

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F306018

ANIBAL POSADAS

CLAIMANT

SUPERIOR INDUSTRIES

RESPONDENT

CROCKETT ADJUSTMENT,  
INSURANCE CARRIER/TPA

RESPONDENT

SUPPLEMENTAL OPINION FILED NOVEMBER 12, 2004

Hearing before ADMINISTRATIVE LAW JUDGE MICHAEL L. ELLIG in Springdale, Washington County, Arkansas.

Claimant represented by LAURA MCKINNON, Attorney, Fayetteville, Arkansas.

Respondents represented by CURTIS NEBBEN, Attorney, Fayetteville, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on June 14, 2004, in Springdale, Arkansas. An Opinion was entered in this case on August 17, 2004. In this Opinion, it was held that the issues raised in the pre-hearing order could not be resolved until a determination had been made in regard to whether or not the claimant had also sustained compensable injuries to his upper back or neck, in the employment related accident of January 28, 2003. The parties were given the opportunity to either litigate this matter, as a contested issue, or to stipulate to the occurrence of such compensable injuries (in addition to the previously stipulated lower back injury). By letter from respondent's counsel, dated September 3, 2004, the respondent agreed to the entry of an additional stipulation that the claimant sustained compensable injuries to his back, in general, and his neck or cervical spine in an employment related accident on January 28, 2003. The claimant has made no response to this proffered additional stipulation. As I can see no way in which the claimant could logically object to such a stipulation, I am going to assume that he concurs. Therefore, the issue set out in the pre-hearing order of April 12, 2004, will be addressed based upon this additional stipulation and the prior record.

By agreement of the parties, the following stipulations have been submitted to the Commission for its consideration and are hereby accepted:

1. On January 28, 2003, the relationship of employee-self insured employer-third party administrator existed between the parties.
2. The appropriate weekly compensation rates are \$355.00 for total disability and \$266.00 for permanent partial disability.
3. On January 28, 2003, the claimant sustained compensable injuries to his back, and neck or cervical spine.
4. There is no dispute over the payment of medical expenses incurred for services by physicians at First Care Family Clinic and Trinity Physical Rehabilitation.
5. The respondent controverts the claimant's entitlement to the payment of any expenses incurred for medical services by any providers except those noted above and his entitlement to any temporary total or permanent disability benefits.

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 temporary total disability benefits from May 22, 2003 through July 15, 2003, including whether the claimant is barred from receiving such benefits by the provisions of Ark. Code Ann. § 11-9-526.
2. The claimant's entitlement to the payment of medical expenses incurred for services by and at the direction of Dr. Luke Knox, including whether the claimant is barred from the receipt of these benefits by Ark. Code Ann. § 11-9-514.
3. The claimant's entitlement to the payment of permanent disability benefits for permanent physical impairment.
4. Attorney's fees.

In regard to these issues, the claimant contends that the claimant sustained a compensable neck and back injury arising out of and in the course of employment with the respondent on or about January 28, 2003. On that date, the claimant was working as a wheel polisher, lifting wheels weighing 50 to 80 lbs. when he was injured. As a result of this compensable injury, the claimant

seeks temporary total disability benefits from May 22, 2003 through July 15, 2003. The claimant also contends that he is entitled to the payment of all reasonably necessary medical expenses, including those rendered him by and at the direction of Dr. Luke Knox. Finally, the claimant seeks permanent partial disability benefits for permanent physical impairment.

In regard to these issues, the respondent contends that they accepted this claim as compensable and provided medical treatment through First Care Family Physicians and Trinity Physical Rehabilitation. The claimant stopped attending physical therapy after four (4) sessions and began seeking medical treatment on his own. The respondent contends that this medical treatment is unauthorized. The respondent has not denied authorized medical treatment. The respondent contends that work was made available for the claimant and that he is not entitled to any temporary total disability benefits. Finally, the respondent contends that the claimant is not entitled to permanent physical impairment.

## DISCUSSION

### I. MEDICAL EXPENSES

\_\_\_\_\_ The first issue concerns the claimant's entitlement to the payment of expenses incurred for medical services rendered him for his compensable injury by and at the direction of Dr. Luke Knox. Included in this issue is whether or not the services of Dr. Knox constitute "unauthorized" medical services, under Ark. Code Ann. § 11-9-514.

Based upon the evidence presented, it appears that the medical services rendered to the claimant, by and at the direction of Dr. Knox were necessitated by or connected with his compensable injuries. These services were also of a type and nature commonly employed by the general medical community in the evaluation and treatment of injuries such as those experienced by the claimant on January 28, 2003. Thus, it would appear that these medical services would satisfy the requirement for "reasonably necessary" medical services, under Ark. Code Ann. § 11-9-508.

However, the record also shows that, prior to reporting the employment related accident of January 28, 2003, the claimant (on his own), sought the services of Dr. Brennan Uehling (a

chiropractor). When properly notified of the compensable injury, the respondents exercised their right to select the claimant's initial treating physician, Ark. Code Ann. § 11-9-514(a)(3)(A)(i). The respondents authorized the claimant to receive appropriate medical care for his compensable injuries by and at the direction of physicians at First Care Medical Clinic, specifically Dr. Garland Thorn and Dr. Scott Fedosky. These physicians provided the claimant with appropriate medical services from February 7, 2003 through approximately March 10, 2003. Still, the claimant continued to consult Dr. Uehling during this period.

In mid March of 2003, the claimant stopped seeing Dr. Thorn and Dr. Fedosky, but continued his treatment with Dr. Uehling. An MRI study was then performed voluntarily on the claimant by Dr. Michael Morse, at the request of Dr. Uehling. Following this study, Dr. Uehling referred the claimant to Dr. Luke Knox, a neurosurgeon, for an evaluation and consultation. It appears from the records of Dr. Knox that, except for various examination and tests, he has provided the claimant with little or no actual treatment. After he performed a myelogram on the claimant, he opined that the claimant was not a surgical candidate and discharged him from any further testing or treatment. I find it curious that in his various reports, Dr. Knox appears to have difficulties in remembering whether the claimant is male or female.

The evidence shows that when the respondent was properly notified of the claimant's compensable injury, he was provided (in person), with a Commission form N. This is the form approved and prescribed by this Commission setting out the claimant's rights and responsibilities concerning the selection of physicians and the method and manner of changing physicians. This written form was only in English.

Finally, the evidence shows that subsequent to the receipt of this form, the claimant made no attempt to obtain authorization from the respondent or this Commission for the continued treatment by Dr. Uehling or the subsequent treatment or evaluation by Dr. Knox. In fact, there has been no request, whatsoever, for a change of physician under Ark. Code Ann. § 11-9-514.

With the recognized exception of emergency treatment, a claimant cannot deprive the

respondent of their right to select the initial treating physician by seeking medical care before reporting the occurrence of the compensable injury. In the present case, I do not find the services of Dr. Uehling or Dr. Knox to represent “emergency” medical treatment. The claimant had ample opportunity to report his injury and request medical services from the respondent, prior to his seeking those services on his own, from Dr. Uehling. He also had ample opportunity to request a change of physicians before he saw Dr. Knox.

Under the provisions of Ark. Code Ann. §11-9-701, the respondent would not be liable for the expense of any services provided by Dr. Uehling, prior to their receipt of appropriate notice of the claimant’s compensable injuries. There is no evidence to indicate that the respondent subsequently acquiesced or authorized the claimant to receive medical services from Dr. Uehling or that it ever accepted liability for any of the expense of these services. Thus, the services provided to the claimant by and at the direction of Dr. Uehling would represent “unauthorized” medical services, under the provisions of Ark. Code Ann. §11-9-514.

As Dr. Uehling was not an “authorized” treating physician, his referral of the claimant to Dr. Knox can in no way make Dr. Knox’s services “authorized”. As previously noted, the services rendered to the claimant by and at the direction of Dr. Knox would not constitute “emergency” medical services. Again, the respondent has never authorized the claimant to receive medical services from Dr. Knox and have never accepted liability for the expense of Dr. Knox’s services. Thus, the medical services of Dr. Knox would represent “unauthorized” medical services, under the provisions of Ark. Code Ann. §11-9-514.

It is of no consequence that the claimant cannot read English. In order to invoke the application of Ark. Code Ann. §11-9-514, the legislature has seen fit to require the respondent only to furnish the claimant with a copy of the approved notice concerning the claimant’s rights and responsibilities concerning a change of physicians. The legislature has not seen fit to place upon the respondent the responsibility to provide the claimant with actual knowledge of his rights and responsibilities in this area. There is no requirement that this information be verbally conveyed to

illiterate claimants or conveyed to claimants in their native tongue, either written or (in the instance of the claimants who are illiterate in their native tongue) verbally. The respondent has complied with all of the requirements necessary to invoke the application of the provisions of Ark. Code Ann. § 11-9-514(b) to the medical services provided to the claimant by and at the direction of Dr. Uehling and Dr. Knox. Thus, pursuant to this subdivision, the respondent cannot be held liable for the expense of these medical services.

## II. TEMPORARY TOTAL DISABILITY BENEFITS

The next issue concerns the claimant's entitlement to temporary total disability benefits from May 22, 2003 through July 15, 2003. This also includes the corollary issue of whether the claimant is barred from receiving these benefits during this period by the provisions of Ark. Code Ann. § 11-9-526.

The initial burden rests upon the claimant to prove his entitlement to these temporary total disability benefits. In order to meet this burden, the claimant must prove (by the greater weight of the credible evidence) that, during this time, he continued within his healing period from the effects of his compensable injury and was rendered totally disabled from performing all forms of regular gainful employment by his compensable injury.

The duration of the healing period is a medical question and which must be resolved on the basis of the greater weight of the credible medical evidence presented. Although Dr. Uehling and Dr. Knox have been found to be "unauthorized" physicians, their reports and records are still relevant in regard to the duration of the claimant's healing period.

Applicable case law provides that the healing period continues until the claimant has achieved the maximum benefit of time and medical treatment in the resolution or stabilization of the actual physical damage caused by the compensable injury. Once this underlying physical damage has resolved or at least stabilized, so that nothing further in the way of medical treatment offers a reasonable expectation of improvement, then the healing period has ended. Once this has occurred, the mere continuation of symptoms and complaints attributable to any remaining permanent injury

is not sufficient, in and of itself, to extend the healing period.

The medical evidence in this case indicates that the claimant continued to receive physical therapy through March 24, 2003. He apparently received continued chiropractic care through approximately April 9, 2003. On April 17, 2003, he was initially evaluated by Dr. Knox. As a result of his evaluation and review of the MRI study, Dr. Knox recommended a myelogram for the apparent purpose of determining the necessity of surgical intervention. This study was performed at Washington Regional Medical Center on May 15, 2003. On May 22, 2003, the claimant was seen by Dr. Knox for follow up and review of the myelogram. On that date, Dr. Knox indicated that he recommended no surgery or other treatment be performed, and he released the claimant from his care to return to work at "full duty". There is no evidence, whatsoever, that any further medical services have been provided or recommended to the claimant by any physician, after May 22, 2003.

After consideration of all the evidence presented, it is my opinion that the claimant has failed to prove by the greater weight of the credible evidence that his healing period from the effects of his compensable injuries continued beyond May 22, 2003. In fact, it appears from the evidence presented that any underlying physical damage caused by his compensable injuries had stabilized and become permanent by May 22, 2003, at a level where no further medical services would be reasonably expected to offer improvement.

The claimant's failure to prove that his "healing period" extended beyond May 22, 2003, would prevent him from receiving an award of temporary total disability benefits after that date. Therefore, it is unnecessary to address the issues of the claimant's disability status, after May 22, 2003, or the possible application of Ark. Code Ann. § 11-9-526.

### III.

#### PERMANENT IMPAIRMENT

The final issue concerns the claimant's entitlement to permanent partial disability benefits solely for permanent physical impairment. This issue is controlled by the provisions of Ark. Code Ann. § 11-9-522(a). The burden rests upon the claimant to prove the existence and extent of any permanent physical impairment attribute to his compensable injuries.

In order to meet this burden, he must also show that the existence and extent of this permanent physical impairment is supported by and based upon "objective and measurable physical findings", Ark. Code Ann. § 11-9-704(c)(1)(B). In determining the extent of permanent physical impairment, no consideration can be given to pain, straight leg raising test results, or range of motion test results, Ark. Code Ann. § 11-9-102(16)(A)(ii). The method and manner of calculating the existence and extent of permanent physical impairment must conform to the official rating Guide adopted by this Commission, Ark. Code Ann. § 11-9-522(g). Finally, the claimant must establish that his compensable injuries were the "major cause" (more than 50%) of any permanent physical impairment, Ark. Code Ann. § 11-9-102(F)(ii)(a).

In regard to this issue, the claimant has offered the expert medical opinion of Dr. Luke Knox, which is contained in his narrative report of October 27, 2003. In this report, Dr. Knox states that his diagnosis of the etiology of the claimant's compensable injuries are in the form of herniated intervertebral discs at C5-6 and C6-7. For this injury, he assesses a permanent physical impairment of 7% to the body as a whole. He states that this impairment rating conforms to the American Medical Association's Guides to the Evaluation of Permanent Impairment (fourth edition) and specifically refers to Table 75, IIC on page 113 of this treatise.

The opinion of Dr. Knox is concise and unqualified. He has had the benefit of his personal examination of the claimant, the results of all prior testing, and the results of the myelogram he performed on May 13, 2003 (this particular test is recognized by the medical community as being the "gold standard" in determining the existence and extent of discal injuries). Although Dr. Knox

may not have been the claimant's "authorized" physician, he is a board certified neurosurgeon with considerable experience and expertise in the area of medicine associated with discal injuries. His opinions are entitled to considerable weight and credible. I would also note that the degree of impairment assessed does, in fact, conform with the official rating Guide adopted by this Commission. Further, Dr. Knox has used the method that is commonly recognized by this Commission as being appropriate for the assessment of permanent physical impairment for spinal injuries. This preference for employing this particular method is based upon the fact that it does not give any consideration to pain, range of motion, or any other subjective factors.

Thus, I find the opinion of Dr. Knox satisfies the requirement of Ark. Code Ann. §11-9-102(16)(B). I further find that his assessment of permanent physical impairment meets the requirements of Ark. Code Ann. §11-9-522(g). I further find that this assessment of permanent physical impairment is supported by objective findings, as required by Ark. Code Ann. §11-9-704(c)(1)(B). These findings include the defects noted on the MRI study of March 18, 2003, Dr. Knox's physical examination (the absent left triceps reflex), and apparently objective defects noted on the subsequent myelogram of May 13, 2003. Although the specific results of the myelogram have not been tendered into evidence, this test was performed by Dr. Knox and was clearly considered by him in reaching his final diagnosis.

However, there still remains the final matter of whether the claimant has shown that his compensable injuries are the "major cause" of this degree of permanent physical impairment. Clearly, the herniated discs at C5-6 and C6-7 are the sole cause of this degree of permanent impairment. Although the initial chiropractic records record a history of neck or back difficulties going back to October of 2001, and refer to a motor vehicle accident in El Salvador, the claimant's testimony and subsequent medical records give a differing history of the onset of his neck and radicular symptoms. The claimant's testimony and the other medical records relate that his severe cervical and radicular difficulties with his left upper extremity (which would be particularly indicative of the actual occurrence of a discal injury), had a sudden onset that occurred contemporaneously

with his employment related accident on January 28, 2003. It is undisputed that the claimant had been employed by the respondent performing relatively heavy and repetitious lifting, since September 13, 2002, and that he performed these job duties, without difficulty, until January 28, 2002. Finally, the medical records of Dr. Knox note a progression of the claimant's radicular symptoms between his initial chiropractic care and his evaluation by Dr. Knox on April 17, 2003. Both the chiropractic records and the reports of Dr. Knox indicated a diminished sensation in the left upper extremity over a C6 dermatomal pattern. However, Dr. Knox noted an absent triceps reflex, while the chiropractic records note the presence of such a reflex. This change or progression of the claimant's neurological difficulties would be indicative of the presence of a more recent injury, in October of 2001.

It is my finding that the greater weight of the credible evidence establishes that the claimant's compensable injury of January 28, 2003, was the "major cause" of his objectively demonstrated discal defects at C5-6 and C6-7. As his compensable injury was the "major cause" of these defects, it is also the major cause of any impairment attributable solely to these defects. Thus, I find that the claimant has satisfied the remaining requirement of Ark. Code Ann. § 11-9-102(F)(ii)(a).

#### FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On January 28, 2003, the relationship of employee-self insured employer-third party administrator existed between the parties.
3. On January 28, 2003, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$355.00 for total disability and \$266.00 for permanent partial disability.
4. On January 28, 2003, the claimant sustained compensable injuries to his back and cervical spine, including injuries in the form of disc herniations at C5-6 and C6-7.
2. There is no dispute over the payment of medical expenses incurred for services rendered to the claimant for his compensable injuries by and at the direction of

physicians at First Care Family Clinic and Trinity Physical Rehabilitation.

3. The claimant has proven that the medical services provided him for his compensable injuries by and at the direction of Dr. Brennan Uehling and Dr. Luke Knox constitute “reasonable necessary” medical services for his compensable injuries. However, the evidence further reveals that these medical services were not “emergency” medical services and were “unauthorized” medical services, within the meaning of Ark. Code Ann. § 11-9-514. As the claimant was provided with the appropriate notice required by subdivision (c) (1) of this subsection, the expense of the services provided him by these physicians cannot be imposed upon the respondent herein but is solely his liability, Ark. Code Ann. § 11-9-514(b).
4. The claimant has failed to prove that he was rendered temporarily totally disabled as a result of his compensable injuries, for the period of May 22, 2003 through July 15, 2003. Specifically, he has failed to prove by the greater weight of the credible evidence that he continued within “his healing period” from the effects of his compensable injuries on and after May 22, 2003.
5. The claimant has sustained a permanent physical impairment of 7% to the body as a whole, as a result of his compensable injuries. He would be entitled under Ark. Code Ann. § 11-9-522(a) for permanent partial disability benefits for this permanent impairment.
6. The respondent has controverted the claimant’s entitlement to the payment of any expenses incurred for medical services , other than those rendered him by and at the direction of the physicians at First Care Family Clinic and Trinity Physical Rehabilitation. The respondent has also controverted his entitlement to temporary total disability benefits on and after May 22, 2003, and his entitlement to any permanent partial disability benefits for permanent physical impairment.

7. A reasonable fee for the claimant's attorney is the maximum statutory attorney's fee on the controverted permanent partial disability benefits herein awarded.

ORDER

For the reasons heretofore stated in this Opinion, the respondent is not liable for the expense of any medical services provided to the claimant by and at the direction of Dr. Brennan Uehling and Dr. Luke Knox, as such expenses were incurred for non emergency medical services by "unauthorized" physicians. Thus, any claim made for the payment of these expenses should be and hereby is denied and dismissed.

For the reasons heretofore set forth in this Opinion the claim for temporary total disability benefits for the period of May 22, 2003 though July 15, 2003 should be and hereby is denied and dismissed.

The respondent shall pay to the claimant permanent partial disability benefits for permanent physical impairment in the amount of 7% to the body as a whole.

The respondent shall pay to the claimant's attorney the maximum statutory attorney's fee on the controverted permanent partial benefits herein awarded. One-half of this fee is the obligation of the respondent in addition to such benefits. The remaining one-half of this fee shall be withheld by the respondent 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.

---

MICHAEL L. ELLIG  
Administrative Law Judge

