

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F508937

MATTHEW REED	CLAIMANT
SOUTHERN STEEL & WIRE CO.	NO. 1 RESPONDENT
GALLAGHER BASSETT SERVICES, INC. INSURANCE CARRIER	NO. 1 RESPONDENT
SECOND INJURY FUND	NO. 2 RESPONDENT

OPINION FILED OCTOBER 16, 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 No. 1 represented by MARK MCCARTY, Attorney, Little Rock, Arkansas.

Respondent No. 2 represented by DAVID PAKE, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held on August 17, 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 May 25, 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. On all pertinent dates, the relationship of employee-employer-carrier existed between the parties.

3. The claimant sustained a compensable injury to his low back on August 10, 2004.

4. Medical expenses have been paid.

By agreement of the parties the issues to litigate are limited to the following:

1. Whether surgery is reasonable and necessary.
2. Temporary total disability after surgery.
3. Attorney's fees.

In regard to the foregoing issues the claimant contends that his authorized treating physician has recommended surgery; however, the respondents have denied liability for the recommended surgery. Further, the claimant contends that he is entitled to temporary total disability benefits in connection with the recommended surgery. The claimant contends that since the respondents are controverting the claimant's entitlement to recommended surgery and temporary total disability benefits related to such surgery, the claim has been controverted and the claimant's attorney is entitled to an attorney's fee on any disability benefits paid after the claimant undergoes surgery.

In regard to the foregoing issues Respondents No. 1 contend that the proposed surgery is not reasonable and necessary since the claimant continues to smoke. The respondents respectfully reserve the right to amend this pre-hearing questionnaire.

In regard to the foregoing issues Respondent No. 2 did not participate in the pre-hearing conference and offered no contentions.

The documentary evidence submitted in this matter consists of the Commission's pre-hearing ordered marked Commission's Exhibit No. 1. The claimant submitted documentary evidence marked Claimant's Exhibit No. 1. Respondents No. 1 submitted a medical record from Dr. Queeney marked Respondents No. 1's Exhibit No. 1 and a medical record from Dr. Queeney marked Respondents No. 1's Exhibit No. 2 has been blue booked to this record. All these exhibits were admitted without objection.

DISCUSSION

The claimant testified that he was thirty-nine years old and has smoked since he was fifteen. The claimant testified and it has been stipulated by the respondents that he sustained a compensable injury on August 10, 2004, to his low back. The claimant explained that this compensable injury occurred while he was dumping scrap metal into a dumpster. The claimant agreed that he was seen by the doctor and was eventually referred to Dr. Joseph Queeney, a neurosurgeon. The claimant agreed that Dr. Queeney has recommended back surgery but also stated that he should quit smoking before he undergoes surgery. The claimant testified that he has attempted to stop smoking but so far has only been able to go three weeks without smoking. The claimant testified that he used to smoke two packs a day and has cut back to one pack a day.

The claimant agreed that he requested a change of physician and has subsequently been seen by Dr. Arthur Johnson, a neurosurgeon. The claimant testified that when he went to see Dr. Johnson, he took his films and MRI and after examination, Dr.

Johnson scheduled surgery for his back on April 17, 2006. The claimant agreed that this surgery has not been performed because the respondents would not authorize it. The claimant testified that he has tried on his own and with the use of nicotine gum to stop smoking but it has not worked. The claimant testified that he understood that if he continues to smoke that the risk is higher for him having a failed back surgery. The claimant testified that he is willing to undergo that risk in order to get his back fixed. The claimant testified that currently he feels pressure in his lower back, sharp pains and he cannot sit or stand for long in any one position.

The claimant testified that he has continued to work although he is not working for the respondent. The claimant testified that he drives a forklift and that his current employer allows him to alternate his activities so that he can stand or sit as needed. The claimant testified that he does not have to do any heavy lifting with his current job.

On cross examination, the claimant was asked if the respondent would agree to pay for his back surgery, would he agree to quit smoking and the claimant responded, "I would try." The claimant testified that he is currently working for Qual Services as a forklift driver. The claimant testified that his shift is from 3:20 p.m. until 11:50 p.m. The claimant agreed that in order to operate his forklift he has to use foot pedals as well as use his right hand to operate the nobs and his left hand to operate the steering wheel. The claimant testified that he has not sought

medical treatment as a result of driving a forklift and that it has been sometime since he has been through physical therapy. The claimant testified that at one time he had a TENS unit but he has returned it at this time. The claimant testified that at his current employment he has not complained to his fellow employees about his back nor has he taken time off for medical leave from his current job due to his back. The claimant testified that he does his own grocery shopping as well as household chores and laundry. The claimant testified that he is able to drive himself to work. The claimant testified that the last medical treatment he sought was with Dr. Johnson which was the first appointment he had with the doctor.

On redirect examination, the claimant testified that since his current employer is accommodating his need to alternate between sitting and standing, he did not think it necessary to ask for any further accommodations. The claimant testified that he has continued to have problems with his back ever since he was hurt and that his back has not improved since he was seen by Dr. Queeney.

The medical records set forth that the claimant was seen by Dr. Joseph Queeney on November 4, 2004, upon referral from Dr. Clark. Dr. Queeney notes that the claimant reports that he has pain that radiates to the right lower extremity radiating from the midline of his lumbar region. The doctor notes that the claimant focuses his complaints currently in his right hip and notes that his back pain tends to come and go but is exacerbated by most activities and is relieved by laying down. Dr. Queeney writes that

the claimant's leg pain is constant and exacerbated by most activities and is relieved with change of position. Dr. Queeney writes that the claimant reports that he has undergone ten to twelve sessions of physical therapy which have not really helped. The claimant reports that he has tried a TENS unit with short relief. Dr. Queeney put the claimant through a physical examination and reviewed the claimant's MRI which he notes was done on October 18, 2004, which revealed some modic inplate changes at L5-S1 as well as a right paramedian herniated disc at L4-5. Dr. Queeney also notes that there is also a central herniated disc at L5-S1. Dr. Queeney recommended surgery for the claimant but noted that before he performed surgery the claimant would have to quit smoking. Dr. Queeney recommended that the claimant go on a treatment plan of anti-inflammatory medications to see if this would improve his situation. The doctor notes that if these medications do not improve his situation then they will discuss surgery. Dr. Queeney writes on December 22, 2004, that he has seen the claimant on follow up. The doctor notes that the claimant reports that his right lower extremity pain still persists as does his low back pain. Dr. Queeney writes concerning the various surgical options he presented to the claimant but ultimately writes that he will not do the surgery unless the claimant stops smoking. On October 18, 2005, Pat Capps Hannah, with the Medical Cost Containment Division of the workers' Compensation Commission granted a change of physician for the claimant to Dr. Arthur Johnson. There is a return to work slip dated March 23, 2006,

signed by Dr. Johnson indicating that the claimant would be disabled from April 17, 2006, to June 16, 2006, due to lumbar fusion and DLL on April 17, 2006, to be performed at Sparks Medical Center.

Blue booked to this record is Respondents' Exhibit No. 2 which is Dr. Queeney's response to a letter from the respondents' attorney. Dr. Queeney writes on August 16, 2006, that he last saw the claimant on December 2, 2004. Dr. Queeney notes that at that time he did offer the claimant a fusion and that as with most of his patients, he recommended that they stop all use of nicotine since he feels that this increases their chances of a failed fusion significantly.

After a complete review of this record, I find that the claimant has proven that the back surgery recommended by both Dr. Queeney as well as Dr. Johnson is both reasonable and necessary for the treatment of his compensable injury. It is not questioned that Dr. Queeney prefers not to operate on a person if they are using nicotine because, in his opinion, it interferes with the possible success of the surgery. Dr. Johnson obviously does not have as strong an opinion concerning a patient's use of nicotine and the results it will have on the success of a back surgery. The claimant has testified that he is trying and has reduced his use of nicotine substantially and has further indicated that he is willing to undergo the risk in order to improve his condition. Therefore, the respondents should pay for the recommended back surgery to be performed by Dr. Arthur Johnson. It is also found that the

claimant will be entitled to temporary total disability during the period of time he is off as a result of his back surgery. The respondents, therefore, shall be responsible for the payment of TTD for the period of time the claimant is off work as a result of his surgery.

FINDINGS & CONCLUSIONS

1. The Arkansas workers' Compensation Commission has jurisdiction of this claim.

2. On all pertinent dates, the relationship of employee-employer-carrier existed between the parties.

3. The claimant sustained a compensable injury to his low back on August 10, 2004.

4. Medical expenses have been paid.

5. The claimant has proven by a preponderance of the evidence that the back surgery as recommended by Dr. Queeney and Dr. Johnson is both reasonable and necessary. See discussion above.

6. The respondents should pay for the cost of this claimant's recommended back surgery for his compensable injury.

7. The respondents should pay temporary total disability to this claimant for the period of time he is off work as a result of his back surgery.

8. The respondents have controverted this claimant's request for additional benefits.

9. The claimant's attorney is entitled to the maximum statutory attorney's fee based on the benefits awarded herein.

ORDER

The claimant has proven by a preponderance of the evidence that the recommended back surgery is both reasonable and necessary. Therefore, the respondents should pay for the cost of this claimant's recommended back surgery for his compensable injury.

The respondents should pay temporary total disability to this claimant for the period of time he is off work as a result of his back surgery.

The respondents shall pay to the claimant's attorney the maximum statutory attorney's fee on the additional benefits awarded herein, with one half of said attorney's fee to be paid by the respondents in addition to such benefits and one half of said attorney's fee to be withheld by the respondents 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.

ELIZABETH DANIELSON
ADMINISTRATIVE LAW JUDGE