

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F200619

RICHARD COSNER	CLAIMANT
C & J FORMS & LABELS CO.	RESPONDENT
SAFECO PROPERTY & CASUALTY INSURANCE CARRIER	RESPONDENT

OPINION FILED JULY 12, 2006

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

Claimant represented by EDDIE H. WALKER, JR., Attorney, Fort Smith, Arkansas.

Respondents represented by GUY ALTON WADE, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held on April 13, 2006, in Fort Smith, Arkansas.

A pre-hearing conference was held in this claim, and as a result a pre-hearing order was entered in the claim on January 18, 2006. This pre-hearing order set forth the stipulations offered by the parties, the issues to litigate and the contentions thereto.

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

1. The Arkansas workers' Compensation Commission has jurisdiction of this claim.
2. Prior opinions are res judicata and the law of this case.
3. The respondents have agreed to let the claimant return to Dr. Buie for medical treatment.

It was agreed by the parties that all of the issues set forth in the pre-hearing order of January 18, 2006, have been resolved

and will not be at issue her today. The parties agreed that the issues to be litigated at this hearing are as follows:

1. Compensability of the claimant's ulnar nerve palsy.
2. Medical treatment for the claimant's lunar nerve palsy.
3. Whether the referral from Dr. Buie to Dr. Woods is reasonable and necessary medical treatment for this claimant.

In regard to the foregoing issues the claimant contends that Dr. Buie is the primary treating physician and has been treating the claimant for several years and is aware of the various complications that have been involved in the claimant's recovery. The claimant has, in fact, undergone surgery for the ulnar nerve palsy and his testimony at the hearing will set forth the development of his symptoms and his condition. It is contended that Dr. Buie recommended that the claimant be seen by another physician in the early part of 2005 which the respondents would not authorize. Instead the respondents had the claimant examined by a physician in Little Rock, Dr. Barnes, and pending that examination would not authorize further treatment by or at the direction of Dr. Buie. After seeing Dr. Barnes the claimant returned to Dr. Buie who still was of the opinion that he needed to be seen by someone else. Dr. Buie has been in practice as an orthopedic surgeon in Fort Smith for over thirty years and he is eminently qualified to know what is available within the boundaries of the state of Arkansas and he has concluded that what the claimant needs is not available in Arkansas. Therefore, the recommendation being made by

Dr. Buie for the claimant's further evaluation for his condition should be complied with.

In regard to the foregoing issues the respondents contend that there is no objective evidence to support a finding of the existence of an ulnar nerve palsy. There has not been any record submitted to today or even before today that there is in fact this particular condition, which would then be related to or have some type of causation in relation to the original knee injury. It is further contended that there has been no indication with respect to Dr. Woods' specialty and as to why such a referral is necessary out of state. The respondents contend that in light of Rule 30, it is questionable if they can enforce this rule on any particular out of state physician further indicating that there is no indication as to why there is not a qualified physician in the state of Arkansas which could evaluate the claimant. It is noted that the respondents are not opposed to the claimant having an evaluation by a qualified physician in the state of Arkansas.

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

Subsequent to the hearing, the claimant submitted a report from Dr. James H. Buie dated April 5, 2006. This document will be admitted as Claimant's Exhibit No. 4. The respondent has objected

to the admission of this medical report. Their objection has been overruled and it will be admitted noting the respondents' acceptance. This record will be blue booked into the transcript.

#### DISCUSSION

The claimant agreed that it has previously been determined that he sustained a job related injury in December 2001. Subsequent to this determination, the claimant testified that he has had twelve surgeries on his right knee, one of them including a total knee replacement in 2003. The claimant testified that following that surgery he has had two other surgeries in hopes of getting him more movement in the knee. The claimant testified that his knee continues to hurt and he has very limited motion making it very hard to walk. The claimant explained that he is a salesman for the respondent and it is necessary for him to go out and meet with customers at their different plants and places of business. The claimant testified that he also has problems climbing stairs and that most plants have stairs which he must negotiate. The claimant testified that if he does not walk with his crutch sometimes his knee will go out from under him. Therefore, he stays on his crutches in order to keep from falling. The claimant testified that Dr. Buie and Dr. Mumme have been his primary treating physicians since December 2001.

The claimant testified that during the early part of 2005 the workers' compensation insurance carrier refused to authorize any further treatment by Dr. Buie. The claimant testified that the respondents insisted that he go to Little Rock to be seen by Dr.

Barnes before they would authorize him going back to Dr. Buie. The claimant testified that subsequent to being seen by Dr. Barnes he has returned to Dr. Buie who has continued to make recommendations and treat his knee.

The claimant testified that the week before this hearing, Dr. Buie operated on his right elbow and that currently he is in a cast from the palm of his hand up to his arm pit.

The claimant testified that he has been using a crutch which is designed with a cuff that fits around his upper arm and has a handle about twelve inches below the cuff. The claimant testified that since he is right-handed he uses this crutch on his right arm. The claimant testified that the collar or cuff hits him on the right elbow, noting that this type of crutch gives him more stability than the more traditional crutches. The claimant agreed that when using this crutch he uses his hand and arm to hold onto the handle that is sticking out. The claimant testified that he has been using this type of crutch for approximately three years. The claimant testified that a regular more standard type crutch caused him a lot more pain under his arms and he would fall more often with that type of crutch. The claimant stated that he never used any kind of crutch before his December 19, 2001, injury nor was he having any problems with his right elbow, hand or fingers before that date.

The claimant testified that prior to his surgery, his ring finger and little finger had gone completely to sleep and when they would come partially awake it would feel like someone was putting

pins and needles into his hand. The claimant testified that he was losing the use of his right hand and that when he would carry something, he would drop it and his ability to write is affected. The claimant testified that this condition seemed to be getting worse. The claimant testified that his surgery has been so recent he cannot tell any difference in his symptoms yet. The claimant testified that these symptoms started approximately a year and a half after he had begun using the type crutch he is currently using. The claimant testified that when he was using his crutch he could tell a difference in his symptoms in his hands and fingers in that he could tell that the pressure was causing his fingers not to work. The claimant clarified by stating that the cuff presses on his elbow and causes pressure on his right elbow. The claimant testified that his surgery was at the same site or at the same part of his arm where the pressure from the cuff was applied. The claimant testified that he has had no other injuries to his right arm since December 19, 2001.

On cross examination, the claimant agreed that after he was seen by Dr. Barnes in Little Rock, additional testing was ordered which was conducted in Fort Smith. The claimant testified that he eventually was allowed to go back to see Dr. Buie and he shared with the doctor the symptoms he was experiencing. The claimant testified that Dr. Buie had him undergo an EMG test. The claimant agreed that he was seen by Dr. Crowe at the VA Hospital in Little Rock at which time a revision was discussed. The claimant testified that he has shared this information from Dr. Crowe with

Dr. Buie. The claimant testified that following his surgery last week, he has continued to work for the respondent and that the doctor has not taken him off work. The claimant indicated that he was not opposed to being treated by Arkansas physicians.

On redirect examination, the claimant testified that he is relying on his authorized treating physician and that no one else has offered him any other type of treatment plan.

The medical records set forth that the claimant was seen by Dr. Lowery Barnes on August 11, 2005, in Little Rock. After evaluation of the claimant's knee as well as review of the claimant's medical information and tests, Dr. Barnes assesses the claimant with having a painful, stiff, total knee replacement which is limiting his activities of daily living and that he appears to be in chronic pain. Dr. Barnes recommended a repeat triple phase bone scan of the claimant's right knee and would obtain an fluoroscopically-controlled views of the femoral and tibial components to look at any radiolucent lines. Dr. Barnes expressed concern about a possible loose component, noting that this could be the culprit of the claimant's pain and secondary loss of motion. Dr. Barnes writes that he is concerned that the claimant is a "scar former" and has true arthrofibrosis of the knee which is a very difficult problem to treat. Dr. Barnes also recommended another opinion from a pain specialist and noted that the claimant has not reached maximum medical improvement at this stage. Dr. Barnes noted that he thinks that the claimant can continue to work but will be limited due to his pain. The claimant underwent a triple

phase bone scan at Sparks Hospital on October 27, 2005. The results of this test indicated that the bone scan findings are not consistent with osteomyelitis. A letter from the respondent's carrier to Dr. Barnes dated November 3, 2005, indicates that the claimant's various test results are being sent to him for review and a follow up report. In a letter to Dr. Buie dated December 23, 2005, the respondent carrier indicates that the claimant is authorized to return to see him and asked for information concerning any recommended treatment plan the doctor should have for the claimant. Dr. Buie writes on January 19, 2006, that he has seen the claimant for his right knee problems. Dr. Buie notes that the claimant's ulnar nerve palsy problem is one that seems to be even as bad as his knee problems. Dr. Buie notes that the claimant's tardy ulnar nerve palsy is secondary to the use of his crutches. Dr. Buie notes that the claimant has classic findings with some sensory and motor functional loss. Dr. Buie notes that the claimant has findings of decreased sensation and some loss of abduction of his fingers and the intrinsic. Dr. Buie diagnosed the claimant with having classic tardy ulnar nerve palsy as well as positive Tindal sign at his elbow. Dr. Buie writes that in regard to the claimant's knee problems he has a total knee arthroplasty with excellent positioning and alignment but continues to have causalgia or at least pain. Dr. Buie writes that he has discussed this review with Dr. Mumme who has been the premier surgeon of the knees and that both he and Dr. Mumme recommended that what the claimant needs is to be seen by Dr. William Woods in Dallas for a

second opinion. Dr. Buie continues to write in regard to the claimant's right upper extremity tardy ulnar nerve palsy that this problem resulted while the claimant was being treated for his knee and is due to the use of the forearm crutches due to his protracted ambulation. Dr. Buie writes on April 5, 2006, that the claimant's tardy ulnar nerve palsy has progressed to the point where the claimant needs to go ahead with surgery. Dr. Buie writes that the claimant has lost sensory as well as some motor function and this has progressively gotten increasingly symptomatic. Dr. Buie notes that the claimant has full range of motion of his right elbow, he has a positive Tindal's sign at the cubital medial and epicondylar area of the right arm. Dr. Buie notes that the claimant has some intrinsic changes and has sensory deficits including lost motor function. Dr. Buie notes that the claimant is scheduled for submuscular transposition of the ulnar nerve on the right.

After a complete review of this record, I find that the claimant has failed to prove by a preponderance of the evidence, in light of Arkansas law, that his tardy ulnar nerve palsy is a compensable consequence of his original compensable injury. I have no doubt that the claimant developed ulnar nerve palsy as a result of using his crutches due to his compensable injury, however, Arkansas law requires objective medical findings of injury to establish a compensable injury. Dr. Buie seems quite definite that the claimant has ulnar nerve palsy and has even operated on the claimant for this problem, however, this record does not include objective medical findings of ulnar nerve palsy on the right. Dr.

Buie sets forth in his records that the claimant has a positive Tindal's at the cubital medial and epicondylar area of the right arm but it has long been understood that Tindal's is not an objective test. Dr. Buie also indicates that the claimant has some intrinsic changes but does not indicate what those changes are. Therefore, in keeping with Arkansas law, all benefits shall be denied as they apply to the claimant's ulnar nerve palsy. I further find, however, the claimant is entitled to a change of physician as recommended by his treating physicians, Dr. Buie and Dr. Mumme, to Dr. William Woods in Dallas, Texas, for another opinion as to treatment for this claimant's right knee problems. The claimant's travel as well as the cost of the examination by Dr. Woods and his follow up report will be at the expense of the respondents.

#### FINDINGS & CONCLUSIONS

1. The Arkansas workers' Compensation Commission has jurisdiction of this claim.
2. Prior opinions are res judicata and the law of this case.
3. The respondents have agreed to let the claimant return to Dr. Buie for medical treatment.
4. The claimant has failed to prove by a preponderance of the evidence that his ulnar nerve palsy is a compensable consequence of his compensable right knee injury. Arkansas law requires objective medical findings of injury to establish a compensable injury. There is no objective medical findings in this record to establish

that the claimant has ulnar nerve palsy of the right elbow. See discussion above.

5. That the claimant has proven by a preponderance of the evidence that it is reasonable and necessary for him to be referred to Dr. William Woods in Dallas for a second opinion as to the course of treatment for his right knee.

6. The respondents should pay for the cost of the claimant's travel to Dallas for an appointment with Dr. Woods as well as the cost of the examination and report.

ORDER

The claimant has failed to prove by a preponderance of the evidence, in light of Arkansas law, that his ulnar nerve palsy is compensable as defined by Arkansas law, therefore, the respondents shall not be responsible for any benefits associated with the claimant's ulnar nerve palsy on the right.

The claimant is authorized to be seen by Dr. William Woods in Dallas, Texas, for a second opinion as to what treatment would be beneficial to him for his right knee. The cost of the claimant's travel as well as his examination by Dr. Woods will be at the respondents' expense.

IT IS SO ORDERED.

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ELIZABETH DANIELSON  
ADMINISTRATIVE LAW JUDGE