

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F701798

JOHNNY MILLER	CLAIMANT
BRISCOE MASONRY	RESPONDENT
FIRSTCOMP INSURANCE, INSURANCE CARRIER	RESPONDENT

OPINION FILED **JUNE 24, 2008**

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 RANDY MURPHY, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held on April 15, 2008, in Fort Smith, Arkansas. The deposition of Dr. Steven L. Cathey was taken on April 4, 2008, in Little Rock, Arkansas and has been admitted as Respondents' Exhibit No. 2.

A pre-hearing order was entered in this case on November 6, 2007. 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. Immediately prior to the commencement of the hearing, the parties announced that they had agreed on the appropriate compensation rates. A copy of the pre-hearing order, with the appropriate weekly compensation rates added, was made Commission's Exhibit No. 1 to the hearing.

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

1. On January 11, 2007, the relationship of employee-employer-carrier existed between the parties.
2. The appropriate weekly compensation rates are \$267.00 for total disability and \$200.00 for permanent partial disability.

3. On January 11, 2007, the claimant sustained a compensable injury to his back.
4. There is no dispute over accrued medical expenses.
5. There is no dispute over temporary total disability benefits through October 11, 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 the additional medical services recommended by Dr. Arthur Johnson.
2. The claimant's entitlement additional temporary total disability from October 12, 2007 through a date yet to be determined.
3. Appropriate attorney's fees.

In regard to these issues, the claimant contends:

"a. The claimant contends that the surgery recommended by Dr. Johnson is reasonably necessary treatment for his admittedly compensable injury and that the respondents should be held liable for such treatment.

b. The claimant contends that any temporary disability benefits awarded in connection with the surgery has been controverted and that the claimant's attorney is entitled to an appropriate attorney's fee."

In regard to these issues, the respondents contend:

"Respondents contend that all appropriate benefits have been paid. Further, respondents contend that any additional medical treatment is not "reasonable and necessary" and is not related to the claimant's 1/11/07 compensable injury but to pre-existing degenerative disease."

DISCUSSION

I. ADDITIONAL MEDICAL SERVICES

The first issue to be addressed concerns the claimant's entitlement to the additional medical services, which have been recommended by Dr. Arthur Johnson. These additional services are in the form of a surgical fusion of the L3 and L4 vertebrae. The burden rests upon the claimant to prove, by a preponderance of the evidence, that these recommended medical services represent "reasonably necessary medical services" for his admittedly compensable low back injury.

In order to meet this burden, the claimant must first prove that the disputed medical services are necessitated by or connected with his admittedly compensable low back injury. Secondly, the claimant must prove that these medical services have a reasonable expectation of accomplishing the purpose or goal for which they are intended. However, the actual success of these medical services in accomplishing this goal is not a necessary pre-requisite.

In the present case, the claimant clearly had extensive damage to various structural components of his lumbar spine, prior to his admittedly compensable low back injury. This pre-existing damage included degenerative disc disease of the intervertebral discs at multiple levels of the claimant's lumbar spine and extensive arthritic changes involving the facets of the various lumbar vertebrae.

However, the claimant testified that he had experienced no difficulties with his back, prior to the admitted compensable injury of January 11, 2007. The claimant's testimony, in this regard, is supported by all of the other evidence presented.

The claimant's supervisor, Ronnie Briscoe, testified that he had known the claimant for years and that his father had trained the claimant as a brick layer. He stated that the claimant was an excellent brick layer and performed all of the strenuous activities required by this job without any complaint or visible apparent discomfort. These activities included repetitive bending, repetitive twisting at the waist, and repetitive lifting. The claimant was also required to climb scaffolding and stand for long periods of time. Essentially the claimant's job would be classified as heavy manual labor.

The claimant's fiancée, LaWanda Presley, testified that she had known the claimant for 25 to 30 years and had lived with him for the last 3 years. Prior to the claimant's employment related injury on January 11, 2007, she had never noticed the claimant having any difficulty in performing any physical activity. The claimant had also never complained to her of any difficulties or pain with his back.

The claimant further testified that he experienced an immediate onset of "shooting pain" in his back, at the time of the employment related incident on January 11, 2007. He further testified that he has experienced continuous pain since that time and that his pain increases with activity.

The claimant appeared to be a truthful witness at the time of his testimony. His testimony is supported by all of the evidence presented. Further, the evidence presented shows that the claimant was a long time excellent employee for the respondent and had an overall excellent job record. The claimant would appear to be well motivated to maintain regular gainful employment. I find the claimant's testimony concerning the lack of prior complaints and the initial contemporaneous onset of his pain and other

difficulties with his back and the continuation of these complaints since the employment related injury of January 11, 2007 to be credible.

The medical evidence shows that the claimant has undergone extensive testing to determine the nature and extent of his compensable injury and the etiology of his continuing complaints. The claimant was initially diagnosed by Dr. Terry Clark, a general practitioner, as suffering from a lumbar strain. However, due to the claimant's initial right lower extremity radicular symptoms and a questionable abnormal lumbar x-ray, Dr. Clark ordered a lumbar MRI scan.

The lumbar MRI scan was performed on March 1, 2007. The medical record shows that this MRI scan has received a multitude of varying interpretations, some of which appear to be contradictory. Dr. Neal Crow, the radiologist that actually performed the MRI scan interpreted the study as showing degenerative narrowing of the L2-3 and L3-4 lumbar discs with slight transverse bulging of the annulus at L2-3 and central and right posterior lateral herniation of the L5-S1 disc.

The respondents subsequently had this study reviewed by a Dr. Peter Franklin, who is also a radiologist. Dr. Franklin interpreted the study as showing degenerative disc disease and spondylotic changes of the adjacent vertebral end plates at the L2-3 level, disc dessication and loss of disc space height with end plate spondylosis at the L3-4 level and disc dessication with mild loss of disc space height and end plate spondylotic changes at the L5-S1 level, together with an annular tear of the L5-S1 disc to the left of the midline and in close proximity to the descending left S1 nerve root.

As a result of this MRI study, the claimant was referred to the River Valley Musculoskeletal Center. The claimant was initially seen and treated

there by Dr. Thomas Cheyne. Dr. Cheyne's diagnosis of the claimant's difficulties was that of low back strain with probable myofascitis and underlying disc herniation of L5-S1.

Ultimately, the claimant came under the care of Dr. Arthur Johnson, a neurosurgeon at the River Valley Musculoskeletal Center. Dr. Johnson's initial diagnosis was degenerative disc disease with resulting changes at L2-3, L3-4, and L5-S1, together with a central and right paracentral disc protrusion of the L5-S1 intervertebral disc. Dr. Johnson ordered a discogram with an accompanying enhanced CT scan.

The discogram and accompanying enhanced CT scan was performed on June 28, 2007. This discogram and enhanced CT scan has also received numerous interpretations.

The discogram was interpreted by Dr. Johnson and Dr. Debra Russell, the radiologist, as showing a reproduction of the claimant's low back pain with injection of contrast into the L3-4. However, this disc, itself, was interpreted as unremarkable in appearance upon fluoroscopic evaluation. The enhanced lumbar CT scan was interpreted by Dr. Russell as showing early degenerative changes of the lumbar spine at L2-3, L3-4, L4-5, and L5-S1 with no focal disc herniations identified.

The enhanced CT scan was subsequently interpreted by Dr. Peter Franklin as showing mild annular bulges of L1-2, L2-3, L3-4, L4-5, and L5-S1, together with degenerative end plate changes. He concurred with the previous assessment that there was no evidence of leakage of the contrast material of any of the discs involved.

On the basis of the positive discogram results at L3-4, Dr. Johnson opined that this was the actual source or etiology of the claimant's continuing

low back complaints. It was his recommendation that a surgical fusion of the L3 and L4 vertebrae was medically appropriate and necessary to relieve the claimant's continuing low back complaints.

At the respondents' request, Dr. Steven Cathey, a neurosurgeon at the Central Arkansas Neurosurgery Clinic in Little Rock, examined the claimant. Dr. Cathey also purportedly reviewed the MRI study of March 1, 2007, Dr. Franklin's interpretation of the discogram and the enhanced CT scan, and the claimant's various other medical records, which had apparently been provided him by the respondents. Dr. Cathey also performed a brief evaluation of the claimant. Following this review and evaluation, Dr. Cathey expressed the opinion that all of the objectively demonstrable defects that involved his lumbar spine pre-existed the compensable injury of January 11, 2007, a view also apparently held by Dr. Franklin. Dr. Cathey further stated that it was his opinion that a lumbar interbody fusion of the L3 and L4 vertebrae was inappropriate treatment for the claimant's compensable injury. He went on to state that such a surgical procedure would be entirely related to the claimant's pre-existing degenerative problems and not to his January 11, 2007 occupational injury. Finally, he expressed doubts that such a procedure would substantially resolve the claimant's continuing low back complaints.

It would appear from his deposition, that his opinion on the appropriateness of the recommended surgery was strongly influenced by his own experience of a lack of success when he performed surgery for discogenic pain. However, he further stated that such differences in the opinion on the appropriateness of surgical intervention is not unusual in cases of this nature, where there is not a lot of objective findings. Dr. Cathey went on to suggest various conservative treatment modalities. These various suggested

modalities included some that had been previously tried, as well as bracing and the possible use of a neuromuscular stimulator. He summed up his deposition by stating:

“And I didn’t say he (the claimant) couldn’t—I didn’t say not to have the surgery. I just indicated to the patient that in my opinion he wouldn’t be happy with it. It wouldn’t alleviate his pain and wouldn’t allow him to go to work. But you know, I told him if you and Dr. Johnson feel good about it, do it, you know. I can just tell you what I think.” (D.25)

This is clearly a difficult decision. I am convinced that as a result of his compensable injury, the claimant has experienced continuous significant pain in his lower back. This compensable injury has also significantly restricted his physical activities and has prevented him from pursuing his regular employment. As a result, the claimant is willing to undergo any treatment modality that might return him to his preinjury state. However, the surgical procedure recommended by Dr. Johnson is extensive and not without substantial risks. However, the mere existence of this risk is not sufficient grounds, in and of itself, to deny the disputed medical treatment on the basis that it is not “reasonably necessary”.

Contrary to the opinion of Dr. Cathey, the medical treatment recommended by Dr. Johnson is not related entirely to the claimant’s pre-existing/degenerative objectively documented defects that involve his lumbar spine. Rather, the surgical procedure recommended by Dr. Johnson is clearly intended to alleviate or at least reduce the claimant’s constant low back pain and the exacerbations of this pain upon activity. “Reasonably necessary medical services” are not limited by the Act to only those medical services necessary to correct or improve objectively established physical defects or damage, but also extend to the alleviation or reduction of subjective

complaints, including pain. As indicated by Dr. Cathey in his deposition, if the claimant were not experiencing the subjective symptoms of pain, no one would recommend any type of medical services.

Thus, I find that the greater weight of the credible evidence establishes that the medical services recommended by Dr. Johnson are necessitated by or connected with the claimant's admittedly compensable back injury of January 11, 2007. This satisfies the first requirement for these medical services to constitute "reasonably necessary medical services", under Ark. Code Ann. §11-9-508.

The claimant must next prove that these recommended medical services have a reasonable expectation of accomplishing their intended purpose. Here there is again a difference of opinion between Dr. Johnson and Dr. Cathey.

Both of these physicians are board certified neurosurgeons. They also have extensive expertise in the particular area of medicine associated with the diagnosis and treatment of spinal injuries and conditions.

However, Dr. Johnson is the claimant's primary treating physician. He has had numerous opportunities to see and evaluate the claimant. He has not only had the opportunity to review all of the claimant's various medical evaluations and testing, but was actually present during the discogram. Obviously, it would also appear that Dr. Johnson's experience with surgical intervention for discogenic pain has been more successful than that of Dr. Cathey.

Dr. Cathey has seen the claimant on only one occasion and that was at the request of the respondents. He appears to have reviewed only some of the medical reports and records involving the claimant's treatment, apparently those provided him by the respondents. Although Dr. Cathy indicated that this

was an "independent medical evaluation" of the claimant, it was in fact an evaluation of the claimant by a physician of the respondents' choosing. I would further note that Dr. Cathy seems to appear frequently in this capacity.

After consideration of all the evidence presented, I find that the opinions of Dr. Johnson are entitled to the greater weight and credit. Thus, I further find that the greater weight of the credible evidence establishes that the surgical procedure recommended by Dr. Johnson has a reasonable expectation of accomplishing its intended purpose or goal of alleviating or reducing the claimant's continuous low back pain and exacerbations of this pain with physical activity. This would satisfy the second requirement for this recommended medical service to constitute "reasonably necessary medical services" for the claimant's compensable injury, under Ark. Code Ann. §11-9-508.

Pursuant to the provisions of Ark. Code Ann. §11-9-508, the respondents are liable for the expense of this recommended medical service. However, this liability is controlled by the medical fee schedule established by this Commission.

II. ADDITIONAL TEMPORARY TOTAL DISABILITY

The next issue to be addressed concerns the claimant's entitlement to additional temporary total disability benefits from October 12, 2007 through a date yet to be determined. The burden rests upon the claimant to prove his entitlement to these additional temporary total disability benefits.

In order to meet this burden, the claimant must prove two facts by the greater weight of the credible evidence. First, he must show that he has continued within his healing period from the effects of his compensable low back injury. Secondly, he must show that he has continued to be rendered

totally disabled from performing regular gainful employment, as a result of the effects of his compensable low back injury.

The healing period is a medical question, which must be resolved on the basis of the greater weight of the medical evidence presented. A claimant continues within his healing period from the effects of the compensable injury until he has achieved the maximum benefit of time and medical treatment in restoring him to as near his pre-injury state as the permanent character of his injury will allow.

In the present case, the medical evidence shows that the claimant was under continuous medical treatment by Dr. Johnson through July 12, 2007. On that date, Dr. Johnson attempted to schedule the claimant for the recommended transforaminal fusion of the L3 and L4 vertebrae. The respondents refused to provide the claimant with this recommended treatment. Following the evaluation of the claimant by Dr. Cathey, the respondents appear to have refused to provide the claimant with any further medical treatment, whatsoever. In this regard, I would note that there is simply no basis for this refusal of continued medical care. Even Dr. Cathey has indicated that continued medical services for the compensable injury would be necessary and medically appropriate (i.e. physical therapy, bracing, and the use of a neuromuscular stimulator). There is no medical evidence that shows that the claimant has ever been totally released from medical treatment or has achieved maximum recovery.

After consideration of the evidence presented, it is my opinion that the greater weight of the credible evidence establishes that the claimant has continued within the healing period from the effects of his compensable low back injury from October 12, 2007 through a date yet to be determined. This

would satisfy the first requirement from his entitlement to additional temporary total disability benefits.

The record reveals that the claimant is 50 years old. Although the claimant purportedly completed the 9th grade, he is essentially illiterate. The claimant's previous work experience is limited to heavy manual labor, primarily the laying of blocks and brick.

The medical evidence shows that the claimant was initially restricted by Dr. Clark from engaging in any employment activities that required lifting more than 20 pounds, that would prevent him from being able to alternately sit, stand, and walk as tolerated, and that required bending, stooping, and twisting. The claimant was subsequently prohibited from engaging in any type of employment by Dr. Cheyne. This restriction was never lifted by Dr. Johnson.

The claimant has also been continuously taking narcotic pain medication, which has been prescribed by his treating physicians for his compensable injury on a regular basis since this injury occurred. As recognized by Dr. Cathey, this medication alone would prevent the claimant from performing any type of regular gainful employment for which he might otherwise be qualified.

After consideration of all the evidence presented, it is my opinion that the claimant has proven that he has continued to be rendered actually totally disabled from performing all forms of regular gainful employment for which he is otherwise qualified by the effects of his compensable injury from October 12, 2007 through a date yet to be determined. Thus, the claimant has met the second requirement for his entitlement to additional temporary total disability benefits.

In summary, I find that the claimant has proven that he is entitled to temporary total disability benefits for his admittedly compensable low back injury from October 12, 2007 through a date yet to be determined.

FINDINGS OF FACT & CONCLUSIONS OF LAW

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

2. On January 11, 2007, the relationship of employee-employer-carrier existed between the parties.

3. On January 11, 2007, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$267.00 for total disability and \$200.00 for permanent partial disability.

4. On January 11, 2007, the claimant sustained a compensable injury to his low back.

5. There is no dispute over accrued medical expenses.

6. The medical services recommended for the claimant's compensable low back injury by Dr. Arthur Johnson represent reasonably necessary medical services, under Ark. Code Ann. §11-9-508. Specifically, these recommended medical services are necessitated by or connected with the claimant's compensable low back injury and have a reasonable expectation of accomplishing their intended purpose or goal. Pursuant to Ark. Code Ann. §11-9-508, the respondents are liable for the expense of these services, subject to the medical fee schedule established by this Commission.

7. There is no dispute over temporary total disability benefits accruing through October 11, 2007.

8. The claimant continued to be rendered temporarily totally disabled by his compensable low back injury from October 12, 2007 through a date yet to

be determined. Specifically, the greater weight of the credible evidence shows that during this time the claimant continued within his healing period from the effects of his compensable injury and was also rendered totally disabled from regular gainful employment by this compensable injury.

9. The respondents have controverted the claimant's entitlement to the medical services recommended by Dr. Johnson and his entitlement to additional temporary total disability benefits after October 11, 2007.

10. The appropriate fee for the claimant's attorney is the maximum statutory attorney's fee on the controverted temporary total disability benefits herein awarded.

ORDER

The respondents shall be liable for the expense of the medical services recommended by Dr. Arthur Johnson, in the form of a surgical fusion of the L3 and L4 vertebrae. This liability is subject to the medical fee schedule established by this Commission.

The respondents shall be liable to the claimant for additional temporary total disability benefits for the period beginning October 12, 2007 and continuing through a date yet to be determined.

The respondents shall pay to the claimant's attorney the maximum statutory attorney's fee on the controverted temporary total disability benefits herein awarded. One-half of this fee is the obligation of the respondents in addition to these benefits. The remaining one-half of this attorney's fee is to be withheld by the respondents from these benefits.

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