

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F508548

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| GEORGE M. CATES | CLAIMANT |
| STRUCTURAL STEEL, INC. | RESPONDENT |
| BITUMINOUS CASUALTY CORPORATION, INSURANCE CARRIER | RESPONDENT |

OPINION FILED **JULY 29, 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 SCOTT ZUERKER, Attorney, Fort Smith, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on May 27, 2008, at Fort Smith, Arkansas. The deposition of the claimant was taken on March 12, 2008, and was admitted as Respondents' Exhibit No. 2.

A pre-hearing order was entered in this case on March 4, 2008. This pre-hearing order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. A copy of this 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. On August 8, 2005, the relationship of employee-employer-carrier existed between the parties.
2. The appropriate weekly compensation benefits are \$382.00 for total disability and \$287.00 for permanent partial disability.
3. On August 8, 2008, the claimant sustained a compensable injury to his head and c-spine.

4. There is no dispute at present over disability benefits.
5. There is no dispute over medical services through November 9, 2007.

By agreement of the parties, the issue to be litigated and resolved at the present time is limited to the following:

1. The claimant's entitlement to additional medical services after November 9, 2007.

In regard to this issue, the claimant contends:

"That claimant is entitled to additional medical benefits."

In regard to this issue, the respondents contend:

"a. Respondents contend that claimant's need for additional medical treatment is not reasonable or necessary nor is it related to his compensable injury which occurred on or about August 8, 2005; and

b. Additionally, respondents contend that attorney's fees are not appropriate for the recovery of medical expenses."

DISCUSSION

The sole issue, at the present time, is the claimant's entitlement to additional medical services for his lower back and radicular difficulties after November 9, 2007. The burden rests upon the claimant to prove his entitlement to these additional medical services at the respondents' expense. In order to meet this burden, he must show that the disputed medical services represent "reasonably necessary medical services" for his compensable injuries.

In order to be "reasonably necessary" the medical services must be necessitated by or connected with the compensable injury. However, the compensable injury need not be the sole or even "major" cause of the need for

the medical services. It is sufficient if the injury played some causal role in the need for the medical services. The medical services must also be shown to have a reasonable expectation of accomplishing the purpose or goal for which they are intended. In this regard, "reasonably necessary" medical services are not limited to medical services, whose purpose or goal is directed toward resolving or reducing the actual physical damage caused by the compensable injury. The term "reasonably necessary medical services" also extends to those medical services, whose purpose or goal may be to determine the nature and extent of the injury, to provide relief of symptoms caused by the injury, or even to only maintain the level of healing achieved.

The evidence presented in this case shows that the claimant neither sought or required any medical services for difficulties with his neck or cervical spine, prior to the employment-related accident of August 8, 2005. The claimant testified that he experienced no difficulties with his neck or cervical spine, prior to his employment-related accident on August 8, 2005. There is no medical evidence that the claimant sought any treatment for difficulties with this portion of his body prior to August 8, 2005. Further, the record does show that prior to August 8, 2005, the claimant was able to perform rather strenuous heavy manual labor without complaint or apparent limitation.

However, immediately following the compensable injury of August 8, 2005, the claimant was hospitalized at St. Mary's Regional Medical Center, where he came under the care of Dr. Russell Allison. At the time of this hospitalization, a cervical MRI revealed the presence of extensive degenerative changes at multiple levels of the claimant's cervical spine. These changes involved both the intervertebral discs and the actual vertebra. This study was also interpreted as showing herniations of the intervertebral discs at C3-4,

C4-5, and C5-6. The primary defect was indicated to be at the C5-6 level, where there was a large posterior lateral disc bulge that caused both spinal and neuroforaminal stenosis. The August 12, 2005 report of Dr. Allison indicates that this MRI study further showed evidence of inflammation of the spinal cord, itself, distal to the area of impingement. Dr. Allison's diagnosis was "central cord syndrome". The claimant was referred by Dr. Allison for further treatment by Dr. Larry Armstrong, a neurosurgeon.

On August 17, 2005, the claimant came under treatment by Dr. Larry Armstrong. In his report of this initial visit, Dr. Armstrong recorded that initial complaints, involving the claimant's lower extremities and trunk, had resolved. He also stated that the claimant's difficulties with his right upper extremity had "pretty much resolved". Finally, Dr. Armstrong noted that the claimant's remaining difficulties primarily involved his neck, shoulder area, and left upper extremity. On physical examination, Dr. Armstrong observed spasms of the cervical musculature, the levator scapular trapezius region (bilaterally), and the supraspinatus musculature (bilaterally). Upon his review of the previous MRI, Dr. Armstrong noted that the claimant had congenital short pedicle syndrome. This condition caused a pre-existing narrowing of the spinal canal. It was Dr. Armstrong's opinion that the study showed that this congenital defect was compounded by further narrowing of the canal, which was due to the various defects at C3-4, C4-5, C6-7, and most significantly, at C5-6. He, too, diagnosed the claimant's difficulties as central cord syndrome and cervical spondylotic myelopathy. It was his opinion that only conservative treatment was appropriate and that surgical intervention was not necessary.

The claimant was then referred for this conservative treatment to Dr. Bradley Short, a physiatrist. The claimant came under the care of Dr. Short on

August 23, 2005. In his initial report, Dr. Short mistakenly indicated that the claimant's MRI study was interpreted as showing "minor" stenosis at L5-6, when, in fact, the report was interpreted as showing moderate or significant spinal stenosis and neuroforaminal narrowing at this level. In his initial physical examination, on August 23, 2005, Dr. Short observed "frank" muscle spasms and muscle tightness in the cervical paraspinal muscles. Dr. Short diagnosed the claimant's difficulties as central cord syndrome, cervical stenosis, neuropathic paresthesias, and neuropathic pain. Dr. Short commenced treatment of the claimant with oral medications, physical therapy, and exercises. During his subsequent evaluations, Dr. Short continued to note the observation of continued muscle spasms in the cervical area.

The claimant returned to Dr. Larry Armstrong on December 21, 2005. At that time, Dr. Armstrong noted that the claimant had made "good clinical improvement", until he continuously leaned over the edge of a roof for a period of time. Following this activity, the claimant reported that he had experienced continuous headaches with occasional arm numbness and neck pain. The claimant also reported a new symptom in the way of sexual dysfunction, but without any specific bladder dysfunction. As the result of this recurrence or exacerbation of the claimant's symptoms, Dr. Armstrong ordered a repeat MRI study and a neurological evaluation.

The repeat MRI study was performed on December 28, 2005. This second study was interpreted by the radiologist as not showing "a great deal of change" from the prior study. Dr. Armstrong, in his report of January 9, 2006, also noted that this new MRI showed no "significant changes" from the prior study. On January 9, 2006, Dr. Armstrong discontinued the drugs Neurontin

and Lyrica (previously prescribed for the claimant's neck and upper extremity difficulties), as these medications could potentially cause sexual dysfunction.

The claimant was next seen by Dr. Armstrong on February 6, 2006. At that time, Dr. Armstrong noted continuing complaints of dyesthesias in the claimant's upper extremities, pain in his cervical spine, and sexual dysfunction. Dr. Armstrong further noted new complaints, which were in the form of low back pain and bladder dysfunction. As a result of these new complaints, Dr. Armstrong recommended a urological evaluation. However, he stated that it was his continuing opinion that neurosurgical treatment (i.e. surgery) was still not required.

The claimant continued to be treated conservatively by Dr. Short. On February 14, 2006, Dr. Short noted increased complaints of pain and paresthesia that involved the claimant's cervical spine and upper extremities. He also recorded the observation of muscle spasms in this area. Finally, he noted the new symptom of low back pain. Dr. Short attributed both the increased difficulties and the new difficulties to the discontinuation of the claimant's Neurontin and Lyrica. He agreed with Dr. Armstrong that a neurological evaluation was necessary to see if there is any actual spinal cord involvement. He also recommended a SSEP for this purpose (I confess that I am unaware of the nature of this test or procedure). Finally, Dr. Short stated that, in his opinion, the claimant's urological symptoms were not due to any injury to the claimant's spinal cord.

On February 17, 2006, the claimant was evaluated by Dr. Michael Morse, a neurologist. At the time of this evaluation Dr. Morse performed nerve conduction velocity studies on the claimant's upper extremities. He stated that the results of this testing showed that the numbness in the claimant's hands

was not caused by a neurological defect in his neck or cervical spine. In this report, Dr. Morse states:

"This gentleman has a congenitally small canal and significant exit foraminal narrowing. He had an extension-flexion injury, which has caused some neck and arm pain. He is not a surgical candidate from the standpoint of his workers' comp injury, but at some point in time, this will need to be addressed by a neurosurgeon for his congenital stenosis...

"The disc protrusions was caused by the accident. The natural history of these is to improve. If they get worse and surgical intervention would be necessary because of the disc protrusions, that would be work related. The spinal stenosis however is pre-existing."

In this report, Dr. Morse recommended continued conservative treatment in the form of a chronic pain management program. He also recommended an MRI of the claimant's brain and, if the MRI was abnormal, an evaluation by a neuropsychologist.

The MRI of the claimant's brain, as recommended by Dr. Morse, was performed on February 23, 2006. This study was interpreted as being within normal limits and not indicative of any physical injury or damage to the claimant's brain. Consequently, no neuropsychological evaluation was ever performed.

The claimant was next seen by Dr. Sinclair Armstrong, a urologist. In his initial evaluation of March 7, 2006, Dr. Armstrong noted that the claimant was complaining of difficulties of obtaining an erection due to a lack of sensation in his penis. If this lack of sensation was neurological in nature, one would reasonably conclude that such extensive damage would have been apparent to Dr. Morse, during his neurological evaluation and testing. I would also note that the subsequent reports of Dr. Armstrong all attribute the claimant's sexual

dysfunction to a systemic oral chemical cause i.e. low testosterone levels, rather than neurological dysfunction.

There is no indication that the claimant's decreased or low testosterone levels were the result of a complication or side effect of the medication he was given for his compensable cervical injury. Clearly, such low testosterone levels would not have any neurogenic cause and would in no way be related to any neurological damage caused by the claimant's compensable cervical injury.

On April 10, 2006, the claimant was seen by Dr. David Cannon, an anesthesiologist and chronic pain management specialist. Dr. Cannon treated the claimant with two epidural steroid injections. According to the testimony of the claimant and the reports of Dr. Short, these injections provided no significant benefit in alleviating the claimant's continued symptoms. These injections are both therapeutic and diagnostic. If the claimant's pain was due to discal or facet defects, some relief should have been provided, at least temporarily.

On June 9, 2006, a Functional Capacity Evaluation (FCE) was performed on the claimant at the Functional Testing Center in Mountain Home, Arkansas. It would appear that this facility was selected by the respondents, as the claimant's various treating physicians were in the Fort Smith area and associated with facilities that provide this same service by competent qualified individuals.

After purportedly running various tests on the claimant, the examiner at the Functional Testing Center concluded that the claimant exhibited unreliable effort with inconsistent and submaximal effort on various tests. It was the further conclusion of the examiner that the claimant's subjective pain complaints "did not correlate" with his demonstrated abilities. However, it was

still the opinion of the examiner that the claimant had shown the ability to perform employment activities that were, at least, within the medium physical demand level.

On June 27, 2006, Dr. Short assessed a permanent physical impairment of 5 percent to the body as a whole and restricted the claimant from engaging in any employments requiring even occasional lifting in excess of 50 pounds, frequent lifting in excess of 25 pounds, or constant lifting in excess of 10 pounds. He further noted that the claimant was currently undergoing treatment in the form of epidural steroid injections, but that these injections had not been effective, "thus far."

A lull appears to have occurred in the claimant's treatment for continuing cervical difficulties, after June 27, 2006. Except for an August 10, 2006 visit with Dr. Sinclair Armstrong (for treatment of his low testosterone levels), the medical record does not show that the claimant obtained or even sought any further medical services until September 19, 2007.

On that date, the claimant consulted Dr. Andrew Daniel, a general practitioner and apparently his family physician. Curiously, Dr. Daniel noted that the claimant had "settled his worker's comp injury" six months ago. He further stated that the claimant was "doing well" and "was off all his medications". Dr. Daniel also described a new incident that occurred approximately a month prior to the September 19, 2007 visit, when the claimant was "doing some heavy lifting." Dr. Daniel recorded that, a result of this activity, the claimant had experienced a "recurrence of his pain." However, in this same report, Dr. Daniel made a somewhat contradictory statement that this "recurrence" came on gradually and that the claimant was simply performing his normal work activities in construction.

At the request of Dr. Daniel, the claimant then underwent yet another cervical MRI, which revealed essentially the same defects as were noted in the prior studies.

On November 7, 2007, the claimant was seen by Dr. Anthony Capocelli, another neurosurgeon. At the time of this visit, Dr. Capocelli performed x-rays of the claimant's cervical spine. These x-rays were interpreted as showing straightening of the cervical spine, with myofascial spasms. Dr. Capocelli recommended a myelogram with an accompanying enhanced CT scan and possibly a discogram. He stated that if these tests revealed the presence of a specific cervical lesion, then surgery might be indicated. The respondents refused to provide this testing.

Ultimately, the claimant appears to have seen Dr. Terry Brackman, a general practitioner. The reports and records of Dr. Brackman show that he has diagnosed a possible carpal tunnel syndrome, which would clearly be unrelated to the claimant's cervical injury. Dr. Brackman has further treated the claimant's cervical difficulties by the extensive use of narcotic pain medication. He has treated the claimant's migraine headaches with Imitrex, his depression with Lexapro, his various joint pains with Feldene, and provided the claimant with Restoril for sleep. Dr. Brackman also diagnosed a lumbosacral strain or sacroiliac sprain that he opines was aggravated on the job by the claimant trying to sling a sledge hammer.

The respondents obtained and offered a report from Dr. Bradley Short, dated April 24, 2008. In this report, Dr. Short stated that, during his course of treatment of the claimant, the claimant experienced "some" improvement of his symptoms. He also expressed the opinion that the primary abnormalities involving the claimant's cervical spine (i.e. a small spinal canal) was congenital

in nature and that the claimant's work related injury did not cause greater than 50 percent of the claimant's cervical abnormalities. Finally, Dr. Short stated that any surgical intervention that might be considered would be to correct the congenital abnormalities.

The respondents also obtained and tendered a report from Dr. Michael Morse, dated April 24, 2008. In this report, Dr. Morse stated, that, upon review of the claimant's records, the claimant's surgical needs would only be related to his congenital small canal and not his reported work injury.

After consideration of all the evidence presented, it is my opinion that the claimant has proven that the medical services recommended by Dr. Capocelli, in the form of a cervical myelogram with an accompanying enhanced CT scan and potentially a discography, are necessitated by or related to his compensable injury of August 8, 2005. Clearly, these recommended tests are, in Dr. Capocelli's opinion, medically appropriate and reasonably necessary to accurately diagnose the nature and extent to the claimant's compensable injury and to formulate an appropriate treatment program. The clear purpose of these tests are to allow a determination, with reasonable accuracy, the cause of the claimant's persistent symptoms that first appeared after his compensable injury, both objective and subjective.

It must be noted that Dr. Capocelli is a board-certified neurosurgeon with considerable expertise in the area of medicine associated with the diagnosis and treatment of injuries and defects such as those experienced by the claimant. Clearly, he would not recommend testing that did not have a reasonable expectation of accomplishing this intended purpose. This additional testing is commonly recognized in the general medical community as the "gold

standard” in accurately determining the nature or etiology of cervical complaints.

Thus, the claimant has satisfied the two necessary elements for this recommended testing to constitute “reasonably necessary medical services” 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 Commission’s medical fee schedule).

I further find that any ruling on the claimant’s entitlement at the respondents’ expense, to any type of cervical surgery is premature. It is apparent from the medical evidence that no such surgery is presently recommended by any of the claimant’s treating physicians. Any decision on liability for surgical intervention should be reserved until this medical service has actually been recommended.

Finally, I find that the greater weight of the credible evidence establishes that the medical services provided to the claimant by and at the direction of Dr. Terry Brackman, solely for his cervical difficulties, was and is also necessitated by or related to the claimant’s compensable cervical injury of August 8, 2005. Further, such medical services provided through January 29, 2008, have been shown to have a reasonable expectation of accomplishing their intended purpose of managing the claimant’s chronic symptoms (particularly pain and muscle spasms) resulting from his compensable cervical injury.

Thus, these medical services would also represent reasonably necessary medical services under Ark. Code Ann. §11-9-508. Further, pursuant to the provisions of this subsection, the respondents would be liable for the expense of these services. Again, this liability would be subject to the Commission’s medical fee schedule.

The claimant has introduced a packet of documents, which purport to set out various medications and the prices paid for these medications. The claimant is obviously under some misconception that the respondents will be ordered to compensate him for out-of-pocket expenses for all the medications he may have obtained since November 9, 2007. The Act simply does not provide for such action. If any of the medications set out in the claimant's lengthy list, constitute "reasonably necessary medical services" for the claimant's compensable injury, then the respondents are liable for the expense of these medications. However, the respondents' liability even for medications, is controlled by the Commission's medical fee schedule. The respondents would be liable to the medical provider or pharmacy for the cost of the medication, as controlled by the medical fee schedule. The claimant must then seek reimbursement for any "out-of-pocket amounts" the claimant may have paid for these medications from the pharmacy where they were obtained.

The first two pages of Claimant's Exhibit No. 2 appears to be a list that has been compiled by someone and sets out certain medications by name, the date, when it was purportedly obtained, and (I assume) the amount charged. However, there is no indication as to what physician prescribed these medications or the purpose for the medications.

Page 3 appears to be a list of medications obtained from Rose Drug. However, this page shows that the medications, provided between August of 2005 and September of 2005, were all paid by the respondents, with possibly one exception. This exception would appear to be the medication Metanx, prescribed by Dr. Short and obtained on August 23, 2005. Dr. Short's report of August 23, 2005, shows that he prescribed the claimant the drug, Metanx,

along with Skelaxin, for muscle spasms. Thus, the expense of this medication would appear to be an expense that should have been paid by the respondents.

Pages 4-6 of Claimant's Exhibit No.2 also consist of printouts from Rose Drug. These pages list various medications received by the claimant between September 20, 2005 and May 12, 2008. All of the medications listed on page 4 indicate that the expense of these medications was apparently paid by the respondents, with the exception of medications recommended by Dr. James Remerscheid (a dentist). These two medications consist of antibiotics and pain killers. There is no conceivable reason that the claimant would have required any treatment by a dentist for his compensable injuries. It can be reasonably assumed that these medications were unrelated to the claimant's compensable injuries.

Page 5 of Claimant's Exhibit No. 2 covers medications prescribed to the claimant between April 15, 2006 and January 24, 2008. Again, these records indicate that the respondents have paid all of the charges for the medications prescribed to the claimant between April 15, 2006 and August 2, 2006, with the exception of three anti-smoking medications prescribed to the claimant by a Dr. Karen Dailey. Clearly, these medications would not represent reasonably necessary medical treatment for the claimant's compensable injuries and would not be the liability of the respondents herein.

Between October 23, 2007 and January 24, 2008, the claimant was prescribed medications by various physicians, including Dr. John Landherr, Dr. Andrew Daniel, and Dr. Terry Brackman. Some of these medications are listed on both page 5 and page 6 of Claimant's Exhibit No. 2, and are clearly duplicative. However, some of these drugs are obviously replacement medications indefinitely required for the claimant's compensable injuries.

These are medications in the form of pain relievers and anti-inflammatories. Yet other drugs listed on these pages are clearly not related to or necessitated by the claimant's compensable injuries (such as Cialis and testosterone). Some of the drugs listed are unfamiliar and their purpose is unknown. Simply because these drugs may have been prescribed by a physician, who may have evaluated and/or treated the claimant for his compensable injuries does not, in and of itself, cause all of these medications to be reasonably necessary for the compensable injuries.

From an evidentiary purpose, Claimant's Exhibit No. 2 is for the most part worthless. The claimant has been awarded additional reasonably necessary medical services, in the form of the tests recommended by Dr. Capocelli. He has also been awarded additional medical services by Dr. Brackman for symptomatic relief of the chronic symptoms resulting from his compensable injuries. These latter medical services are essentially in the form of monitoring and supplying the claimant with indefinitely required medication to relieve his chronic symptoms of pain and muscle spasms. If the parties cannot agree on what services and what medication satisfies this criteria, they are to specifically identify the disputed expenses, and these expenses will then be specifically addressed.

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On August 8, 2005, the relationship of employee-employer-carrier existed between the parties.
3. On August 8, 2005, the claimant sustained a compensable injury to his head and cervical spine.

4. There is no dispute, at the present time, over temporary disability benefits.

5. There is no dispute, at the present time, over medical services rendered to the claimant through November 9, 2007.

6. The medical services recommended to the claimant by Dr. Anthony Capocelli, in the form of a myelogram with an accompanying enhanced CT scan and a possible discogram, constitutes reasonably necessary medical services for the claimant's compensable cervical injury. Specifically, these medical services are necessitated by or connected with his compensable cervical injury and have a reasonable expectation of accomplishing the purpose or goal for which they are intended (i.e. the reasonably accurate diagnosis of the nature and extent of the claimant's compensable injury and the formulation of an appropriate treatment program).

7. The medical services rendered to the claimant for his cervical difficulties by and the direction of Dr. Terry Brackman, in the form of monitoring and replacement of oral medication indefinitely required for the chronic symptoms for the claimant's compensable cervical injury, also represents reasonably necessary medical services for the compensable injury. Specifically, these medical services are necessitated by or connected with the compensable injury and have a reasonable expectation of accomplishing their intended purpose of reducing or alleviating the claimant's chronic symptoms and allowing him to maintain regular gainful employment.

8. The medical services rendered to the claimant by and at the direction of Dr. Brackman for any other ailment or condition for which the claimant may be suffering does not represent reasonably necessary medical treatment for the claimant's compensable injury.

9. The respondents have controverted the claimant's entitlement to any additional medical services, after November 9, 2007.

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

ORDER

Based upon my foregoing findings and conclusions, the respondents are liable for the expense of the medical testing recommended by Dr. Anthony Capocelli on November 7, 2007, specifically, a cervical myelogram with an accompanying enhanced CT scan and a possible cervical discogram. The respondents are also liable for the expense incurred by the claimant for services of Dr. Terry Brackman in the form of monitoring and management of the claimant's chronic symptoms from his compensable cervical injury. This includes the replacement of medication indefinitely required for the management of these chronic symptoms.

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