BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F503801

BILLY G. SWEANEY, EMPLOYEE	CLAIMANT
L A DARLING COMPANY, EMPLOYER	RESPONDENT
MANAGEMENT CLAIM SOLUTIONS, INSURANCE CARRIER/TPA	RESPONDENT

OPINION FILED APRIL 26, 2006

Hearing before Chief Administrative Law Judge David Greenbaum on March 24, 2006, at Jonesboro, Craighead County, Arkansas.

Claimant appeared, *pro se.*

Respondents represented by Mr. Gail O. Matthews, Attorney-at-Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted March 24, 2006, to determine whether the claimant was entitled to additional workers' compensation benefits.

A prehearing conference was conducted in this claim on February 8, 2006, and a Prehearing Order was filed on February 9, 2006. In addition, this claim has been the subject of an administrative proceeding which resulted in a Change of Physicians Order being filed by the Medical Cost Containment Division on August 10, 2005, permitting the claimant to change treating physicians from Dr. David M. Rhodes to Dr. Randy R. Bindra. At the hearing, the parties announced that the stipulations, issues, as well as their respective contentions were properly set out in the Prehearing Order. Further, although claimant's entitlement to indemnity benefits was not at issue, subsequent to the prehearing conference, respondents provided

the claimant with wage records. At the hearing, the parties agreed that the claimant's average weekly wage was $424.54.

It was stipulated that the employment relationship existed between the parties at all relevant times, including May 20, 2004; that the claimant sustained a compensable injury to his left elbow for which respondents paid various medical expenses; and that respondents, to date, have resisted a recommended, second surgery without further clarification from Dr. Bindra.

By agreement of the parties, the sole issue presented for determination was whether a second surgical repair of the claimant's left elbow, specifically, a reconstructive ligament surgery, was reasonably necessary.

Claimant contended, in summary, that he continued to experience significant problems with his left elbow; that his authorized treating physician, Dr. Randy Bindra, recommended surgical repair of the elbow, specifically, a reconstructive ligament surgery; that the surgical repair is reasonably necessary, as well as related to the admitted injury and should, therefore, be the responsibility of the respondents.

The respondents have, at all times, maintained that they have not refused the recommended surgery, but requested further clarification from Dr. Bindra concerning the need for surgery following a medical review conducted by the Medical Review Institute of America which opined that it did not see a need for surgery while asserting that it should not have to make a decision until Dr. Bindra

complies with Commission Rule 30 and provides the physical findings that Dr. Bindra utilized to justify the surgery. At the hearing, respondents, alternatively contended that based upon Dr. Rhodes' reports, additional surgery was not reasonably necessary.

The claimant testified in his own behalf. Lela Taskey was called as a witness by the respondents. The record is composed solely of the transcript of the March 24, 2006, hearing containing numerous exhibits.

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 Ark. Code Ann. §11-9-704:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties are hereby accepted as fact.
2. On or about May 20, 2004, the claimant sustained an injury to his left elbow which arose out of and during the course of his employment with L A Darling Company, at which time his average weekly wage was $424.54, entitling him to compensation rates of $283.00 per week for temporary total disability and $212.00 per week for permanent partial disability.
3. The claimant has proven, by a preponderance of the credible evidence, that additional medical treatment, including, but not limited to a recommended

second surgery by Dr. Randy Bindra, claimant's authorized treating physician, is reasonably necessary, as well as related to the admitted injury, and remains the responsibility of the respondent.

4. Additional issues not addressed herein are specifically reserved.

DISCUSSION

_____The claimant, Billy G. Sweaney, sustained an admitted injury to his left elbow on May 20, 2004. The injury was promptly reported and an incident report was immediately filled out. The claimant continued working for several weeks without either seeking or being provided medical treatment. The claimant apparently continued performing his regular duties. He eventually complained to his supervisors concerning the swelling in his left upper extremity, at which time he was sent to the emergency room. The claimant stated that x-rays taken at the emergency room failed to reveal any fractures, so the claimant was returned to work with instructions to see an orthopedic specialist. The respondent then sent the claimant to Dr. Ron Schechter, an orthopedic surgeon in Paragould, Arkansas. The claimant pointed out that prior to seeing Dr. Schechter, the third-party claims administrator sent him to have an MRI performed on the left elbow. The MRI clearly revealed objective evidence of injury. In fact, the radiology report opined that the claimant had sustained a partial tear of the radial collateral ligament. (Cl. Ex. A, p.1)

The claimant was next examined by Dr. Ron Schechter who apparently read the radiology report somewhat differently, but still felt the claimant required surgical

intervention, including soft tissue grafting and ligament reconstruction, and advised the claimant to see an upper extremity/elbow specialist. (Cl. Ex. A, pp.2-3)

The claimant was next referred to Dr. David M. Rhodes at the Martin Bowen Hefley Clinic in Little Rock, Arkansas. Dr. Rhodes first evaluated the claimant on August 5, 2004. Following failed conservative treatment, Dr. Rhodes performed surgery on September 8, 2004, at which time he removed a loose body in the left elbow, as well as inflamed synovium tissue. On November 11, 2004, Dr. Rhodes released the claimant to return to work, full-duty, with a zero impairment rating and to return on an as needed basis. Dr. Rhodes advised the claimant that he would continue to have some discomfort in the elbow, secondary to his arthritis which was not work-related. The record reflects that the claimant continued experiencing problems and returned to Dr. Rhodes on January 17, 2005, at which time physical exam revealed crepitation with range of motion which Dr. Rhodes diagnosed as a flare-up of the claimant's arthritis which was inconsistent with his initial diagnosis and assessment on August 5, 2004, which was, admittedly his findings, prior to performing elbow surgery. (Cl. Ex. A, pp.4-13)

I found the claimant to be an extremely credible witness. The claimant's credible testimony is undisputed. The claimant has continued working at all times since his injury. It is apparent that he is not motivated by any secondary gain, but merely seeks to have his left elbow fixed. It is also undisputed that the claimant continues to experience significant physical problems which did not exist prior to the

injury. Portions of the claimant's testimony are set out below:

Q Now, you had the surgery. Do you know personally what type of surgery Dr. Rhodes performed on your elbow?

A I can't pronounce it, but the removal of the loose body. I can't physically pronounce the medical name for it.

Q So he removed a piece of bone from your elbow?

A I guess that's what it is. It's just a loose body. It never was really explained to me. It's just a loose body. So I take it it's cartilage or bone or something.

Q Did the surgery help you?

A Yeah. When I first started having problems, it would lock. I mean, at times my arm would lock. It helped it as far as that part went. I mean, sometimes I would reach for something and my arm would lock, and I'd have to take this other arm and literally pop it on open and then boy it would (snapping fingers), and you would hear it across the room.

Q So the surgery relieved that part of the problem?

A Relieved that part of it, and when I started through the therapy, I started getting the snapping and popping back. It didn't always lock before the surgery, but it would always pop and snap when I'd open my left arm out. But he stopped the catching. I don't catch no more, but as I started the therapy, it started to snapping and popping whenever I would get to a certain point, a range –

Q When you say therapy, I assume this is the therapy that Dr. Rhodes prescribed, is that right?

A Yes, sir, it would be Cooper Rehab here in Jonesboro.

Q When you went to Cooper Rehab and continued to have these problems, did you explain those to Dr. Rhodes?

A Yes, sir, I explained it to Cooper Rehab. I got a report that I didn't get to you and I didn't know what to do with. I didn't know it existed until the other day, so I told them –

Q Is it not a part of this record you submitted?

A No, I missed it. It's just a report where I told him to record the snapping and popping in my arm. I didn't know it existed until the other day. I took one report to Dr. Rhodes, and I went back to see if he had any more reports, and they had another one that I didn't know. (Tr. 21-23)

It is clear that on November 5, 2004, during his physical rehabilitation, that the claimant was complaining of swelling, as well as popping in his elbow. (Cl. Ex. B)

Because of his continued complaints, the claimant subsequently petitioned, and received a change of physicians from Dr. Rhodes to Dr. Randy Bindra, an upper extremity specialist at UAMS. Again, the claimant maintained that he, at all times, complained about popping, snapping, and swelling in his left elbow, as reflected by the following exchange:

EXAMINATION BY THE COMMISSION

BY JUDGE GREENBAUM:

Q Mr. Sweaney, when you were in the offices of either Dr. Rhodes or Dr. Bindra, could you duplicate the snapping and popping in your arm? In other words, I'm asking you can you duplicate the popping and snapping that you experienced? No doctor can experience your pain for you. That's strictly subjective. If you tell me that you're hurting, I've got to believe you because I can't feel that pain. Can you duplicate the popping and snapping?

A Do you want me to show you?

Q No, the doctor, could you show the doctor?

A Yeah, I could show him where it – to the point where it snapped, but sometimes it wouldn't be so loud, but every time I'd open my arms up, I could do it right now, right there, and it pops. Then when I bring it back, it don't. It pops every time I straighten it out. That's what I told Dr. Bindra. That's what I told Dr. Rhodes.

Q So your basic complaints to them at all times have been snapping and popping

of your arm and the –

A The swelling in my arm.

Q – swelling.

A And the swelling in my arm. It gets so sore I don't use it. I use my right arm. I catch myself like this right here (demonstrating). I just don't use it. If I don't use it, it don't hurt. Up here it don't hurt, if I keep it up here. If I don't ever use it, I don't guess it would ever hurt. I'd run around like this. But you use your left arm in normal things, you'll forget and grab something and it hurts. If you use it very much, it swells.

Q Okay. You were aware – or, perhaps, you know, some of it's legal jargon for you, but you know that Ms. Taskey had tried to get Dr. Bindra to be specific as to what physical findings he found on his examination to support the request for surgery, are you not?

A Yeah, I think I know what you're talking about, yeah.

Q Have you ever asked him to give a report setting out what his specific or objective findings were to warrant surgery?

A I just know what the man explained to me in the office that day, that I had fluid up here on – which I don't know in medical terms.

Q You've got fluid where?

A Right here on the top of my elbow. He run an MRI, and he could have explained it to me and I probably I wouldn't even know the legal, I mean, medicine terms. I didn't ask him for no surgery. He explained to me that he thought this tendon was tore. This tendon was causing – (Tr. 37-39)

Following a change of physicians, the claimant was initially examined and evaluated by Dr. Randy Bindra on September 19, 2005. Dr. Bindra was furnished the prior diagnostic studies, as well as the clinical notes from Dr. Rhodes. Clearly, Dr. Bindra disagreed with the final diagnosis of Dr. Rhodes, as reflected by his concluding, out-patient notes and recommendations which follow:

He did have surgery with Dr. Rhodes where he was documented to have some arthritis, but x-rays taken today do not show any progression or any evidence, indeed, that he does have any arthritis in his elbow. There was a tiny, loose body removed according to Dr. Rhodes, but he has not documented the amount of cartilage that was lost or the extent of the osteoarthritis. In my opinion, it is possible this gentleman may have some osteoarthritis in his elbow. However, most of his symptoms appear to be stemming from instability of the elbow, which appears to have resulted when he first had his injury. His symptoms now are very similar to what he had when he first presented with the injury, and this is a difficult problem to treat. If this gentleman does feel his symptoms are significant enough, he would need a reconstruction of the collateral ligament complex, which is quite likely to leave him with some resulting loss of elbow motion. He is agreeable for further investigations, and I have arranged for an MRI scan as well as an MR arthrogram to evaluate the lateral collateral ligament complex fully and to see if he has any additional loose bodies or any other signs of arthritis in his elbow. Based on that, I will recommend further treatment for him. I will see him when these results are available. All his questions are answered to his satisfaction. (Cl. Ex. A, p.20)

Dr. Bindra conducted additional diagnostic testing, specifically, an arthrogram of the left elbow, together with an MRI post-arthrogram on October 18, 2005. In a report dated October 4, 2005, Dr. Bindra made the following diagnosis and recommendations:

ASSESSMENT/PLAN:
At this point, it appears that the patient does have a lateral ulnar collateral ligament injury of the elbow <u>by physical exam</u>. Because the MR is essentially negative for any loose bodies or other reasons for his pain, at this point, the patient has agreed to go to surgery for reconstruction of the collateral ligament complex. (Cl. Ex. A, p.28) (Emphasis supplied)

It is unclear whether respondents have resisted the recommended surgery by Dr. Bindra because he failed to provide them with further clarification concerning the need for surgery with additional medical evidence supported by objective findings or because of a determination by Systemedic, a utilization review organization, after it requested a review by Medical Review Institute of

America, Incorporated, which is apparently an out-of-state organization that reviewed certain medical records and concluded that surgery was not reasonably necessary. (Resp. Ex. A, pp.3-10)

Lela Taskey, a witness called by the respondent, is the president of the third-party claims administrator for the employer. Ms. Taskey acknowledged that Dr. Bindra recommended surgery following authorized diagnostic testing and based upon physical findings on examination. However, prior to surgery, Systemedic sent information to a peer review committee who apparently asked Dr. Bindra for his physical findings. Because Dr. Bindra refused to respond, Systemedic would not authorize surgery. Although Ms. Taskey maintained that pre-authorization was required under Commission Rule 30, I find no such mandatory requirement under the Act.

The sole issue presented for determination was whether a second surgical repair of the claimant's left elbow, specifically, a reconstructive ligament surgery was reasonably necessary. Dr. Bindra, the claimant's authorized treating physician, selected by the Commission's Medical Cost Containment Division from a list of providers through the employer's managed care organization, recommended the surgery. The recommendation was made following diagnostic testing ordered by Dr. Bindra confirming lateral epicondylitis. Further, the record reflects a history of instability of the left elbow following the May 20, 2004, admitted injury which was not resolved following Dr. Rhodes' initial surgery. The undisputed testimony of the claimant reflects continued physical problems related to the left elbow including

snapping and popping, as well as swelling of the injured extremity. Clearly, Dr. Rhodes did not correct the injury which is why the claimant petitioned and received a change of treating physicians. Dr. Bindra's recommendations were based upon the claimant's history, diagnostic testing, and most importantly, his physical examination of the claimant's elbow. Since the record reflects that the claimant was able to reproduce his symptoms at the within hearing, it can logically be inferred that Dr. Bindra was able to observe the snapping and popping, as well as the swelling which satisfies the requirement of medical evidence supported by objective findings.

I feel compelled to point out that while the respondents' insistence that Dr. Bindra provide more specific information concerning any objective findings, the workers' compensation law does not require medical evidence supported by objective findings in order to receive medical treatment. Although the Act requires medical evidence supported by objective findings to support a compensable injury, as well as to establish entitlement to permanent disability benefits, objective medical evidence is not required to support continued, reasonably necessary medical treatment. *Chamber Door Industries, Inc., vs. Graham*, 59 Ark. App. 224, 956 S.W.2d 196 (1997); *Green Bay Packing vs. Bartlett*, 67 Ark. App. 332, 999 S.W.2d 695 (1999).

The Workers' Compensation Act requires employers to provide such medical services as may be reasonably necessary in connection with an employee's injury. A.C.A. §11-9-508; *American Greeting Corp. vs. Garey*, 61 Ark. App. 18, 963 S.W.2d 613 (1998). What constitutes reasonably necessary medical treatment under

A.C.A. §11-9-508 is a question of fact for the Commission. *Gansky vs. Hi-Tech Engineering*, 325 Ark. 163, 924 S.W.2d 790 (1996); *Geo Specialty Chem., Inc. vs. Clingan*, 69 Ark. App. 369, 13 S.W.3d 218 (2000). Medical treatment which is required to stabilize and maintain an injured worker's status remains the responsibility of the employer. *Artex Hydrophonics, Inc. vs. Pippin*, 8 Ark. App. 200, 649 S.W.2d 845 (1983).

Claimants have the burden of proving, by a preponderance of the evidence, that the medical treatment requested is reasonably necessary for treatment of the compensable injury. *Norma Beatty vs. Ben Pearson, Inc.*, Full Workers' Compensation Commission Opinion filed February 17, 1989 (AWCC #D612291). When assessing whether medical treatment is reasonably necessary for the treatment of a compensable injury, the Commission must analyze both the proposed procedure and the condition it is sought to remedy. *Deborah Jones vs. Seba, Inc.*, Full Workers' Compensation Commission Opinion filed December 13, 1989 (AWCC #D511255).

Dr. Bindra's recommendations are contained in a November 4, 2005, report which followed three (3) physical examinations, as well as diagnostic testing. It appears that respondents attempted to frustrate the claimant's efforts in receiving the recommended surgery based upon the review by Systemedic, a utilization review organization which was consulted to provide professional services on the claim. Rather than provide the treatment and/or submit Dr. Bindra's

recommendations to either the original treating physician or have the claimant evaluated by an independent medical examiner, it chose to obtain an opinion from an out-of-state peer review organization, Medical Review Institute of America. Said organization issued a November 22, 2005, report concluding that the proposed reconstruction of the lateral ligament complex of the left elbow was not medically appropriate. (Resp. Ex. A, pp.8-10)

I do not find the Medical Review Institute of America's report to be persuasive. The major flaw in its evaluation is that no physical examination of the claimant's elbow was performed. The recommendations contained in the report are by an allegedly qualified, independent physician whose name is confidential and who is not subject to cross-examination. Clearly, respondents could have taken the evidentiary deposition of Dr. Bindra at a minimal cost under the Commission's Rule 30 guidelines. It chose to obtain a report from an out-of-state peer review committee with questionable credibility. Dr. Bindra is an eminently, well qualified and respected orthopedic surgeon at UAMS. When weighing the competing medical evidence, together with the claimant's credible testimony, I find that the claimant has shown, by a preponderance of the credible evidence, that he is entitled to continued reasonably necessary medical treatment, including, but not limited to the recommended surgery.

I recognize that respondents insist that prior to authorizing the proposed surgery, Dr. Bindra was required to comply with various requirements and pre-

authorization procedures as determined by the employer's third-party administrator, as well as its utilization review organization. This is an issue that can best be addressed by the Commission's Medical Cost Containment Division. The sole issue presented for adjudication is whether additional treatment is reasonably necessary, as well as related to the admitted, compensable injury. Despite respondents' assertion that the continued problems are the result of arthritis, I disagree with this conclusion. The medical evidence supports the conclusion that claimant's continued problems are the result of a work-related injury that requires surgical correction.

AWARD

Respondent, Management Claim Solutions, Inc., is hereby directed and ordered to pay continued, reasonably necessary medical treatment, including, but not limited to recommended surgical repair by claimant's authorized treating physician, Dr. Randy Bindra, to be paid in accordance with the cost containment provisions provided in Commission Rules.

IT IS SO ORDERED.

DAVID GREENBAUM
Chief Administrative Law Judge