BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. C252908

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

OPINION FILED JANUARY 26, 2009

Upon review before the FULL COMMISSION in Little Rock, Pulaski County, Arkansas.

Claimant represented by the HONORABLE EDDIE H. WALKER, JR., Attorney at Law, Fort Smith, Arkansas.

Respondent represented by the HONORABLE RANDY P. MURPHY, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed.

OPINION AND ORDER

The respondents appeal an administrative law judge's opinion filed August 21, 2008. The administrative law judge found that the claimant proved he was entitled to additional medical treatment. After reviewing the entire record *de novo*, the Full Commission affirms the administrative law judge's opinion.

I. HISTORY

Bobby Zane Stevens, Sr., age 67, testified that he injured his lower back as the result of a work-related motor vehicle accident in August 1972. The parties stipulated that "on August 26, 1972, claimant sustained a compensable injury to his back that rendered him permanently totally disabled." The claimant testified that he underwent a back fusion in 1974. The claimant's testimony indicated that he subsequently slipped and fell, landing on his back. An administrative law judge filed an opinion on April 2, 1996. The administrative law judge found, in pertinent part: "2. The claimant has proven by a preponderance of the credible evidence of record that his re-injury on December 22, 1993, was a compensable consequence of his initial back injury and respondents are liable for all reasonable and necessary medical expenses associated with Dr. Smith's treatment."

The claimant was seen in the office of Dr. Stephen R. Marano, a neurological surgeon, on October 22, 2004. James Cook, PA-C, examined the claimant:

> We have seen this gentleman in the past, the last was a hospital consult in October 2002. He had a previous lumbar fusion from L2-S1. He stated that about a month ago he started having some increased low back and right leg pain. His left leg was always the one that gave him problems and has since his original injury back in the 1970's. This back pain, however, feels different than his

normal back pain. Most of the pain is in the low back, but there is some in the right buttock, occasionally it travels down to about the mid shin on the right leg. He has been having more difficulty walking, he has good days and bad days....

He did have a CT of the lumbar spine ordered by Brian Decker, NP, at Teton MRI on 10-4-04, showing some evidence of severe degenerative disc disease at L1-2. All of his hardware does appear to be intact, but it is very difficult to evaluate anything further because no contrast dye was used.

PAST MEDICAL HISTORY ...
SURGICAL: 1974 & 1998 back surgery, 1992 neck surgery....

PHYSICAL EXAM
Reveals a healthy appearing gentleman in a mild amount of distress. He does appear to be hunched over when he is walking in. His gait and station is slow, antalgic, broad based, and he does hunch forward when he walks....The back is visually unremarkable, other than a well healed midline scar consistent with his previous surgery. He is tender to palpation over the upper edge of his scar, and the tenderness becomes more prominent the more caudal of palpation.
X-Rays: Films taken today in the office show, flexion, extension views show a large anterior subluxation of L1 on L2, probably about 10 mm on the neutral view, this does decrease to about 7 mm on the extension view. There is some bone marrow edema present over the anterior aspect of the L2 vertebrae as well as the middle of L1, where those bone have probably been wearing on each other. The disc space is essentially gone.

IMPRESSION
1. Degenerative disc and joint disease throughout the cervical and lumbar spine.
2. Segmental instability L1-2.
3. Status post L2-L1 fusion.

> 4. Increasing low back and right lower extremity pain.
> 5. Hypertension.
> 6. Depression.
>
> The diagnosis was discussed with the patient and his wife. We are going to need to get a myelogram to better assess the status of his central canal and neural foramen.
> It's very likely he is going to require another fusion to correct that segmental instability at L1-2. Dr. Marano also came in, we reviewed his films with them, showed them the x-rays....

Dr. Marano noted on November 23, 2004:

> Comes in today, the results of his myelogram were reviewed with him. He has an anterior subluxation of L1 on the lower fusion mass from 2 down, resulting in a complete myelographic block. His pain has gotten progressively worse....I showed him and his wife the films and said really the only way to fix this is going to be surgical intervention. It's going to require screws into 12 & 1, and maybe even a hook on 11, this will take away pretty much all of his movement in his back. The main point of the surgery is going to be preventing him from going paralyzed, and not necessarily for pain relief, although there may be some pain relief from this....We are going to proceed with the surgical scheduling process at this point and get approval from the workman's compensation.

Dr. Marano noted on December 7, 2004 regarding additional surgery, "If it's not done he could very well lose his ability to walk. We are going to extend the fusion up to T11, hopefully, either with hook or screws there, and then T12-L1 and connect them to the old construct. We are

going to put him in a brace afterwards, it will be up to a year for the bone to heal....I told him it's in many ways similar to his old surgery, but higher up...."

Dr. Marano performed an operation on December 9, 2004: "1. Lumbar laminectomies L1 and L2 with thoracic laminectomies of T11 and T12. 2. Bilateral diskectomies L1-2. 3. Bilateral placement of hydrosorb cages L1-2. 4. Bilateral posterior lumbar interbody fusion L1-2. 5. Partial removal of old hardware. 6. Exploration of fusion. 7. Harvesting of autologous bone graft from decompression. 8. Harvesting of autologous bone graft from right posterior iliac crest. 9. Bilateral pedicle screw fixation T11, l2 and L1. 10. Bilateral transverse process fusion T11-12, T12-L1, L1-L2." The pre- and post-operative diagnoses were "1. Status post fusion L2 to S1. 2. Lumbar stenosis with complete myelographic block L1-2 with offset."

Dr. Marano noted on December 21, 2004: "He is about ten days out from surgery. He is standing up much straighter, the pain is pretty well controlled, he is about to get up and walk around quite a bit better." The claimant continued to follow up with Dr. Marano and the claimant continued to report good results from surgery.

Dr. Marano noted on April 5, 2005, "X-rays taken today in the office look good. The hardware is intact. There is no abnormal motion on flexion or extension. There is not a lot of bone mass visualized at the lateral fusions, there is some at the interbody fusions. Actually his back looks very good as far as the alignment, we were able to correct that offset that was above his previous fusion. He needs to continue to wear the TLSO for another month. We are going to have him get started on some pool therapy and then in a month he can transition to an LS corset...."

Dr. Marano reported on May 24, 2005:

> Comes in today, he said over the weekend he had an accident where he was helping his wife lift a five gallon bucket full of dirt, he picked that up and had the immediate onset of right sided low back pain that radiated down the right leg to about the knee. He has really had a hard time moving around and when he comes in today he is requiring the use of a walker to ambulate. We took some x-rays. **X-ray**: Took AP & Lateral views, showing the hardware to be intact. No signs of any acute injury other than a probable muscle strain. He needs to continue doing his physical therapy, I think the pool therapy will help with the muscle strain in his back....

The claimant continued to follow up with Dr. Marano.

Dr. Marano reported on April 14, 2006: "Comes in today, he was last seen in October 2005. He has returned from Arkansas where he spent the Winter. He is about sixteen

months out from surgery. He is doing about the same, still has some pain in the right and left leg, more so on the left. He wants to get started on some pool therapy, he thinks that helps his pain....X-rays taken today in the office look good. The hardware is intact. There is no abnormal motion on flexion or extension. The fusion is healing well, there is good bone mass present, it is essentially solid at this point at the upper levels that we did last time. He was given an order for therapy and a prescription for an orthopaedic pillow....We'll see him back in 4-5 months."

Dr. Marano noted on September 5, 2006, "he is about 21 months out from surgery. He feels he has plateaued as far as his pain goes. He is walking much better than he was, he stands up straight, needs to walk with a cane for any type of distance. He feels the therapy helped and would like to continue that on a permanent basis. He is going back to Arkansas for the Winter, we'll see him back in October before he leaves, if he needs. Otherwise we'll see him back in Spring when he returns."

The claimant testified that he slipped and fell while deer hunting in November 2006: "I was sitting on a log and I

was watching some deer that was coming up and they were coming more to my right and I needed to move to get a good shot, so I stood up and when I stood up, my left leg gave out on me and I fell on my back at that time."

The parties stipulated that there was "no dispute over any benefits through the date of a fall in February of 2007."

Dr. Marano reported on April 10, 2007:

> Comes in today with his wife, he was last seen in September 2006. He has returned from Arkansas. While he was back there, he fell while deer hunting in February. He fell off a log and kind of landed on his back. He has mid to lower back pain, as well as pain down both legs to about the knee. The pain is getting worse. He is really not able to walk much at all, when he comes in today he is using a walker to ambulate. **X-Ray**: X-Rays taken today in the office shows good alignment. However there does appear to be a small amount of instability at the L3-4 level. When he flexes forward the disc space opens up a little bit posteriorly. I think given the fact that there is some apparent instability we need to get a myelogram to further evaluate that spine....

Dr. Marano reported on May 8, 2007:

> Comes in today, he says he fell hunting back in November or December 2006. He was going over a log, fell backwards onto his back and had quite a bit of pain at the waist, going up the back. Both legs are involved, the left side worse than the right. Some pain comes around the chest, some of it is up just below the nipple area and another area down between the bottom of the rib cage and top of the iliac crest. The myelogram films were

> reviewed with him. He has advanced arachnoiditis. He has degenerative changes fairly marked at the T10-11 area above the fusion, with a large amount of disc space gas, endplate sclerosis, a disc protrusion to the left of midline going down a canal a sizeable portion past the pedicle screw of T11. Reviewed the films, reviewed varying options. He his (sic) having increasing pain, increasing difficulty walking. I think he probably needs surgical intervention. Reviewed the extensive list of medications he has. Also reviewed treatment options for the arachnoiditis, which I think is probably a separate issue from the pain at the lower thoracic spine. We'll probably have to put a couple more levels of pedicle screws in to extend the fusion....At this point he wants to proceed with the surgical intervention.

Dr. Marano noted in part on May 17, 2007, "Use of the rod, bone morphogenic protein, post-op bone stimulator, screws, laminectomy, discectomy, extension of the rod and fusion up the back were all also reviewed. The arachnoiditis is a secondary source of pain and the inability to differentiate how much pain is coming from each one was again reviewed."

Dr. Marano reported on August 29, 2007:

> 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 this long fused segment of the spine and a long period of time from which he has been fused. The recent fall he

> had in late 2006 was something that may have just brought some the symptoms to head, but the etiology of the need for this surgery dates back to him (sic) multiple lumbar and thoracolumbar fusions.

A pre-hearing order was filed on March 4, 2008. The claimant contended, among other things, 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 said surgery." The respondents contended "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)."

The parties agreed to litigate the following issues: "1. Claimant's entitlement to additional medical services after his fall in February of 2007. 2. Appropriate attorney's fee."

An administrative law judge filed an opinion on August 21, 2008. The administrative law judge essentially found that the claimant proved he was entitled to additional

medical treatment. The respondents appeal to the Full Commission.

II. ADJUDICATION

The parties stipulated that the claimant sustained a compensable injury on August 26, 1972. The law applicable to this claim is found at Ark. Stat. Ann. §81-1311 (Repl. 1960), which reads in part as follows:

> The employer shall promptly provide for an injured employee such medical, surgical, hospital and nursing service, and medicine, crutches, artificial limbs and other apparatus as may be reasonably necessary during the period of six [6] months after the injury, or for such time in excess thereof as the Commission, in its discretion, may require....

It is the Commission's duty, according to the applicable law, to draw every legitimate inference possible in favor of the claimant and to give him the benefit of the doubt in making the factual determination. *American Red Cross et al v. Wilson*, 257 Ark. 647, 519 S.W.2d 60 (1975).

In the present matter, an administrative law judge found that additional medical services were reasonably necessary, and he found that the respondents were liable for surgery recommended by Dr. Marano. The Full Commission affirms the administrative law judge's finding. The claimant sustained a compensable injury to his back on

August 26, 1972 and he has since undergone several surgeries, accepted and paid for by the respondents. The claimant testified that he fell on his back while deer hunting in November 2006. The record indicates that the respondents controverted further benefits after February 2007. On May 8, 2007, Dr. Marano recommended another surgery. The record does not demonstrate that the claimant's slip and fall in November 2006 constituted an independent intervening cause which ended the respondents' liability. Dr. Marano, the current primary treating physician, recognized on August 29, 2007 that the slip-and-fall incident may have caused an increase in symptoms. Nevertheless, Dr. Marano opined that the etiology of the claimant's need for surgery was the compensable and accepted surgeries the claimant had already undergone.

Based on our *de novo* review of the entire record, the Full Commission affirms the administrative law judge's finding that the claimant proved he was entitled to additional medical treatment. The Full Commission finds that the claimant proved he was entitled to an additional surgery as recommended by Dr. Marano. The claimant's attorney is entitled to fees for legal services pursuant to

Ark. Stat. Ann. §81-1332 (Repl. 1960). For prevailing on the respondents' appeal to the Full Commission, the claimant's attorney is entitled to an additional fee of One Hundred Dollars ($100), pursuant to Ark. Stat. Ann. §81-1332 (Repl. 1960).

IT IS SO ORDERED.

A. WATSON BELL, Chairman

KAREN H. McKINNEY, Commissioner

PHILIP A. HOOD, Commissioner