

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F602908

JACKIE R. SHAVER, EMPLOYEE

CLAIMANT

LAND O'FROST, INC., SELF-INSURED EMPLOYER

RESPONDENTS

OPINION FILED MAY 30, 2008

Hearing before Administrative Law Judge O. Milton Fine II on March 11, 2008, in Little Rock, Pulaski County, Arkansas.

Claimant represented by Mr. Robert Buckalew, Attorney at Law, Little Rock, Arkansas.

Respondent represented by Mr. John D. Davis, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

On March 11, 2008, the above-captioned claim was heard in Little, Arkansas. A pre-hearing conference took place on November 5, 2007. A prehearing order entered that same day pursuant to the conference was admitted without objection as Commission Exhibit 1. At the hearing, the parties confirmed that the stipulations, issue, and respective contentions, as amended, were properly set forth in the order.

Stipulations

At the hearing, the parties discussed the stipulations set forth in Commission Exhibit 1. The parties agreed to an amendment of the third stipulation to reflect that the requested cosmetic prosthetic arm has not been prescribed. The stipulations, which I find to be reasonable and acceptable, now read:

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

2. Claimant was an employee of Respondent on or about March 10, 2006, at which time he sustained a compensable on-the-job injury consisting of an injury to his left arm that resulted in the amputation of the arm below the elbow.
3. Respondent accepted the claim as compensable and has paid temporary total disability and medical, including one prescribed prosthesis for a working arm; but Respondent has refused to pay for a cosmetic prosthetic arm.

Issues

By agreement of the parties, the sole issue litigated was the following:

1. Whether Respondent is responsible for the payment for a cosmetic prosthesis.

Contentions

Claimant's contention, like the stipulation cited above, has been amended to reflect that the cosmetic prosthesis he is seeking has not been prescribed. The contentions now read:

Claimant:

1. Claimant contends that as a result of his compensable on-the-job injury of March 10, 2006 at Land O'Frost, that he is entitled to have his cosmetic prosthesis paid for by Respondent, and that this particular treatment is reasonable and necessary.

Respondents:

1. Respondents contend that the cosmetic prosthesis is not reasonable and necessary under Ark. Code Ann. § 11-9-508(a) and that Respondent is not responsible for payment for the cosmetic prosthesis.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record as a whole, including medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the Claimant/witness and to observe his demeanor, I hereby make the following findings of fact and conclusions of law in accordance with Ark. Code Ann. § 11-9-704 (Repl. 2002):

1. The Arkansas Workers' Compensation Commission has jurisdiction over these claims.
2. The stipulations set forth above are reasonable and are hereby accepted.
3. Claimant has not proven by a preponderance of the evidence that he is entitled to cosmetic arm prosthesis.

CASE IN CHIEF

Summary of Evidence

_____ Claimant was the sole witness at the hearing.

In addition to the prehearing order discussed above, also admitted into evidence in this case were the following: Joint Exhibit 1, an estimate of the cost of the cosmetic prosthetic arm, consisting of two pages; and Joint Exhibit 2, a compilation of Claimant's

medical records, consisting of two index pages and 70 individually numbered pages thereafter.

Testimony

Jackie R. Shaver. Claimant testified that he has a twelfth grade education and is currently receiving Social Security disability benefits. He was injured on March 10, 2006, when he reached into a large meat tenderizing machine to clear it and it caught his sleeve and pulled his left arm inside it. Claimant sustained severe bone and soft injuries in the arm, and underwent an amputation of it below the elbow. He has completed medical treatment, and presently wears a prosthesis.

He referred to the prosthesis as his “working arm,” and described it as follows: “This arm works with the strap that goes around the back with a soft piece here. When I move my right arm and my left arm, it makes this move.” He is unable to perform delicate work, such as woodworking or fastening his pants, with the present prosthesis. The prosthesis has hooks that function roughly as fingers; the pressure required to open and close them depends on the size of bands used on the device.

A hand came with the prosthesis. It is an attachment, like the hooks. Only the thumb opens and closes on it. Claimant testified that it does not appear life-like, but rather looks “rubbery.” He described the attachment as being “really heavy”—that it “feels like 30 pounds.” Because the surgery on his left arm diminished his musculature there, he testified that it makes it all the harder to use the hand attachment. He also feels that he has to wear a long-sleeve shirt year-round to camouflage it.

Claimant has become aware of the availability of a cosmetic prosthesis. They are available at the office of a prosthesis provider for \$7,034.00. It is fairly lightweight, and can

be designed to match the skin tone of the wearer. While the hand on the cosmetic prosthesis does not function at all, the arm portion does.

When asked why he wanted a cosmetic prosthesis, Claimant stated:

Well, I've got a bunch of nephews and you get the kids' reactions when they walk up to you and look at you. And when I'm out in public people look at you, and I'm not that kind of a person. I feel like I'm a freak or something.

His desire is to go square dancing, but he feels he cannot do so because the other dancers are leery of his prosthesis. He testified that because of these feelings of embarrassment, he rarely leaves his house and he has gone through bouts of depression. It is his wish to appear normal again—and he believes that the cosmetic prosthesis would help in this.

When questioned by Respondent, Claimant testified that the cosmetic prosthesis would be “simply for looks,” since it does not function. His amputation is six inches below the elbow. Were he to obtain the cosmetic device, it would attach at that point. He admitted that someone could tell by looking closely that the cosmetic device is not a real arm. Claimant stated that the hand attachment and the cosmetic one are both rubber. Claimant admitted that the hand attachment actually weighs only about five pounds—two pounds more than the hook attachment.

Claimant also admitted that he is able to square dance and go out in public with his working arm prosthesis. He presently uses the hook for square dancing, and attends a dance once a month.

Under follow-up questioning from his counsel, Claimant stated that he hardly square dances with anyone other than his wife because of the prosthesis. Other partners are hesitant to grasp the hook when dancing with him.

Claimant revealed when questioned by me that the hand attachment will not lock into place; but he has not informed the adjustor of this.

Respondents called no witnesses.

Records

Joint Exhibit 1. As discussed above, the parties jointly introduced a letter from Claimant's prosthetic provider that sets forth the components of a prosthetic arm, along with their costs, which total \$7,034.00.

Joint Exhibit 2. This is a compilation of Claimant's medical records from March 10, 2006 to January 31, 2007, and details that he suffered an industrial crush injury to his left hand and forearm on March 10, 2006. This resulted in numerous fractures and extensive soft tissue damage. His arm was amputated below the elbow.

ADJUDICATION

Claimant asserts that he is entitled to additional medical treatment in the form of a cosmetic arm prosthesis. Arkansas Code Annotated Section 11-9-508(a) (Repl. 2002) provides that an employer shall provide for an injured employee such medical treatment, including artificial limbs, as may be necessary in connection with the injury received by the employee. *Air Compressor Equip. v. Sword*, 69 Ark. App. 162, 11 S.W.3d 1 (2000). But employers are liable only for such treatment and services as are deemed necessary for the treatment of the claimant's injuries. *DeBoard v. Colson Co.*, 20 Ark. App. 166, 725 S.W.2d 857 (1987). The claimant must prove by a preponderance of the evidence that medical treatment is reasonable and necessary for the treatment of a compensable injury. *Brown, supra*; *Geo Specialty Chem. v. Clingan*, 69 Ark. App. 369, 13 S.W.3d 218 (2000). What

constitutes reasonable and necessary medical treatment is a question of fact for the Commission. *White Consolidated Indus. v. Galloway*, 74 Ark. App. 13, 45 S.W.3d 396 (2001); *Wackenhut Corp. v. Jones*, 73 Ark. App. 158, 40 S.W.3d 333 (2001).

As the parties agreed, this appears to be a case of first impression. No reported case deals with the question of whether a claimant is entitled to a cosmetic prosthesis. As Claimant testified, he is wanting the new prosthesis strictly for aesthetic reasons—to better avoid the embarrassment and stigma he perceives as an amputee. In no respect would the cosmetic prosthesis help him better perform the activities of daily living, or any other task. The hand is purely cosmetic, and does not function. In that respect, it is inferior to the prosthetic hand Claimant currently has, which has a moveable thumb.

For that reason, the decision of the Commission in *Carter v. Wonder Cable TV Const.*, 2002 AWCC 125, Claim No. E812754 (Full Commission Opinion filed June 19, 2002), is inapposite. *Carter* dealt with whether a prosthesis was reasonable and necessary in light of the fact that a physician prescribed it because it would increase the claimant's functional capacity. While Claimant testified that the improved self-confidence he would have with the cosmetic prosthesis would make him more likely to get out of the house, that is not the physical improvement in function the Commission found to be key in *Carter*.

In a related vein, the decision of the Arkansas Court of Appeals in *Sword, supra*, also is not controlling here. The prosthesis that the claimant in *Sword* was seeking was a myoelectric one, which was more convenient and had better function than a traditional hook prosthesis. “The more sophisticated functions include pinchers that would allow the user some dexterity based upon electric signals from his forearm muscles; less bulk in that

it is attached only to the arm itself; and it can be used with variable grip strength.” *Id.* The *Sword* Court found the myoelectric prosthesis reasonable and necessary because it would restore the claimant as far as practicable to his pre-injury physical condition. The court credited the testimony of the prosthetic orthotist that the myoelectric device would be the best fit because it was more functional and because the claimant required its greater dexterity. However, the cosmetic device at issue here would not restore function at all. And Claimant has not offered a prescription or the testimony of an orthotist to state otherwise. *Sword* is thus readily distinguishable.

In *Tatum v. Intl. Paper Co.*, 1998 AWCC 81, Claim No. E115092 (Full Commission Opinion filed February 26, 1998), the Commission rejected the argument of respondents that scar revision surgery was reasonable and necessary only to the extent that the scarring is on the head of the claimant. The Commission cited *Crain Burton Ford Co. v. Rogers*, 12 Ark. App. 246, 674 S.W.2d 944 (1984), in support of this position. The Commission ultimately found that the scar revision surgery was necessary, but highlighted the fact that the surgery improved her physical symptoms. But that is not the case with the instant claim.

Crain Burton Ford addressed the matter of a claimant seeking a prosthetic penile implant. The Arkansas Court of Appeals noted that a line of out-of-state cases exists that have found treatment that is “purely palliative” to be reasonable and necessary, and cited, *inter alia*, the decision of the Oklahoma Supreme Court in *Akers Auto Salvage v. Waddle*, 394 P.2d 452 (Okla. 1964). Therein, the court found plastic surgery on a claimant’s ears to be reasonable and necessary even though the compensable injury caused no hearing loss and the prognosis of the surgery was poor. His physician stated that the surgery

would improve the claimant's disfigurement. But while the court in *Crain Burton Ford* pointed out that the Oklahoma provision in question was nearly identical to its Arkansas counterpart, the court did not expressly adopt the reasoning of *Akers* or the other cases cited in the opinion. Rather, the court appeared to hinge its holding on the fact that the proposed surgical procedure would restore Claimant's physical function. See generally *Sword v. Air Compressor Equip. Co.*, 1999 AWCC 153, Claim No. E612908 (Full Commission Opinion filed May 20, 1999), *aff'd*, 69 Ark. App. 162, 11 S.W.3d 1 (2000)(*Crain Burton Ford* still good law despite changes to the Arkansas Workers' Compensation Act by Act 796 of 1993).

The law in Arkansas appears to require that, for a proposed treatment to be reasonable and necessary, that it be purposed to restore function in some manner and to some degree. The prosthesis Claimant is seeking here does not do that. After weighing the evidence in the record, both testimonial and documentary, in light of the law, I find that Claimant has not proven by a preponderance of the evidence that he is entitled to a cosmetic left arm prosthesis under § 11-9-508(a).

CONCLUSION

As recounted above, I find that Claimant has not met his burden of proving that he is entitled to the cosmetic prosthesis.

IT IS SO ORDERED.

Hon. O. Milton Fine II
Administrative Law Judge