

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F411543

ANTONIO SANCHEZ RODRIGUEZ, EMPLOYEE	CLAIMANT
TAYLOR & STUCKEY, INC., EMPLOYER	RESPONDENT
AG-COMP SIF CLAIMS, INSURANCE CARRIER/TPA	RESPONDENT

OPINION FILED JANUARY 9, 2008

Hearing before Chief Administrative Law Judge David Greenbaum on December 6, 2007, at Jonesboro, Craighead County, Arkansas.

Claimant represented by Ms. Evelyn E. Brooks, Attorney-at-Law, Fayetteville, Arkansas.

Respondents represented by Mr. Guy Alton Wade, Attorney-at-Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted December 6, 2007, to determine whether the claimant was entitled to additional workers' compensation benefits.

A prehearing conference was conducted in this claim on October 10, 2007, and a Prehearing Order was filed on said date. At the hearing, the parties announced that the stipulations, the issue, as well as their respective contentions were properly set out in the Prehearing Order, subject to an additional stipulation concerning the applicable compensation rates. A copy of the Prehearing Order was introduced as "Commission's Exhibit 1."

It was stipulated that the claimant sustained a compensable injury to his left elbow on November 3, 2004; that respondents paid various medical and indemnity

benefits; and that respondents have controverted claimant's entitlement to a recommended additional surgery. At the hearing, the parties agreed that the claimant earned sufficient wages to entitle him to compensation rates of \$299.00 per week for temporary total disability and \$224.00 per week for permanent partial disability; however, any issue related to whether the claimant was paid all appropriate indemnity benefits was specifically reserved.

By agreement of the parties, the primary issue for determination was whether the claimant was entitled to additional medical treatment, specifically, surgery recommended by Dr. Christian Fahey.

Claimant contended, in summary, that his authorized treating physician, Dr. Christian Fahey, had recommended additional surgery; that the recommended surgery was reasonably necessary, as well as related to the claimant's November 3, 2004, injury and should be paid by the respondents. If approved, the claimant requested a period of temporary total disability following the surgery.

The respondents contended that the claimant cannot prove that the requested surgery was reasonably necessary, maintaining that other medical providers had concluded that further surgery was not necessary.

The record is composed solely of the transcript of the December 6, 2007, hearing containing several exhibits, including a joint medical exhibit consisting of thirty-eight (38) pages.

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 Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The stipulations agreed to by the parties are hereby accepted as fact.
3. The claimant has proven, by a preponderance of the credible evidence, that he is entitled to additional surgery recommended by Dr. Christian Fahey. The surgery recommended by Dr. Fahey is reasonably necessary, as well as related to the claimant's November 3, 2004, injury and should be paid by respondents.
4. The claimant would be entitled to an additional period of temporary total disability for the period beginning the date of surgery and continuing until such time as claimant reaches maximum medical improvement following the additional surgery.
5. Claimant's entitlement to additional indemnity benefits beyond those awarded herein have been specifically reserved.

DISCUSSION

The claimant, Antonio Sanchez Rodriguez, testified in his own behalf. The

claimant is forty-three (43) years old. He sustained an admitted injury to his left elbow on November 3, 2004, while working for Taylor & Stuckey, Inc. The claimant stated that he had not returned to any gainful employment since the injury. The claimant denied having sustained any additional injuries since November 3, 2004. The record reflects that the claimant has seen numerous medical providers for his elbow injury. Most recently the claimant has been examined and evaluated by Dr. Christian Fahey, an orthopedic surgeon in Memphis, Tennessee. Dr. Fahey has recommended surgery to improve the function of the claimant's left upper extremity. The claimant wishes to proceed with the surgery. Respondents have refused to authorize the surgery recommended by Dr. Fahey.

A review of the claimant's medical history is warranted. First, it must be pointed out that the claimant does not speak English and, therefore, has difficulty communicating with the medical providers which is noted in some of his medical histories. The medical evidence reflects that prior to his November 3, 2004, compensable injury, the claimant was examined one-time only by Dr. Trent R. Lamb, a general practitioner at the Trumann Medical Center. The claimant stated that he saw Dr. Lamb following a motor vehicle accident which resulted in an injury to his right shoulder. However, the patient history contained in Dr. Lamb's August 20, 2004, report notes that the claimant reported injuring his left shoulder as the result of lifting things at work. Although there were no objective signs of injury contained in Dr. Lamb's records, he diagnosed a pulled left shoulder

acromioclavicular joint, prescribed medications, and released the claimant to return on an as-needed basis. The claimant did not return to Dr. Lamb. (Tr.13)(Jt. Ex. A, p.1)

Again, the claimant sustained an admitted work-related injury to his left elbow on November 3, 2004. The claimant was initially taken by ambulance to the emergency room of the NEA Medical Center in Jonesboro, Arkansas. X-rays revealed that the claimant's elbow was out of its socket. The dislocation was reduced. Additional diagnostic studies revealed a radial head fracture of the left upper extremity. The left arm was placed in a splint and the claimant was released to follow-up with an orthopedic surgeon.

The claimant was next examined and treated by Dr. R. Edward Cooper, Jr., an orthopedic surgeon in Jonesboro, Arkansas. Dr. Cooper first evaluated the claimant on November 8, 2004. He diagnosed a severely comminuted left radial head fracture with subluxation of the joint which appeared to be reduced with long arm casting. Dr. Cooper ordered a CT scan of the left elbow to determine whether the claimant could be treated conservatively or would require more aggressive intervention in the form of a radial head excision and replacement with a titanium device. The claimant returned to Dr. Cooper on November 10, 2004, at which time Dr. Cooper reviewed the CT scan. Because of a comminuted left radial head fracture with subluxation of the elbow joint, Dr. Cooper determined that it was imperative that surgical intervention be pursued, at which time the claimant was

scheduled for a radial head replacement of the left elbow. The claimant underwent surgery on November 15, 2004. The claimant returned to Dr. Cooper on November 29, 2004. X-rays taken on that day demonstrated excellent alignment of the prosthesis and elbow joint. Dr. Cooper prescribed a regimen of physical therapy, medication for pain, and hinged left elbow brace to protect the claimant between physical therapy sessions, at which time he scheduled the claimant for a return visit in four (4) weeks for repeat x-rays and further evaluation. The claimant returned to Dr. Cooper on December 1, 2004, with complaints of hand swelling. Dr. Cooper felt that the swelling was likely related to either the cuff on the brace being too tight or possibly just normal swelling after the arm was in the dependent position. Dr. Cooper prescribed ice and elevation for at least seventy-two (72) hours as needed for swelling, continued use of the hinged brace, occupational therapy previously prescribed, with a return at his regularly scheduled appointment. Dr. Cooper's medical records then become confusing. The next entry is dated January 4, 2005. His notes on that date reflect that the claimant is now seven (7) days post-surgery. However, there are no records of any treatment or surgery between December 1, 2004, and January 4, 2005, save the occupational therapy. The January 4, 2005, office note is set out in its entirety below:

1-4-05 Mr. Sanchez returns today. He is now 7 days S/P radial head replacement for complex radial head fracture with tear of the medial collateral ligament of the elbow. Today he has no complaints. He has been afraid to move his elbow in OT. I don't think it has done quite as well as it should have.

On physical examination today he does have ROM from 95 degrees of flexion to 50

degrees of flexion. He still has significant loss of pronation and supination of the forearm. He appears to be neurovascularly intact with excellent digital ROM.

IMPRESSION:

1. S/P radial head replacement left elbow for complex severely comminuted radial head fracture.

PLAN:

1. He will be placed in OT. We had a translator today and I think he understands that he is going to have to go through some pain to get his motion back and is more willing to do that now.

2. He will return to clinic in four weeks for follow-up. At that time hopefully we will have an interpreter again and we can advance his activities. REC:jm (Jt. Ex. A, p.27)

Apparently, the claimant did not return to Dr. Cooper four (4) weeks later.

Rather, the record reflects that the claimant was next referred by Dr. Trent R. Lamb, in Trumann, Arkansas, to Dr. David M. Rhodes, an orthopedic surgeon specializing in upper extremity surgery in Little Rock, Arkansas. Dr. Rhodes' recommended plan follows:

PLAN:

1. I told the patient that there is a possibility that a larger spacer could be placed in the elbow to help reverse the ulner plus variance. However, this may not improve his range of motion of his elbow. With decreased range of motion of his elbow it more than likely will not improve with radial head arthroplasty. Patient states that most of his problem is with his elbow and now his wrist. I told him that he does have arthritic changes of the elbow and that he more than likely had this prior to his injury and that surgery would not improve the range of motion of his elbow. I think the patient could gradually increase his weight limit to the left upper extremity but at this point he will remain no use of left upper extremity.

I appreciate this consult. If there is any questions regarding this patient's care please do not hesitate to ask. (Jt. Ex. A, p.28) (emphasis supplied)

It is clear from the aforementioned report, that while Dr. Rhodes did not believe additional surgery would improve the range of motion of the claimant's

elbow, that surgery could improve the overall function of the upper extremity. Further, Dr. Rhodes restricted the claimant to the use of the right upper extremity only. However, for some unexplained reason, on March 7, 2005, Dr. Rhodes issued a report addressed to Medical Case Management Nurse opining that the claimant had reached maximum medical improvement and that an impairment rating would follow while, at the same time, indicating that the claimant would be a candidate for a functional capacity evaluation. (Jt. Ex. A, p.29)

The record does not reflect the claimant's subsequent course of medical treatment, if any, or the extent of claimant's permanent impairment. As previously pointed out, the claimant's entitlement to additional indemnity benefits, if any, prior to the immediate request for additional surgery has been specifically reserved. The claimant next obtained a change of treating physicians, issued by the Commission from Dr. Trent Lamb, to Dr. Guy J. L'Heureux, in West Memphis, Arkansas. Dr. L'Heureux evaluated the claimant on July 18, 2006. It is clear from Dr. L'Heureux's report that he was unaware that the claimant had been provided a permanent impairment rating. Although Dr. L'Heureux did not address the amount of claimant's impairment in his report, he did indicate that the surgical prosthesis had migrated slightly and recommended that the claimant be evaluated once a year because the prosthesis would cause synovitis and there was also a possibility that there could be a partial break of the prosthesis and a migration within the area of the elbow joint. A portion of Dr. L'Heureux's July 18, 2006, report follows:

I proceed to review x-rays provided to me by Ms. Debra Wilson, Case Manager, and they do show the fracture of the radial head comminuted shortly after the injury. Then the reduction that was done and immobilization in the cast in fairly good position. Finally, the x-rays post surgery, which do show perfect alignment of the prosthesis and of the elbow. At a later date though the prosthesis has very slightly migrated superiorly if we consider the area of the neck, but it is still in good position.

REVIEW OF RECORDS: I have reviewed the records provided to me from St. Bernard's Medical Center, as well as the notes from Dr. Trent Lamb and physical therapy from Health South.

OPINION:

1. When I discussed with Mr. Sanchez I was not aware that he had been provided with a PPI and I did recommend to him to have a PPI. I definitely realized that he should have been at MMI which was indicated in the records that I have received.
2. I explained to Mr. Sanchez that as far as the surgery done I agree with it and also he has to understand that he will never get back the strength that he had before, but that he has to go back to work and use his arm in order to increase the strength and increase the muscular mass. His alternative would be an elbow fusion and the patient definitely doesn't want to consider that at all.

Since the patient already has an MMI and a PPI, I think this should be followed since he should have returned to work in order to strengthen his upper extremity. I do not think that any new surgery would be indicated.

Finally, my last recommendation would be for the patient to be seen and evaluated once a year, because there is always the possibility that the silastic prosthesis will cause synovitis which is related to the prosthesis and there is also a possibility that there could be partial break of the prosthesis and migration within the area of the joint.

Since I do not have any other treatment to offer, I will not continue to see Mr. Sanchez and I will release him from my care.

Finally, I explained to Mr. Sanchez that he should be treated for his diabetes and hypertension.

ADDENDUM: When Mr. Sanchez returns to work it will be advisable to have at first a restriction on his lifting at about 20 pounds for the first month, 30 pounds for the second month and without restriction thereafter. Since he had plenty of time to

increase his strength this is not a strict recommendation. (Jt. Ex. A, p.32) (emphasis supplied)

Dr. L'Heureux subsequently retired. Thereafter, the parties agreed to allow the claimant to be examined and evaluated by Dr. Christian Fahey, an orthopedic surgeon with the Memphis Orthopedic Group in Memphis, Tennessee. Dr. Fahey evaluated the claimant on June 20, 2007. Dr. Fahey has recommended additional surgery to improve the function of the claimant's left upper extremity. It is clear that he discussed his treatment options with both the claimant and the case manager as reflected below:

IMPRESSION/PLAN: Monteggia fracture, apparently with radial head Cylastic arthroplasty, with subsequent ulnocarpal abutment.

Through his translator I discussed this with him at length. I understand he has had three previous opinions before and they have all told him he should be able to return to function. I certainly understand where they are coming from, but I believe that they are less than completely accurate. Although I can not promise the patient he will improve, I believe that the correct medical answer is to perform an ulnar shortening osteotomy. This will correct the ulnar positive variance and will disimpact the distal ulna from the carpus, allowing improved range of motion without pain. This is a relatively reliable operation, although no where near guaranteed.

I discussed this operation with him, after mentioning this to his case manager to make sure this was an IME for treatment and not just for an opinion. I made sure he understood the risks, the benefits and alternatives, the expected outcome, the possible adverse outcome and the typical chronology of recovery. He seemed to be excited about the idea and wanted to proceed. We are cognizant of the fact that we will have to get approval from his insurance company first. We will file a request with them.

Once again, I believe he has ulnar carpal abutment secondary to a Monteggia fracture dislocation and I do believe this would benefit from surgical intervention consisting of shortening the relatively long ulna. I will be available to answer questions as necessary./kmw
IME

cc: Debra Wilson, RN (Jt. Ex. A, pp.36-37)

Tammie Hester, respondents' claims manager, acknowledged that following receipt of Dr. Fahey's recommendations, the nurse case manager suggested either a peer review of Dr. Fahey's recommendations or a pre-certification of the recommended surgery, but that neither was performed. Rather, respondents controverted the recommendations based upon medical opinions of record from February, 2005. (Tr.25-26)

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. v. 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 v. Hi-Tech Engineering*, 325 Ark. 163, 924 S.W.2d 790 (1996); *Geo Specialty Chem., Inc. v. 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 Hydroponics, Inc. v. Pippin*, 8 Ark. App. 200, 649 S.W.2d 845 (1983).

_____ From a thorough review of the record as a whole, including the medical evidence, I find that the claimant has proven, by a preponderance of the credible evidence, that he is entitled to the additional surgery recommended by Dr. Christian Fahey. Contrary to respondents' contentions, other medical providers have not

stated that additional surgery would not improve the function of claimant's arm. Dr. Cooper did not complete his treatment when the respondent apparently, unilaterally, sent the claimant to Dr. David Rhodes. Dr. Rhodes suggested various treatment options and restricted the claimant's use of the left arm. For unexplained reasons, he changed his opinion and found that the claimant reached maximum medical improvement in less than three (3) weeks, without further examination. After Dr. Fahey issued a report recommending additional surgery, respondents' nurse case manager recommended obtaining a peer review opinion prior to proceeding with surgery, but again respondents did not follow through with the recommendations of its own nurse case manager. The recommendations of Dr. Fahey are reasonable, necessary, and related to the compensable injury. Accordingly, I hereby make the following:

AWARD

_____ Respondent, AG-Comp SIF Claims, is hereby directed and ordered to pay for the surgical procedure recommended by Dr. Christian Fahey. All medical treatment shall be paid in accordance with the medical cost containment guidelines established by Commission Rule 099.30.

In addition, respondents are directed and ordered to pay additional temporary total disability at the rate of \$299.00 per week beginning with the date of the surgery and continuing until such time that Dr. Fahey determines that the claimant has reached maximum medical improvement.

Additionally, claimant's attorney, Ms. Evelyn E. Brooks, is hereby awarded the maximum statutory attorney's fee on this entire Award pursuant to, and limited by, the provisions of Ark. Code Ann. §11-9-715.

IT IS SO ORDERED.

DAVID GREENBAUM
Chief Administrative Law Judge