

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F102714

REX SCHACHT, Employee	CLAIMANT
NORTHSTAR ENGINEERING, Employer	RESPONDENT
CNA INSURANCE COMPANY, Carrier	RESPONDENT
ASSOCIATES' HEALTH & WELFARE PLAN	GROUP MEDICAL PROVIDER

OPINION FILED AUGUST 12, 2003

Before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Springdale, Washington County, Arkansas.

Claimant represented by JAY TOLLEY, Attorney, Fayetteville, Arkansas.

Respondents represented by CONSTANCE G. CLARK, Attorney, Fayetteville, Arkansas.

Associates' Health & Welfare Plan appearing through CHRISTY HERBAUGH, Reimbursement Specialist, Rogers, Arkansas.

STATEMENT OF THE CASE

This case comes on for review on remand from the Full Commission.

A hearing was conducted on this claim on October 17, 2001. The issues to be litigated at that time included whether claimant suffered a compensable injury to his foot on November 18, 2000, medical benefits, temporary total disability benefits, and a controverted attorney fee. In an opinion filed November 16, 2001, I found that claimant had proven by a preponderance of the evidence that he suffered a compensable injury in the form of an aggravation of his pre-existing diabetic condition while working for respondent on November 18, 2000. I also found that respondent was liable for all reasonable and necessary medical treatment provided in connection with the compensable aggravation, but not for medical benefits which were provided for claimant's pre-existing condition. I also found that claimant had failed to prove by a preponderance of the evidence that he was entitled to temporary total disability benefits as a result of his compensable injury, primarily because claimant received his full salary while he was off

work. This opinion was appealed to the Full Commission by the claimant and cross-appealed by the respondent. While on appeal the parties filed a motion to remand the case for the purpose of a joint petition settlement. The Full Commission's Order of Remand for the joint petition settlement was entered on February 19, 2002. As a result, a hearing on the claimant's joint petition settlement was conducted on May 8, 2002. At that hearing I denied approval of the joint petition based upon the fact that medical benefits for the claimant's injury had been paid pursuant to a group health care policy from Wal-Mart, the employer of claimant's spouse. This entity is formally known as Associates' Health & Welfare Plan and will be referred to as "AHWP" throughout this opinion. I noted that medical benefits paid by AHWP had not been reimbursed and claimant had not furnished respondent with a release of all subrogation claims as required by A.C.A. §11-9-411. This order denying approval of the joint petition settlement was appealed by the claimant. In an order filed February 6, 2003, the Full Commission remanded the case with instructions for me to determine the amount of any potential subrogation claims and direct the compensation carrier to hold in reserve said sums for five years pursuant to A.C.A. §11-9-411(c)(2)(A). Thereafter, a joint petition hearing may be conducted.

After much correspondence between the parties, two pre-hearing conferences and a delay caused by outdated medical authorizations, the parties have agreed to submit this case for consideration on remand on the transcripts of the prior hearings. These transcripts include both the original hearing of October 17, 2001, as well as the joint petition hearing conducted on May 8, 2002, which was transcribed at the request and cost of the claimant. These transcripts constitute the "record" in this case.

The Commission's remand instructs me to determine the amount of any potential subrogation claim and to direct the carrier to hold in reserve any potential subrogation claim for five years pursuant to A.C.A. §11-9-411(c)(2)(A). In this particular case, this requires a determination as to what medical treatment paid for by AHWP was related to

claimant's aggravation as opposed to his pre-existing diabetic condition. After my review of the relevant evidence, I find that AHWP's subrogation for benefits paid on behalf of claimant for his compensable injury totals \$11,670.47.

The claimant worked as a computer aided design manager for the respondent. The claimant suffered from a pre-existing diabetic condition which had resulted in a significant amount of medical treatment, including multiple surgical procedures which involved partial amputation of various toes.

Following claimant's compensable injury on November 18, 2000, he first sought medical treatment from Dr. Byrum on November 22, 2000. Dr. Byrum's notes of that date reflect the claimant having a history of blisters on his feet after seven hours of surveying and walking. Handwritten notations on that note seem to indicate that these ulcers involved the left foot. After claimant continued having problems he returned to Dr. Byrum on November 27, 2000, at which time Dr. Byrum diagnosed claimant as suffering from cellulitis of the foot and admitted him to St. Mary's Hospital. Again, the handwritten portion of Dr. Byrum's note mentions claimant's left foot, not his right.

In another report dated November 27, 2000, Dr. Byrum indicated that he saw claimant five days ago for a blister on the bottom of his left foot. Dr. Byrum noted the claimant now has a fever and redness of the fourth toe of the left foot. Dr. Byrum went on to note that the claimant had a non-healing right great toe ulceration, but noted that this condition was chronic in nature. Also on November 27, 2000, x-rays were taken of the claimant's left foot. The impression at that time was moderate soft tissue swelling in the left forefoot and some post-operative changes involving the claimant's third toe. A bone scan of both of claimant's feet was performed the next day on November 28, 2000. That bone scan revealed increased activity in the left forefoot. The report also notes that increased activity in the right hind foot is consistent with previous arthrodesis in that area which is unchanged from prior examinations.

Following his review of the x-rays and the bone scan on November 28, 2000, Dr. Cooper, the orthopaedic surgeon who has performed most of the surgical procedures on the claimant, noted that claimant has a left diabetic forefoot infection. Dr. Cooper also noted that an ulcer on the claimant's right big toe has been present off and on for several months.

After consideration of this evidence, it appears that the aggravation of claimant's pre-existing diabetic condition involved an ulcer on the claimant's left forefoot which eventually resulted in a partial amputation of the fourth toe on claimant's right foot. Any findings relating to the claimant's right foot at that time were related to an ulcer on his right big toe which had been present for several months.

This is consistent with the testimony of Dr. Scott Cooper. At his deposition Dr. Cooper testified that he believed that claimant's walking caused a sore on the plantar part of claimant's left forefoot which was near the third web space which is near to the fourth toe. Because of claimant's pre-existing diabetic condition, this ulcer became infected and spread into claimant's fourth toe and resulted in an eventual amputation.

Accordingly, for the foregoing reasons, I find that claimant's compensable injury consisted of an aggravation of his diabetic condition which involved an ulcer on his left foot which eventually resulted in the partial amputation of the fourth toe of his left foot. The evidence indicates that claimant's compensable injury did not include an injury to his right foot where an ulcer on his right big toe had been present for several months.

Based upon my review of the evidence, I find that the medical treatment rendered to claimant as a result of his compensable injury began at the time of his visit to Dr. Bynum on November 22, 2000, and continued until his visit with Dr. Bynum on December 28, 2000. Records provided at the time of the joint petition hearing and contained on Page 37 of Claimant's Exhibit 1 indicate that during this time period AHWP paid on behalf of claimant medical benefits in the amount of \$11,670.47. I find based upon the evidence

presented that this medical treatment was the direct result of claimant's compensable injury; therefore, I find that AHWP's subrogation claim pursuant to A.C.A. §11-9-411(c)(2)(A) equals \$11,670.47. The respondent carrier is hereby ordered to hold in reserve this sum for a period of five years. If after the expiration of this five year period no release or final Court order is presented otherwise directing payment of those sums, then the sums shall be tendered to the Death & Permanent Total Disability Trust Fund in accordance with A.C.A. §11-9-411(c)(2)(B).

I should note that claimant has contended that AHWP's subrogation interest should be \$5000.00. I find no merit to this contention. My review of the evidence reveals that \$11,670.47 was paid by AHWP for medical treatment associated with claimant's compensable injury. Medical paid to St. Mary's for claimant's hospitalization alone equaled \$9,101.60. Thus, I find no evidentiary basis to support a contention that the subrogation interest is only \$5,000.00.

In reaching this decision, I do note that the claimant has undergone three surgical procedures subsequent to November 18, 2000. However, I find based upon the evidence presented that only the first surgery was causally related to the claimant's compensable injury. Following claimant's visit with Dr. Bynum on December 28, 2000, claimant next sought medical treatment from Dr. Bynum on January 23, 2001, at which time claimant was diagnosed as suffering from a sephis-type syndrome and admitted to St. Mary's Hospital. Importantly, it appears from Dr. Bynum's admission notes that claimant's hospitalization and subsequent medical treatment involves a condition relating to his right foot, not the compensable left foot injury. In his admission notes of that date Dr. Bynum noted that over the last twenty-four hours the claimant had developed fevers, chills, sweats, body aches, nausea with vomiting and elevated blood sugars with some redness in his right leg.

He also noted that claimant had some healing callous ulcers on the bottom of his right foot and his left foot, but noted that these were not affected in appearance. Finally, he

noted that claimant had an area of erythema over the distal tibia of his right leg which was tender and typical of cellulitis.

Furthermore, in a hospital discharge summary dated January 29, 2001, Dr. Bynum mentioned claimant's problems involving the right leg but not his left.

In short, there is insufficient evidence indicating that claimant's hospitalization and medical treating beginning January 23, 2001 was causally related to his compensable left foot injury. Therefore, payment for that medical treatment is not the responsibility of the respondent workers' compensation carrier and AHWP is therefore not entitled to subrogation for those medical benefits paid.

The claimant's third hospitalization occurred on February 16, 2001. In his admission report Dr. Bynum noted that claimant had been admitted to the hospital with symptoms similar to those which were present at his hospitalization three weeks ago. Furthermore, at this time Dr. Bynum requested that the claimant be re-evaluated by Dr. Cooper. In his report dated February 16, 2001, Dr. Cooper indicated that claimant's prior compensable wound had healed.

The last time I saw him was in mid December. I had operated on him late last year and amputated his fourth toe. When I last saw him in December, he still had an open wound from that operation and he actually has some purulence there and we changed his antibiotics. He missed subsequent appointment and I have not seen him since; however, that wound has healed... His surgical wound, which was not healed when I saw him approximately two months ago is now completely healed and benign in appearance.

I also believe it is important to note that on March 28, 2001, Dr. Cooper noted that claimant still had an ulcer on his right big toe, but that the ulcer on the planter part of claimant's left foot where the amputation occurred is dry and superficial.

Accordingly, based upon this evidence, I find that the third hospitalization of claimant beginning on February 16, 2001, was not causally related to claimant's compensable left

foot injury. The medical records indicate that claimant's left foot injury had healed by the time he was evaluated by Dr. Cooper on that date. Therefore, medical treatment associated with this third hospitalization is not the liability of the respondent workers' compensation carrier and AHWP is not entitled to a subrogation of that sum.

In summary, I find that as a result of the compensable injury to claimant's left foot the group health carrier paid medical benefits totaling \$11,670.47 for the period beginning November 22, 2000 and continuing through December 28, 2000. Medical benefits for subsequent hospitalizations are not causally related to the claimant's compensable injury. Accordingly, pursuant to A.C.A. §11-9-411, I find that the group carrier has a potential subrogation claim in the amount of \$11,670.47.

In its remand the Commission ordered a hearing on the joint petition settlement following a determination of any potential subrogation claim. Having now determined the potential subrogation claim, a hearing will be set on the parties' proposed joint petition for final settlement as soon as possible.

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The subrogation claim of the Associates' Health & Welfare Plan equals \$11,670.47.

ORDER

The Associates' Health & Welfare Plan subrogation claim equals \$11,670.47. CNA Insurance Company is hereby ordered to hold in reserve this sum for a period of five years. If after expiration of this five year period no release or final court order is presented otherwise directing payment of this sum, then CNA is hereby ordered to tender this amount to the Death & Permanent Total Disability Trust Fund.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE