

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F609776/F609777

TIMOTHY JONES	CLAIMANT
ASC PROPERTY MANAGEMENT, INC.	RESPONDENT
LEMIC INSURANCE COMPANY, INSURANCE CARRIER	RESPONDENT

OPINION FILED AUGUST 30, 2007

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

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

Respondents represented by MELISSA WOOD, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claims on July 10, 2007, in Fort Smith, Arkansas.

A pre-hearing order was entered in this case on January 9, 2007. This pre-hearing order set out the stipulations offered by the parties and outlined the issue to be litigated and resolved at the present time. As of the date of hearing, the parties had not agreed on the appropriate weekly compensation rates. However, since the current issue before the Commission does not involve the payment of any disability benefits, no stipulation or finding is necessary at the present time on the appropriate weekly compensation rates. With the stipulation concerning the appropriate weekly compensation rate deleted, a copy of the pre-hearing order was admitted as Commission's Exhibit No. 1 to the hearing.

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

1. On May 31, 2005 and October 2, 2005, the relationship of employee-self insured employer-TPA existed between the parties.
2. On May 31, 2005, and October 2, 2005, the claimant sustained compensable injuries to his low back.
3. There is no dispute over the payment of medical expenses incurred through October 27, 2006.
4. There is no dispute over temporary disability benefits at present.

By agreement of the parties, the sole issue to be addressed at the present time is:

1. The claimant's entitlement to additional medical services after October 27, 2006 at the respondents' expense.

In regard to this issue, the claimant contends:

"a. The claimant contends that his authorized treating physician has determined that additional treatment is necessary in order to determine the nature and extent of the claimant's condition and that the respondents have refused to authorize the recommended treatment. Therefore, the claimant contends that the respondents have controverted the claim and its entitlement to additional benefits.

b. The claimant contends that since the respondents are controverting the claimant's entitlement to additional medical treatment, they also are controverting the claimant's entitlement to any disability benefits that may become due as a result of further assessment of the nature and extent of the claimant's condition."

In regard to this issue, the respondents contend:

“Respondents contend that all appropriate benefits have been paid with regard to this matter. The claimant may have suffered an independent intervening incident in April, 2006, which accounts for his current need for medical treatment, if any. This is being explored at this time. However, benefits are ongoing with regard to this matter pending this clarification.”

#### DISCUSSION

The sole issue for resolution at the present time is whether the claimant is entitled to additional medical services, as recommended by Dr. Anthony Capocelli. The burden rests upon the claimant to prove his entitlement to these services. In order to meet this burden, he must prove that the recommended medical services represent “reasonably necessary medical services” as that term is used in the Act.

Medical services are “reasonably necessary” when they have a purpose or goal that is connected with the compensable injury. Such services must also have a reasonable expectation of accomplishing this purpose or goal, at the time the services are actually rendered. However, reasonably necessary medical services are not limited to those services that are ultimately successful. Nor, are reasonably necessary medical services limited only to those services intended to improve the actual physical damage caused by the compensable injury. Medical services may be reasonably necessary even if they are only intended to accurately diagnose the nature and extent of the injury or simply alleviate or reduce pain and other symptoms caused by the compensable injury,

including chronic pain and symptoms that persist after the end of the actual healing period.

The stipulations and the evidence presented show that the claimant sustained two separate and distinct compensable injuries to his lower back or lumbar spine. The first of these occurred on May 31, 2005, and the second on October 2, 2005.

The first of these injuries appears to have been relatively minor in nature. From the claimant's testimony and the medical evidence presented it would appear that this injury was merely a myofascial strain, which completely resolved within a brief period of time and required only the initial treatment from the emergency room physician.

The second injury, on October 2, 2005, appears to be a different matter. The medical evidence and the claimant's testimony shows that the claimant's symptoms involved not only his lower back, but also included radicular symptoms into both legs. As a result, the lumbar MRI was performed on October 5, 2005.

In her interpretation, Dr. Debra Russell (the radiologist) noted mild disc space narrowing at the level of the L5-S1 disc, with dessication and dehydration of both the L4-5 and L5-S1 discs. She also somewhat cryptically states:

"L4-L5: There is mild diffuse disc bulge at the level of L4-L5 with more focal left paracentral disc protrusion. There is effacement upon the anterior left lateral aspect of the thecal sac. The spinal canal and bilateral neural foramina remain patent."

When this same study was subsequently viewed by Dr. Anthony Capocelli (a neurosurgeon) on January 18, 2006, it was his

interpretation that this study showed a mild disc protrusion on the left side and centrally at L5, or what would be the L5-S1 disc. However, he too noted that there was no real "definite" neural foraminal compromise.

The claimant's testimony reflects that after the October 2, 2005 injury, he continuously experienced significant pain and other difficulties with his back and lower extremities. During this time, he was treated with various conservative modalities, including epidural steroid injections, oral medication, and various types of physical therapy. Although these various treatments appear to have been somewhat successful in reducing the magnitude of the claimant's symptoms and complaints, he has still continued to experience substantial difficulties with both his back and lower extremities.

A second MRI, which was performed on October 27, 2006, was interpreted by Dr. Capocelli as showing a herniated nucleus pulposus of the L5-S1 intervertebral disc that was central and paracentral and was causing some narrowing of the spinal canal and neural foraminal openings (worse on the right than the left). He further indicated that this study showed some degree of "superior migration of the fragment". There is no indication in this report by Dr. Capocelli that these findings were indicative of any new injury or new damage to the claimant's lumbar spine.

Following this MRI, Dr. Capocelli continued to be of the opinion that the claimant was still not a surgical candidate, at that time, but should continue conservative treatment modalities.

On September 21, 2006, Dr. Capocelli recommended additional testing, which he felt was necessary to accurately determine the etiology of the claimant's continuing complaints and develop an appropriate treatment program. This additional testing consisted of a second MRI (i.e. the study performed on October 27, 2006), a possible myelogram and a possible discogram. The myelogram and discogram have not been performed. On December 8, 2006, Dr. Capocelli again recommended a myelogram and a referral to a chronic pain management specialist for treatment of the claimant's continuing symptoms. On December 13, 2006, Dr. Capocelli recommended additional conservative treatment in the form of physical therapy with traction, until the other testing and treatment was authorized. At that time, the claimant was directed to return in three months or when his workers' compensation dispute over this recommended care had been addressed.

In a report, dated May 16, 2007, Dr. Capocelli clearly opined that the claimant's disc herniation at L5-S1, which was noted on the October 27, 2006 lumbar MRI, was likely due to the claimant's job related injury (presumably the injury of October 2, 2005). He further stated that it was his continuing medical opinion that the previously recommended myelography and possible discography were medically necessary.

In June of 2007, the respondents had the claimant's medical records reviewed by Dr. J. Michael Calhoun, also a neurosurgeon. On June 13, 2007, Dr. Calhoun authored a report to the respondents, which confirmed most of the opinions of Dr. Capocelli. In this

report, Dr. Calhoun stated that it was his expert medical opinion, within a reasonable degree of medical certainty, that the L5-S1 disc herniation, noted on the October 27, 2006 MRI, was likely due to the job injury of October 2, 2005. He also concurs with Dr. Capocelli that the claimant does not, at the present time, appear to be a surgical candidate. Thus, as a neurosurgeon, he would have nothing further to suggest. However, he does note the previously provided conservative treatment modalities of epidural steroid injections and physical therapy and appears to agree that such continued treatment modalities might be appropriate. He does go on to assess a permanent physical impairment of 7 percent to the body as a whole for the disc herniation.

It is my opinion that the evidence presented shows that the medical services provided by Dr. Capocelli, after October 27, 2006, and those recommended by Dr. Capocelli, in his report of December 6, 2006, are connected with the claimant's compensable injury of October 2, 2005. It is my further opinion that these services have a reasonable expectation of accomplishing the purpose or goal for which they are intended.

Dr. Capocelli is a competent board-certified neurosurgeon. He has considerable expertise in the area of medicine associated with the diagnosis and treatment of injuries such as that experienced by the claimant. It cannot be presumed that he would recommend medical services that would be unnecessary or medically inappropriate. There is no expert medical opinion presented that directly contradicts the recommendations of Dr. Capocelli. I would further

note that a myelography is widely recognized by the general medical community as being the “gold standard” for the diagnosis of the nature and extent of physical injuries involving the spine. Further, it is also widely recognized by the medical community that programs of chronic pain management is reasonable and appropriate for non surgical spinal injuries, such as that experienced by the claimant.

Thus, I find that the medical services provided by Dr. Capocelli after October 27, 2006, and those recommended by Dr. Capocelli, in his report of December 6, 2006, represent reasonably necessary medical services for the claimant’s compensable injury of October 2, 2005. Pursuant to Ark. Code Ann. §11-9-508, the expense of these services should be the liability of the respondents herein. However, this liability is subject to the medical fee schedule established by this Commission.

In reaching the foregoing decision, I recognize that the claimant also engaged in other strenuous activities that were not employment related and was involved in a nonemployment related motor vehicle accident. However, both of the claimant’s credible testimony and the medical evidence, show that these activities or events produced no change in the claimant’s back or radicular difficulties. Thus, these activities and events would have no effect on this claim.

#### FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas workers' Compensation Commission has jurisdiction of this claim.

2. On May 31, 2005 and October 2, 2005, the relationship of employee-employer carrier-third party administrator existed between the parties.

3. On May 31, 2005, and October 2, 2005, the claimant sustained compensable injuries to his low back or lumbar spine.

4. There is no dispute over the payment of medical expenses incurred through October 27, 2006.

5. The greater weight of the credible evidence establishes that the medical services provided for the claimant for his low back and lower extremity difficulties by and at the direction of Dr. Anthony Capocelli, after October 27, 2006, and the additional medical services and testing recommended by Dr. Capocelli, in his report of December 6, 2006, represent reasonably necessary medical services for the claimant's compensable injury of October 2, 2005. The greater weight of the evidence shows that such medical services were necessitated by or connected with the compensable injury of October 2, 2005 and have a reasonable expectation of accomplishing the purpose or goal for which they are intended.

6. There is no dispute at the present time, over the claimant's entitlement to temporary disability benefits.

7. The respondents have controverted the claimant's entitlement to any additional medical services, after October 27, 2006.

8. As no controverted benefits have been directly awarded to the claimant, no controverted attorney's fee can be awarded to his attorney.

ORDER

The respondents shall be liable for the medical services provided to the claimant for his compensable lumbar injury by and at the direction of Dr. Anthony Capocelli, on and after October 28, 2006. The respondents are further liable for the medical services recommended for the claimant's compensable injury by Dr. Capocelli in his report of December 6, 2006. This liability is subject to the medical fee schedule established by this Commission.

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.

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MICHAEL L. ELLIG  
ADMINISTRATIVE LAW JUDGE