

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E815277

LONG THANH LE	CLAIMANT
SIMMONS FOODS, INC.	RESPONDENT
S.B. HOWARD & COMPANY INSURANCE CARRIER	RESPONDENT

OPINION FILED AUGUST 8, 2003

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH DANIELSON in Fort Smith, Sebastian County, Arkansas.

Claimant represented by GARY UDOUJ, Attorney, Fort Smith, Arkansas.

Respondents represented by J. RODNEY MILLS, Attorney, Fort Smith, Arkansas.

STATEMENT OF THE CASE

The Full Commission, on January 28, 2003, remanded this matter for clarification as to the claimant's entitlement for additional medical treatment, compensability of the alleged RSD, correct impairment rating for the claimant and entitlement to wage loss.

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

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

2. On all pertinent dates, the relationship of employee-employer-carrier existed between the parties.

3. The claimant sustained a compensable injury to his left arm on December 13, 1998.

4. The claimant is entitled to a compensation rate of \$154.00.

5. On March 9, 2000, the respondents accepted and have paid a 19 percent rating to the left arm.

6. The claimant was earning \$6.70 per hour when he first began to work for the respondent in 1998. The claimant was earning \$7.95 per hour when he was terminated on September 29, 2000.

7. The claimant began working for the respondent in October 1998.

By agreement of the parties the issues to litigate are limited to the following:

1. Additional permanent partial disability.
2. Additional medical.
3. Compensability of claimant's RSD.
4. Wage loss over any impairment rating if RSD is found to be compensable.
5. Attorney's fees.

In regard to the foregoing issues the claimant contends that he has probable reflex sympathetic dystrophy in the left upper extremity and arm as a result of his injury of December 13, 1998, and is a body as a whole injury. Claimant suffers a complex regional pain syndrome. Claimant suffered/suffers a work loss disability. Respondent is responsible for the medical expenses of treating physician Dr. N. Van Hoang. Respondent is responsible for appropriate statutory fees and costs associated with this action, medical and other related expenses not previously paid for by the respondent in connection with claimant's work related injury. Claimant suffered a body as a whole injury.

In regard to the foregoing issues the respondents contend that all authorized, reasonable and necessary benefits due and owing the claimant have been paid. The benefits currently sought by the claimant did not arise out of any compensable event. The medical treatment and benefits sought by the claimant are not authorized, reasonable and/or necessary as a result of a compensable injury. No compensable injury is the major cause of the claimant's current disability and/or need for medical treatment, if any. The claimant's upper extremity injury is a scheduled injury and he is not entitled to wage loss, or any additional disability benefits, as a result thereof. No safety violation was committed for which this respondent is liable. The claimant does not have standing to raise or pursue a safety violation claim under the Arkansas Workers' Compensation Act.

The documentary evidence submitted in this matter consists of the Commission's pre-hearing order marked Commission's Exhibit No. 1. The claimant submitted documentary evidence marked Claimant's Exhibit No. 1 and photographs marked Claimant's Exhibit No. 2. The respondents submitted documentation marked Respondents' Exhibit No. 1, the claimant's deposition marked Respondents' Exhibit No. 2 and the deposition of Dr. Buie marked Respondents' Exhibit No. 3. All these exhibits were admitted without objection.

DISCUSSION

The claimant testified, through an interpreter, and the parties have stipulated that the claimant sustained a compensable injury to his left arm on December 13, 1998. The claimant

testified that he broke his left arm in three places while he was trying to clean a machine and got his uniform and arm caught in a conveyor belt. The claimant testified that it took several minutes for the power to be cut off to the conveyor belt and in fact no switch could be found and while he was caught his supervisor tried to lift him up or hold him up to relieve the pressure off of his arm while co-employees located the wires to the machine and cut them to stop the machine. The claimant testified that he was seen by Dr. Martimbeau but was eventually operated on three separate times by Dr. Bebout for his compensable injury. The claimant remembers that when he was released to return to work he did in fact return to work for the respondent and in the process of his work his arm broke again. The claimant testified that he has been treated by Dr. Taft for an infection in his arm. The claimant testified that Dr. Taft, while treating him for his infection, referred him also to Dr. Swicegood who gave him an injection. The claimant testified that he had his arm operated on four times and he had metal screws and a plate in his arm but this metal has now been removed. The claimant testified that when he was released to return to work he was released to one arm duty and he was cleaning the tables in the break room and eventually cleaned the bathrooms. The claimant testified that his arm continued to swell and be very painful attributing some of this to the cold temperatures throughout the plant. The claimant remembers that he was given a new supervisor and was moved back to his old job. The claimant stated that this new supervisor instructed him to use a water hose

to spray down the machines. The claimant testified that the pulling of the hose caused his arm to crack again.

The claimant testified that throughout the period of time he worked for the respondent he had problems with his arm swelling and aching. The claimant testified that his arm still swells when the weather changes or it gets very cold. The claimant testified that he was very sensitive to cold stating "I can't stand cold." The claimant testified that now his problems are more with the pain than it is with the swelling.

The claimant testified that before he had his accident he had gone to beauty school to learn to do nails. The claimant testified that he would do nails in the morning and he would work in the evenings for the respondent. The claimant testified that he was not able to make a living doing nails just in the morning and that is why he had the second job with the respondent. The claimant testified that about the time he returned to work for the respondent after his accident he also tried to return to doing nails. The claimant testified that in his sister's nail shop he was given the job of soaking and washing the customers nails, answering the phone and bringing in customers and showing them where to sit. The claimant testified that if business was good his sister would give him \$100.00 a week but if it was a slow week she would give him only \$50.00. The claimant testified that he worked for his sister for about one month and then went to New Jersey and worked in a friends nail shop for about two months. The claimant testified that he was still in training while working for his

friend in New Jersey and he was paid approximately \$150.00 per week while out of state. The claimant testified that he is still in training and, due to the weakness of his arm, is having problems. The claimant stated that currently he is working in Little Rock at a friends nail shop and, depending on business, is paid from \$150.00 to \$80.00 per week.

The claimant testified that he is left hand dominate and used his left hand to perform most of the nail and manicure functions. The claimant testified that he really could not do the detailed manicures which most nail shops require. The claimant testified that he had tried to do the more detailed work of sculpturing and applying acrylics but the customers were not satisfied.

The claimant testified that he has worked at fast food restaurants prior to his injury and he still would like to cook but that due to his arm problems and his weakness, he has problems holding the pans for cooking and he cannot carry and move stock.

The claimant agreed that no one from the respondent's business sent him to see Dr. Buie or Dr. Hoang. The claimant stated that he picked Dr. Hoang himself but this was only after the respondent had told him that they were not going to pay any more money for him to see Dr. Bebout or Dr. Martimbeau. The claimant testified that the respondent had told him to find himself a family doctor.

The claimant's sister, Dung Thi Le, testified on behalf of her brother. This witness testified that she had a nail shop in Poteau, Oklahoma. This witness also testified that after her brother's accident he could do very few things to help take care of

himself because he could only use one hand so she took care of him. Ms. Le testified that after the claimant's injury she tried to use him in her shop so that he would feel useful but that her customers complained so much about his work that it was hurting her business. This witness testified that the claimant did not have the strength to use the drill to work on the client's nails but just generally his work on the client's nails was substandard. Ms. Le testified that, in her opinion, the claimant will not ever be able to do sculptured nails. Ms. Le testified that "I think nails are probably the easiest job that a man could ever have and, he's not able to do that, so I don't know what he'd be able to do."

The medical records set forth that Dr. Eileen Taft saw the claimant on April 29, 1999. Dr. Taft sets forth that the claimant was referred to her from Dr. Martimbeau for his injuries resulting from a contaminated open fracture of both bones of the claimant's left forearm. Dr. Taft notes that Dr. Martimbeau has operated on the claimant and placed an external fixation device initially with placement of a plate and screw device in the ulna to fix a comminuted fracture. This was subsequently removed in follow up. Dr. Taft notes that the claimant subsequently developed an infection in his arm for which he has been given medication. Dr. Taft continued to see and treat the claimant through May 27, 1999, for his infection and skin disorders on his left arm. Dr. Claude Martimbeau writes on June 7, 1999, that he has seen the claimant who is status post ORIF of both bone forearm for open fracture. Dr. Martimbeau notes that the claimant's left forearm shows that

the fracture is healing with more new bone bridging the fracture. Dr. Martimbeau writes on June 17, 1999, that the claimant is complaining of a sensation of fever for the past day and also redness in his left arm. Antibiotics were prescribed and a return visit in four days and eventually an appointment to remove the hardware from the claimant's arm. On July 12, 1999, Dr. Martimbeau released the claimant to return to work, no restrictions, but to return to see him in one month. On that same day, Dr. Martimbeau gave a slip to the claimant to return to work with no lifting more than twenty pounds, no working cold or very hot areas until follow up in one month. Dr. Martimbeau then released the claimant from work from July 16, 1999, until August 10, 1999. The medical records set forth that the claimant continued to be seen by Dr. Martimbeau throughout July and into August for his complaints of swelling, redness and intermittent pain in his left forearm.

On August 5, 1999, Dr. Martimbeau removed the hardware from the claimant's left arm. On August 18, 1999, Dr. Martimbeau writes that the claimant is complaining of swelling and more pain in his left arm. X-rays taken that same day reveal a non-displaced fracture of the claimant's left radius and Dr. Martimbeau notes that the claimant's x-rays two weeks earlier had shown a definitely healed fracture. The doctor recommended that the claimant keep using his cockup splint for his non-displaced fracture. Dr. Martimbeau continued to see the claimant for his complaints of swelling, pain and redness in his left arm and on October 13, 1999, Dr. Martimbeau writes that the claimant underwent an MRI the

previous day which showed some defect in the distal radius and ulnar shaft with swelling and enhancement consistent with possible infection but also possibly related to re-injury and inflammatory change. On November 23, 1999, Dr. Martimbeau writes that the claimant is having at times some sharp pain as well as intermittent swelling. Upon examination, the doctor notes that there is some minimal swelling of the claimant's forearm and he has pain with deep palpitation but there is no warmth or redness. Dr. Martimbeau released the claimant to return to restricted work with no repetitive motion with his left forearm, no heavy lifting more than twenty-pounds and he is to wear his cockup splint. Dr. Martimbeau writes on December 7, 1999, that the claimant is worked and having, at times, swelling with stiffness of his hand, wrist and fingers with a sensation of pain as well as edema of the fingers, hand and forearm. Dr. Martimbeau recommended a compression glove to include the claimant's wrist and forearm.

Dr. Robert Bebout writes on December 22, 1999, that the claimant's x-rays taken on December 7, 1999, show osteoporosis affecting the claimant's distal radius and ulnar and the carpal and metacarpal bones of his left hand consistent with some disuse atrophy or reflex sympathetic dystrophy. Dr. Bebout notes that the claimant is wearing a compression devise for the forearm and hand to help control the swelling and that his surgical incisions are well healed. After extensive measurement of the claimant's range of motion in his left upper extremity, Dr. Bebout notes that the claimant has considerable swelling over the dorsum of the hand and

fingers and he has decreased sensation. Dr. Bebout opines that the claimant has disuse atrophy of the hand and maybe some reflex sympathetic dystrophy. Dr. Bebout recommended physical therapy, light duty status at work and to continue the use of his compressive stocking. Dr. Bebout writes on January 5, 2000, that the claimant refused to participate in occupational therapy alleging that it hurt him too much. Dr. Bebout recommended stellate ganglion blocks with the claimant's diagnosis of reflex sympathetic dystrophy and medications were recommended as well as to continue on his light work status. On March 9, 2000, Dr. Bebout writes that the claimant has been through occupational therapy as well as chronic pain syndrome therapy. At this time Dr. Bebout assessed the claimant with a 19 percent combined permanent impairment rating to the left upper extremity.

The claimant was seen by Dr. James Buie for a medical evaluation. Dr. Buie goes through a very extensive review of the claimant's past medical history and the physicians who have treated him as well as the treatment prescribed to the claimant for his left arm compensable injury. After examination, Dr. Buie writes;

"He (the claimant) has findings of sympathetic changes involving the arm and has along with muscle mass loss of the forearm and slight deformity, de-sensitivity to tactile stimulation and findings suggestive of a complex regional pain syndrome manifested by primarily sympathetic changes that are associated with some but not all evidence of reflex sympathetic dystrophy."

Dr. Buie assessed the claimant with an overall impairment rating of 43 percent including in that impairment rating loss of sensitivity,

motor weakness and loss of range of motion. Dr. Buie concludes that, in his opinion, the claimant should reconsider re-evaluation by a pain clinic and some medications would be of great benefit to him. Dr. Buie also recommends that the claimant seek work that would allow him to function so that there would be no further risk and limit the aggravation of his present condition.

Dr. Buie, in his deposition, testified that reflex sympathetic dystrophy is a response of the parasympathetic and sympathetic nervous systems to injury. Dr. Buie indicated that these two neural types control a person's sensation, circulation and the responses to sweat to the skin and associated tissue in the extremities. The doctor continued that when an injury occurs to the extremity there is a kind of short circuit in the systems and what happens is that these individual characteristics develop a syndrome of which they have constant pain, swelling, coolness and cold sweaty tissue. Dr. Buie stated that the active stages are a lot of swelling, coolness and changes which can result in fibrosis, loss of motion, limited function and veritable chronic pain. The doctor stated that there are some tests used to diagnose RSD and that it is known that RSD does respond to some medications as well as treatment by blocks of the sympathetic nervous system. The doctor stated that he did not run any of these tests on the claimant stating that usually these tests are run by a pain clinic and an anesthesiologist. The doctor stated that although he used the term probable reflex sympathetic dystrophy it was a situation where he did not word his statement well and that, in his opinion,

he would say that "yes" the claimant does have RSD unless clinically or definitely proven otherwise. Dr. Buie stated that it is the claimant's hand and forearm where the claimant's fractures occurred that are primarily affected, however, he may have discomfort above or in the lower arm as well. Dr. Buie further explained that the claimant's swelling and the fact that he has this vascular velvety feeling of the skin which is related to the circulation and some of the tactile changes. Dr. Buie noted that in an injury such as the claimant experienced he injured not only the bones but also the muscles, skin and nerves in his left extremity. Dr. Buie stated that he thinks that the worst of these injuries are those which place the nerve under tension and traction for a period of time. Dr. Buie agreed that he had also diagnosed the claimant with having minor causalgia explaining that causalgia is a chronic pain which might vary in severity. When asked, Dr. Buie testified that in his opinion the claimant experiences constant pain with the severity varying depending on his activities.

Dr. Buie continued in his deposition by explaining that his diagnosis of osteomyelitis was a combination of the result following the claimant's injury. Dr. Buie noted that the original cultures done at the time of the claimant's surgery grew out of Pseudomonas, which means the wound was contaminated from the injuries and then subsequently he had clinical symptoms of swelling, erythema, some drainage and was treated with antibiotics. Dr. Buie further noted that x-rays taken of the claimant's arm

showed some suggestion of possible changes compatible with osteomyelitis. The doctor stated that there is an old adage in orthopaedics that once a bone is infected it is always infected, noting that a bone is much like a sponge and once they are infected they always have a potential to have a flair up of that infection. Dr. Buie stated that the osteomyelitis in the presence of the infection or in the presence of fracture delays the healing, noting that the claimant had a long healing period. Dr. Buie noted that the claimant's injury, as to the stripping of the musculature, also would have attributed to the claimant's lengthy healing period. When asked in his deposition if the finding of osteomyelitis was consistent with a finding of RSD, Dr. Buie replied "not always" but then stated that in his opinion the severity of the claimant's injury is the thing that is more compatible with RSD. When asked, Dr. Buie agreed that his finding of reflex sympathetic dystrophy were stated within a reasonable degree of medical certainty.

Dr. Buie explained in his deposition that in arriving at the claimant's impairment rating of 43 percent to the upper extremity, he utilized sensitivity tests which are based on the claimant's reaction to different stimuli. Dr. Buie agreed that these tests are subjective and come within the control of the claimant as to his responses to the various tests. Dr. Buie explained that he had the claimant undergo a series of Jamar grip tests which the doctor felt to be valid. Dr. Buie explained that he does a repetitive test comparing the dominate hand which was the claimant's left hand and the claimant's non-dominate right hand. Dr. Buie explained

that the Jamar grip device is a standardized testing device for measuring a person's grip, explaining that it has a dynamometer on the side opposite from the patient so they cannot see it and you do a series of grip tests a number of times. Dr. Buie explained that if the patient is giving maximum effort during this test the results will be within a reasonable variation and if not giving their maximum effort these tests will have a greater variation thus producing an invalid test. Dr. Buie stated that the claimant's test did not vary more than one half pound. Dr. Buie stated that using these guidelines as set forth in the A.M.A. Guides, Forth Edition, that he determined the claimant had a 20 percent weakness of the left upper extremity. Dr. Buie then stated that to evaluate the claimant's range of motion he did a combination of active and passive tests, explaining that he required the claimant to first do active motions and then he would assist the claimant with a series of passive motions. Dr. Buie stated that although the claimant had just a little decrease on the right compared to the left he felt as though these tests were valid. Dr. Buie stated that he uses a goniometer to measure the claimant's movement. Dr. Buie stated that the range of motion tests which he performed on the claimant were all passively done since he was manipulating the claimant's movements.

After a complete re-review of this case, I find that there is insufficient evidence to find that this claimant has reflex sympathetic dystrophy. Dr. Buie has stated that in his opinion he feels as though the claimant possibly has RSD but that the tests

which are more definitive in establishing RSD have not been administered. Dr. Buie does set forth several findings which he attributes to RSD and even states within a reasonable degree of medical certainty that, in his opinion, the claimant does, in fact, have RSD as a result of his compensable injury. Dr. Buie, in his deposition, also stated that there were tests used to diagnose RSD and medications to which RSD does respond but that these protocols have not been performed. Although Dr. Buie did recognize some of the symptoms for RSD, such as swelling and a velvety feeling of the skin, these two factors could be associated with the dramatic injury which this claimant experienced when he had his compensable injury. Therefore, without more objective medical findings on which to establish RSD, I find that the claimant has failed to prove by a preponderance of the evidence that he has RSD as a result of his compensable injury.

One of the issues to be addressed is that of authorization of medical treatment for the claimant. It is noted in the documentary evidence that on March 8, 2000, Dr. Bebout released the claimant from his care with no restrictions. There is a hand written notation dated March 30, 2000, indicating that the claimant has called for a refill of his pain medications and that he has been released from Dr. Bebout's care and needs to call his family physician. The respondent filed an AR-2 on October 31, 2000, signed by Leesa Davis indicating that they are controverting the claimant's request for benefits noting that: all benefits paid or being paid, all medical treatment given, and the claimant's

physician released him to return to work. Based upon this form, the respondent was denying any additional benefits as requested in his AR-C requesting additional benefits, signed on October 12, 2000, and filed with the Commission on October 17, 2000. Based upon the respondents' clear indication that they were controverting the claimant's request for additional medical treatment, he had no authorized treating physician and was free to be seen by whomever he needed to be seen by for the treatment of his compensable injury.

I find, based on the evidence, that this claimant is entitled to additional medical treatment for his compensable injury. The doctor's records reflect that the claimant consistently experiences swelling and has complaints of pain. Dr. Buie noted that the claimant experienced not only an injury to the bones in his arm but also the muscles, skin and nerves in his upper left extremity. Dr. Buie stated that he thinks that the worst of these injuries are those which place the nerves under tension and traction for a period of time. Dr. Hoang, on April 25, 2001, saw the claimant for his left extremity problems, noting that the claimant is experiencing muscle spasms in his left arm and continues to have complaints of pain. Both Dr. Buie and Dr. Hoang have recommended ongoing medical treatment for this claimant's compensable injury.

The respondents have previously accepted and paid a 19 percent impairment rating for the claimant's left upper extremity. At the time this impairment rating was given it was noted that a grip test had been administered but was felt to be invalid due to

inconsistent results. Dr. Buie administered the claimant a strength test which he measured with a Jamar grip device and noted that the test variances were slight, therefore, in his opinion establishing it as a valid test of the claimant's loss of strength. Dr. Buie assessed the claimant with a 20 percent impairment rating for loss of strength in his left arm which shall be added to the 19 percent permanent partial impairment rating giving this claimant an impairment rating of 39 percent to the upper extremity. It, of course, is noted that Dr. Buie assessed the claimant with a lower impairment rating on all elements minus the grip strength test than he had previously been assessed. The respondents have accepted and paid the 19 percent impairment rating as assessed by Dr. Bebout. Dr. Bebout did not include a rating for the claimant's loss of grip strength due to his assessment of an invalid test. Dr. Buie has described, at length in his deposition, the Jamar grip test which involves a device which measures grip strength. Dr. Buie stated that this test is administered repetitively and that the claimant had very little variance as to the results of this test, therefore, determining it as a valid test and assessed the claimant with a 20 percent impairment rating for his loss of grip strength. It is my opinion that the 20 percent impairment rating as assessed by Dr. Buie should be added to the claimant's previous impairment rating giving him a total impairment rating for his left upper extremity of 39 percent.

Since RSD has not been found to be compensable in this matter, there is no body as a whole impairment rating which would entitle this claimant to wage loss over and above any impairment rating.

FINDINGS & CONCLUSIONS

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

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

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

2. On all pertinent dates, the relationship of employee-employer-carrier existed between the parties.

3. The claimant sustained a compensable injury to his left arm on December 13, 1998.

4. The claimant is entitled to a compensation rate of \$154.00.

5. On March 9, 2000, the respondents accepted and have paid a 19 percent rating to the left arm.

6. The claimant was earning \$6.70 per hour when he first began to work for the respondent in 1998. The claimant was earning \$7.95 per hour when he was terminated on September 29, 2000.

7. The claimant began working for the respondent in October 1998.

8. The claimant is entitled to additional permanent partial impairment for his loss of strength in his left upper extremity in the amount of 20 percent which should be added to the 19 percent

impairment which the respondents have previously accepted and paid. See discussion above.

9. The respondents had controverted this claimant's request for additional medical treatment and additional benefits of any kind on October 31, 2000. Therefore, the claimant did not have an authorized treating physician from that date forward and was free to be seen by whatever physician was needed to address his ongoing problems with his compensable injury.

10. The claimant has failed to prove by a preponderance of the evidence that he has RSD as a result of his compensable injury. See discussion above.

11. The claimant is not entitled to wage loss since his compensable injury is a scheduled injury only.

12. That the respondents have controverted this claimant's entitlement to additional benefits.

13. The claimant's attorney is entitled to the maximum statutory attorney's fee based on the benefits awarded herein.

ORDER

The claimant has failed to prove by a preponderance of the evidence that he is suffering from RSD as a result of his compensable injury.

The claimant has proven by a preponderance of the evidence that he is entitled to additional medical treatment for his compensable injury, therefore, the respondents should pay for all reasonable and necessary medical treatment for this claimant's compensable injuries.

The claimant has proven by a preponderance of the evidence that he is entitled to additional impairment in the amount of 20 percent to his left upper extremity which the respondents should pay over and above the 19 percent which they previously accepted and paid.

The respondents shall pay to the claimant's attorney the maximum statutory attorney's fee on the additional benefits awarded herein, with one half of said attorney's fee to be paid by the respondents in addition to such benefits and one half of said attorney's fee to be withheld by the respondents from such 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.

ELIZABETH DANIELSON
ADMINISTRATIVE LAW JUDGE