

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F402773

BYRON E. OWENS, EMPLOYEE	CLAIMANT
LENNOX INDUSTRIES, EMPLOYER	RESPONDENT
ACE AMERICAN INSURANCE, CARRIER	RESPONDENT

OPINION FILED FEBRUARY 7, 2006

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH W. HOGAN, on November 9, 2005, at Stuttgart, Arkansas County, Arkansas.

Claimant represented by the HONORABLE STEVEN R. MCNEELY, Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE BETTY J. DEMORY, Attorney at Law, Little Rock, Arkansas.

ISSUES

A hearing was conducted to determine the claimant's entitlement to payment of additional temporary total disability benefits and attorney's fees.

At issue is whether or not the claimant unreasonably refused to submit to an operation pursuant to Ark. Code Ann. §11-9-512. All other issues are reserved.

After reviewing the evidence impartially without giving the benefit of the doubt to either party, Ark. Code Ann. §11-9-704, I find the evidence preponderates in favor of the claimant.

STATEMENT OF THE CASE

The parties stipulated to an employer-employee-carrier relationship on October 9, 2003, at which time the claimant sustained a compensable injury at a compensation rate of \$440.00. Medical expenses and temporary total disability benefits (from April 13, 2004 to May 9, 2005 and from July 26, 2005 to a date yet to be determined) are being paid. Respondents have advanced the claimant three weeks and five days of permanent partial disability even though no rating has been assessed.

The claimant contends he is entitled to temporary total disability benefits from May

10, 2005 to July 25, 2005 and attorney's fees. The claimant sustained a scheduled injury and has been under the care of Dr. Ackerman and Dr. Hefley who recommended surgery.

The respondents contend temporary total disability benefits were interrupted because the claimant refused to undergo the recommended surgery. Benefits were reinstated when the claimant complied with his doctor's recommendation.

The following were submitted without objection and comprise the evidence of record: the parties' prehearing questionnaires and exhibits contained in the hearing transcript.

The claimant, who appeared to be credible, was the only witness to testify at the hearing. The claimant walks with a noticeable limp.

The claimant, age 35 (D.O.B. February 25, 1970) has worked for the respondent-employer since 1991. He twisted his right knee trying to catch a heavy piece of equipment at work. The scheduled injury was accepted as compensable. The claimant has not returned to work since the accident.

The claimant came under the care of Dr. Nichols and surgery was performed on May 3, 2004. Unfortunately complications (nerve damage with reflex sympathetic dystrophy (RSD)) developed and the claimant remained symptomatic with pain and swelling.

Dr. Ackerman evaluated the claimant in September, 2004, and Dr. Vander Schilden examined the claimant in January, 2005. Both physicians released the claimant. Inexplicably, the carrier continued paying temporary total disability benefits until May, 2005. Also puzzling is the fact that the employer did not terminate the claimant for failing to return to work after his release.

The claimant testified that a case manager, Cheryl Johnson, had been assigned to him by the carrier. She had accompanied him to every doctor's appointment since 2004. It was the claimant's understanding that she was supposed to coordinate his return to work but that Lennox had no light duty available. The claimant testified that no one from Lennox contacted him about returning to work. The claimant also denied returning to work for one

day on January 31, 2005. No testimony or documentation was provided to refute the claimant's testimony.

The claimant remained symptomatic and saw Dr. Hefley on January 26, 2005. After further diagnostic testing in March, 2005, Dr. Hefley recommended a second surgery. It was the claimant's understanding that the RSD needed to be evaluated before submitting to another operation. The case manager, Cheryl Johnson, arranged for the claimant to be seen by Dr. Ackerman again in June 2005.

After discussing the matter with Dr. Ackerman, the claimant's surgery was scheduled. One month later on July 26, 2005, Dr. Hefley performed the second surgery. The claimant denies ever refusing surgery. The carrier reinstated the claimant's temporary total disability benefits in July 2005.

MEDICAL EVIDENCE

After the first surgery by Dr. Nichols, the claimant remained symptomatic and developed specific complications:

Dr. Vander Schilden's Report of 8-20-04:

(After the first surgery he) developed significant pain and dysfunction as well as marked crepitus in the right knee.... A sheen is appreciated to (sic) his right knee... X-rays taken today show marked to region (sic) osteopenia of the distal femur, proximal tibia and patella consistent with RSD of the knee... Also of note ... some postoperative changes but also a chondral defect of his lateral patellar facet.

Dr. Vander Schilden prescribed medication, injections and physical therapy. He opined that the claimant "may need an arthroscopic debridement sometime in the future with sympathetic blocks if necessary." The claimant was advised to return to the doctor for follow-up in 6-8 weeks.

Dr. Ackerman saw the claimant on August 25, 2004. He was aware of Dr. Vander Schilden's diagnosis and noted that an EMG-NCV study showed evidence of femoral neuropathy in the right knee. Dr. Ackerman also diagnosed atrophy of the right thigh.

The patient's Complex Regional Pain Syndrome appears to have resolved, as a result of the early diagnosis and immediate treatment that was done by Dr. Vander Schilden... (based on medical studies) RSD was most commonly triggered by injuries or surgery to the patellofemoral joint. This finding is believed to be related to the patella's tenuous blood supply and superficial relation to the skin... It is my opinion that he will not have a permanent impairment as a result of reflex sympathetic dystrophy. However, because he could theoretically be entitled to a higher impairment rating if he does have a residual reflex sympathetic dystrophy, I would recommend a 3-phase bone scan. I would also recommend the utilization of the Lidoderm transdermal patch... ...It is my opinion that sympathetic injections are not indicated in this patient.

The bone scan was conducted on August 30, 2004 and showed degenerative arthritis. On September 15, 2004 Dr. Ackerman assessed "post traumatic arthritis with resolution of reflex sympathetic dystrophy." He advised that, "if he has an exacerbation of his reflex sympathetic dystrophy, he would then be a candidate for a lumbar sympathetic block."

The claimant returned to Dr. Vander Schilden, who prescribed medication for depression, continued his physical therapy and excused him from work, (see his report of October 8, 2004).

In a follow-up visit on December 3, 2004, Dr. Vander Schilden noted acute mechanical low back pain caused by an abnormal gait from his injured knee. Dr. Vander Schilden prescribed medication and excused the claimant from work. A repeat EMG/NCV study on December 14, 2004 showed improvement and the doctor commented that "his prognosis is outstanding."

Dr. Vander Schilden authored a letter dated January 11, 2005 commenting that although the claimant had significant crepitus and tendonitis, and had developed chronic neck and back pain as a compensable consequence, he had reached maximum medical improvement and no surgery was necessary. Dr. Vander Schilden returned the claimant to Dr. Nicholas for an impairment rating, noting the claimant was seeking pain management for his neck and back. Dr. Vander Schilden commented, "I do not believe he is capable of

working at this point.” No rating was ever assessed for the first surgery.

The claimant saw Dr. Safman for back pain due to an altered gait on January 19, 2005, and was given injections. On January 26, 2005, the claimant returned to Dr. Hefley who diagnosed femoral neuropathy, quadriceps atrophy and mechanical symptoms (locking) due to an articular chondral defect. He prescribed physical therapy and mentioned that, “at some point he may benefit from arthroscopy and a chondroplasty to smooth the articular surface,” (emphasis added). I do not interpret this as a definite recommendation for surgery. The doctor is merely advising the claimant about his prognosis. Dr. Hefley asked the claimant to return for follow-up in two months and mentioned that the case manager was coordinating efforts to return the claimant to light duty, (see light duty slips dated January 27, 2005 and March 23, 2005). There is nothing in the medical records to explain the significance of the date the respondents decided to stop benefits in May, 2005.

The claimant saw Dr. Ackerman on June 20, 2005 to discuss the effect of additional surgery on his RSD. Dr. Ackerman prescribed medication and recommended the use of an epidural catheter pre and post surgically to decrease the risk of RSD and facilitate rehabilitation.

The claimant returned to Dr. Hefley on July 6, 2005. He was then excused from work as surgery was planned for July 26, 2005.

FINDINGS AND CONCLUSIONS

The respondents have controverted benefits, contending the claimant refused surgery.

In pertinent part, Ark. Code Ann. §11-9-512 provides:

where an injured person unreasonably refuses to submit to a surgical operation which has been advised by at least two (2) qualified physicians and where the recommended operation does not involve unreasonable risk of life or additional serious physical impairment, the Workers’ Compensation Commission, in fixing the amount of compensation, may take into consideration such refusal to submit to the advised operation.

Temporary disability is determined by the extent to which a compensable injury has

affected the claimant's ability to earn a livelihood. For a scheduled injury, a claimant is entitled to temporary total disability compensation during the time that the employee is within the healing period or until the employee returns to work, whichever occurs first. Wheeler Construction Co. v. Armstrong, 73 Ark. App. 146, 41 S.W.3d 822 (2001). The "healing period" is defined as the period necessary for the healing of an injury resulting from an accident. Ark. Code. Ann. §11-9-102(12). The healing period continues until the employee is as far restored as the permanent character of his injury will permit. When the underlying condition causing the disability becomes stable and when nothing further will improve that condition, the healing period has ended, and the claimant is no longer entitled to receive temporary total disability compensation or temporary partial disability compensation, regardless of physical capabilities. Carroll General Hospital v. Green, 54 Ark. App. 102, 923 S.W.2d 878 (1996). If the employee is unable to perform remunerative labor with reasonable consistency and without pain and discomfort, the temporary disability is deemed "total." Pyles v. Triple F. Feeds of Texas, 270 Ark. 729, 606 S.W.2d 146 (Ark. App. 1980). The determination of the end of the healing period and whether the claimant has made a good faith effort to "return to work" are factual questions to be decided by the Commission. Poulan Weed Eater v. Marshall, 79 Ark. App. 129, 84 S.W.3d 878 (2002). Farmers Cooperative v. Biles, 77 Ark. App. 1, 69 S.W.3d 899 (2002).

The evidence of record shows the claimant sustained a compensable knee injury. Unfortunately, complications (RSD), nerve damage, altered gait affecting back and neck developed which extended the claimant's healing period. When a second operation was mentioned by Dr. Hefley in January, 2005, the claimant was understandably concerned about a flare-up of his RSD symptoms. It is evident in the medical records that he discussed these concerns with Dr. Hefley and Dr. Ackerman and they both made suggestions on ways to minimize the risk during surgery, (see Dr. Ackerman's report of June 20, 2005).

It is also evident that the claimant was released for light duty beginning January 27,

2005. The respondents agent, the case manager who accompanied the claimant to the doctor visits, was responsible for coordinating return to work efforts with the respondents. There is no indication that light duty within the claimant's work restrictions was ever offered to the claimant and there is no evidence that the claimant ever refused a job offer.

Dr. Hefley did not schedule surgery until July 6, 2005. There is no evidence that two physicians recommended this surgery. There is no evidence that the claimant ever refused surgery.

I also find that the proposed surgery did not involve unreasonable risk of life, but because of the claimant's history of complications, the second surgery did involve the risk of additional serious physical impairment.

As I interpret the lay testimony and medical evidence, the claimant has been cooperative, following his doctor's instructions. He has never refused surgery or refused a job offer.

1. The Workers' Compensation Commission has jurisdiction of this claim in which the relationship of employer-employee-carrier existed among the parties on October 9, 2003.
2. The claimant has proven by a preponderance of the evidence of record that he is entitled to temporary total disability benefits from May 9, 2005 to July 25, 2005 as he remained in his healing period, and had not returned to work.
3. This claim has been controverted and the claimant's counsel is entitled to the maximum attorney's fees to be paid in accordance with A.C.A. §11-9-715, §11-9-801, and WCC Rule 10.

Pursuant to the Full Commission decisions of Coleman v. Holiday Inn, (November 21, 1990) (D708577), and Chamness v. Superior Industries, (March 5, 1992)(E019760), the claimant's portion of the controverted attorney's fee is to be withheld from, and paid out of, indemnity benefits, and remitted by the respondent, directly to the claimant's attorney.

As a reminder, Ark. Code Ann. §11-9-715 was amended by Act 1281 of 2001, limiting attorney's fees on medical benefits and services for injuries after July 1, 2001.

4. The respondents are directed to pay the court reporter's fees and expenses associated with transcribing this hearing within thirty days pursuant to Commission Rule 20.

AWARD

Respondents are directed to pay benefits in accordance with the Findings of Fact above along with their proportionate share of attorney's fees. All accrued sums shall be paid in a lump sum without discount and this award shall earn interest at the legal rate until paid, pursuant to A.C.A. §11-9-809, and Couch v. First State Bank of Newport, 49 Ark. App. 102, 898 S.W.2d 57 (Ark. Ct. App. 1995), and Burlington Industries, et al v. Pickett, 64 Ark. App 67, 983 S.W.2d 126 (1998), 336 S.W. 515, 988 S.W.2d 3 (1999).

IT IS SO ORDERED.

ELIZABETH W. HOGAN
Administrative Law Judge