

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NOS. E214467 & E216882

ROD BRIDGES, EMPLOYEE	CLAIMANT
ALUMAX, INC., EMPLOYER	RESPONDENT
CONTINENTAL INSURANCE CO., INSURANCE CARRIER/TPA	RESPONDENT
DALE GRADY, ATTORNEY AT LAW	INTERVENOR

OPINION FILED FEBRUARY 11, 2008

Hearing conducted before Administrative Law Judge S. Dale Douthit in El Dorado, Union County, Arkansas.

Claimant was represented by Mr. Michael W. Boyd, Attorney at Law, Pine Bluff, Arkansas.

The respondents were represented by Mr. Guy A. Wade, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted on November 14, 2007, to determine whether the claimant was entitled to additional workers' compensation benefits.

A prehearing conference was conducted in these claims on September 5, 2007, and a Prehearing Order was filed on that same day. A copy of the Prehearing Order was introduced as Commission Exhibit "2", pages one through five, without objection, subject to any modifications made at the full hearing.

At the prehearing, the parties agreed to litigate the following issues:

- 1) Claimant's entitlement to Radio-frequency L2 through S1 with

ROD BRIDGES - E214467 & E216882

post Transforaminal ESI.

- 2) Unpaid travel expenses.
- 3) Penalties and interest, and double maximum attorney's fees.

However, the issues to be litigated were modified at the full hearing. Issue number two outlined in the Prehearing Order was agreed to be reserved by the parties, regarding travel expenses and attorney's fees on those travel expenses. (T. pg. 6, lines 5-7). With issue number two outlined in the Prehearing Order being reserved, the following issues were left to be addressed at the full hearing:

- 1) Whether the claimant is entitled to the Radio-frequency procedure now recommended by Dr. Hart at L2-S1 with post Transforaminal ESI.
- 2) Preauthorization per Rule 30.
- 3) Penalties, interest, contempt, and double maximum attorney's fees.

At the full hearing, the parties stipulated to the following:

- 1) The Commission has jurisdiction of these claims.
- 2) The employee-employer-carrier relationship existed at all relevant times, including March 3, 1991, and March 9, 1992.
- 3) The claimant was earning sufficient wages to entitle him to a TTD rate of \$241.93 per week and a PPD rate of \$181.45 per week.
- 4) The parties agree that Mr. Dale Grady would be included in this matter as an Intervenor.

ROD BRIDGES - E214467 & E216882

- 5) All previous orders and opinions issued by the Commission are *res judicata* to the case and will be included by reference into the record.
- 6) All hearing transcripts and exhibits to those transcripts previously before the Arkansas Workers' Compensation Commission are hereby incorporated into this record by reference.
- 7) The issue regarding travel expenses and attorney's fees related to those travel expenses are reserved. Respondents stipulate that if the travel expenses have not been paid that Attorney Dale Grady would be entitled to an attorney's fee for whatever mileage has not been paid. Attorney Michael Boyd stipulated he would not be asking for attorney's fees on previously incurred travel related expenses. (T. pg. 6, lines 1-4).
- 8) The Radio-frequency treatment that is being requested at this particular time would cost in excess of \$1,000.00.

At the prehearing conference, the claimant contended, in summary, the following:

- 1) The Radio-frequency treatment now recommended by Dr. Hart is reasonable, necessary, and related to the claimant's compensable injuries, but that respondents have denied it.
- 2) The claimant is entitled to double maximum attorney's fees, penalties, and interest.
- 3) Rule 30 and Rule 33 read together are not clear as to what are the requirements for it to be afforded on or be disputed to Medical Cost Containment Unit and eventually onto an administrative law judge. The issue of additional medical treatment regarding the Radio-frequency procedures is ripe to be presented at the November 14, 2007, hearing in front of the administrative law judge. The claimant contends that Rule 30 or Rule 33 was

ROD BRIDGES - E214467 & E216882

possibly not in place in 1992 and that this case should not be governed by Commission Rule 30 or 33.

Respondents contended, in summary, the following at the full hearing:

- 1) Respondents have and are continuing to pay for all reasonably related medical treatment.
- 2) That the Radio-frequency at L5-S1 with post Transforaminal treatment was determined through the precertification process as not medically necessary. Respondents contend that because of this determination that they are unable to pay for the requested treatment. Respondents contend that the issue of additional medical treatment for the Radio-frequency is not ripe at this time because the Rule 30 appeal process was not properly administered and gone through Medical Cost Containmentment.
- 3) Respondents contend that they acted in accordance with Rule 30 and that they did not controvert the denial of this procedure, they simply followed the mandates of Rule 30 and the preauthorization procedure.
- 4) Respondents contend that Mr. Grady is not entitled to double maximum attorney's fees, any contempt charges, penalties, interest, or anything.
- 5) That the issue of Radio-frequency treatment has not been placed twice in jeopardy.
- 6) The last opinion in this case was in 2002 by Administrative Law Judge Blood, that was a year before the claimant began seeing Dr. Hart.
- 7) The claimant had not seen Dr. Hart, and that Radio-frequency has never been an issue in this case, and so there should not be penalties, interest, attorney's fees, or any contempt.
- 8) That Attorney Dale Grady filed a motion to withdraw with the

ROD BRIDGES - E214467 & E216882

Commission on January 31, 2006, and an order was entered by the Workers' Compensation Commission permitting Mr. Grady his withdrawal as representative of the claimant. That Mr. Grady is not entitled to any kind of double maximum attorney's fees, any kind of contempt, any kind of fees, penalties, since he is no longer representing the claimant.

Intervenor, Mr. Dale Grady, contended, in summary, the following at the full hearing:

- 1) Due to past final orders and opinions of the Commission, including the order of June 21, 2004, and payment of medical and related expenses and in particular those expenses related to Dr. Thomas Hart, the claimant's pain management specialist, including the Radio-frequency procedure, has been paid by CNA and attorney's fees to Dale Grady.
- 2) All of Dr. Hart's treatments, tests, procedures, diagnostics, prescriptions, etcetera, including the Radio-frequency procedure of which CNA now controverts, as a matter of law has now been placed twice in jeopardy and that therefore the Radio-frequency procedure is subject to double maximum attorney's fees pursuant to Tyson Foods, Inc. v. Fatherree.
- 3) The previous orders and opinions of the Commission in this record are final and *res judicata*.
- 4) Mr. Grady contends that if the Radio-frequency procedure is found to be the liability of CNA, in fact or law, as he has argued, that under Tyson Foods, Inc. v. Fatherree, Mr. Grady's quarterly fee should continue pursuant to WCC orders and opinions, and also include the Radio-frequency procedure respondents now controvert.
- 5) That Attorney Mike Boyd should also receive the maximum attorney's fees, and therefore splitting the double maximum attorney's fees between the two attorneys regarding the Radio-

ROD BRIDGES - E214467 & E216882

frequency procedure.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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 witnesses and to observe their demeanor, the following findings of fact and conclusions of law are hereby made in accordance with A.C.A.

§ 11-9-704:

- 1) The Arkansas Workers' Compensation Commission has jurisdiction over these claims.
- 2) The stipulations agreed to by the parties are hereby accepted as fact.
- 3) The issue of additional medical treatment as it relates specifically to the Radio-frequency procedures now recommended by Dr. Hart have not been placed twice in jeopardy and therefore respondents shall not be assessed any penalties or be found in contempt for their controversion other than the appropriate attorney's fees that will attach.
- 4) The preauthorization process outlined in Rule 30 does not prohibit this administrative law judge from determining whether or not the Radio-frequency procedure is reasonable, necessary, and related to the claimant's compensable injuries. The issue of additional medical treatment in the form of the Radio-frequency procedures and whether or not they are reasonable, necessary, and related to the compensable injuries are ripe to be determined.
- 5) The claimant has proven, by a preponderance of the evidence, that he is entitled to the additional medical treatment

ROD BRIDGES - E214467 & E216882

recommended by Dr. Thomas Hart in the form of Radio-frequency L2-S1 with post Transforaminal ESI. I find that the Radio-frequency procedures now recommended by Dr. Thomas Hart to be reasonable, necessary, and related to the claimant's stipulated compensable injuries and therefore said treatment is the responsibility of the respondents.

- 6) Since the medical treatment approved herein relates to compensable injuries which occurred prior to 1993, maximum attorney's fees are herein awarded to Attorney Michael Boyd. The claimant is entitled to the maximum attorney's fees that would attach to this additional medical treatment now approved in the form of Radio-frequencies as the law stood in 1992 with regard to attorney's fees on medical treatment. However, the claimant is not entitled to a double maximum attorney's fee and Intervenor Dale Grady is not entitled to an attorney's fee with regard to the Radio-frequency procedures now approved. This order in no way addresses attorney's fees previously earned by Intervenor Dale Grady with regard to these claims and is only intended to address the attorney's fees related specifically to the Radio-frequency procedures now ordered.
- 7) Any additional issues, if any, are by necessity, specifically reserved.

DISCUSSION

These claims have a long history with the Workers' Compensation Commission and have been the subject of multiple hearings. Administrative Law Judge Blood recited a detailed history of the claimant and the claims now pending before the Commission in his May 15, 2002, opinion. Judge Blood's opinion is contained in the record herein in Commission Exhibit "2" and will not be repeated in this opinion. It is stipulated the claimant sustained compensable injuries in 1991 and 1992 related to his

ROD BRIDGES - E214467 & E216882

back. The prior administrative law judges' opinions from ALJ Koonce and Blood show that after the claimant's compensable injuries he underwent surgeries which included, but were not limited to, a spinal fusion at L4/5, L5-S1 with pedicle screw fixation and postural lateral bone graft. Subsequently, the claimant was assigned a 25% impairment rating which was accepted and paid by the respondents. Later, the issues of wage loss disability were presented to Judges Koonce and Blood whereby the claimant received various awards for wage loss disability.

It must be noted for the record that the previous opinions incorporated herein from ALJs Blood and Koonce show that the respondents have been penalized for their failure to timely pay the claimant for his medical and other related benefits.

Eventually, the claimant received pain management from Dr. Jeffrey Ketcham until Dr. Ketcham retired. Dr. Ketcham referred the claimant then to Dr. Thomas Hart for his pain management. The records show that the claimant has treated with Dr. Hart for pain management for several years. Dr. Hart has managed the claimant's pain with medication, steroid injections, and Radio-frequency procedures for several years. The record shows that Dr. Hart gave the claimant Radio-frequency procedures once a year since 2003. However, at some point, respondents refused to pay for the Radio-frequency procedures recommended by Dr. Hart.

Respondents allege that the Radio-frequency procedure was not precertified by

ROD BRIDGES - E214467 & E216882

Concentra and therefore the respondents “hands were tied.” Respondents argue that the preauthorization process in Rule 30 gives them some sort of cover to not pay for the Radio-frequency procedure. However, I find that argument to be without merit. Claimant contends that the Radio-frequency procedure now recommended by Dr. Hart is reasonable, necessary medical treatment that is related to his stipulated compensable injuries.

Although many sub issues arose at the full hearing, the primary issue to be determined at this time is whether the claimant’s Radio-frequency procedures now recommended by Dr. Hart is reasonable, necessary, and related to the claimant’s compensable injuries. In making this determination, as well as all other aspects of this case, the Workers’ Compensation Laws prior to 1993 and in effect in 1991 and 1992 are to be applied. The Workers’ Compensation Act requires employers to provide such medical services as may reasonably necessary in connection with an employee’s injury. Ark. Code Ann. § 11-9-508(a) Medical treatment which is required to stabilize and maintain an injured worker’s status remains the responsibility of the employer. Artex Hydroponics, Inc. v. Pippin, 8 Ark. App. 200, 649 S.W.2d 845 (1983). What constitutes reasonably necessary medical treatment is a question of fact for the Commission.

After reviewing the medical records contained herein and incorporated by

ROD BRIDGES - E214467 & E216882

reference, of which there are several hundred, and finding the claimant's testimony to be highly credible; I find that the Radio-frequency procedures now recommended by Dr. Thomas Hart to be reasonable, necessary, and related to the claimant's compensable injuries. As such, I order the respondents to pay for said Radio-frequency procedures from Dr. Hart forthwith plus full attorney's fees pursuant to the workers' compensation maximum awardable attorney's fees for medical benefits in 1992. I find that Attorney Michael Boyd is entitled to the maximum attorney's fees related to the Radio-frequency procedure.

In making such determination I do not disregard totally the respondents' argument regarding Rule 30 preauthorization. However, I find respondents' argument to be without merit. In Taylor v. City of Little Rock, 2004 AWCC 51, Claim Number E914169, Opinion filed March 15, 2004, the Full Commission stated as follows: "Rule 30 is a comprehensive measure with extensive provisions regarding proper procedures for payment of medical costs. Cyphers v. United Parcel Service, 68 Ark. App. 62, 3 S.W.3d 698 (1999). Rule 30 does not apply to a determination of whether a particular medical service is reasonably necessary, but simply states the respondents' duty to review itemized bills prior to payment for services. Brown v. Ark. Trucking Services, AWCC (E216726) Opinion filed September 26, 1995." The respondents would have this administrative law judge believe that they have not controverted the

ROD BRIDGES - E214467 & E216882

Radio-frequency procedure now recommended by Dr. Hart. Respondents argue that they acted in accordance with Rule 30 and did not controvert the denial of the procedures, they argue that they simply followed the mandates of Rule 30 and the preauthorization procedure. It is clear to this examiner that the preauthorization MCO, Concentra, did not deny the Radio-frequency procedure due to the cost of the procedure, but rather because Concentra felt it was not reasonably necessary and related to the compensable injury. Respondents' attorney specifically stated that Concentra reviewed the request for Radio-frequency procedures and determined that they thought it was not reasonable and necessary.

MR. WADE: ... My client is saying what they did was through their MCO, Concentra, had this procedure and the recommendation reviewed by its specific physicians to determine if they thought it was reasonable and necessary and would be preauthorized. In this case there were two doctors who had actually reviewed the procedure on behalf of Concentra, on behalf of the carrier and their MCO, and two doctors said, no, it's not.

(T. pg. 10, lines 3-11).

The evaluator for Concentra stated "He is treating with Dr. Hart, who loves to give his patient Radio-frequency treatment. I recommend we send this claimant to an IME to be evaluated. He can determine what medical treatment is considered reasonable and necessary." (R. Ex. 2, pg. 1). I have reviewed the reports from Concentra contained in the record as well as the reports from Dr. Hart, and find that the Radio-frequency

ROD BRIDGES - E214467 & E216882

procedures recommended by Dr. Hart are reasonable, necessary, and related to the claimant's compensable injuries. Further, I find that the testimony from the claimant was highly credible as related to how the Radio-frequency treatments helped him in the past. The record shows that the claimant received the Radio-frequency procedures once a year for several years before being controverted by the respondents. The medical records from Dr. Hart after these treatments further corroborate the claimant's testimony stating that the Radio-frequency procedures were most beneficial.

I find the respondents' argument that they have not controverted this treatment due to Concentra not authorizing the treatment to be without merit. I find that the respondents have controverted the Radio-frequency procedure and Attorney Michael Boyd is entitled to a full attorney's fee on all such procedures now and in the future.

Intervenor, Mr. Dale Grady, has argued strenuously that he is entitled to an attorney's fee on the Radio-frequency procedure in addition to Mr. Boyd under the theory of double maximum attorney's fees. In his argument, Mr. Grady contends that the prior orders from Judge Blood awarded him attorney's fees on all future pain management from Dr. Hart. Mr. Grady argues that even if Radio-frequency was not specifically outlined as medical treatment for the claimant's pain management prior to 2003 that he should be awarded an attorney's fee on future medical related to this Radio-frequency procedure under the theory that Judge Blood ordered him attorney's

ROD BRIDGES - E214467 & E216882

fees on all future pain management from Dr. Hart. I have reviewed the prior orders and opinions made a part of the record herein and also incorporated by referenced. No where in the records can I find that Radio-frequency procedures were controverted by the respondents or even recommended by a pain management physician prior to 2003. The bulk of the prior opinions and orders regarding claimant's entitlement to medical benefits dealt with the claimant's spinal cord stimulator, and not Radio-frequency procedures. I find that Mr. Grady's interpretation of Judge Blood's orders regarding his attorney's fees on future pain management from Dr. Hart to be overly broad.

Mr. Grady specifically stated on the record at the November 14, 2007, hearing that he in no way represented Mr. Bridges at this time regarding the additional medical treatment as Mr. Grady is no longer actively practicing law. However, Mr. Grady contended that he was still entitled to the attorney's fee for the additional treatment now recommended by Dr. Hart due to prior orders of the Commission contained in the record herein. I find that this is the first time respondents have controverted the Radio-frequency procedure specifically and that Attorney Michael Boyd is entitled to the controverted attorney's fee on that specific medical procedure. I make no findings with regard to previously adjudicated medical treatment as the only issue now before the Commission is the Radio-frequency procedure.

Further, I find that no penalties or contempt actions are warranted against the

ROD BRIDGES - E214467 & E216882

respondents at this time regarding the Radio-frequency procedures. However, respondents are responsible for a full attorney's fee on all Radio-frequency procedures now and in the future to Mr. Michael Boyd as such benefits were controverted.

Following the November 14, 2007, hearing, Intervenor Dale Grady filed a Request/Motion for Post-Hearing Exhibits on February 2, 2008. Mr. Grady attached to that exhibit a letter that he sent the Commission on January 10, 2008, which addressed medical travel mileage and attorney's fee for which he claimed he was entitled. However, at the full hearing on November 14, 2007, the parties, including Mr. Grady, agreed to reserve the issue of travel expenses (T. pg. 24, lines 4-9) and the respondents specifically stipulated on the record at the November 14, 2007, hearing that Mr. Grady would be entitled to an attorney's fee on all unpaid travel related expenses up through the date of the hearing. Additionally, on page two of Mr. Grady's Request/Motion for Post-Hearing Exhibits, Mr. Grady acknowledges that "the issue was reserved prior to exhibits and testimony." Even though Mr. Grady agreed to reserve the issue at the full hearing, he now requests in his motion to introduce post-hearing exhibits and other arguments. Mr. Grady's Request/Motion for Post-Hearing Exhibits is denied, due to the fact that Mr. Grady's motion and exhibits primarily deal with medical mileage expenses; and that issue was specifically reserved. However, Mr. Grady's February 2, 2008, motion and accompanying documents are blue-backed

ROD BRIDGES - E214467 & E216882

herein as Intervenor Proffered Exhibit "1".

AWARD

Respondents are hereby directed and ordered to pay for the additional medical treatment in the form of Radio-frequency procedures at L2-S1 with post Transforaminal ESI. Additionally, Attorney Michael Boyd is entitled to the maximum attorney's fees on the medical award pursuant to the Workers' Compensation Act prior to 1993.

IT IS SO ORDERED.

S. DALE DOUTHIT
Administrative Law Judge

SDD/pjb