

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F405234

JERRY PIPPINGER, EMPLOYEE	CLAIMANT
SEA-ARK MARINE, EMPLOYER	RESPONDENT
AIG CLAIM SERVICES, CARRIER	RESPONDENT

OPINION FILED FEBRUARY 14, 2008

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH W. HOGAN on November 16, 2007 at Pine Bluff, Jefferson County, Arkansas.

Claimant represented by the HONORABLE KEN BUCKNER, Attorney at Law, Pine Bluff, Arkansas.

Respondents represented by the HONORABLE JARROD PARRISH, Attorney at Law, Little Rock, Arkansas.

ISSUES

A hearing was conducted to determine the claimant's entitlement to payment of additional medical expenses and attorney's fees.

At issue is whether or not additional medical treatment is reasonable and necessary pursuant to Ark. Code Ann. §11-9-508. 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 May 1, 2004 at which time the claimant sustained a compensable injury at a compensation rate of \$268.00/\$202.00. Medical expenses, temporary total disability benefits and a 21% impairment rating, assessed by Dr. Larry Nguyen in his report of March 30, 2005 have been accepted. The claimant receives Social Security Disability benefits.

The claimant injured his left foot on May 1, 2004, resulting in surgical treatment (May, 2004) and subsequent hardware removal (February 2005), by Dr. Larry Nguyen. The claimant has also received treatment from Dr. William Ackerman for pain and physical therapy with Nate Grubbs.

The claimant contends he remains symptomatic and in need of continuing medical treatment.

The respondents contend the claimant has been released by both Dr. Nguyen and Dr. Ackerman and additional medical treatment is unreasonable and unnecessary. Based on his reports of September 13, 2004 and October 28, 2004, Dr. Ackerman released the claimant from his care and Dr. Nguyen released him on March 30, 2005. Surveillance in March, 2006 also indicates the claimant is physically active.

Respondent No. 2 the Second Injury Fund was joined after the prehearing conference; did not participate in the hearing; and is not bound by the stipulations entered into by the claimant and respondent No. 1.

The following were submitted without objection and comprise the evidence of record: the parties' prehearing questionnaires and exhibits, a DVD, and the deposition of Dr. Mahmood Ahmad contained in the hearing transcript.

The following witnesses testified at the hearing: the claimant and his wife, Myra whose testimony was corroborative; and private investigator, Mary Jane Keidley. The claimant used a cane at the hearing.

The claimant, age 62 (D.O.B. January 29, 1946), injured his left foot in 2004 when he fell from a boat he was working on at Sea Ark Marine. Dr. Lytle performed surgery but the claimant developed reflex sympathetic dystrophy (RSD) of the left lower extremity. The claimant was being treated by Dr. Ackerman for RSD when the doctor closed his practice in 2005. The claimant then came under the care of Dr. Nguyen who surgically removed the hardware implanted by Dr. Lytle earlier. The second surgery did not improve the claimant's RSD symptoms but did improve the pain. Dr. Nguyen's surgery involved clipping a nerve leaving the side of his foot numb.

Before he closed his practice, Dr. Ackerman recommended a laser doppler study, but that test was not approved by the carrier.

The carrier agreed to send the claimant to Dr. Ahmad to evaluate the RSD. He recommended trial of a stimulator, but the carrier did not approve anything beyond the first doctor's visit.

Presently, the claimant suffers from throbbing pain, weakness, discoloration and coldness in his left leg. His symptoms have worsened, spreading up his leg to his thigh. The claimant is worried that the condition will eventually affect his hip. His symptoms wax and wane, especially with the weather, and he does not always use his cane. He has shoe inserts that help with heel pain but he does not always wear them because it causes discomfort in his toes. He occasionally uses over-the-counter medication, and gets relief with massage, popping his ankle joint, physical therapy and home exercise.

The claimant considers himself retired and is not interested in retraining. He has dabbled in some work (rabbit farm, carpentry, duck hunting guide, and delivery of recreational vehicles) but is careful not to exceed the income limits dictated by Social Security.

The investigator observed the claimant walking with a normal gait and without the assistance of a cane. He changed a tire on his pickup. The claimant explained that due to his injury, with weakness and numbness in his foot, it is difficult to balance himself. However, as long as he was seated on a block, he was able to change the tire.

MEDICAL EVIDENCE

An overview of the claimant's symptoms and treatment can be found in Nat Grubb's physical therapy reports of September 27, 2004, October 22, 2004, March 14, 2005, and April 4, 2005.

The claimant was diagnosed with a comminuted and compressed fracture of the left calcaneus bone. Dr. Lytle performed surgery on May 26, 2004, installing screws and plates. In his report of September 2, 2004, Dr. Lytle found evidence of RSD with atrophy, red glow and shiny skin. Dr. Schlesinger's report of September 9, 2004 reflects symptoms of atrophy, change in hair pattern, hyperhidrosis, and temperature changes. He recommended confirmation with diagnostic studies.

On September 13, 2004, a Laser Doppler Study was performed which was negative, but a triple Phase Bone Scan was positive and an EMG/NCV study was abnormal.

The claimant received treatment to desensitize the scar. Physical therapy improved, but did not eliminate, his pain.

Dr. Ackerman stated that the claimant's RSD symptoms were gone as of October 28, 2004, but he recommended hardware removal. The claimant returned to Dr. Ackerman on November 29, 2004 with pain.

On February 15, 2005 Dr. Nguyen performed surgery on the claimant's left foot to remove the hardware and free a nerve trapped in scar tissue (sural nerve resection).

On March 3, 2005 Dr. Nguyen assessed a rating of 21% to the foot and warned that the claimant would require additional surgery, fusion with allograft, sometime in the future.

Dr. Ackerman closed his practice and referred his patients to Dr. Ahmad.

Dr. Ahmad authored a letter dated June 27, 2007 indicating that while RSD can wax and wane, it cannot be cured. The claimant needed additional pain treatment and was a candidate for a spinal cord stimulator trial.

The claimant saw Dr. Whipple on August 21, 2007. He also recommended additional diagnostic testing (MRI scan) which the carrier has not authorized. Dr. Whipple noted coolness in the left foot and restricted range of motion. The claimant complained of pain his foot and back.

In his deposition, Dr. Ahmed testified that RSD is now called, "complex regional pain syndrome." The condition involves the sympathetic nervous system and regional blood flow. Symptoms include hypersensitivity, changes in hair growth and skin color, edema and sweating. Once the diagnosis of the syndrome is confirmed by examination, laser doppler and bone scan, there is usually no need to repeat those tests. Follow-up examinations confirm if the syndrome is active or in remission. If a spinal cord stimulator is implanted, it would then be possible to switch the device on or off depending on flare-ups.

If the carrier demanded further testing before approving treatment, Dr. Ahmad would prefer to repeat the laser doppler study. This test would shed light on the claimant's circulatory system. If the carrier demanded confirmation that the claimant was suffering from pain, that could be tested

with the Von Frey hair exam or thermal sensory analysis (TSA).

Dr. Ahmad did not have Dr. Nguyen's records at the time of the claimant's appointment. The fact that Dr. Nguyen's post-op records mention good blood flow to the ankle is not determinative of RSD or healing. In Dr. Ahmad's opinion, the claimant's healing period has ended with regard to surgery but he remains in a healing period for treatment of pain. Increased blood flow six weeks after surgery is consistent with RSD. In a normal patient, the blood flow would increase immediately after surgery but then constrict with healing.

Dr. Ahmad has not seen the claimant in a year and would want to evaluate him again before proceeding, but in general, dorsal column stimulators are key to preventing symptoms progression of RSD. Once the symptoms have progressed to other part of the body, patients require implantation of a pain pump. A pain pump requires maintenance and increases the risk of complications.

Dr. Ahmad testified that patients with RSD are encouraged to stay active. The claimant has no physical limitations as long as he can tolerate pain.

FINDINGS AND CONCLUSIONS

Employers must promptly provide medical services which are "reasonably necessary in connection with" the compensable injuries. Ark. Code Ann. §11-9-508(a). However, injured employees have the burden of proving by a preponderance of the evidence that medical treatment is reasonably necessary. Patchell v. Wal-Mart Stores, Inc., 86 Ark. App. 230, 184 S.W.3d 31 (2004). What constitutes reasonable and necessary medical treatment is a fact question for the Commission, and the resolution of this issue depends upon the sufficiency of the evidence. Gansky v. Hi-Tech Engineering, 325 Ark. 163, 924 S.W.2d 790 (1996). Reasonably necessary medical services "may include that necessary to accurately diagnose the nature and extent of the compensable injury; to maintain the level of healing achieved; or to prevent further deterioration of the damage produced by the compensable injury." Greer v. Phillip Mitchell Construction, Full Commission opinion February 14, 2003 (E906565). In assessing whether a given medical procedure is reasonably

necessary for treatment of the compensable injury, it is necessary to analyze both the proposed procedure and the condition it is sought to remedy. Deborah Jones v. Seba, Inc., Full Workers' Compensation Commission, December 13, 1989 (Claim No. D511255).

In reviewing this case it occurs to me that the respondents are treating this case differently because it concerns RSD. In any other case, treatment for pain following a compensable injury is considered reasonable and necessary medical treatment absent some evidence of malingering.

The respondents have couched this dispute in terms of compensability actually. The deposition questions centered around whether or not Dr. Ahmad has objective evidence to prove the claimant still has RSD after Dr. Ackerman found that the claimant's symptoms resolved in October, 2004. As I understand Dr. Ahmad's testimony, RSD is never cured. It may wax and wane, but once the syndrom is confirmed by diagnostic testing (laser doppler, triple phase bone scan, EMG/NCV study) the patient will always have to be followed by a physician to treat flare-ups and to prevent progression of the symptoms. In this case, the claimant has had those diagnostic tests in the past and RSD has been confirmed.

Additionally, Dr. Ackerman's finding in October 2004 predates Dr. Nguyen's surgery in February 2005 adding yet another insult to the claimant's foot.

The claimant's ability to work occasionally, drive, and change a tire does not mean that he is pain-free. I found him to be a credible witness who has cooperated with is physicians and treatment. He is entitled to continuing medical treatment with Dr. Ahmad and if ultimately Dr. Ahmad needs to implant a stimulator, I find that to be a reasonable and necessary medical expense.

1. The Workers' Compensation Commission has jurisdiction of this claim in which the employment relationship existed among the parties on May 1, 2004. The claimant sustained a compensable left foot injury. After two surgeries, he was assessed 21% permanent anatomical impairment.
2. Dr. Ackerman diagnosed the claimant with complex regional pain syndrome, formerly known as reflex sympathetic dystrophy, after diagnostic testing. There is no evidence that the claimant is malingering.

3. According to Dr. Ahmad, this pain syndrome may wax and wane but it cannot be cured. The claimant will need follow-up pain management for the rest of his life. Since Dr. Ahmad did not have all of the claimant's medical records at the time of the evaluation, he needs to reevaluate the claimant before proceeding, but a stimulator implant is the preferred course of treatment. This pain management treatment is reasonable and necessary to address pain and to stop the syndrome from progressing.
4. The respondents are directed to pay Dr. Ahmad's expenses within thirty days of receipt pursuant to Rule 30.
5. The respondents are directed to pay court reporting fees and expenses to Ms. Linda Parker pursuant to Commission Rule 20.
6. 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.

AWARD

Respondents are directed to pay benefits in accordance with the Findings of Fact above. 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