

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F602908

JACKIE R. SHAVER, EMPLOYEE

CLAIMANT

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

RESPONDENT

OPINION FILED MARCH 2, 2009

Upon review before the FULL COMMISSION, Little Rock, Pulaski County, Arkansas.

Claimant represented by HONORABLE ROBERT BUCKALEW, Attorney at Law, Little Rock, Arkansas.

Respondent represented by HONORABLE JOHN D. DAVIS, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed.

OPINION AND ORDER

Claimant appeals from an opinion of the Administrative Law Judge finding that the claimant has failed to prove by a preponderance of the evidence that he is entitled to a cosmetic arm prosthesis. Based upon our de novo review of the entire record, without giving the benefit of the doubt to either party, we find that the claimant has failed to meet his burden of proof. Therefore, we find that the decision of the Administrative Law Judge must be, and hereby is, affirmed.

The facts in this claim are not in dispute. The claimant sustained a compensable injury to his left arm on

March 10, 2006, when he reached into a large meat tenderizing machine when his sleeve caught, pulling his arm inside. The claimant sustained a severe injury to his left arm resulting in an amputation below the elbow. The claimant reached the end of his healing period and presently wears a prosthesis. The issue for determination at the hearing and on appeal is whether a cosmetic arm prosthesis requested by the claimant is reasonable and necessary medical treatment which is the liability of the respondents. We find that it is not.

The record reflects that the claimant was prescribed a working prosthesis which was paid for by the respondents. The claimant described this prosthesis as "a working arm, where I can do things without anybody else being with me." This prosthesis is strapped to his right arm which allows the claimant to control the movement of the prosthesis. Although a hand came with the prosthesis, the claimant chooses to wear a metal hook instead. Claimant described the hand attachment as having a working or moving thumb but that the hand is real heavy. He even testified in his deposition that it weighed 30 pounds. However, when

questioned on cross-examination as to the actual weight of the hand attachment, the claimant testified that the metal hook weighs three pounds while the rubber hand weighs five pounds.

When having an adjustment made to his prosthesis, the claimant inquired of the technician about a new lightweight prosthesis that he had seen other people wearing which match the wearer's skin tone. The hand on this prosthesis does not function at all. It is this new cosmetic prosthesis that the claimant seeks to have the respondents purchase for him. The record reflects that this cosmetic prosthesis costs over \$7,000.00. The claimant testified that he is self-conscious about his prosthesis and does not like to go out in public as much as he did prior to his injury, which is why he wants this new cosmetic prosthesis.

Ark. Code Ann. §11-9-508(a) (Supp. 2005) provides that an employer shall provide for an injured employee such medical treatment as may be reasonably necessary in connection with the injury received by the employee. Wal-Mart Stores, Inc. v. Brown, 82 Ark. App. 600, 120 S.W.3d 153 (2003). However, employers are only liable for medical

treatment and services which are deemed reasonably necessary for the treatment of the employee's injuries. DeBoard v. Colson Co., 20 Ark. App. 166, 725 S.W.2d 857 (1987). The employee has the burden of proving by a preponderance of the evidence that medical treatment is reasonable and necessary for the treatment of the compensable injury. Wal-Mart, supra; GEO Specialty Chemical v. Clingan, 69 Ark. App. 369, 13 S.W.3d 218 (2000); Dalton v. Allen Eng'g Co., 66 Ark. App. 201, 989 S.W.2d 543 (1999). What constitutes reasonable and necessary medical treatment is a question of fact for the Commission. Wackenhut Corp. v. Jones, 73 Ark. App. 158, 40 S.W.3d 333 (2001); White Consolidated Indus. v. Galloway, 74 Ark. App. 13, 45 S.W.3d 396 (2001); Air Compressor Equipment v. Sword, 69 Ark. App. 162, 11 S.W.3d 1 (2000); Gansky v. Hi-Tech Engineering, 325 Ark. 163, 924 S.W.2d 790 (1996).

When assessing whether medical treatment is reasonably necessary for the treatment of a compensable injury, we must analyze both the proposed procedure and the condition it is sought to remedy. Gardner v. Area Agency on Aging, Full Commission Opinion, January 4, 2006 (Claim No.

F302438); Jones v. Seba, Inc., Full Commission Opinion, December 13, 1989 (Claim No. D512553).

The record reflects that the respondents have provided the claimant with a functional, working prosthesis to meet the claimant's needs. This prosthesis comes with both a hook and a hand attachment. Although the hand attachment only weighs two pounds more than the hook attachment, the claimant chooses to wear the hook attachment, claiming that the hand is too heavy. The claimant seeks to have the respondents purchase him a purely cosmetic prosthesis that will match his skin tone, but will not be able to function as a hand to grasp things with. Simply stated, the prosthetic device at issue here is solely for appearance purposes and will not provide the claimant with any additional functional capabilities.

In Crain Burton Ford Co. v. Rogers, 12 Ark. App. 246, 674 S.W.2d 944 (1984), when a claimant's physician prescribed a penile implant to increase the claimant's functional capacity, the Arkansas Court of Appeals found that "the surgical procedure in question was 'necessary' to restore the claimant, as far as practicable, to the physical

condition he enjoyed immediately preceding this injury." Likewise, in Air Compressor Equipment v. Sword, 69 Ark. App. 162, 11 S.W.3d 1 (2000), the Arkansas Court of Appeals held that a myoelectric prosthesis which the claimant's physician stated was best suited for the claimant's future needs was reasonable and necessary medical treatment. Specifically, the Court stated; "Given the testimonies of the appellee's plastic and reconstructive surgeon and the board-certified prosthetic orthotist, there was substantial evidence to support the finding that the myoelectric prosthesis was reasonable and necessary to restore the appellee as far as practicable to his physical condition before this work-related injury."

The issue then is whether the cosmetic prosthesis sought by the claimant will restore the claimant as far as practicable to his physical condition before the work-related injury. The answer to this question is clearly, no. Prior to his injury, the claimant had a working left hand. Respondents have provided the claimant with a working prosthesis which has both a metal hook and a rubber hand attachment, both of which provide the claimant with the

ability to grasp objects. The claimant now wants a new prosthesis that does not restore any function at all, but actually leaves him with less function and ability than he presently has. Moreover, unlike previous cases before this Commission, the claimant has failed to offer any medical evidence or opinion that the purely cosmetic prosthesis would offer any medical benefit or restore any function whatsoever to the claimant.

Accordingly, we find that the claimant has failed to prove by a preponderance of the evidence that the cosmetic prosthesis is reasonable and necessary medical treatment to which he is entitled. Therefore, the decision of the Administrative Law Judge is, hereby, affirmed.

IT IS SO ORDERED.

A. WATSON BELL, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

DISSENTING OPINION

I must respectfully dissent from the majority's opinion. The majority, by affirming and adopting the May 30, 2008 opinion of an Administrative Law Judge, finds that the claimant failed to prove that the respondent was responsible for an additional prosthesis for the claimant. Based on a de novo review of the record, I find that the additional prosthetic device is required to restore the claimant as closely as possible to his physical condition prior to the accident and, therefore, I must respectfully dissent from the majority opinion.

History

_____ The claimant suffered a compensable injury which required his left arm be amputated below the elbow. The claimant requires a prosthesis for his left arm. The prosthesis currently used by the claimant is a hook-type which, while functional and utilitarian, is immediately recognizable as unnatural and aesthetically unpleasing.

The claimant testified that his current prosthesis came with a natural hand attachment, but while this

attachment weighed about 5 pounds, that it felt like 30 pounds. The claimant testified that the new prosthesis he sought would be "really lightweight." The claimant testified that his current prosthesis makes him feel like a "freak." The claimant testified that because of the appearance of the prosthesis, he would stay home and had gone through incidents of depression as a result. The claimant testified that he enjoyed square dancing, but that other dancers were scared of his prosthesis and that this made him feel he should not take part in this activity. The claimant testified that part of his current prosthesis would wrap around his body in order to be functional, unlike the prosthesis he is seeking. The claimant testified that the prosthesis he is seeking would match his skin color, unlike the current prosthesis.

Discussion

The majority, by affirming and adopting the opinion of the Administrative Law Judge, finds that the claimant is not entitled to an additional prosthesis which more closely resembles a natural hand. In making the original finding, the Administrative Law Judge went through

a comparison of the current, hook-type prosthesis used by the claimant and the prosthesis which the claimant sought. Such an analysis is not necessary. The Arkansas Workers' Compensation Act provides for replacement prostheses; it does not limit the number. Employers must provide medical services, including artificial limbs, that are reasonably necessary treatment of compensable injuries. Ark. Code Ann. § 11-9-508(a). The goal of providing an amputee with certain prosthetic devices is to restore the claimant as closely as possible to his physical condition prior to the accident. Air Compressor Equipment v. Sword, 69 Ark. App. 162, 11 S.W.3d 1 (2000); Crain-Burton Ford Co. v. Rogers, 12 Ark. App. 246, 674 S.W.2d 944 (1984). 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).

The majority, by affirming and adopting the Administrative Law Judge, appears to find that the law regarding "cosmetic" prosthetics is unsettled. I disagree and cite Air Compressor Equipment v. Sword, supra, and

Crain-Burton Ford Co. v. Rogers, supra. The law makes no distinction between a so-called "cosmetic prosthesis" and a "utilitarian prosthesis". Prior to the accident which resulted in the amputation of the claimant's left arm, the claimant had a normal-looking left arm. Since the loss of his left arm, the claimant has had a metal hook and an arm attachment that he testified does not match his skin color. The claimant testified that he is treated as a pariah in public and that when he takes part in his square dancing events, other dancers will avoid contact with him because of his obvious prosthesis. The claimant testified that he hardly square dances with anyone other than his wife as a result of the other dancers' reactions. Additionally, the claimant feels his own family members avoid contact with him because of the obvious prosthesis. Furthermore, the claimant testified that the skin color of the prosthesis he is seeking more closely resembles his own skin color. If the claimant is to be restored as closely as possible to his physical condition prior to the accident the claimant must have an prosthetic appendage which resembles his normal hand.

Furthermore, the majority, by adopting the decision of the Administrative Law Judge, errs by holding the claimant to a higher standard than is required by our Workers' Compensation Act. The Administrative Law Judge stated:

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.

The Arkansas Court of Appeals, in awarding the claimant a myoelectric prosthesis in Air Compressor Equipment, discussed the differences in the different types of prosthetics the claimant could choose, but does not base their decision on such an analysis. While the Court discussed the facts regarding the choices of prostheses, this is simply dicta, independent of the Court's conclusions of law. The Court in Air Compressor Equipment never based their award of a myoelectric prosthesis on a "better performance" or "inferior/superior" analysis; the Court of Appeals limited their analysis to a decision as to whether

the prosthesis "more closely restores [the claimant] to his physical condition that existed before being injured at work." Air Compressor Equipment v. Sword, 69 Ark. App. 162, 11 S.W.3d 1 (2000); Crain-Burton Ford Co. v. Rogers, 12 Ark. App. 246, 674 S.W.2d 944 (1984). Accordingly, I find that the claimant in the instant claim would be more closely restored to his pre-injury condition by receiving a lightweight prosthesis which actually resembles his other hand in skin color.

In conclusion, I find that the claimant has shown by a preponderance of the evidence that he is entitled to reasonable medical treatment in the form of a prosthetic left arm. I find that the additional prosthetic device is required to restore the claimant as closely as possible to his physical condition prior to the accident.

For the aforementioned reasons, I must respectfully dissent.

PHILIP A. HOOD, Commissioner