

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F603352

WESLEY BOURNE

CLAIMANT

J & B SUPPLY

RESPONDENT

CINCINNATI CASUALTY INSURANCE,
INSURANCE CARRIER

RESPONDENT

OPINION FILED **JUNE 19, 2008**

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

Claimant represented by J. RANDOLPH SHOCK, Attorney, Fort Smith, Arkansas.

Respondents represented by WILLIAM FRYE, Attorney, North Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on March 25, 2008, in Fort Smith, Arkansas. The deposition of Dr. Rowland P. Vernon was taken on March 18, 2008, and has been admitted as Joint Exhibit No. 1 to this proceeding.

A pre-hearing order was entered in this case on February 4, 2008. This pre-hearing order purported to set forth the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. However, numerous changes were made in this pre-hearing order immediately prior to the hearing. First, a clerical correction was made in regard to the appropriate workers' compensation insurance carrier (Cincinnati Casualty Insurance, rather than American Home Assurance). The claimant withdrew his request for a determination on his entitlement to temporary total disability benefits and, instead, requested a determination on his entitlement to permanent partial disability benefits for both permanent physical impairment and permanent functional disability and wage-earning capacity. The respondents had no objection to this amendment. The respondents requested

that the issue of whether the claimant would be precluded from receiving an award of permanent partial disability benefits for permanent functional disability or loss of wage earning capacity by the provisions of Ark. Code Ann. §11-9-522(b)(2) be added. The claimant had no objection. A copy of the pre-hearing order with these various amendments noted thereon was made Commission's Exhibit No. 1 to the hearing.

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

1. On March 15, 2006, the relationship of employee-employer-carrier existed between the parties.
2. The appropriate weekly compensation rates are \$240.00 for total disability and \$180.00 for permanent partial disability.
3. On March 15, 2006, the claimant sustained a compensable injury to his right lung.
4. All appropriate medical expenses were paid through December 5, 2006.
5. There is no dispute over temporary disability through February 16, 2007.

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 on and after February 17, 2007, permanent partial disability benefits for both permanent physical impairment and permanent functional or wage loss disability, and attorney's fees.

2. Whether the claimant is precluded from receiving benefits for permanent functional disability or wage loss under Ark. Code Ann. §11-9-522(b)(2).

In regard to these issues, the claimant contends that the claimant sustained a compensable lifting injury March 15, 2006 that resulted in a pneumothorax. Although this is a recurring condition and thus a compensable consequence of the initial injury respondents have refused to pay for subsequent episodes. Claimant contends that he is entitled to permanent partial disability benefits for both permanent physical impairment and permanent functional disability or loss of wage-earning capacity.

In regard to these issues, the respondents contend that he developed a pneumothorax on March 15, 2006. The claimant was treated by Drs. Vernon and Nolan. On April 21, 2006, the claimant had a chest tube inserted in his left side. At that point, he had pulmonary function that was reported as normal. After this hospitalization, Dr. Vernon noted the claimant was doing reasonably well and told him to increase his activities. He also did a chest x-ray which was reported to be fine. Subsequent to this, the claimant was released to return to work for the respondent employer but failed to return to work. Instead, the claimant went to work for another employer, namely Pepsi Cola. In September, Dr. Vernon reported the claimant was functioning comfortably. As of December 5, 2006, Dr. Vernon noted the claimant had no new problems, was working, and was having (by his own description) a good time with his life in general. There was no further medical treatment at that point. In addition, Dr. Vernon noted in a report dated July 30th, that he felt that the congenital subpleural blebs was the ultimate etiology for the claimant's left spontaneous pneumothorax. Other than not undertaking deep sea diving or mountain

climbing, there was nothing else he recommends as far as restriction of activities. He also indicated that he did not anticipate any additional pneumothorax on the left. He did feel that the claimant because of his congenital problem might have a right spontaneous pneumothorax. In fact, the claimant did develop the problem on the right side in 2007. In February 2007, the claimant went to the emergency room with a history of an onset of a new left sided chest pain that developed the day before. There was also an indication with Dr. Vernon that he had taken some type of fall. It is important to note that in the medical records from St. Edwards in July 2006, it was noted that the claimant had a motor vehicle accident and left knee injury, but no mention of shortness of breath. In April 2007, the claimant had a second motor vehicle accident and another knee injury. At this point, the respondents contend that any problems on the left side are related to his congenital subpleural bleb problem and any problems on the right are also not work related. The respondents contend that the claimant is not entitled to any permanent disability benefits for either permanent physical impairment or permanent functional disability or loss of wage-earning capacity. The claimant would be barred from receiving an award of benefits for permanent functional disability or loss of wage-earning capacity, at the present time by the provisions of Ark. Code Ann. §11-9-522(b)(1).

DISCUSSION

I. ADDITIONAL MEDICAL SERVICES AFTER FEBRUARY 17, 2007

The first issue to be addressed concerns the claimant's entitlement to additional medical services for his lung or respiratory difficulties on and after February 17, 2007. The burden rests upon the claimant to prove his entitlement to these additional medical services. In order to meet this burden,

the claimant must show that these additional medical services constitute "reasonably necessary medical services" , within the meaning of the Act.

The claimant must first show that the disputed medical services were necessitated by or connected with his admittedly compensable injury to his left lung on March 15, 2006. Secondly, he must show that such medical services had a reasonable expectation of accomplishing the purpose or goal for which they were intended, at the time the services were rendered. However, he need not show that such medical services were ultimately successful in accomplishing their intended purpose or goal.

The initial medical services, which are in dispute, were rendered to the claimant at the emergency room of the St. Edwards Mercy Medical Center, on February 17, 2007. The records from this facility show that the claimant's difficulties were diagnosed as being the result of a new spontaneous pneumothorax involving the upper lobe of his left lung. It is this diagnosis that likely caused the respondents to conclude that the claimant's problems with his left lung, on and after February 17, 2007, were unrelated to his admittedly compensable injury to this same part of his body.

However, on February 20, 2007, Dr. Rowland Vernon, at thoracic surgeon and the claimant's primary treating physician for his compensable lung injury of March 15, 2006, reevaluated the claimant and examined the various records from St. Edwards Mercy Medical Center emergency room, specifically the x-rays taken at that time. It was Dr. Vernon's expert medical opinion that the claimant had not experienced a new spontaneous pneumothorax of his left lung. Rather, it was his expert medical opinion that the x-ray defect, which was shown involve the upper lobe of the claimant's left lung and which formed the basis for the emergency room's diagnosis of a new spontaneous pneumothorax was

merely the continued presence of the damage or defect to this portion of the claimant's lung that had been present since the prior corrective surgery on April 21, 2006, and was attributable to the compensable injury and for resulting surgery. This clearly remained the opinion of Dr. Vernon at the time of his deposition on March 18, 2008.

Dr. Vernon, as the claimant's primary treating physician has had the opportunity to view all of the numerous x-rays taken of the claimant's left lung from the time of the initial compensable injury through the present. Dr. Vernon is also a highly competent thoracic surgeon with considerably more expertise in the area of lung injuries and conditions, than that possessed by the emergency room personnel or even the radiologist who interpreted the emergency room x-rays. Further, Dr. Vernon's opinion is supported by the fact that the abnormality noted on the emergency room x-ray involved exactly the same portion of the claimant's left lung as the compensable injury of March 15, 2006 and the exact same area of the corrective surgery that was performed by Dr. Vernon on April 21, 2006.

The medical evidence further shows that all of the medical services provided to the claimant by and at the direction of Dr. Vernon after February 17, 2007, have also involved the exact same area of the claimant's left lung, as that injured in the employment related accident of March 15, 2006. The treatment provided to the claimant by and at the direction of Dr. Vernon after February 17, 2007, was necessitated by the exact same symptoms which had been present since the claimant's compensable injury to his left lung on March 15, 2006.

After consideration of all the evidence presented, it is my opinion that the claimant has proven that the medical service he has received for his left lung

difficulties, on and after February 17, 2007, were necessitated by or connected with the compensable injury to this portion of his body on March 15, 2006. Thus, the claimant has satisfied the first requirement for these services to constitute "reasonably necessary medical services" under Ark. Code Ann. §11-9-508.

In his reports and deposition, Dr. Vernon clearly indicates that the claimant's compensable lung injury had not totally resolved prior to February 17, 2007. Although he had released the claimant from active medical treatment, Dr. Vernon advised the claimant was to return for follow up for further monitoring of his condition, as needed. When the claimant followed these instructions, Dr. Vernon was of the opinion that the claimant's continuing symptoms with his left lung, on and after February 17, 2007, merited further evaluation and testing. The evidence further shows that the evaluations and testing provided by and at the direction of Dr. Vernon were of a type and nature that would be generally recognized by the medical community as being appropriate to investigate the current status of the claimant's injury and the cause of his persistent complaints. There is no evidence, whatsoever, to indicate that any of the services rendered to the claimant by or at the direction of Dr. Vernon, after February 17, 2007, were in any way unnecessary or unreasonable. Dr. Vernon is a highly competent physician with considerable experience and expertise in the area of medicine associated with the claimant's difficulties. It cannot be presumed that he would provide or recommend services, which he believed to be unreasonable or unnecessary.

After consideration of all the evidence presented, it is my opinion that the greater weight of the evidence shows that the medical services provided to the claimant for his left lung difficulties by and at the direction of Dr. Vernon, after

February 17, 2007, had a reasonable expectation of accomplishing the intended purpose of these services, i.e. to insure an accurate diagnosis of the nature and extent of the claimant's compensable injury, the current status of that compensable injury, and to treat the effects of that compensable injury. Therefore, the second and final requirement for these medical services to constitute "reasonably necessary medical services" has been met.

In summary, the medical services provided to the claimant by the personnel at the emergency room of the St. Edwards Mercy Medical Center, on February 17, 2007, and by and at the direction Dr. Rowland Vernon, on and after February 20, 2007, constitutes reasonably necessary medical services for the claimant's compensable left lung injury, under Ark. Code Ann. §11-9-508. Pursuant to the provisions of this subsection, the respondents are liable for the expense of these services, subject to the medical fee schedule established by this Commission.

II. PERMANENT PARTIAL DISABILITY

The next issue to be addressed concern the claimant's entitlement to permanent partial disability benefits for his compensable left lung injury of March 15, 2006. Again, the burden rests upon the claimant to prove his entitlement to these benefits. The claimant's entitlement to these benefits is controlled by the proving of Ark. Code Ann. §11-9-522.

Applicable case law provides that the claimant cannot be awarded permanent partial disability benefits for permanent functional disability or loss of wage earning capacity, unless he first proves his entitlement to permanent partial disability benefits for permanent physical impairment. In order to be entitled to permanent partial disability benefits for permanent physical impairment, the claimant must prove the existence of permanent physical

impairment, which is supported by objective and measurable physical findings, Ark. Code Ann. §11-9-704(c)(1)(B). In determining the extent of such permanent physical impairment, no consideration can be given to pain, or other subjective factors, Ark. Code Ann. §11-9-102(16)(A)(ii)(a). Further, the degree or percentage of permanent physical impairment must be calculated in a manner that conforms with the Commission office rating guide, which at this time is the American Medical Association's Guides to the Evaluation of Permanent Impairment, fourth edition, Ark. Code Ann. §11-9-522(g). Finally, the claimant must prove that the compensable injury was the "major cause" (i.e. more than 50 percent of the cause) of the permanent impairment, Ark. Code Ann. §11-9-102(4)(F)(ii)(a).

However, no determination can be made upon the existence and extent of either physical impairment or permanent functional disability, until the claimant has achieved the maximum benefit of time and medical treatment in the resolution of the physical damage caused by the compensable injury and the remaining damage becomes fixed, permanent, and ascertainable. In other words, no permanent partial disability can be awarded until the claimant has reached the end of his healing period from the effects of his compensable injury.

On March 21, 2007, the claimant was again evaluated by Dr. Kirkland Nolan, a pulmonologist, and one of the claimant's initial treating physicians for his compensable injury. Dr. Nolan relates that the claimant demonstrates a mild restrictive defect on the pulmonary tests and that x-rays show hyperinflation of the chest cavity in the area of the left upper lobe. He further indicates that a CT of the claimant's chest and a cardiopulmonary stress test could be performed, but doubted that these tests would show anything that

would significantly change his diagnosis over the course of the claimant's treatment. Most importantly, Dr. Nolan states that it is his expert medical opinion that the defects demonstrated by the pulmonary tests and x-rays should get better with time and exercise. Dr. Nolan is a highly competent pulmonary specialist with considerable expertise in this area. His opinion is entitled to substantial weight and credit.

In his deposition, Dr. Vernon indicated that the defect demonstrated on x-ray likely represented a bleb that had been missed during the initial surgery. If this is actually the case, then this defect could be corrected by surgical intervention. In his deposition, Dr. Vernon further indicated that the defect noted on the pulmonary studies could also be the result of something other than a compensable injury and that the cardiopulmonary stress study which had been recommended by Dr. Nolan would be necessary in order to make a differentiation. Finally, Dr. Vernon reiterated his previous opinion that the claimant's compensable injury and any resulting physical damage would not cause him to place any permanent restrictions on the claimant's potential employment activities, other than deep sea diving.

After consideration of all the evidence presented, it is simply my opinion that the issue of the existence and extent of permanent physical impairment and permanent functional disability is not ripe for a decision, at the present time. It would appear that before such a decision could be made the pulmonary function test should be repeated to see if the claimant had made any progress, as anticipated by Dr. Nolan. Further, it would seem that the cardiopulmonary stress test recommended by Dr. Nolan and possibly the CT scan would be required. Therefore, I decline to rule on the issue of the existence and extent of permanent physical impairment and permanent

functional disability. This matter is reserved for future determination, if necessary.

FINDINGS OF FACT & CONCLUSIONS OF LAW

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

2. On March 15, 2006, the relationship of employee-employer-carrier existed between the parties.

3. On March 15, 2006, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$240.00 for total disability and \$180.00 for permanent partial disability.

4. On March 15, 2006, the claimant sustained a compensable injury to his right lung.

5. There is no dispute over the payment of medical expenses incurred through December 5, 2006, and all such benefits have or will be paid.

6. The medical services rendered to the claimant by and at the direction of the physicians at the emergency room of St. Edwards Mercy Medical Center and by and at the direction of Dr. Rowland Vernon (including a requested consultation from Dr. Kirkland Nolan) constitute reasonably necessary medical services, within the meaning of Ark. Code Ann. §11-9-508. Pursuant to the provisions of this subsection, the respondents are liable for the expense of these services. This liability is subject to the medical fee schedule established by this Commission.

7. There is no dispute over the payment of temporary total disability benefits through February 16, 2007.

8. The issues of whether the claimant has sustained any permanent partial disability for permanent physical impairment and permanent functional

disability is not for a determination at this time. As this issue is not ripe for a decision at the present time, the same is true for whether the claimant is precluded from receiving benefits for permanent functional disability by the provisions of Ark. Code Ann. §11-9-522(b)(2). These issues should be reserved for future determination, if necessary.

9. The respondents have controverted the claimant's entitlement to any medical services after February 17, 2007, and his entitlement to any permanent partial disability benefits.

10. As no controverted indemnity benefits have been awarded at this time, no controverted attorney's fee can be awarded to the claimant's attorney.

ORDER

The respondents shall be liable for the expense of medical services provided to the claimant for his left lung difficulties by and at the direction of the personnel at the emergency room of St. Edwards Mercy Medical Center, on February 17, 2007, and by and at the direction of Dr. Rowland Vernon, on and after February 20, 2007 (including a requested consultation by Dr. Kirkland Nolan). This liability is subject to the medical fee schedule established by this Commission.

At the present time, no controverted attorney's fee can be awarded to the claimant's attorney for the reasons heretofore set forth in this Opinion.

The issue of the claimant's entitlement to permanent partial disability benefits for permanent physical impairment and permanent functional disability is not ripe for a decision, at the present time, and is reserved for future determination (if necessary).

The issue of whether the claimant is barred from receiving benefits for permanent functional disability, at the present time, by the provisions of Ark.

Code Ann. §11-9-522(b)(2) is also not ripe for a decision, at the present time, and is reserved for future determination (if necessary).

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