

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F206832

WILLIAM MAZE, Employee	CLAIMANT
DANAHER TOOL GROUP, Employer	RESPONDENT
GAB ROBINS NORTH AMERICA, Carrier	RESPONDENT

OPINION & ORDER FILED MARCH 8, 2004

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

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

Respondents represented by CAROL LOCKARD WORLEY, Attorney, Little Rock, Arkansas.

OPINION & ORDER

\_\_\_\_\_ This case comes on for review following a pre-hearing conference and briefs submitted by the parties regarding an attorney fee.

This claimant suffered a compensable injury to his left upper arm on June 19, 2001, when a piece of steel became lodged in his arm. The claimant underwent surgery to remove the steel but continued to have persistent numbness in his small finger and weakness in the ulnar distribution of his left arm. As a result, Dr. James Moore, claimant's primary treating physician, in a report dated August 16, 2001 indicated that claimant might have significant ulnar nerve damage just above his elbow. Dr. Moore indicated that a nerve graft might be necessary and as a result recommended that claimant undergo an evaluation and possible surgery by Dr. Susan McKinnon at Barnes Hospital in St. Louis.

Claimant was also evaluated by Dr. Michael Moore in Little Rock for a second opinion. Dr. Moore recommended surgery to repair claimant's ulnar nerve and indicated that he performed this type of procedure on a frequent basis.

Claimant originally filed a claim contending that he was entitled to an evaluation and treatment by Dr. McKinnon. This claim was the subject of a pre-hearing conference which

was conducted on August 7, 2002. At the time of that pre-hearing conference a hearing was subsequently set for September 25, 2002. Subsequent to the pre-hearing conference the parties determined that a hearing was not necessary and instead requested that the claim be submitted for consideration on stipulations set forth in the pre-hearing order, documentary evidence submitted, and briefs.

The claim was submitted and I filed an opinion on October 22, 2002, finding that claimant had failed to prove by a preponderance of the evidence that evaluation and treatment by Dr. McKinnon in St. Louis was reasonable and necessary. In reaching this decision I noted that the same medical treatment was available from Dr. Michael Moore, a hand specialist, in Little Rock.

Subsequent to the October 22, 2002 opinion, claimant filed a notice of appeal with the Full Commission. While this case was on appeal the respondent indicated that it would go ahead and allow the claimant to be evaluated by Dr. McKinnon in St. Louis. As a result, claimant filed a motion requesting that the appeal be dismissed and this motion was granted by Commission order dated April 23, 2003.

According to correspondence subsequently submitted by the respondent, it appears that Dr. McKinnon, while willing to evaluate the claimant for a second opinion, was not willing to actively treat the claimant. As a result, a second pre-hearing conference was conducted in this case on February 18, 2004. At that pre-hearing conference the parties agreed that claimant would undergo additional medical treatment for his compensable injury from Dr. Michael Moore in Little Rock. This left as an issue to be determined claimant's contention that he is entitled to a controverted attorney fee for the medical treatment requested from Dr. Susan McKinnon. Again, the parties have agreed that a hearing is not necessary but instead have submitted briefs and documentary evidence with regard to this issue. These items have been blue-backed and are being considered as part of the record in this claim.

As previously noted, the only issue presented in this case is whether claimant's attorney is entitled to a controverted attorney fee for medical treatment requested from Dr. Susan McKinnon in St. Louis. I find that claimant's attorney is not entitled to a fee in this case. The attorney fee statute in effect at the time of claimant's injury codified at A.C.A. §11-9-715(a)(1)(B)(i) states that in cases where the Commission finds that a claim has been controverted, the Commission may order a fee to be paid, one-half by the employer or carrier "in addition to the compensation awarded" and one-half by the employee "out of compensation payable to them."

In this particular case, no benefits were awarded or payable to the claimant. To the contrary, the original opinion filed October 22, 2002, specifically found that claimant had failed to meet his burden of proving by a preponderance of the evidence that evaluation and treatment by Dr. McKinnon in St. Louis was reasonable and necessary. While this case was appealed to the Full Commission and the respondent subsequently agreed to allow claimant to undergo an evaluation by Dr. McKinnon, Dr. McKinnon never performed an evaluation. While the record contains no documentation from Dr. McKinnon as to her reasons for not evaluating the claimant, correspondence from the respondent indicates that Dr. McKinnon was only willing to evaluate the claimant for a second opinion, not for continued medical treatment. As a result, the parties have now agreed that claimant will undergo additional treatment and evaluation by Dr. Michael Moore in Little Rock.

In summary, I find that claimant's attorney is not entitled to an attorney fee in this claim. First, the opinion filed October 22, 2002 specifically found that claimant had failed to meet his burden of proving by a preponderance of the evidence that evaluation and treatment by Dr. McKinnon was reasonable and necessary. While on appeal the respondent agreed to allow the claimant to undergo an evaluation by Dr. McKinnon. However, Dr. McKinnon is not willing to actively treat the claimant. Instead, claimant has agreed to receive treatment from Dr. Michael Moore. While the respondent controverted

claimant's entitlement to treatment from Dr. McKinnon, the claimant has not prevailed. The opinion of October 22, 2002 specifically finds that treatment from Dr. McKinnon is not reasonable and necessary and despite respondent's willingness to now allow claimant to undergo an evaluation from Dr. McKinnon, Dr. McKinnon is unwilling to treat the claimant. Therefore, given the fact that a finding was made that treatment from Dr. McKinnon was not reasonable and necessary and the fact that Dr. McKinnon, even after the acquiescence of the respondent is still not willing to treat the claimant, I do not find that claimant has prevailed in any way in this claim such that a controverted attorney fee would be justified. Therefore, I find that claimant's attorney is not entitled to a fee in this claim.

IT IS SO ORDERED.

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GREGORY K. STEWART  
ADMINISTRATIVE LAW JUDGE