

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. D805529

UDIALUS COLEMAN (deceased), Employee	CLAIMANT
WHEELING MACHINE PRODUCTS, Employer	RESPONDENT NO. 1
LIBERTY MUTUAL INSURANCE COMPANY, Carrier	RESPONDENT NO. 1
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT NO. 2

OPINION FILED MARCH 20, 2023

Hearing before ADMINISTRATIVE LAW JUDGE TERRY DON LUCY in Pine Bluff, Jefferson County, Arkansas; reassigned to ADMINISTRATIVE LAW JUDGE ERIC PAUL WELLS for the purpose of writing opinion.

Claimant Udialus Coleman (deceased), appearing at hearing through OPAL COLEMAN, surviving spouse.

Respondents No. 1 represented by DAVID C. JONES, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by CHRISTY L. KING, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

On October 6, 2022, the above captioned claim came on for a hearing at Pine Bluff, Arkansas. A pre-hearing conference was conducted on August 2, 2022, and a Pre-hearing Order was filed by Administrative Law Judge Terry Don Lucy on August 16, 2022. A copy of the Pre-hearing Order has been marked Commission's Exhibit No. 1 and made a part of the record without objection. Subsequent to the hearing, Administrative Law Judge Terry Don Lucy became no longer employed by the Commission and the file was reassigned to me for further handling.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. That the employee-employer-carrier relationship existed at all relevant times including on or about April 12, 1988, when the Claimant sustained a compensable injury to his neck.
3. At the time of the compensable injury, the Claimant was earning an average weekly wage of \$290.00, entitling him to temporary total disability (TTD)/permanent partial disability (PPD) compensation rates of \$189.00/\$154.00, the maximum rates for 1988.
4. The Claimant was released as having reached maximum medical improvement on July 2, 1996.
5. The Claimant was accepted as permanently and totally disabled. Respondents No. 1 paid out the maximum \$75,000.00 in indemnity benefits, and Respondents No. 2 began paying benefits to the Claimant on May 9, 2002.
6. The Claimant underwent surgery for his lumbar spine on or about December 1, 2021, which was not authorized or approved by Respondents No. 1.
7. The Claimant passed away on February 28, 2022.
8. All issues not litigated herein are reserved under the Arkansas Workers' Compensation Act.

By agreement of the parties the issues to litigate are limited to the following:

1. Whether the Claimant's death was a direct result of his April 12, 1988, work-related injury.
2. In the event the Claimant's death was ruled to be due to cause of injury, whether the Claimant's spouse is entitled to widow's benefits and funeral expenses pursuant to Ark. Code Ann. § 11-9-527.

3. Whether the Claimant's alleged lumbar spine injury is barred by the statute of limitations.

4. Whether the Claimant sustained a compensable injury to his lumbar spine as a result of his April 12, 1988, work-related injury.

5. Whether Respondents No. 1 failed to follow proper protocol regarding Commission Rule 099.33 by not providing the Claimant with an assigned physician (specifically a neurosurgeon or a neurologist) on or about 2013.

Claimant's contentions are:

"Failed to follow proper protocol of rule 099.33 managed care. For example: No annual visits, no assigned physician, complications of his surgeries/injury which lead to his death."

Respondents No. 1's contentions are:

"1. Respondents No. 1 contend that all appropriate benefits have previously been paid. In particular, Respondents No. 1 accepted the Decedent's cervical injury of April 12, 1988 as compensable and paid for numerous surgeries at the direction of Dr. Richard Jordan.

2. Respondents No. 1 contend that they previously paid all appropriate temporary total disability benefits and permanent and total disability benefits to the Decedent prior to his demise. Specifically, Respondents No. 1 accepted the Decedent as being permanently and totally disabled, and the Death and Permanent Total Disability Trust Fund took over payments of all indemnity benefits in 2002. Accordingly, Respondents No. 1 contend that no additional benefits or monetary benefits are due from Respondents No. 1 to the Claimant.

3. Respondents No. 1 contend that the Decedent's lumbar problems were not a result of the work-related injury, which occurred over 30 years ago, and Respondents No. 1 were not held liable for any medical treatment for the alleged lumbar problems as they were degenerative in nature and never litigated for compensability considerations.

4. Respondents No. 1 contend that the Claimant is seeking benefits that are not covered under the Arkansas Workers' Compensation Act, including what appear to be civil types of remedies, punitive damages and penalties that are not covered under the statutes. Respondents No. 1 contend that the Commission does not have

jurisdiction to address the numerous issues raised by the Claimant in her pleadings.

5. Respondents No. 1 join in the Fund's contentions that the decedent's passing was in no way causally connected to the 1988 injury and the Claimant herein cannot meet her burden of proof pursuant to Arkansas Code annotated 11-9-527(b).

6. Respondents No. 1 contend that the issues raised by the Claimant concerning the prior actions, medical treatment issues and alleged rule violations concerning prior treatment are moot based upon the demise of Mr. Coleman.

7. Respondents No. 1 would reserve the right to amend and supplement their contentions after the discovery has been completed."

Respondent No. 2's contentions are:

"Pursuant to § 11-9-527(b): If death does not result within one (1) year from the date of the accident, or within the first three (3) years of the period from compensation payments fixed by the compensation order, a rebuttable presumption shall arise that the death did not result from the injury.

The Trust Fund contends that the documents the claimant provided are not admissible as evidence because they have things underlined or highlighted. Many of the medical documents are not full reports. Most of the documents are pages from the internet describing different conditions with no indication of where they came from or of who authored them.

The Death and Permanent Total Disability Trust Fund will state its remaining contentions upon completion of discovery."

The claimant in this matter is a deceased male who died on February 28, 2022, at the age of 79 and sustained a compensable injury to his neck on April 12, 1988. The claimant reached maximum medical improvement for that injury on July 2, 1996. The claimant was accepted as permanently and totally disabled and the Death and Permanent Total Disability Trust Fund began paying benefits on May 9, 2002. At the present time, Opal Coleman, the claimant's widow, has brought this action before the Commission. The claimant's widow alleges that the claimant's death was a direct result of his April 12, 1988, work-related injury. The most recent medical

record submitted into evidence is an August 20, 2021, office visit with Dr. Samuel Clay Overley at UAMS Orthopedic Spine Clinic. Following is a portion of the record from that office visit:

Chief Complaint: Spinal cord injury

History of Present Illness: The patient is a 78 y.o. male who presents to clinic as a new patient for evaluation of cervical neck pain and low back pain. He has a history of spinal cord injury in 1988 after he was injured at work doing oil inspections. He is status post multiple cervical surgeries. He is here today for worsening neck pain and upper motor weakness. He has pain that originates in the posterior cervical spine radiating into the left shoulder, biceps, forearm and hand. He has bilateral upper extremity weakness and numbness. He has been wheelchair bound after his injury as believes that he has declined with his motor function over the last several years, but particularly over the last 10 months to a year. He and his wife are disappointed with the care that he has been receiving. He has been seeing pain management and takes oxycodone for pain. He would like to stop taking pain medication and treat the actual problem at hand. He is not looking for surgical intervention per say, but would like to hear conservative therapy options that may help him with decreasing his narcotic intake. He is accompanied today by his wife and case worker, Jennifer. He has been in and out of physical therapy and occupational therapy over the years. He is able to stand and walk with the assist of a rolling walker with a seat. He reports worsening low back pain with bilateral leg pain that radiates down the posterior aspect of the legs. He has numbness and tingling and weakness to bilateral lower extremities. He denies bowel or bladder incontinence.

Assessment/Plan:

78 year old male with prior SCI, status post 2 cervical surgeries. He is fused from C4-6. The patient is having worsening neck pain over the last year. He also has had worsening upper motor strength and numbness. Based off xrays, he does seem solidly fused from his prior surgery, there is concern for worsening proximal kyphosis causing more cervical stenosis. He has limited strength to bilateral upper extremities and a positive hoffman sign. He is also experiencing low back pain and bilateral lower extremity radiculopathy with profound weakness on physical exam. I discussed with the patient that while I do not see anything striking on imaging studies, he does have several levels of severe foraminal

stenosis in the cervical spine that may account for his radicular type pain. He also has moderate to severe lumbar spinal stenosis primarily at L2-3. I did discuss potential interventions such as selective nerve root block for the neck and epidural steroid injection for the low back. At the present time the patient does not wish to pursue any of these interventions. Should he decide to pursue these interventions he will contact my office and we will refer him to the appropriate physician.

The claimant's Certificate of Death is found at Respondent No. 2's Exhibit 1. That certificate states that the claimant died at home with an immediate cause of Rhabdomyolysis. The claimant's widow was questioned by Respondent No. 1 on cross examination about the claimant's death being a result of his work-related injury as follows:

Q And as we sit here today while you attempted to submit records, you didn't even have a record from any doctor saying his death was a result of this injury, is that correct?

A No, I don't. I didn't.

There is simply no medical or other documentary evidence in the record that provides a connection between the claimant's death on February 28, 2022, and his work-related accident of April 12, 1988, which resulted in a compensable neck injury. The claimant's widow is unable to show that the claimant's death was a direct result of that April 12, 1988, compensable neck injury.

The claimant's widow also alleged that the claimant sustained a compensable injury to his lumbar spine as a result of his April 12, 1988, work-related injury. The oldest medical record in evidence referencing any problems with the claimant's lumbar spine is a November 16, 2007, medical record from Dr. Michael McKee at Interventional Pain Management/Spine Care of San Antonio. Following is a portion of that medical record:

History of Present Illness: Mr. Coleman is a pleasant gentleman, 65 years old, who has sought our consultation. He is managed by

Dr. Richard Jordan at Little Rock, Arkansas, who has been his physician for a long time. He is recently relocated to the area and is seeking advice and help for medication management mostly for his chronic cervical and low back pain. He has had total of eight surgeries including anterior and posterior fusions in the cervical spine and lumbar surgery as well with fusion. He has chronic posterior neck pain radiating to the posterior trapezius area and shoulders in both lower extremities. He has intermittent paresthesias in the left arm. He has chronic low back pain radiating to both lower extremity, mostly posterior thighs and paresthesias into the right leg and some weakness complaints on the left leg. Overall, his pain level ranges anywhere from 5-9/10 depending on activity. His being managed for long-time by Dr. Jordan in Little Rock with the following medications of Percocet 5 mg up to 9-10 a day, Neurontin 100 mg on a p.r.n. basis. OxyContin 10 mg up to b.i.d. only when more severe pain presents, and baclofen 20 mg up to four a day. He seems to have been compliant and has a note from Dr. Jordan that he has been managing him even at long distances. He is a known patient of him who he actually did most of his surgeries. At this point, there is no indication that he needs further surgeries and his plan has been mostly maintenance. He seems to be a pleasant compliant gentleman. There does not seem to be a risk of abusive behavior.

Assessment and Plan: On extensive discussion with Mr. Coleman, I have told him I will be able to help him with the pain medication management. We might modify some regimen at some point. At this point, he has enough medication to last him for another few weeks, pending approval for me to become his pain management physician. We have also had discussion of prior epidural steroid injections and other procedures that have not helped him in the past. There was no need to reinvent the wheel at this point and try to redo a lot of injections. He also is aware of spinal cord stimulator or intrathecal morphine pumps that he has refused in the past and I tend to agree that might not be sufficient for him. Overall plan will be to pending approval for us to see him again, we will consider taking over his medication management to make is easier for him instead of having to do a long assist from Dr. Jordan in Little Rock.

I find no evidence in the above medical record or any other medical record that would indicate that any lumbar spine problems the claimant had were related to his April 12, 1988,

work injury. Regardless of that, the parties have asked the Commission to consider whether the claimant's alleged lumbar spine injury is barred by the statute of limitations. On cross examination by Respondent No. 1, the claimant's widow was questioned about the allegations of her husband having a work-related compensable lumbar injury as follows:

Q Okay. And we've got copies of the transcript and all that. Ms. Coleman, your husband, we'd stipulate that your husband underwent several cervical surgeries for his neck, is that correct?

A Right. Uh-huh, yes.

Q And he never filed a claim for back benefits with the Commission until recently, is that correct?

A Back benefits?

Q For lumbar, for his low back. He never alleged a back injury, is that correct?

A Repeat that, Mr. Jones?

Q Yeah, he never filed a claim for benefits with the Arkansas Commission alleging he had sustained a back injury, is that correct?

A No, it was just the original.

Q Which was the neck?

A Right, uh-huh.

Q Okay. And while you've testified today that he didn't know he had a back injury, he did, in fact, have lumbar surgery in 2002, is that correct?

A Yes, he did.

Q And you're aware he had that lumbar surgery?

A Through medical records, yes, I – yes.

Q Okay. I mean, you took him to the doctor probably?

A No, I say that, because I was not familiar with the terms the lumbar and this, that, and the other. I knew he had had surgery. Everything was back to me, you understand?

Q Okay. But you do realize the original injury was just to his neck?

A Right.

Q But you've made a statement today that you're contending his back was injured back in 1988, is that correct?

A Yes, I did say that.

Q Okay. And in fact, for the record, I pulled this from your exhibits that we will submit as rebuttal evidence, because it was submitted by you; so it's not a surprise to you. I've got a report from Dr. Ketcham from January 30th of 2002, talking about his back just started suddenly. Were you aware of that? Did you –

A Dr. Ketcham said what?

Q Yeah.

JUDGE LUCY: Hold on, Mr. Jones. Is that in your packet?

MR. JONES: No, sir, it's in her packet.

JUDGE LUCY: Which I had excluded.

MR. JONES: Yes, sir. Yes, sir. I understand that, but she's made a statement today that his back was hurt in 1988; so at that point, I believe that gives me the option to submit rebuttal evidence to what she's testifying to.

JUDGE LUCY: I will let you question her on that document, but I do not intend to introduce it into evidence.

MR. JONES: That's fine.

JUDGE LUCY: Go ahead, Mr. Jones.

MR. JONES: (Continuing)

Q Ms. Coleman, you did attempt to submit a record from Dr. Ketcham, do you recall that?

A Yes.

Q Okay. And did you read the report?

A His report, yes, I read it.

Q And the doctor says here, “Of interest today, it seems that his low back has begun to hurt about four to six weeks ago. It seems rather sudden in onset.” Did you read that part of the report?

A I’m sure I did, ‘cause I read the report, yes.

Q All right. So, in fact, his back problems didn’t start until 2011 or 2022?

A No, that wouldn’t be what it’s saying. It just said it started hurting then.

Q Okay. All right.

Q Okay. All right. And once again, neither you nor your husband ever filed a claim for benefits on the lumbar spine, the low back, correct, until the hearing today? He never asserted back in 2002, when he had the lumbar surgery that his back was work-related, did he?

A He didn’t know, no. He never, uh-uh.

An email dated November 12, 2012, was submitted into evidence by Respondent No. 1 and is found at Respondent No.1’s Exhibit No. 2, page 1. That email was authored by someone named Sherri Johnson and references the claimant. The body of that email follows: “Message: Spoke Ellen Allen case worker for the pt at Liberty Mutual regarding Auth for BB. Liberty Mutual only covering neck injury, No lumbar. They will not approve BB. Must file BB through medicare. SJ.” The claimant would have been aware at least by the end of 2012 that the respondent was denying the compensability of a lumbar spine injury associated with this April

12, 1988, work-related injury. It was not until after his death, which occurred on February 28, 2022, that the claimant's widow made a claim to the Commission regarding the claimant's alleged lumbar spine injury. The claimant's widow signed a form AR-C on the deceased claimant's behalf on March 14, 2022.

A.C.A. §11-9-702(a)(1) sets forth the time limitation for filing a claim as follows: "A claim for compensation for disability on account of an injury, other than an occupational disease and occupational infection, shall be barred unless filed with the Workers' Compensation Commission within (2) years from the date of the compensable injury. If, during the two year period following the filing of the claim, the claimant receives no weekly benefit compensation and receives no medical treatment resulting from the alleged injury, the claim shall be barred thereafter."

It is without question that the claimant's claim regarding a lumbar spine injury is barred by the statute of limitations. The claimant was involved in a work-related incident on April 12, 1988, which resulted in a compensable neck injury. It is clear that the claimant would have known, at least by late 2012, that the respondent was denying coverage for his alleged lumbar difficulties. However, the claimant during his lifetime, never filed a request for benefits regarding his lumbar spine and then passed away on February 28, 2022. Through his widow, Opal Coleman, a claim was brought regarding the lumbar spine on March 14, 2022. The statute of limitations bars the claimant regarding the claimant's allegations of lumbar spine difficulties.

The claimant's widow has alleged that Respondent No. 1 has failed to follow proper protocol regarding Commission Rule 099.33 by not providing the claimant with an assigned physician (specifically a neurosurgeon or neurologist) on or about 2013. Commission Rule 099.33 is titled "Managed Care" and deals with a wide variety of managed care issues. Here it

appears that the claimant's widow is alleging the claimant was not able to see a neurosurgeon or neurologist on or about 2013. It appears that the claimant's widow is referencing Rule 099.33 IV, which deals with Change of Physician. The claimant's widow was questioned on cross examination by Respondent No. 1 about her husband's 2013 Change of Physician as follows:

Q And while you talk about things were not being provided, your husband clearly knew how to request action before the Commission, because he did request a change of physician back in 2013, correct?

A Request what?

Q A change of physician.

A Oh, yes, he knew he had one. Well, an opportunity to change one. He had the one doctor, yes.

Q Okay.

A Choice of his own doctor, yes.

At Respondent No. 1's Exhibit 2, pages 2-3, a Change of Physician was introduced into evidence. That Change of Physician order changed the claimant from Dr. Amir Qureshi to Dr. Christopher Mocek and was signed on July 30, 2013, by Pat Capps Hannah, the administrator of the Medical Cost Containment Division. In review of the evidence and testimony submitted into the record, I find no evidence that Respondent No. 1 failed to comply with Commission Rule 099.33.

From a review of the record as a whole, to include medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witness and to observe her demeanor, the following findings of fact and conclusions of law are made in accordance with A.C.A. §11-9-704:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on August 2, 2022, and contained in a Pre-hearing Order filed August 16, 2022, are hereby accepted as fact.

2. The claimant's widow has failed to prove by a preponderance of the evidence that the claimant's death was a direct result of his April 12, 1988, work-related injury.

3. The issue regarding the claimant's spouse's entitlement to widow's benefits and funeral expenses pursuant to Arkansas Code Annotated §11-9-527 is moot as the claimant, through the claimant's widow, has failed to prove that the claimant's death was a direct result of his April 12, 1988, work-related injury.

4. The claimant's alleged lumbar spine injury is barred by the statute of limitations.

5. The issue of whether the claimant sustained a compensable injury to his lumbar spine as result of his April 12, 1988, work-related injury is barred by the statute limitations.

6. The claimant's widow has failed to prove by a preponderance of the evidence that Respondent No. 1 failed to follow proper protocol regarding Commission Rule 099.33 by not providing the claimant with an assigned physician, specifically a neurosurgeon or neurologist on or around 2013.

ORDER

Pursuant to the above findings and conclusions, I have no alternative but to deny this claim in its entirety.

IT IS SO ORDERED.

**HONORABLE ERIC PAUL WELLS
ADMINISTRATIVE LAW JUDGE**