

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F210164

PHILLIP ROGERS	CLAIMANT
AREA AGENCY ON AGING	RESPONDENT
RISK MANAGEMENT SERVICES, INSURANCE CARRIER	NO. 1 RESPONDENT
SECOND INJURY FUND	NO. 2 RESPONDENT

OPINION FILED DECEMBER 22, 2004

Hearing before ADMINISTRATIVE LAW JUDGE MICHAEL L. ELLIG in Fort Smith, Sebastian County, Arkansas.

Claimant represented by MICHAEL HAMBY, Attorney, Greenwood, Arkansas.

Respondents No. 1 represented by CURTIS NEBBEN, Attorney, Fayetteville, Arkansas.

Second Injury Fund represented by TERRY PENCE, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on September 28, 2004, in Fort Smith, Arkansas. A pre-hearing order had been entered on July 9, 2004. This pre-hearing order purported to set out the stipulations offered by the parties and outlined the issues to be raised and addressed at the present time. A copy of the pre-hearing order was made Commission's Exhibit No. 1 to the hearing.

The following stipulations were offered by the parties and are hereby accepted:

1. The Opinion of June 27, 2003, has become final and is res judicata of all the issues raised and addressed therein.
2. The respondents have accepted and are paying permanent partial disability benefits for permanent physical impairment of 12% to the body as a whole.

By agreement of the parties the issues to be litigated and resolved at the present time were limited to the following:

1. The claimant's entitlement to additional medical services at the respondent's expense.

2. Extent of permanent disability for loss of wage earning capacity.
3. Second Injury Fund liability.
3. Appropriate attorney's fee.

In regard to these issues, the claimant contends:

“The claimant’s treating physician, Dr. Claude Martimbeau, has recommended a vertebroplasty. However, the respondents have denied such treatment, and have continued to drag their feet, and do nothing concerning the claimant’s physical condition, and the doctor’s recommended treatment. The claimant is entitled to the treatment recommended by Dr. Martimbeau including the vertebroplasty, and any other recommendations for further treatment. The claimant is also entitled to a statutory attorney fee in addition and total permanent disability over and above the 12% as given by Dr. Johnson, as well as Second Injury Fund liability.”

In regard to these issues, the respondent #1's contentions are not entirely clear and no prehearing questionnaire from the respondents can be found in the file.

The respondent Second Injury Fund contends that it has no liability in this claim. It contends that the claimant’s conditions existing at the time of his compensable injury were either latent or were producing no impairment or disability, at the time of the compensable injury giving rise to this claim. The Fund further contends that the claimant’s current disability status is solely the result of the compensable injury of August 29, 2002.

DISCUSSION

_____A previous hearing was held in this case on April 15, 2003, and an Opinion was entered on June 27, 2003. The parties have stipulated that this prior Opinion has become final and is res judicata of all issues raised and addressed therein.

Although this prior Opinion made findings concerning the Commission’s jurisdiction, the existence of the employee-self insured employer-third party administrator relationship, the appropriate compensation rates, and the occurrence of a compensable spinal injury on August 29, 2002, the real focus of this hearing was over the claimant’s entitlement to a vertebroplasty, which had been recommended by the claimant’s treating physician, Dr. Claude Maritmbeau. In this Opinion, a further evaluation of the claimant was ordered to determine if this form of treatment still

remained medically appropriate. It appears that this evaluation may have been performed by Dr. Arthur Johnson.

Clearly, the claimant was seen by Dr. Johnson, a board certified neurosurgeon, on September 18, 2003. Although Dr. Johnson makes no mention of the previously recommended vertebroplasty it was his opinion that the appropriate treatment for the claimant's difficulties would be a kyphoplasty of the L1 and L2 vertebral bodies. From the subsequent description of this procedure, it seems to be closely similar to, if not identical with, the previously recommended vertebroplasty.

In his operative note of October 1, 2003, Dr. Johnson indicated that visual observation confirmed his preoperative diagnosis of compression fractures involving both the L1 and L2 vertebral bodies. In this regard, I would note that a previous CT bone density examination, performed on December 13, 2002, also showed objective evidence of a lesser acute injury to the L2 vertebral body.

In a subsequent report, Dr. Johnson notes that x-rays also show that the claimant had experienced a mild compression fracture of the L3 vertebral body. Again, it must be noted that the L3 defect had been previously observed in the CT bone density examination, performed on December 13, 2002.

A subsequent MRI, performed on December 3, 2003, showed a compression fracture of L2 that was not visible in the prior MRI of October 10, 2002, but was unchanged since the plain x-rays of October 1, 2003. This study further showed the presence of the "cement" placed into the vertebral bodies by Dr. Johnson on September 18, 2003. Finally, it noted various disc bulging and the protrusion of the intervertebral discs which had "not significantly changed" since the prior study on October 10, 2002.

According to the claimant's testimony, and the records of Dr. Johnson, the kyphoplasty performed by Dr. Johnson did not substantially alleviate the claimant's complaints. Dr. Johnson notes that due to the claimant's continuing low back complaints, a discogram should be performed

to determine the possibility that at least some of the claimant's low back complaints may be of discogenic origin, rather than the result of his vertebral body fractures.

In a report to the claimant's attorney, dated February 26, 2004, Dr. Johnson discussed the claimant's kyphoplasty and apparently changes his counting methods, as he indicated that this procedure was performed on the T12 and L1 vertebral bodies, rather than the L1 and L2. This appears to have been a prevalent problem in this case and is not unusual. Depending on whether the examiner counts down from the ribs or up from the sacrum a T12 vertebra can become a L1 and a L1 can become a L2, etc. He also reiterated his opinion that the claimant's persistent back complaints may have been to a certain degree, discogenic in origin, and in addition to the complaints caused by his two vertebral compression fractures.

In a subsequent report to the respondents, dated March 30, 2004, Dr. Johnson expressed the opinion that the claimant has reached "maximum medical improvement" from the L1 and L2 vertebral body compression fractures. He further assessed a permanent physical impairment of 12% to the body, solely as a whole, as a result of these conditions. Finally, he states that the compression fractures, alone would place certain restrictions on the claimant's potential employment activities, but indicates that his discal injuries should be further evaluated before the claimant returned to work.

In a subsequent "fill in the blank" report (apparently completed at the request of the claimant's attorney) Dr. Johnson indicated that it is his expert opinion that the claimant's continuing and current need for medical treatment for his lumbar spine complaints and his continuing disability was most probably the result of his employment related injury on August 29, 2002. While I am not generally inclined to afford very much credit to a medical report where the doctor was only to check a box, I recognize that this is sometimes the only way to obtain medical reports from certain doctors. In this case, I would also note that Dr. Johnson underlined the word probably and explained by handwritten notation that he was not 100% certain that his discal injury and the need for its treatment was "probable", since the claimant has continuously experienced pain in this

portion of his back since the injury of August 29, 2002.

I find Dr. Johnson's opinion to be supported by the other evidence presented and persuasive. The previous tests performed on the claimant, soon after his compensable injury, showed objective evidence of the presence of discal defects in the involved area. These defects could have been logically and reasonably caused or aggravated by the injury described by the claimant. The claimant's symptoms would be compatible with the occurrence of both a vertebral compression fracture and a disc injury. The claimant's testimony, which I find to be credible, shows that he had not experienced any similar complaints with his lower back prior to the compensable injury, but experienced them immediately following this injury. While the medical records do indicate a prior episode of back difficulties in October of 1996, these difficulties were diagnosed as only an acute lumbosacral strain or sacroiliitis on the right. These difficulties also appear to have rapidly resolved with only a brief period of rest, heat, and oral medication. There is no evidence of any continuing back difficulties after October 21, 1996.

Dr. Johnson subsequently performed a laminectomy and interbody fusion for the claimant's bulging, protruded, or herniated discs at L4-5 and L5-S1. At that time, Dr. Johnson also performed an accompanying fusion from the L4- to S1 vertebrae.

After consideration of all the evidence presented, it is my opinion that the greater weight of the credible evidence shows that the subsequent medical services rendered to the claimant by Dr. Johnson, constitute reasonably necessary medical services for the claimant's compensable injury of August 29, 2002. This treatment was necessitated by and connected with his compensable back injury on that date, and had a reasonable expectation of accomplishing the purpose or goal for which it was intended. Thus, the respondents are liable for the expense of these services, pursuant to Ark. Code Ann. §11-9-508. However, this liability is governed by the medical fee schedule established by the Commission.

I would further note that although Dr. Johnson has rated the claimant in regard to his compression fractures and has opined that the claimant has reached maximum medical

improvement, in regard to these fractures, there is no evidence that the claimant has also reached the end of his healing period, in regard to all of the aspects of his compensable spine injury of August 29, 2002. Thus, the issues of the extent of permanent disability or loss of wage earning capacity, and Second Injury Fund liability would appear premature. A decision of these issues should be reserved until the claimant has reached the end of his healing period from the effects of all of the aspects of his compensable lumbar injury of August 29, 2002.

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On August 29, 2002 , the relationship of employee-self insured employer-third party administrator existed between the parties.
3. On August 29, 2002, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$170.00 for total disability and \$154.00 for permanent partial disability.
4. On August 29, 2002, the claimant sustained a compensable injury to his lumbar spine.
5. All of the medical services rendered to the claimant for his lumbar spine difficulties, by and at the direction of Dr. Johnson, represent reasonably necessary medical services for the claimant's compensable injury of August 29, 2002. Pursuant to Ark. Code Ann. § 11-9-508, the respondents are liable for this expense, subject to the medical fee schedule established by this Commission.
6. The evidence fails to show that the claimant has reached the end of his hearing period from all of the effects of his compensable injury of August 29, 2002. Thus, the issues of the extent of permanent disability for loss of wage earning capacity and Second Injury Fund liability are premature.
7. The respondents have controverted the claimant's entitlement to some, if not all, of the medical services rendered to the claimant for his lower back complaints by

and at the direction of Dr. Johnson.

8. Pursuant to Ark. Code Ann. § 11-9-715, no attorney's fees can be awarded from the respondents from the controverted medical expenses herein awarded.

ORDER

The respondents shall be liable for the expense of all of the services provided to the claimant for his compensable lumbar spine injuries by and at the direction of Dr. Johnson. Such liability shall be subject to the medical fee schedule established by this Commission.

The issues of the extent of any permanent disability for loss of wage earning capacity and the liability of the Second injury Fund for any such benefits should be and hereby is reserved for future determination, if necessary, upon completion of the claimant's healing period from all of the effects of his compensable lumbar injury.

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

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

IT IS SO ORDERED.

MICHAEL L. ELLIG
Administrative Law Judge