

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F412317

CARLOS RUVALCABA	CLAIMANT
KAISERS CONTRACT CLEANING	RESPONDENT
HARTFORD ACCIDENT & INDEMNITY, INSURANCE CARRIER	RESPONDENT

OPINION FILED **JUNE 30, 2008**

Hearing before ADMINISTRATIVE LAW JUDGE MICHAEL L. ELLIG in Fort Smith, Sebastian County, Arkansas.

Claimant represented by GARY UDOUJ, Attorney, Fort Smith, Arkansas.

Respondents represented by MICHAEL WRIGHT, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on April 29, 2008, in Fort Smith, Arkansas. The deposition of Dr. James Kelly was taken on April 28, 2008. This deposition has been admitted as Respondents' Exhibit No. 2.

A pre-hearing order was entered in this case on February 21, 2008. Prior to the commencement of the hearing and by the agreement of the parties, an additional issue of whether the claimant sustained a compensable injury to his left knee in the employment related accident of October 9, 2004, was added. A copy of the pre-hearing order with this amendment noted thereon was Commission's Exhibit No. 1 to the hearing.

The following stipulations were offered by the parties and are hereby accepted:

1. On October 9, 2004, the relationship of employee-employer-carrier existed between the parties.
2. On October 9, 2004, the claimant sustained a compensable injury to his left forearm.

3. On October 9, 2004, the appropriate weekly compensation rates were \$372.00 for total disability and \$279.00 for permanent partial disability.
4. There is no dispute over temporary total disability benefits for the claimant's compensable left forearm injury.
5. There is no dispute over the payment of expenses incurred for medical services for the compensable left forearm injury accruing to date.
6. The respondents controvert the claimant's entitlement to any benefits for his left leg difficulties and his alleged left shoulder injury.

By agreement of the parties, the issues to be litigated and resolved at the present time were limited to the following:

1. Whether the claimant's left leg difficulties represent a compensable consequence or complication of his compensable left forearm injury.
2. Whether the claimant also sustained a compensable injury to his left knee in the accident on October 9, 2004.
3. The claimant's entitlement to medical services for his left leg difficulties.
4. Whether the claimant also sustained a compensable injury to his left shoulder in the employment related accident of October 9, 2004.
5. The claimant's entitlement to medical services for this left shoulder injury.

6. The claimant's entitlement to recommended medical services for his compensable left forearm injury.

In regard to these issues, the claimant contends:

(a) Claimant sustained a compensable injury to the left leg as a consequence of surgery following the injury of 10/9/04. Surgery to the left leg resulted in a sensory nerve injury (Dr. James Kelly, III's progress note 11/4/07).

(b) Claimant sustained a compensable injury this left arm on 10/9/04. Dr. James Kelly, III is of the opinion that a surgery involving a flap reconstruction of his forearm will give the arm muscle both "better support and it should improve its amplitude." Dr. Kelly scheduled claimant for surgery on December 4, 2007, which the carrier denied.

(c) Claimant sustained a compensable injury to his left shoulder on 10/9/04. Dr. Kelly's progress note of 11/14/07 stated his belief that the shoulder injury had not been dealt with to date, and acknowledged that one of the injury sites was at the shoulder and recommended referral to an orthopaedic group for evaluation and treatment at their discretion. Contrary to the carrier's contentions, the claimant has complained about his shoulder injury and has documented the same. The AR-C form refers to "injury to shoulder and left leg." Medical documents were also attached to claimant's previous pre-hearing questionnaire dated 6/16/06, referring to the shoulder, specifically, physical therapist Sharon Miesner in progress note of 3/24/05 reflects fatigue at the shoulder trying to position his hand by flexing the shoulder and evaluating it. Miesner's report of 4/28/05 states, "Patient still reports having shoulder pain." Problem area was discovered to be "upper trapezius muscle spasm and/or fatigue." This seems to be the correct area of problem with his left shoulder.

(d) Dr. James E. Kelly, III, recommended and scheduled an excision and fascia cutaneous closure of the left forearm. Surgery was scheduled for 12/4/07, but was denied by the respondents.

(e) Dr. James E. Kelly, III, attempted to refer claimant to an orthopedist for evaluation and treatment of the left forearm, but the appointment was not approved by the respondent.

In regard to these issues, the respondents contend:

"Respondents contend the claimant sustained a compensable injury as previously stated on October 9, 2004. Respondents contend that all appropriate medical benefits, temporary total disability benefits and permanent impairment benefits have been or are in the process of being paid at this time. Respondents contend the claimant did not sustain a compensable injury to his left leg. Respondent further contend claimant's request for scar revisions or additional medical procedure on his left upper extremity are not reasonable and necessary medical treatment for the injuries sustained in the compensable injury. Respondents contend the claimant is not entitled to penalties and interest on the payment of permanent impairment benefits based upon the impairment rating as it was assessed initially by Dr. Bindra. Respondents contend once the impairment rating was appropriately based by Dr. Michael Moore, respondents initiated payment of permanent impairment benefits."

DISCUSSION

I. ALLEGED LEFT KNEE INJURY

_____The first issue to be addressed is whether the claimant also sustained a "compensable injury" to his left knee in the employment related accident of October 9, 2004. The burden rests upon the claimant to prove this contention. In order to meet this burden, the claimant must establish by medical evidence, which is supported by objective findings, the actual existence of the alleged physical injury to his left knee. Further, he must prove that this injury was caused by the specific incident or accident on October 9, 2004. Further, he must prove that this injury resulted in internal or external physical harm to this part of his body and was sufficient to require medical treatment or resulted in disability.

The medical evidence presented simply fails to establish the actual existence of any physical injury involving the claimant's left knee, as required by Ark. Code Ann. §11-9-102(4)(D). The initial medical reports indicate that the claimant was complaining of difficulties with his left leg, immediately

following the employment related accident of October 9, 2004. However, there is no mention of any specific complaints involving the claimant's left knee.

As a result of the claimant's subjective complaints with his left leg, x-rays were taken of this portion of his body on October 9, 2004. This test was interpreted as showing some sclerosis involving the mid distal shaft of the tibia that was probably the result of healing of an old tibial fracture. However, no indication of any "acute" or recent injury or abnormality was observed. The medical record also fails to reveal any "objective findings" to substantiate or support the existence of a physical injury or defect involving the claimant's left knee. There is no mention of any observed swelling, instability, crepitus, or locking of this joint.

The only specific mention made of difficulties with the claimant's left knee is found in the physical therapy reports, particularly the report dated November 16, 2004. This latter report notes that the claimant was not bending his left knee when walking, but walked "stiff legged". The previous physical therapy reports had also mentioned that the claimant was having difficulty in walking, but attributed this problem to the effects of the surgical harvesting of the muscle and nerve from this leg for reconstruction of his injured left arm.

After consideration of all the evidence presented, it is also my opinion that the claimant has failed to prove that he sustained a physical injury to his left knee in the employment related accident of October 9, 2004, which would satisfy the various statutory requirements for a "compensable injury" that are set out in Ark. Code Ann. §11-9-102(4)(A)(i). The only evidence presented by the claimant to prove the occurrence of a physical injury to his left knee in the employment related accident of October 9, 2004, is his own testimony. At the hearing the claimant testified that in this employment related accident, he

fell to the floor striking his left knee, that he experienced the contemporaneous onset of pain in this knee, and that this pain has persisted thereafter. As previously stated, the initial medical records noted subjective complaints involving the claimant's left leg. However, there was no specific mention made of any complaints involving the knee. None of the various physicians, who have evaluated and treated the claimant, have recorded any history of an injury to the claimant's left knee on October 9, 2004, or diagnosed any physical injury or defect involving the claimant's left knee.

In summary, the claimant has simply failed to "establish" by medical evidence, which is supported by objective findings, the actual existence of any physical injury involving his left knee. He has further failed to prove the evidence of a causal connection between his left knee complaints and the employment related accident of October 9, 2004. Finally, he has failed to prove by the greater weight of the credible evidence the occurrence of any physical injury to his left knee that caused internal or external physical harm to this part of his body, and was sufficient to require medical services or result in disability.

II. ALLEGED LEFT SHOULDER

The next issue to be addressed is whether the claimant also sustained a "compensable" injury to his left shoulder in the employment related accident of October 9, 2004. Again, the burden rests upon the claimant to prove this contention. The various facts he must prove, in order to meet his burden, are the same as those that are previously set out in this Opinion, in regard to the claimant's alleged left knee injury.

The claimant testified that he had no injury to his shoulder or difficulties with this portion of his body prior to the employment related accident of October 9, 2004. The claimant further testified that he began experiencing

difficulties with his left shoulder contemporaneous to the accident on October 9, 2004. He stated that he told all of his various treating physicians about his complaints with his left shoulder. The initial medical records noted a visible friction burn or abrasion to the claimant's left upper extremity that "was more pronounced at the shoulder". Although these records do not expressly refer to an injury to the shoulder, it must be noted that in the general medical community (unlike the Workers' Compensation Act), the "upper extremity" is considered to include the "shoulder". The initial medical records do repeatedly refer to upper extremity injuries and complaints.

Although the subsequent medical reports and records of Dr. David Sudbrink and Dr. Randy Bindra do not specifically diagnose any injury directly to the left shoulder joint itself, difficulties with the claimant's left shoulder are repeatedly noted in the physical therapy reports. These reports note not only pain but muscle spasms involving the left shoulder.

However, Dr. James Kelly did ultimately conclude that the claimant had experienced an injury to his left shoulder, itself, in the employment related accident of October 9, 2004. He further opined that this injury had not been properly evaluated or addressed, because of the severity and urgency of the claimant's other compensable injuries to his left upper extremity. It was his recommendation that the claimant be evaluated by an orthopaedic surgeon with expertise in the area of shoulder difficulties. Dr. Kelly further stated that based upon his knowledge and experience, the stress and trauma of the employment related accident of October 9, 2004, could have easily produced some type of injury to the claimant's left shoulder joint, itself. From the actual mechanics of the employment related injury and the magnitude of the stress

and trauma involved, such a conclusion on the part of Dr. Kelly would appear to be logical and reasonable.

Dr. Kelly's expert medical opinion that the claimant sustained a physical injury to his left shoulder in the employment related accident of October 9, 2004, is sufficient to "establish" by medical evidence the actual existence of a physical injury to this portion of the claimant's body. Further, the objective finding noted on the initial medical records of a friction burn or abrasion of the skin that was most pronounced in the area of the claimant's left shoulder and the subsequent spasms noted by the physical therapist in this area, would represent "objective findings" to support Dr. Kelly's diagnosis of the existence of a physical injury to the claimant's left shoulder. Thus, the claimant has satisfied the statutory requirements for a "compensable injury" to this portion of his body that are found in Ark. Code Ann. §11-9-102(4)(D).

I find the claimant's testimony that he had not had any difficulties with his shoulder prior to the employment related incident of October 9, 2004, and that he has had continuous difficulties with this portion of his body thereafter to be credible. Clearly, the mechanics and magnitude of the trauma produced in the employment related incident of October 9, 2004, could reasonably and logically cause the claimant's difficulties with his left shoulder. There is no evidence presented of any equally reasonable or probable cause for these complaints.

Therefore, the claimant has proven the existence of a causal relationship between his left shoulder difficulties and the specific employment related incident or accident on October 9, 2004. The existence of this causal relationship would be sufficient to satisfy the first three definitional requirements of Ark. Code Ann. §11-9-102(4)(A)(i), i.e. that his left shoulder

difficulty were the result of an injury that arose out of and occurred in the course of his employment with the respondent, was caused by a specific incident, and is identifiable by time and place of occurrence.

The claimant's credible testimony concerning the magnitude and persistence of his left shoulder difficulties and the objective findings noted during the physical therapy are sufficient to prove that this left shoulder injury resulted in internal physical harm to this part of his body. The magnitude and persistence of the claimant's left shoulder difficulties, as shown by his credible testimony, and the expert opinion of Dr. Kelly that the claimant requires further examination and evaluation of these difficulties is sufficient to prove that the left shoulder injury reasonably requires medical services. This would satisfy the final definitional requirement of Ark. Code Ann. §11-9-102(4)(A)(i).

In summary, the claimant has proven all of the statutory requirements necessary to establish the occurrence of a "compensable injury" to his left shoulder in the employment related accident of October 9, 2004. He is therefore entitled to appropriate benefits for this compensable injury as provided by the Act.

III. MEDICAL SERVICES FOR THE CLAIMANT'S COMPENSABLE LEFT SHOULDER INJURY

At the present time, the only benefits the claimant is seeking for his compensable left shoulder injury is medical services. The claimant's entitlement to this benefit is controlled by the provisions of Ark. Code Ann. §11-9-508. The burden still remains on the claimant to prove his entitlement to these benefits.

Under the foregoing subsection, the claimant is only entitled to "reasonably necessary" medical services for this compensable left shoulder

injury. Whether medical services are "reasonably necessary" is a medical question which must be resolved on the basis of the greater weight of the medical evidence presented. In order to constitute "reasonably necessary" medical services, the medical services must be connected with or necessitated by the compensable injury and have a reasonable expectation of accomplishing the purpose or goal for which they are intended.

It appears that the only medical service in dispute at the present time is the evaluation of the claimant's left shoulder by a medical specialist with expertise in the area associated with such difficulties, as recommended by Dr. Kelly. Clearly, "reasonably necessary medical services" under Ark. Code Ann. §11-9-508 extend to medical services required to accurately diagnose the nature and extent of a compensable injury. The evidence presented shows that such an evaluation has never been performed in regard to the claimant's left shoulder difficulties. The obvious reason for this failure being that the primary focus of the claimant's medical treatment, to date, has been his far more extensive and urgent compensable injuries to other portions of his left upper extremity. During the process of the treatment for these other injuries, the claimant's left shoulder difficulties appear to have been essentially overlooked. This problem has been further complicated by difficulties in communication between the claimant and his various treating physicians.

After consideration of all the evidence presented, it is my opinion that the greater weight of this evidence establishes that an evaluation of the claimant's left shoulder by a physician with expertise in the area of medicine associated with the treatment of injuries and conditions to this portion of the body is reasonably necessary and medically appropriate in order to obtain an adequately accurate diagnosis of the nature and extent of the compensable

left shoulder injury. Thus, this evaluation would represent "reasonably necessary medical services," as that term is used in Ark. Code Ann. §11-9-508. Pursuant to the provisions of this subsection, the respondents are liable for the expense of this evaluation. However, this liability is subject to the medical fee schedule established by this Commission.

IV. COMPENSABILITY OF THE CLAIMANT'S LEFT LEG COMPLAINTS

The next issue is whether the claimant's various complaints with his left leg represent a compensable consequence or complication of his admittedly compensable left arm injury. Again, the burden rests upon the claimant to prove all of the facts necessary for these difficulties to be "compensable". In order to meet this burden, the claimant must prove that his difficulties with his left leg or lower extremity are causally related to his compensable left arm injury and represent a natural consequence or complication of this injury.

The medical evidence shows that, on October 16, 2004, Dr. Bindra performed complex reconstructive surgery on the claimant's left arm to reduce the extensive damage caused to various bones, muscles, and nerves of the claimant's left arm by the employment related accident of October 9, 2004. This reconstructive procedure required in the surgical removal of the gracilis muscle, together with accompanying vascular structures, from the claimant's left thigh and the sural nerve from the claimant's left calf and lower leg. The gracilis muscle was then grafted to the flexor tendons of the wrist and medial epicondyle to replace the flexor muscles damaged in the injury. The sural nerve was grafted to the ulnar nerve that had been significantly damaged in the area of the claimant's left forearm.

The surgical removal of the gracilis muscle and sural nerve produced extensive scarring to the claimant's left leg, as demonstrated in Claimant's

Exhibit No. 3. The loss of the sural nerve also resulted in a sensory loss involving a portion of the claimant's left lower leg and foot. Other sensory loss would have resulted from damage to cutaneous nerves by the lengthy incisions.

The harvesting of these two anatomical structures from the claimant's left leg, in order to repair the damage caused by the compensable injury to the claimant's left arm, represents accepted appropriate medical treatment for the severe injuries to the claimant's left arm on October 9, 2004. Thus, the physical damage to the claimant's left leg from the surgical removal of the gracilis muscle and sural nerve was necessitated by or connected with his compensable injury and represents a reasonable and natural consequence of his compensable left arm injury. As such, the claimant would be entitled to appropriate benefits for this compensable consequence of the compensable left arm injury.

V. THE CLAIMANT'S ENTITLEMENT TO MEDICAL SERVICES FOR HIS CLAIMANT'S LEFT LEG DIFFICULTIES

At the present time, the only benefits the claimant is seeking for the physical damage done to his left leg, as a compensable consequence of his compensable left arm injury, are in the form of medical services. However, the evidence presented does not show that any further medical services would improve any difficulties which the claimant may be currently experiencing, as the result of the damage to his left leg from the surgical removal of the gracilis muscle and sural nerve. The medical evidence fails to show that any type of additional medical treatment of the claimant's left leg difficulties has been recommended by any physician.

I therefore find that the claimant has failed to prove that any further medical services are "reasonably necessary" for his left leg difficulties, which

represent a compensable consequence of his compensable left arm injury would be reasonably necessary. His request for additional medical services for these difficulties must be denied.

VI. THE CLAIMANT'S ENTITLEMENT TO ADDITIONAL MEDICAL SERVICES FOR HIS COMPENSABLE LEFT ARM INJURY

The final issue concerns the claimant's entitlement to additional medical services for his compensable left arm injury. The medical services being sought by the claimant are those recommended by Dr. Kelly. The burden rests upon the claimant to prove that these recommended services represent "reasonably necessary medical services" for his compensable left arm injury.

Clearly, the medical services recommended by Dr. Kelly, in the form of outpatient surgery to revise the gracilis muscle graft, would be necessitated by or connected with the compensable injury to the claimant's arm. This would satisfy the first requirement for this recommended procedure to constitute "reasonably necessary medical services", under Ark. Code Ann. §11-9-508.

In his deposition, Dr. Kelly stated that the surgical procedure which he has recommended for the claimant's left forearm, would not "greatly improve" the strength and use of his left upper extremity, but would likely be of significant help in the use and function of this upper extremity in performing the regular activities of day to day life. In his opinion, this surgical procedure would make the grafted gracilis muscle more effective by giving it better tractability and travel. This procedure would also improve the appearance of the claimant's left forearm by reducing the pouting or protrusion of this muscle.

Dr. Kelly is a highly competent plastic surgeon and hand specialist with considerable expertise in the area of medicine associated with the treatment he has recommended. His opinion in regard to the potential success and benefic

of the recommended surgical procedure is entitled to great weight and credit. In fact, I find his opinion in this regard, to be convincing. Thus, the claimant has proven that the additional medical services recommended have a reasonable expectation of accomplishing their intended purpose or goal. This would satisfy the second requirement for the recommended services to constitute "reasonably necessary medical services" under Ark. Code Ann. §11-9-508.

At this point, I would note that "reasonably necessary medical services" are not limited solely to those medical services directed toward the alleviation or reduction of permanent physical impairment from a compensable injury or even the alleviation or reduction of physical limitations caused by a compensable injury. Rather, medical services maybe "reasonably necessary" for a compensable injury, when they are medically appropriate to restore the claimant to as near his pre-injury state as the permanent character of his injury will allow. In considering the claimant's pre-injury state, such matters as improving the appearance of the injury site and increasing the use of the injured member in performing the day to day activities of life are also to be considered.

In summary, I find that the claimant has proven by the greater weight of the credible evidence that the medical services recommended by Dr. Kelly, in the form of a surgical modification of the gracilis graft, constitutes a "reasonably necessary medical service" for the claimant's compensable left arm injury, under Ark. Code Ann. §11-9-508. Pursuant to the provisions of this subsection, the respondents are liable for the expense of this procedure, subject to the medical fee schedule established by this Commission.

FINDINGS OF FACT & CONCLUSIONS OF LAW

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

2. On October 9, 2004, the relationship of employee-employer-carrier existed between the parties.

3. On October 9, 2004, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$372.00 for total disability and \$279.00 for permanent partial disability.

4. On October 9, 2004, the claimant sustained a compensable injury to his left arm. Although the stipulations reflect an admittedly compensable injury to the claimant's left "forearm", the medical evidence clearly shows that the compensable injury to the claimant's arm extended above the elbow joint, as it unquestionably included a fracture of the left humerus.

5. On October 9, 2004, the claimant sustained a compensable injury to his left shoulder. Specifically, the claimant has proven by the greater weight of the credible evidence that he sustained a physical injury to his left shoulder in the employment related incident on that date, which is established by medical evidence and supported by objective findings, that caused internal physical harm to this portion of his body, and that has reasonably required medical services.

6. The claimant has failed to prove that he sustained a compensable injury to this left knee, in the specific employment related incident of October 9, 2004. In particular, he has failed to "establish" by medical evidence, which is supported by objective findings, the actual existence of any physical injury to this portion of his body, as required by Ark. Code Ann. §11-9-102(4)(D).

7. The claimant has proven by the greater weight of the credible evidence that he sustained physical injury or damage to his left leg, which was a compensable consequence of his admittedly compensable left arm injury.

8. There is no dispute, at the present time, over accrued medical expenses incurred for medical services rendered to the claimant for his compensable left arm injury.

9. The medical services, recommended for treatment of the claimant's left arm by Dr. James Kelly, represent reasonably necessary medical services under Ark. Code Ann. §11-9-508 for the compensable left arm injury. Pursuant to the provisions of this subsection, the respondents are liable for the expense of these services, subject to the medical fee schedule established by this Commission.

10. Additional medical services, in the form of an evaluation of the claimant's shoulder by a medical expert for the purpose of determining the nature and extent of the compensable injury to the claimant's left shoulder and the reasonableness and necessity of any medical treatment for this compensable injury, represents reasonably necessary medical services under Ark. Code Ann. §11-9-508 for the claimant's compensable left shoulder injury. Pursuant to the provisions of this subsection, the respondents are liable for the expense of this evaluation, subject to the medical fee schedule established by this Commission.

11. As the claimant has failed to prove the occurrence of a compensable injury to this left knee, he would not be entitled to any medical services for the treatment of such an injury, under Ark. Code Ann. §11-9-508.

12. There is no dispute, at the present time, over the claimant's entitlement to temporary total disability benefits for his compensable left arm

injury and all such benefits, which have accrued to date, have apparently been paid.

13. The respondents have controverted the claimant's entitlement to any benefits for a left shoulder injury, his entitlement to any benefits for a left knee injury, his entitlement to any benefits for his left leg difficulties, and his entitlement to the medical services recommended by Dr. Kelly for his compensable left arm injury.

14. As no controverted benefits have been awarded directly to the claimant, at the present time, no controverted attorney's fee can be awarded to the claimant's attorney.

ORDER

The respondents shall be liable for the expense of an evaluation of the claimant's compensable left shoulder injury by a physician with particular expertise in the area of medicine associated with injuries to this portion of the body and shall be liable for the expense incurred for the additional medical services recommended by Dr. Kelly for treatment of the claimant's compensable left arm injury. The respondents' liability for these services is subject to the medical fee schedule established by this Commission.

Based upon my foregoing findings and conclusions, the respondents are not liable for any benefits attributable to the claimant's alleged left knee injury.

Based upon my foregoing findings and conclusions, no additional medical services can be awarded, at this time, for the physical damage to the claimant's left leg, even though this damage represents a compensable consequence of the claimant's compensable left arm injury.

For the reasons heretofore stated in this Opinion, no controverted attorney's fee can be awarded to the claimant's attorney, at this time.

All benefits herein awarded shall bear the maximum legal rate of interest until paid.

IT IS SO ORDERED.

MICHAEL L. ELLIG
ADMINISTRATIVE LAW JUDGE