

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F303330

RICHARD CLARK, Employee	CLAIMANT
FURNITURE & APPLIANCES NOW, Employer	RESPONDENT
AIG CLAIMS SERVICES, Carrier	RESPONDENT

OPINION FILED MAY 25, 2005

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

Claimant represented by KENNETH OSBORNE, Attorney, Fayetteville, Arkansas.

Respondents represented by MELISSA CRINER, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On May 4, 2005, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on March 2, 2005, and a pre-hearing order was filed on that same date. A copy of the pre-hearing order has been marked Commission's Exhibit #1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The relationship of employee-employer-carrier existed among the parties on December 3, 2002.
3. The claimant sustained a compensable injury to his neck on December 3, 2002.
4. The claimant was earning an average weekly wage of \$433.84 which would entitle him to total disability benefits at the rate of \$289.00 per week and permanent partial disability benefits at the rate of \$217.00 per week.
5. Respondent has paid claimant permanent partial disability benefits based upon a 7% rating.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Claimant's entitlement to additional medical treatment.
2. Temporary total disability benefits from December 22, 2004 through a date yet to be determined.
3. Attorney fee.

The claimant contends that he is entitled to additional medical treatment for his neck, as well as temporary total disability benefits and an attorney's fee.

The respondents contend that all appropriate benefits have been and are continuing to be paid with regard to this claim. Respondents have at least one medical opinion indicating that surgery is not reasonable and necessary with regard to this matter. It is respondent's position that the claimant's need for surgery is associated with arthritic changes in his neck and not any traumatic work-related injury. As such, the respondents contend they should not be liable for benefits associated with any surgical intervention.

From a review of the record as a whole, to include medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witnesses and to observe their demeanor, the following findings of fact and conclusions of law are made in accordance with A.C.A. §11-9-704:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on March 2, 2005, and contained in a pre-hearing order filed that same date, are hereby accepted as fact.
2. Claimant has met his burden of proving by a preponderance of the evidence that he is entitled to additional medical treatment for his compensable injury. Specifically, claimant is entitled to surgery as recommended by Dr. Luke Knox.
3. Claimant has met his burden of proving by a preponderance of the evidence that he is entitled to temporary total disability benefits beginning December 22, 2004 and

continuing through a date yet to be determined.

4. Respondent has controverted claimant's entitlement to indemnity benefits.

FACTUAL BACKGROUND

The claimant has worked for a number of companies which rent appliances and electronics. One of the companies for whom the claimant worked was the respondent. Claimant's job duties with the respondent involved pickup and delivery of appliances and electronics. On December 31, 2002 the claimant had picked up a television from a customer and was driving back to the respondent's store when his vehicle was struck by another driver. Claimant testified that he felt his neck and head snap and he was taken by ambulance to the emergency room.

Claimant's injury was accepted as compensable and he has been evaluated by a number of treating physicians including Drs. Haws, Bailey, Arnold, Blankenship, Standefer, and Knox. Dr. Knox has been the claimant's primary treating physician.

Following the claimant's injury numerous tests have been performed which have all centered on the claimant's cervical spine at the C3-4 and C5-6 levels. The medical records indicate that claimant has spurs at both of those locations, but it is unclear as to whether they encroach upon the nerve roots. Claimant has undergone a significant amount of conservative treatment including facet injections by Dr. Cannon which have provided a limited benefit to the claimant. Claimant has also undergone the use of an RS stimulator which provided no benefit. In a report dated October 11, 2004, Dr. Knox indicated that given claimant's response to the facet injections he would not recommend surgery at that time. He indicated that he was releasing the claimant from his care and that claimant should return for additional treatment if needed. In a letter dated November 8, 2004, Dr. Knox indicated that he would not recommend surgery at that time. He indicated that claimant had probably reached maximum medical improvement but might

benefit from further chiropractic/pain management treatment. Dr. Knox also assigned the claimant a permanent physical impairment rating in an amount equal to 7% to the body as a whole. Finally, Dr. Knox also noted that he might consider surgery if claimant's condition worsened.

Claimant was next evaluated by Dr. Knox on December 22, 2004 and described his condition as "absolutely miserable." As a result, Dr. Knox recommended that the claimant undergo a cervical discectomy and fusion at the C3-4, C4-5, and C5-6 levels.

Claimant has filed this claim requesting additional medical treatment for his compensable injury; specifically, the surgery recommended by Dr. Knox. Claimant also seeks payment of temporary total disability benefits from December 22, 2004 through a date yet to be determined.

ADJUDICATION

The claimant has the burden of proving by a preponderance of the evidence that medical treatment is reasonably necessary for treatment of a compensable injury. *Norma Beatty v. Ben Pearson, Inc.*, Full Commission Opinion filed February 17, 1989 (D612291). What constitutes necessary medical treatment is a question of fact to be determined by the Commission. *White Consolidated Industries v. Galloway*, 74 Ark. App. 13, 45 S.W. 3d 396 (2001).

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that claimant has met his burden of proving by a preponderance of the evidence that he is entitled to additional medical treatment; specifically, surgery as recommended by Dr. Knox.

Whether claimant is entitled to additional medical treatment and the recommended surgery primarily depends upon whether one accords more weight to the opinion of Dr. Knox or to the remaining evidence. I find that the opinion of Dr. Knox is credible and entitled to great weight. Dr. Knox is a highly respected neurosurgeon in Northwest

Arkansas and he has been the claimant's primary treating physician for more than one year. It is clear from a review of Dr. Knox's medical reports that claimant's condition has not been one which has easily been diagnosed. In fact, Dr. Knox himself in October and November of 2004 released the claimant from his care and assigned an impairment rating. Dr. Knox also indicated that surgery was not recommended at that time. However, Dr. Knox also indicated that surgery would be considered if the claimant's condition worsened. By the time of claimant's visit with Dr. Knox on December 22, 2004, claimant's condition had worsened to the point that Dr. Knox described claimant as "absolutely miserable". Based upon claimant's condition as well as his review of all testing and prior examinations, Dr. Knox recommended surgery to alleviate a portion of claimant's pain.

I also note that it is Dr. Knox's opinion that claimant's condition is causally related to his compensable injury. In a letter dated December 4, 2003, Dr. Knox addressed this issue in response to an inquiry by the carrier.

Causation. As you know, I have reviewed his records dating back to his initial evaluation in my clinic on June 27, 2003, at which point he relates his neck pain to a motor vehicle accident occurring on December 31, 2002, although his x-rays reveal a large spur at C3-C4. I suspect that this is the culprit of his continuing complaints, which seem to be resulting from the motor vehicle accident on December 31, 2002. In other words, this would be an exacerbation of a preexisting condition.

In contrast to the opinion of Dr. Knox is the opinion of Dr. Standefer, a neurosurgeon, who evaluated claimant at respondent's request in September 2004. Dr. Standefer at that time stated that claimant's condition was consistent with a longstanding chronic cervical strain. It was his opinion that claimant would not benefit from surgery.

I find that the opinion of Dr. Knox is entitled to greater weight than that of Dr. Standefer. First, Dr. Knox has been claimant's primary treating physician and has evaluated the claimant on numerous occasions. On the other hand, Dr. Standefer evaluated the claimant on only one occasion. Furthermore, Dr. Standefer has not

evaluated the claimant since September 2004 while on the other hand Dr. Knox has continued to evaluate the claimant and based upon those subsequent evaluations has now concluded that surgery should be performed.

Finally, I note that respondent also offered into evidence a report from Dr. B. J. Rutledge dated January 3, 2005, wherein he states that claimant's condition might be made worse by the recommended surgery. I find that Dr. Rutledge's opinion is entitled to less weight than the opinion of Dr. Knox. First, Dr. Rutledge has never examined the claimant, but instead has only reviewed medical reports. Furthermore, Dr. Rutledge appears to be employed by the workers' compensation carrier. Finally, there is no indication that Dr. Rutledge is a specialist as is Dr. Knox.

In summary, as previously noted, this case basically boils down to whether one accords the opinion of Dr. Knox greater weight than the remaining evidence. I find based upon the evidence presented that Dr. Knox's opinion is entitled to great weight and therefore find that claimant has met his burden of proving by a preponderance of the evidence that he is entitled to additional medical treatment for his compensable injury; specifically, the surgery recommended by Dr. Knox.

The next issue for consideration involves claimant's request for temporary total disability benefits beginning December 22, 2004 and continuing through a date yet to be determined. In order to be entitled to temporary total disability benefits claimant has the burden of proving by a preponderance of the evidence that he remains within his healing period and that he suffers a total incapacity to earn wages. *Arkansas State Highway & Transportation Department v. Breshears*, 272 Ark. 244, 613 S.W. 2d 392 (1981). Here, Dr. Knox in October and November of 2004 opined that claimant had reached maximum medical improvement and released him from his care at that time. Based upon that release claimant did return to work. However, as previously noted, on December 22, 2004 Dr. Knox recommended surgery. He also recommended on that date that claimant be off

work until the surgery could be performed. Based upon the opinion of Dr. Knox which I find to be credible and entitled to great weight, I find that claimant remained within his healing period and that he suffered a total incapacity to earn wages beginning December 22, 2004, and continuing through a date yet to be determined.

Because claimant's compensable injury occurred after July 1, 2001, the claimant's attorney fee is governed by the amendments made by the Arkansas General Assembly in 2001. Pursuant to A.C.A. §11-9-715(a)(1)(B), claimant's attorney is entitled to an attorney fee in the amount of 25% of the compensation for indemnity benefits payable to the claimant. Thus, claimant's attorney is entitled to a 25% attorney fee based upon the temporary total disability benefits awarded. This fee is to be paid one-half by the carrier and one-half by the claimant. Also pursuant to A.C.A. §11-9-715(a)(1)(B), an attorney fee is not awarded on medical benefits.

AWARD

_____ Claimant has met his burden of proving by a preponderance of the evidence that he is entitled to additional medical treatment for his compensable injury. This includes surgery as recommended by Dr. Knox. Claimant has also met his burden of proving by a preponderance of the evidence that he is entitled to temporary total disability benefits beginning December 22, 2004 and continuing through a date yet to be determined. Respondent has controverted claimant's entitlement to all unpaid indemnity benefits.

Pursuant to A.C.A. §11-9-715(a)(1)(B), claimant's attorney is entitled to an attorney fee in the amount of 25% of the compensation for indemnity benefits payable to the claimant. Thus, claimant's attorney is entitled to a 25% attorney fee based upon the temporary total disability benefits awarded. This fee is to be paid one-half by the carrier and one-half by the claimant. Also pursuant to A.C.A. §11-9-715(a)(1)(B), an attorney fee is not awarded on medical benefits.

All sums herein accrued are payable in a lump sum without discount and this award shall bear interest at the maximum legal rate until paid.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE