

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. C252908

BOBBY STEVENS	CLAIMANT
CITY OF CLARKSVILLE	RESPONDENT
AMERICAN INSURANCE COMPANY, INSURANCE CARRIER	RESPONDENT

OPINION FILED **AUGUST 21, 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 in the above styled claim on June 3, 2008, in Fort Smith, Arkansas. A pre-hearing order was entered in this case on March 4, 2008. The 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 26, 1972, the relationship of employee-employer-carrier existed between the parties.
2. On August 26, 1972, claimant sustained a compensable injury to his back that rendered him permanently totally disabled.
3. There is no dispute over any benefits through the date of a fall in February of 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 after his fall in February of 2007.
2. Appropriate attorney's fee.

In regard to these issues, the claimant contends:

"a. The claimant contends that as a result of the effects of his job related injury his condition has worsened to the point that additional surgery has been recommended. The respondents have refused to authorize such surgery.

b. The claimant contends that he has outstanding bills regarding prescription medications for which the respondents should be directed to pay.

c. The claimant contends that his attorney is entitled to an attorney's fee in regard to above medical benefits."

In regard to these issues, the respondents contend:

"Respondents contend that claimant's current need for surgery is unrelated to claimant's prior compensable injury and is solely related to a fall sustained while on a hunting trip. As such, respondents contend that claimant is not entitled to benefits for this non work related independent intervening cause under §11-2-102(4)(F)(iii)."

DISCUSSION

_____The central issue in this case is the claimant's entitlement to additional medical services after February of 2007. These disputed medical services consist of medical services provided the claimant by and at the direction of Dr. Stephen Marano, on and after April 10, 2007. These disputed medical services also include additional medical services that have been recommended by Dr. Marano, but which have not yet been provided. The burden rests upon the claimant to prove his entitlement to these disputed medical services.

In order to meet this burden, the claimant must prove that these disputed medical services represent "reasonably necessary medical services" for his

compensable injury, as that term is used in Ark. Code Ann. §11-9-508. In order to represent "reasonably necessary medical services", medical services must be necessitated by or connected with the compensable injury. Further, these medical services must have a reasonable expectation of accomplishing their intended purpose or goal, at the time the services are rendered. However, the claimant need not show that the compensable injury was the sole or even major cause of the need for these medical services. He need only prove that the compensable injury contributed to or was connected with the need for the medical services.

The records and reports of Dr. Marano show that at the time of the claimant's visit on April 10, 2007, the claimant was seen essentially for a routine follow up, which had been tentatively scheduled at the time of the September 5, 2006 visit. However, when the claimant returned for this routine follow up visit, he was complaining of increased difficulties, particularly pain in his mid to lower back and down both legs to approximately the knee. He also indicated that he was having considerable difficulty walking and required the use of a walker. Finally, he indicated that his symptoms appeared to be "getting worse." At the time of this visit, the claimant also gave a history of a fall, while deer hunting, and that he "kind of landed on his back." X-rays taken, at the time of this visit, were interpreted as showing a small amount of instability at the L3-4 level, in that this disc space "opened up a little bit posteriorly" when the claimant flexed forward. A myelogram was scheduled to further investigate the etiology of the claimant's increased complaints.

The claimant was subsequently seen by Dr. Marano on May 8, 2007. Again, a history of a fall while hunting was recorded. The actual date of this fall appears to vary between the various medical records and the claimant's

testimony. In some instances, the date of the fall was recorded as November of 2006. In other instances, it was noted to have occurred in December of 2006 or even February of 2007. At the time of the May 8, 2007 visit, the claimant was complaining of pain at the waist going up his back and down both of his legs, with the left being worse than the right. The claimant also complained of pain around his chest with some of this pain located just below the nipple area and some of the pain was located between the bottom of his rib cage and the top of the iliac crest.

In his report of May 8, 2007, Dr. Marano further also described the results of the myelogram. He indicated that this study showed the claimant to have advanced arachnoiditis. It also showed some degenerative changes at the T10-11 area. This was the level directly above the fused segment of the claimant's spine. Dr. Marano describes the defects as a large amount of disc space gas, endplate sclerosis, and a disc protrusion to the left and midline going down the spinal canal past the pedicle screw that had been placed in the T11 vertebra during the prior fusion.

On the basis of the myelogram results, his examinations of the claimant, and the claimant's current complaints, Dr. Marano has recommended yet another further fusion with an accompanying laminectomy/discectomy at the T10-11 level. This surgery was initially scheduled for May 21, but was cancelled due to an elevation in the claimant's blood sugar. It appears that this surgery has been currently placed on hold, due to the dispute over liability for the expense of this surgery.

In his report of August 29, 2007, Dr. Marano expressed the following expert medical opinion:

"In regards to Mr. Stevens' proposed surgery, this is in relation of the etiology to the need for this. This

gentleman's history obviously dates back many, many years. Multiple surgical procedures. He is fused from probably T12 level distally. He has marked degenerative changes at T10-11, which is in response to his long fused segment of the spine and a long period of time for which he has been fused. The recent fall he had in late 2006 was something that may have just brought some symptoms to a head, but the etiology for the need of this surgery dates back to him (sic) multiple lumbar and thoracolumbar fusions."

As previously indicated, Dr. Marano is a neurosurgeon. He has also been the claimant's treating physician for a significant period of time. His opinion further appears to be substantiated by the actual defects objectively shown on the recent myelogram. Most of the defects shown at the T10-11 level are due to progressive degeneration of the various structural components of the claimant's spine at this level and are not due to any particular or specific incident or trauma, such as a fall. Clearly, these degenerative defects would take a substantial period of time to evolve and would not likely be caused by a single incident of trauma occurring only five or six months prior.

The relationship recognized by Dr. Marano between the claimant's prior fusions and his current defects at the T10-11 level, is clearly not unusual. Progressive deterioration often occurs, at the level above or below a fused spinal segment, due to the increased stress placed upon such levels by the loss of mobility and the loss of cushioning in the fused segment. In fact, this exact situation appears to have previously occurred in the present case. The medical records shows that the claimant initially had some type of surgery to his lumbar spine as a result of his compensable injury in 1974. He next had surgery on his lumbar spine in 1998. This surgery was also the result of his compensable injury in 1998. In one or both of these procedures, the claimant's lumbar spine was fused. By 2004, his spine was fused at four levels, the L2-3, the L3-4, the L4-5, and the L5-S1. This extensive fusion in time resulted in the

degeneration and instability at the L1-2 level, which produced lumbar stenosis with a complete myelographic block at this level. In order to correct this defect, Dr. Marano performed yet another surgery on the claimant, on December 9, 2004. In this surgery the claimant's fusion was extended to encompass the L1-L2, T12-L1, and T11-12 intervertebral levels. Thus, the claimant's spine was essentially rigid bone from the T11 vertebra to his tail bone.

After consideration of all the evidence presented, it is my opinion that the greater weight of the credible evidence proves that the medical services provided and recommended to the claimant for his back or spinal difficulties by Dr. Stephen Marano, on and after April 10, 2007 were necessitated by or connected with the claimant's compensable injury. Specifically, I find that these medical services were necessitated by or connected with a progressive deterioration of the structural components of the claimant's spine at the T10-11 level, which was a natural result or consequence of the claimant's initial compensable lumbar injury. The surgical fusions required by the initial compensable lumbar injury caused more stress to be placed upon the structural components of the claimant's lumbar spine at the T10-11 area by the claimant's day to day activities of life. Therefore, the claimant has proven the first requirement that these medical services represent "reasonably necessary medical services" under Ark. Code Ann. §11-9-508, Wackenhut Corp. v. Jones, 73 Ark. 158, 40 S.W. 3rd 333 (2001).

After consideration of all the evidence presented, I find that the medical services provided and recommended to the claimant for his spinal difficulties by Dr. Marano, on and after April 10, 2007, have a reasonable expectation of accomplishing the purpose or goal for which they are intended, i.e. alleviating

the compression on the claimant's spinal cord and exiting nerve roots and thereby reducing the magnitude of his symptoms and limitations. I would note that the medical services provided and recommended by Dr. Marano are of a type and nature commonly recognized by the medical community as being appropriate medical treatment to reduce the extent of the physical damage diagnosed and to alleviate or reduce the symptoms and limitations this damage is producing. I would further note that a similar surgical procedure was performed by Dr. Marano in 2004, for similar defects then noted at the L1-2 level, and this surgery substantially improved the claimant's symptoms and limitations. Therefore, the claimant has met the second requirement for these medical services to represent "reasonably necessary medical services" for his initial compensable injury, under Ark. Code Ann. §11-9-508.

In reaching these decisions, I am aware that the evidence overwhelmingly shows that the claimant was involved in a fall, while deer hunting, in either November of 2006, December of 2006, or February of 2007. However, the greater weight of the credible evidence shows that this fall was, itself, the result of the effects of the claimant's initial compensable injury in that his compensable injury produced a weakness in his leg and a tendency for his leg giving way. This fall also occurred while the claimant was performing the normal activities of his day to day life and was in no way the result of any misconduct or negligence on the part of the claimant. Most importantly, the greater weight of the evidence presented shows that any of the medical services by Dr. Marano (i.e. the further fusion) were not necessitated by or connected with any physical injury sustained in this fall. At best, the claimant's accidental fall would only be another contribution to the ongoing cumulative stress on the various components of the claimant's spine at the T10-11 level.

It must also be noted that at the time of the claimant's compensable injury the enactment of Ark. Code Ann. §11-9-102(4)(F) was twenty years in the future. Prior to the enactment of the provision of this subsection by Act 796 of 1993, there was no bar to benefits resulting from the combination of the effects of a compensable injury with the natural aging process and any independent intervening cause had to be the result of negligence, recklessness, or misconduct on the part of the claimant.

It is simply my opinion that the claimant's accidental fall in November of 2006, December of 2006, or February of 2007 is not an independent intervening cause of his current ongoing back difficulties. Thus, this fall does not prevent him from receiving the additional benefits he now seeks.

FINDINGS OF FACT & CONCLUSIONS OF LAW

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

2. On August 26, 1972, the relationship of employee-employer-carrier-third party administrator existed between the parties.

3. On August 26, 1972, the claimant sustained a compensable injury to his back that rendered him permanently totally disabled.

4. There is no dispute, at the present time, over the claimant's entitlement to indemnity benefits.

5. There is no dispute over the claimant's entitlement to the payment of expenses incurred for medical services provided him prior to the occurrence of the employment related fall in either of November of 2006, December of 2006, or February of 2007.

6. The claimant has proven by the greater weight of the credible evidence that the medical services provided and recommended to him for his

back difficulties by Dr. Stephen Marano, on and after April 10, 2007, represents reasonably necessary medical services for his 1972 compensable injury, under Ark. Code Ann. §11-9-508, Specifically, the claimant has proven by the greater weight of the credible evidence that these medical services were necessitated by or connected with his compensable injury of August 26, 1972 and have a reasonable expectation of accomplishing the purpose or goal for which these services are intended.

7. The claimant's fall in November of 2006, December of 2006, or February of 2007, does not represent an independent intervening cause of his subsequent back difficulties, so as to relieve the respondents for appropriate benefits under the Act for these difficulties.

8. The respondents have controverted the claimant's entitlement to any medical expenses incurred on and after April 10, 2007.

9. A reasonable fee for the claimant's attorney is the maximum statutory attorney's fee on the controverted medical expenses herein awarded.

ORDER

The respondents shall be liable for the expense of medical services provided and recommended to the claimant for his back difficulties, by and at the direction of Dr. Stephen Marano, on and after April 10, 2007. This specifically included the recommended surgical fusion.

The respondents shall pay to the claimant's attorney the maximum statutory attorney's fee on the controverted medical benefits herein awarded. Based on the law in effect at the time of the claimant's compensable injury, this maximum statutory attorney's fee would be the equivalent to 10 percent of the controverted medical expenses herein awarded.

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