assistant Superintendent, Bryant Public Schools, testified that the claimant's last day of work was approximately September 12, 2007. The respondents' attorney questioned Mr. McGohan at hearing:

Q. What was the reason for sending him home without pay?

Aylor - F511713, F610180, 9
& F811859

A. I had gotten a call from Mr. Padgett, telling me that Mr. Aylor was refusing to cut grass with a push mower. So I asked that Mr. Moix and Mr. Padgett come to my office with Mr. Aylor so we could talk.

Q. What happened at that meeting?

A. In that particular meeting I reviewed - because I'd been made aware of some of the previous things that the district maintenance office had done to address Mr. Aylor's instructions from his physician - and I asked him - I briefly reviewed some of the ones that have been already mentioned in testimony today - working overhead changing light bulbs, the trash bags, picking up trash and putting it on the trash bus. I reviewed those things, and he replied to me that he couldn't do those things because they hurt....I said, "Are you telling me that you are refusing to cut grass with a push mower?" He replied, "Yes."...

Korrine Lancaster, a Workers' Compensation Specialist, corresponded with the claimant's attorney on September 17, 2007:

It is my understanding from Dr. Nguyen that Mr. Aylor is at MMI and his restrictions are permanent. We have paid out his PPD rating at this time. The school does not have continued permanent work within the permanent restrictions that Dr. Nguyen has given.

Please let me know if you would like me to do a job market survey. To see if there are any jobs available within his restrictions if Mr. Aylor is interested in returning to work for another employer.

Aylor - F511713, F610180, 10
& F811859

Dr. Nguyen wrote to Korrine Lancaster on September 28,
2007:

In regard to your letter September 24, 2007, Mr. Aylor saw me again on 08/29/07, see last clinic note. I think he has got some chronic rotator cuff tendinosis and biceps tendinosis. He will have flare-ups from time to time that require anti-inflammatories and periodic resting. He is able to comply with most of his job activities but the heavy duty lifting tends to flare it up.

I think his most recent visit was due to an exacerbation of his injuries. I was going to try him on a trial of light duty activities, no lifting more than 30 pounds. I hope that his employer can help comply with some limited heavy lifting duty restrictions so that he may continue to work. He would like to. If this is not acceptable then perhaps a functional capacity evaluation would be in order and this would become a permanent restriction but this gentleman does wish to continue his employment and is able to comply with 90% of his occupational duties.

The claimant followed up with Dr. Nguyen on October 10,
2007:

He has not been working for the past month because his employer would not let him work with restrictions. He comes back today for recheck....

At this point I think he has some tendinosis and partial tearing. Discussed with him he can do the majority of his work 90% of the time. It's just the heavy, prolonged activities that really bother him a lot. Wishes employer would comply with him to do his regular maintenance job and avoid the heavy things, but apparently his employer is not working with him in this regard. I recommend job

Aylor - F511713, F610180, 11
& F811859

reeducation for more lighter class III restrictions. We'll get a functional capacity evaluation and I'll call him back with the results. I'd be happy to fill out any paper work he needs in regards to medication, relocation, early retirement or disability, but I've advised him that the best thing to do would be to try to go back to previous occupation and work with his employer if possible.

Dr. Nguyen's impression was "1. Right shoulder degenerative joint disease with rotator cuff syndrome. 2. Left biceps tendinosis - previous tear." Dr. Nguyen assigned a Class II Work Status on October 10, 2007: "Medium manual activity - NO lifting greater than 40 pounds."

Don McGohan corresponded with the claimant on October 22, 2007:

We have received a new medical assessment from your physician, Dr. Larry Nguyen, that appears to upgrade your physical condition. According to what I am reading from this new work status report, Dr. Nguyen feels that you are able to perform "medium manual activity" and states that your only limitation is no lifting greater than 40 lbs. It no longer mentions the restriction on repetitive motions or overhead work. This seems to be good news and indicates to me an improvement in your physical condition.

Therefore, as I said previously, we are willing for you to return to work immediately since your doctor has issued this new medical opinion, including driving a bus. Please feel free to contact Mr. Padgett and Mr. Farmer about returning to work as soon as possible. As with any

Aylor - F511713, F610180, 12
& F811859

assignment given to an employee by a supervisor, we will expect you to accept any work assignment given to you by Mr. Padgett or Mr. Moix that does not exceed the physical limitation stipulated by your physician....

The claimant testified on cross-examination that he became employed with another employer, Home Depot, on October 28, 2007.

The claimant's attorney wrote to Don McGohan on October 30, 2007:

I represent Walter Aylor in his claims for workers' compensation benefits from Bryant Public Schools. Mr. Aylor has provided me with your October 22 letter allowing him to return to work with the school, and it appears there may be a misunderstanding about the nature of his restrictions.

None of Mr. Aylor's physical restrictions have changed. He is still under "permanent" restrictions, per Dr. Nguyen, of limited overhead activities, limited repetitive activities, and no heavy lifting.

Please advise whether or not you are willing to allow Mr. Aylor to return to work with these restrictions.

Jay Bequette, attorney at law, replied to the claimant's attorney on November 7, 2007:

This firm represents the Bryant School District in connection with the above matter. Your letter to Mr. Don McGohan, Assistant Superintendent for the Bryant School District, dated October 30, 2007 has been forward to me for response.

Aylor - F511713, F610180, 13
& F811859

Enclosed herewith please find a Work Status Report from Dr. Larry Nguyen, a doctor at OrthoArkansas. As you can see from this report, Dr. Nguyen has classified Mr. Aylor's work status as Class II (medium manual activity - no lifting greater than 40 pounds). Previous "permanent" restrictions mentioned in your letter of October 30 (limited overhead activities, limited repetitive activities, no heavy lifting) are not noted in Dr. Nguyen's October 10 report. Dr. Nguyen's report does not indicate a "no repetitive work" restriction. Further, Dr. Nguyen has made no additional comments which would indicate or suggest any further restrictions beyond the Class II designation.

Dr. Nguyen expressly noted that Mr. Aylor could return to light duty effective October 11, 2007. The District is willing to allow Mr. Aylor to return to work immediately within the limitations indicated by Dr. Nguyen....

Dr. Nguyen corresponded with Korrine Lancaster on
November 9, 2007:

Walter Aylor is a patient of mine, a 60 year old white male status post right rotator cuff syndrome with DJD and left biceps tendinosis status post previous tear repair. I saw him last 10/10/07 and I apologize for that clinic note that should dictate Class II activities. We are apparently awaiting functional capacity evaluation in regard to further clarifying his permanent light duty restrictions. I think he is capable of doing medium manual activities, with no lifting greater than 40 pounds, in addition with limited overhead and repetitive activities but he can lift up to 40 pounds. He can lift up to 40 pounds.

Please do what you can to help him in this regard with his light duty restrictions until a

Aylor - F511713, F610180, 14
& F811859

functional capacity evaluation can further elucidate the matter.

The parties stipulated that the last medical paid for the claimant's shoulder was on April 23, 2008. Dr. Nguyen saw the claimant on April 30, 2008:

The patient is a 61 year old white male, well known to me status post previous left biceps tendon repair and right shoulder rotator cuff syndrome and DJD, presents back for evaluation today. Since the last time I saw him in October of 2007 he has quit working for the school district and says they weren't able to comply with his work restrictions. He has since got a new job at Home Depot mixing paint and was doing relatively well with that but it has flared up over the past month when he has had to do more lifting of pallets because they have lost some employees and comes in today regarding his right shoulder that is a little bit more sore....

At this point, he says he does relatively well doing his home physical therapy exercises every day but if he doesn't it gets to be quite stiff. He is able to tolerate activities without overhead lifting. However, since his new job has recently required more lifting and has flared up, he would like to consider another steroid shot today. I think this is reasonable. We'll give him another steroid shot. He will continue his home exercises and see me back in six or eight weeks p.r.n. He has permanent restrictions for Class II type of activities, no lifting more than 40 pounds and limited overhead activities. I'll see him back in six or eight weeks p.r.n. for another clinical evaluation. If it continues to be sore, perhaps a MRI scan of the right shoulder would be in order.

Aylor - F511713, F610180, 15
& F811859

Dr. Nguyen's notes on April 30, 2008 indicated that he examined the claimant's right shoulder and left upper extremity. Dr. Nguyen's impression was "Right shoulder DJD with rotator cuff syndrome."

Counsel for Respondent No. 1 questioned Don McGohan at hearing:

Q. How long did you keep Mr. Aylor's job open?

A. For the remainder of that school year.

Q. So that would have taken us through May of 2008?

A. Correct.

Q. Was he terminated?

A. He was not.

Q. What was his status?

A. At the end of the school year we were approaching the point where, under applicable Arkansas law, we had to make a decision as an employer as to whether or not to offer him another time frame. So he had not returned to work, even though we'd attempted previously to get him back to work. He had not responded to those attempts. He had not returned to work. So, with the deadlines, that exist under Arkansas law, I sent him a certified letter, notifying him - the superintendent is the one who signs those letters, but the letter was notifying him of the fact that he was being recommended for nonrenewal of his contract....

Aylor - F511713, F610180, 16
& F811859

Q. You heard Mr. Moix and Mr. Padgett testify earlier that they did not think there would be a position in maintenance if a worker had a 40-pound lifting restriction. Is that correct?

A. That's correct.

Q. Would you agree with that?

A. Yes.

A pre-hearing order was filed on April 14, 2009. The claimant's contentions were listed as follows: "1. Entitlement to some additional TTD benefits, dates to be provided. 2. Entitlement to §505(a) benefits. 3. Alternatively, entitlement to wage loss benefits. 4. Entitlement to attorney's fees."

The respondents' contentions were, "1. Respondent No. 1 contends that all appropriate benefits have been paid to the claimant. 2. Respondent No. 1 further contends that appropriate work within the claimant's restrictions was provided to the claimant. 3. Respondent No. 1 contends that wage loss benefits are not owed but, alternatively, if wage loss is owed, it would be the responsibility of the Second Injury Fund. 4. Respondent No. 1 also contends if wage loss or other benefits are awarded, it is entitled to an offset for any unemployment benefits paid."

Aylor - F511713, F610180, 17
& F811859

Dr. Nguyen reported on June 1, 2009:

Patient is a follow-up patient. 62 year-old white male status post left biceps tendon repair, right shoulder rotator cuff repair back in 2007. He has a new job now at Home Depot mixing paint. His left elbow has flared up over the past couple of months with severe excruciating pain running up to the left shoulder. He states he cannot really lift anything. The right shoulder is a little bit tolerable but sore. It is the left arm that has been hurting him more as of late.

PHYSICAL EXAMINATION:

Left shoulder biceps tendon repair palpable intact with some atrophy of the muscle, some tenderness along the lateral biceps....

Dr. Nguyen's impression was "Left rotator cuff syndrome and left elbow biceps tendon tear." Dr. Nguyen's treatment plan included additional diagnostic testing and medication.

A hearing was held on July 21, 2009. At that time, the claimant contended that he was entitled to a period of additional temporary total disability benefits. The claimant contended that he was entitled to continuing medical benefits for his left arm. The claimant asked that the February 27, 2009 hearing request and pre-hearing questionnaire be incorporated into the record by reference; the respondents did not object to this request. The claimant also contended that he was entitled to benefits in

Aylor - F511713, F610180, 18
& F811859

accordance with Ark. Code Ann. §11-9-505(a) beginning September 13, 2007.

The respondents contended that the last benefits of any kind were paid in April 2008 and that the claimant did not file a Form C for the left arm. The respondents contended that additional medical treatment was not reasonably necessary.

An administrative law judge filed an amended order and opinion on October 21, 2009. The administrative law judge found that the claimant proved he was entitled to temporary total disability benefits from April 25, 2006 through May 8, 2006. The respondents do not appeal that finding. The administrative law judge found that the claimant did not prove he sustained a compensable allergic condition, and that the claimant did not prove he was entitled to wage-loss disability. The claimant does not appeal those findings.

The administrative law judge found that the claimant proved additional medical treatment for the claimant's left arm was reasonably necessary, and that the statute of limitations did not bar the claim for additional medical treatment. The administrative law judge found that the claimant failed to prove he was entitled to benefits in

Aylor - F511713, F610180, 19
& F811859

accordance with Ark. Code Ann. §11-9-505(a). The claimant appeals to the Full Commission and the respondents cross-appeal.

II. ADJUDICATION

A. Medical Treatment

The employer shall promptly provide for an injured employee such medical treatment as may be reasonably necessary in connection with the injury received by the employee. Ark. Code Ann. §11-9-508(a) (Repl. 2002). The employee must prove by a preponderance of the evidence that he is entitled to additional medical treatment. *Wal-Mart Stores, Inc. v. Brown*, 82 Ark. App. 600, 120 S.W.3d 153 (2003). What constitutes reasonably necessary medical treatment is a question of fact for the Commission. *Hamilton v. Gregory Trucking*, 90 Ark. App. 248, 205 S.W.3d 181 (2005).

An administrative law judge found in the present matter, "6. The claimant has proven by a preponderance of the evidence that additional medical treatment for his left arm is reasonable and necessary. Respondents are responsible for this medical treatment." The Full Commission affirms this finding. The parties stipulated

Aylor - F511713, F610180, 20
& F811859

that the claimant sustained a compensable injury to his left upper extremity on August 16, 2006. The claimant testified that he felt a pop in his left arm while lifting a large bag overhead. The claimant was diagnosed with a ruptured left distal biceps muscle tendon. Dr. Nguyen performed a left distal biceps repair on October 3, 2006. Dr. Nguyen pronounced maximum medical improvement on January 10, 2007 and assigned a 5% left upper extremity impairment rating. Dr. Nguyen noted on August 29, 2007 that the claimant still suffered from left biceps tendinosis and partial tearing. Dr. Nguyen opined on September 28, 2007 that the claimant would have "flare-ups from time to time that require anti-inflammatories and periodic resting."

The claimant testified that he began working for Home Depot on October 28, 2007. The claimant returned for treatment with Dr. Nguyen on April 30, 2008. Dr. Nguyen noted that the claimant's physical condition had "flared" after lifting pallets at Home Depot. Dr. Nguyen's report indicated that he was referring to the claimant's left biceps tendon as well as the claimant's right shoulder. Dr. Nguyen did not opine that the claimant had sustained a new injury. On June 1, 2009, Dr. Nguyen reported that the

claimant's left elbow had again "flared up" after mixing paint at Home Depot. Dr. Nguyen's impression included "left elbow biceps tendon tear." A recurrence exists when the second complication is a natural and probable consequence of the prior injury; it is not a new injury but merely another period of incapacitation resulting from a previous injury. *King v. Peopleworks*, 97 Ark. App. 105, 244 S.W.3d 729 (2006), citing *Weldon v. Pierce Bros. Constr.*, 54 Ark. App. 344, 925 S.W.2d 179 (1996). An aggravation is a new injury resulting from an independent incident and, being a new injury with an independent cause, must meet the requirements for a compensable injury. *Crudup v. Regal Ware, Inc.*, 341 Ark. 804, 20 S.W.3d 900 (2000).

The evidence in the present matter does not demonstrate that the claimant sustained an aggravation or a new injury to his left upper extremity as a result of his work at Home Depot. Dr. Nguyen reported on June 1, 2009 that the claimant's left elbow had "flared up" after the claimant was mixing paint at Home Depot. However, Dr. Nguyen had opined in September 2007 that the claimant would experience occasional flare-ups in his left arm after the compensable injury and surgery. The record does not show that the

Aylor - F511713, F610180, 22
& F811859

claimant sustained a new injury to his left upper extremity as a result of his employment at Home Depot. The evidence instead demonstrates that Dr. Nguyen's treatment recommendations on June 1, 2009 were the result of a recurrence of the claimant's August 16, 2006 compensable injury. The Full Commission therefore finds that Dr. Nguyen's treatment recommendations on June 1, 2009 were reasonably necessary in connection with the August 16, 2006 compensable injury. We therefore affirm the administrative law judge's award of additional medical treatment.

B. Filing of claims

Ark. Code Ann. §11-9-702 (Repl. 2002) provides:

(b) TIME FOR FILING ADDITIONAL COMPENSATION. (1) In cases where any compensation, including disability or medical, has been paid on account of injury, a claim for additional compensation shall be barred unless filed with the commission within one (1) year from the date of the last payment of compensation or two years from the date of the injury, whichever is greater....

(c) A claim for additional compensation must specifically state that it is a claim for additional compensation. Documents which do not specifically request additional benefits shall not be considered a claim for additional compensation.

An administrative law judge found in the present matter, "7. The preponderance of the evidence supports the claim for additional medical for the arm is not barred by

the statute of limitations." The Full Commission affirms this finding. The parties stipulated that the claimant sustained a compensable injury to his left upper extremity on August 16, 2006. The claimant eventually underwent surgery for this compensable injury from Dr. Nguyen as well as follow-up visits. Dr. Nguyen examined the claimant's right shoulder and left upper extremity on April 30, 2008. Dr. Nguyen planned additional treatment.

The filing of a claim for additional benefits tolls the running of the statute of limitations. *Spencer v. Stone Container Corp.*, 72 Ark. App. 450, 38 S.W.3d 909 (2001). It is the claimant's burden to prove that he acted within the time allowed for filing a claim for additional compensation. *Superior Fed. Sav. & Loan Ass'n v. Shelby*, 265 Ark. 599, 580 S.W.2d 201 (1979). In order to be entitled to additional treatment, the claimant must have filed his claim for additional compensation within one year from the date of the last payment of compensation. Ark. Code Ann. §11-9-702(b), *supra*. For purposes of §11-9-702(b), the provision of medical services constitutes payment of compensation. See *Plante v. Tyson Foods, Inc.*, 319 Ark. 126, 890 S.W.2d 253 (1994). It is the furnishing of medical services, not the

Aylor - F511713, F610180, 24
& F811859

payment thereof, which constitutes the payment of compensation. See *Heflin v. Pepsi Cola Bottling Co.*, 244 Ark. 195, 424 S.W.2d 365 (1968).

In the present matter, the authorized treating physician, Dr. Nguyen, furnished medical services to the claimant on April 30, 2008. The claimant was thus required to file a claim for additional compensation no later than April 30, 2009, in accordance with Ark. Code Ann. §11-9-702(b). A pre-hearing order was filed on April 14, 2009 in which the claimant contended that he was entitled to additional benefits. The record therefore indicates that the claimant filed a claim for additional compensation within the required one-year period.

C. Additional compensation

Ark. Code Ann. §11-9-505(Repl. 2002) provides:

(a) (1) Any employer who without reasonable cause refuses to return an employee who is injured in the course of employment to work, where suitable employment is available within the employee's physical and mental limitations, upon order of the Workers' Compensation Commission, and in addition to other benefits, shall be liable to pay the employee the difference between benefits received and the average weekly wages lost during the period of the refusal, for a period not to exceed one (1) year.

Aylor - F511713, F610180, 25
& F811859

An administrative law judge found in the present matter, "9. The claimant has failed to prove that he is entitled to 505(a) benefits." The Full Commission affirms this finding. The parties stipulated that the claimant sustained a compensable right shoulder injury on August 25, 2005. Dr. Nguyen performed surgery and released the claimant on August 10, 2006 with a 2% anatomical impairment rating. The parties stipulated that the claimant sustained a compensable injury to his left upper extremity on August 16, 2006. Dr. Nguyen performed surgery and released the claimant on January 10, 2007 with a 5% rating to the left upper extremity. Dr. Nguyen advised the claimant to "stay away from heavy lifting activities." The claimant testified that he attempted to return to work in January 2007 but was unable to perform his employment duties. The claimant testified that he refused to work with a leaf blower because it weighed 75 pounds and caused pain. Dr. Nguyen's Work Status Report on July 18, 2007 was "Class II - Medium manual activity - NO lifting greater than 40 pounds." Dr. Nguyen assigned a 30-pound lifting restriction on August 29, 2007.

The claimant did not work for the Bryant School District after approximately September 12, 2007. The claimant testified that he could not perform work which involved use of a backback blower, weed eater, or lawnmower. Don McGohan, the school district assistant superintendent, testified that the claimant was sent home without pay for refusing to operate a lawnmower. Korrine Lancaster advised the claimant's attorney on September 17, 2007, "The school does not have continued permanent work within the permanent restrictions that Dr. Nguyen has given." We note the Court of Appeals' holding in *Torrey v. City of Fort Smith*, 55 Ark. App. 226, 934 S.W.2d 237 (1996):

Before Ark. Code Ann. §11-9-505(a) applies several requirements must be met. The employee must prove by a preponderance of the evidence that he sustained a compensable injury; that suitable employment which is within his physical and mental limitations is available with the employer; that the employer has refused to return him to work; and, that the employer's refusal to return him to work is without reasonable cause.

In the present matter, the Full Commission finds that suitable employment within the claimant's physical limitations was not available with the employer. The claimant contends on appeal that he could have returned to work for the respondents as a bus driver. Nevertheless, we

Aylor - F511713, F610180, 27
& F811859

note the claimant's testimony at hearing that he drove a bus for only one hour daily before his compensable injuries and performed maintenance work for the balance of his employment duties. Both of the claimant's compensable injuries occurred while the claimant was performing manual labor for the respondents. Although he attempted to persuade the claimant to return to work in October 2007, Mr. McGohan's testimony indicated that work within Dr. Nguyen's 40-pound lifting restriction was not available with the respondents. The respondents' attorney questioned Bob Padgett, the respondent-employer's maintenance director:

Q. Now, if someone has a permanent restriction of no lifting over 40 pounds, do you think that that person could continue to work full time in maintenance?

A. No, he could not.

Q. Why do you say that?

A. Because those areas consisting of it would be creating a problem. Coming in contact with subjects being offered or being given to him, he would probably come in contact with areas being more than 40 pounds. Another thing that creates a problem is that we're very limited to manpower. We're very limited to resources. So each individual pretty well has to carry a load of responsibility, and we'd be very limited for that individual not to be able to carry on that responsibility. I could not foresee him working with those restrictions I've heard....

Peter Moix, assistant maintenance director for the respondent-employer, agreed at hearing that an individual with a 40-pound lifting restriction could not perform maintenance work. The Full Commission finds, pursuant to the Court's guidelines in *Torrey, supra*, that the claimant did not prove suitable employment within the claimant's physical limitations was available with the employer. We therefore affirm the administrative law judge's finding that the claimant did not prove he was entitled to benefits in accordance with Ark. Code Ann. §11-9-505(a).

Based on our *de novo* review of the entire record, the Full Commission finds that the claimant proved additional medical treatment for his left arm as recommended by Dr. Nguyen was reasonably necessary. We find that the statute of limitations does not bar the claim for additional medical treatment. We find that the claimant did not prove he was entitled to benefits in accordance with Ark. Code Ann. §11-9-505(a). The Full Commission therefore affirms the administrative law judge's findings. The claimant's attorney is entitled to fees for legal services in accordance with Ark. Code Ann. §11-9-715(Repl. 2002). For prevailing in part on appeal to the Full Commission, the

Aylor - F511713, F610180, 29
& F811859

claimant's attorney is entitled to an additional fee of five hundred dollars (\$500), pursuant to Ark. Code Ann. §11-9-715(b) (Repl. 2002).

IT IS SO ORDERED.

A. WATSON BELL, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Hood concurs & dissents.

CONCURRING & DISSENTING OPINION

I must respectfully concur, in part, and dissent, in part, from the majority opinion. I specifically concur in the finding that the additional medical treatment for the claimant's left arm was reasonably necessary. I also agree that the statute of limitations did not bar this claim for additional medical treatment. However, as I would award benefits under Ark. Code Ann. §11-9-505(a)(1), I must respectfully dissent on this issue.

Ark. Code Ann. §11-9-505(a)(1) provides as follows:

Any employer who without reasonable cause refuses to return an employee who is injured in the course of employment to work, where suitable employment is

available within the employee's physical and mental limitations, upon order of the Workers' Compensation Commission, and in addition to other benefits, shall be liable to pay to the employees the difference between benefits received and the average weekly wages lost during the period of the refusal, for a period not exceeding one (1) year.

I believe the majority has erred by conflating two different job positions - maintenance and bus driver. The claimant first went to work for the respondent as a bus driver, and then added the maintenance position. The bus driver and maintenance positions were separate positions, working under separate rates of pay. When the respondents unilaterally suspended the claimant's employment, they suspended him from both positions and required him to surrender his bus keys. The respondents did so, despite the fact that the claimant was still able to drive the school bus despite his physical limitations, and had been driving since the beginning of the school year.

Don McGohan, the respondents' assistant superintendent, claimed that he suspended the claimant from the bus driver position because he did not believe the claimant could operate the bus door handle. Yet, he admitted that the claimant had been successfully driving the

bus anyway. In fact, the claimant had been successfully driving a school bus for many months between his August 2005 shoulder injury and the suspension of his employment in September 2007. Not only that, he had been specifically cleared by a doctor to drive a school bus on August 8, 2007. He was cleared, in spite of the fact that he was having problems with his shoulder at the time, and had even seen Dr. Nguyen only a couple of weeks prior. Given that long period of time in which the claimant successfully drove a school bus, and the fact that he was specifically cleared by a physician to operate a school bus, McGohan's claim of a sudden concern about the claimant's ability to operate a bus door handle is neither credible nor reasonable.

Torrey v. City of Fort Smith, 55 Ark. App. 226, 934 S.W.2d 237 (1996), establishes a four-part test to determine entitlement to 505(a) benefits:

The employee must prove by a preponderance of the evidence that he sustained a compensable injury; that suitable employment which is within his physical and mental limitations is available with the employer; that the employer has refused to return him to work; and, that the employer's refusal to return him to work is without reasonable cause.

Torrey v. City of Fort Smith, 55 Ark. App. At 230.

It is undisputable that the claimant sustained a compensable injury, and that the respondents suspended his employment as a bus driver, satisfying the first and third tests. The claimant proved that he was still able to perform the duties of the separate, contracted, bus driver position - and had been successfully performing those duties for months prior. This fact, combined with the respondents' failure to credibly articulate a reasonable cause for suspending the claimant's employment as a bus driver, satisfies the second and fourth Torrey tests. The claimant has, therefore, proven his entitlement to benefits pursuant to Ark. Code Ann. §11-9-505(a).

For the aforementioned reasons I must concur, in part, and dissent, in part, from the majority opinion.

PHILIP A. HOOD, Commissioner