

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. **G806325**

WILLIAM D. BERGTHOLD, Employee	CLAIMANT
CITY OF SILOAM SPRINGS, Employer	RESPONDENT
ARKANSAS MUNICIPAL LEAGUE, Carrier	RESPONDENT

OPINION FILED **AUGUST 11, 2022**

Hearing before ADMINISTRATIVE LAW JUDGE JOSEPH C. SELF in Springdale, Washington County, Arkansas.

Claimant represented by EVELYN E. BROOKS, Attorney, Fayetteville, Arkansas.

Respondents represented by MARY K. EDWARDS, Attorney, North Little Rock, Arkansas.

STATEMENT OF THE CASE

On July 21, 2022, the above captioned claim came on for hearing at Springdale, Arkansas. A pre-hearing conference was conducted on May 26, 2022, and a pre-hearing order was filed on that same date. A copy of the pre-hearing order has been marked as Commission's Exhibit #1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The employee/employer/carrier relationship existed on August 23, 2018.
3. The claimant sustained a compensable injury on August 23, 2018.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Whether claimant is entitled to additional medical treatment regarding his compensable hand injury.

All other issues are reserved by the parties.

The claimant contends that “he is entitled to additional medical treatment for his compensable hand injury. Specifically, he contends he is entitled to return to his authorized treating physician, Dr. James Kelly. The claimant reserves all other issues.”

The respondents contend that “claimant cannot prove by a preponderance of the evidence that additional medical treatment is reasonably necessary. Specifically, respondents are not aware of a current physician recommending further medical treatment. Respondents reserve the right to file an Amended Response to the Prehearing Questionnaire or other appropriate pleading and to allege any further affirmative defense(s) that might be available upon further discovery.”

From a review of the entire record, including medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the claimant and to observe his demeanor, the following findings of fact and conclusions of law are made in accordance with A.C.A. §11-9-704:

#### FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at a pre-hearing conference conducted on May 26, 2022, and contained in a pre-hearing order filed that same date are hereby accepted as fact.
2. Claimant has met his burden of proof by a preponderance of evidence that he is entitled to additional medical treatment from Dr. James Kelly for his wrist injury.

#### FACTUAL BACKGROUND

While claimant’s contention recited above mentions a “compensable hand injury,” the testimony and documentary proof in the case is that the injury should more properly be termed as one to claimant’s wrist. This opinion will refer to the injury as one to claimant’s wrist or right upper extremity.

HEARING TESTIMONY

Claimant was the only witness to testify at the hearing. He said that he was employed as a firefighter for the City of Siloam Springs on August 23, 2018. During a session of physical fitness, claimant fell and broke his right wrist. He subsequently had four surgeries performed on the injured wrist and a fifth surgery was recommended by Dr. James Kelly. Claimant said that Dr. Kelly wanted him to get a second opinion regarding that fifth surgery.

After being released from care in December 2020, claimant said his wrist has been “swollen, sore, and weak.” He was not able to return to his duties as a firefighter and he struggles in using his right upper extremity in his daily living activities. Claimant said he had not gotten the second opinion that Dr. Kelly had recommended because he had moved to Florida. He testified that he “tried to get workers’ comp to approve me moving to a doctor in Florida, and I wasn’t able to do that, so I did see a doctor in Florida.” Claimant stated that he paid the doctor in Florida. Claimant’s request at the hearing was that he receive a second opinion and have it provided to Dr. Kelly, as per Dr. Kelly’s recommendation.

On cross-examination, claimant went through his medical history in chronological order and that will be covered in the review of the medical records in this case. During the review of his medical history, claimant repeated that Dr. Kelly encouraged him to get a second opinion before having the fifth surgery, but claimant did not get the second opinion because “I wanted to actually let my hand rest since it has been poked and prodded on so much to see if any improvement happened with that and manipulate it.” Claimant was unaware that two of the three functional capacity evaluations that he had undergone were considered to be unreliable.

On redirect-examination, claimant said he had given his best effort on the functional capacity evaluations but did not complete the third one because his wrist was swollen. When asked how

claimant felt about not being able to do his firefighter work, he said “It kills me every day. I love being a firefighter so now I have to get my wife help me do-- open a jar of pickles.”

#### REVIEW OF THE MEDICAL EXHIBITS

Claimant first saw Dr. Janan Lane, who then referred claimant to Dr. Matthew Coker. (R.X.2) Dr. Coker saw claimant on August 30, 2018, and put the claimant in a long arm thumb spica cast. Dr. Coker recorded “we will discuss it with one of the hand specialists to see if there is anything they can do or would they consider surgery sooner to allow him to possibly get back to work sooner.” This was apparently accomplished because he next saw Dr. Jeff Johnson on September 10, 2018. The plan from Dr. Johnson was to undergo an open reduction internal fixation surgery which was performed on September 17, 2018. A percutaneous screw was inserted during the procedure. (R.X.11-12)

The post-surgical visit with Dr. Johnson was on December 11, 2018. Claimant reported that he had no improvement in his wrist whatsoever. Claimant reported to Dr. Johnson that he woke up several times at night due to the pain in the wrist. Dr. Johnson ordered an MRI arthrogram and placed claimant on a ten- pound limit on his right side with no climbing. (R.X.15)

Claimant then requested a change of physicians, which was granted. He began seeing Dr. David Yakin at Advanced Orthopedic Specialists on January 16, 2019. After trying conservative care, Dr. Yakin performed a right wrist arthroscopy with debridement of TFCC (triangular fibrocartilage complex) tear. (R.X.42) Following the surgery, claimant reported that he was doing well but still having quite a bit of pain, although he did have better motion. (R.X.45) On March 8, 2019, there was a concern about claimant being allergic to the screw that was inserted by Dr. Johnson (R.X.49); on April 3, 2019, claimant reported that he had a purple blister under the wound site and that his wound had been bleeding. (R.X.52)

Claimant was sent for a functional capacity evaluation on May 20, 2019. It was determined

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that he gave an unreliable effort. A detailed review of this FCE is unnecessary since claimant has undergone two subsequent surgeries and two subsequent FCE's.

Following the result of the FCE, on May 29, 2019, Dr. Yakin assessed a permanent impairment rating of 7% to the right upper extremity. Because the FCE evaluator noted inconsistent effort during that test, he recommended that claimant return to full duty. For reasons that were not explained in the records, Dr. Yakin referred claimant to Spine and Sports Physical Therapy for another functional capacity evaluation on June 13, 2019. Likewise, the only explanation for the treatment by Dr. Nicholas Camp at Camp Interventional Pain was claimant was referred by Dr. Yakin; it appears to be a single visit on June 14, 2019. (R.X.125) Claimant saw Dr. Yakin again on June 21, 2019 and that time, Dr. Yakin says, "in light of new information, he can do light duty as outlined in both functional capacity examinations until we get the final issue resolved with regard to independent medical exam." (CL.X.20)

Claimant was next seen by Dr. James Kelly on October 30, 2019<sup>1</sup>. Dr. Kelly opined that claimant's pain might be due to the screw that Dr. Johnson inserted. Dr. Kelly performed surgery on May 7, 2020, with the goal to remove the screw, but the attempt to "back the screw out was impossible to do as it was incorporated into the scaphoid. Decision was made to leave the screw in place as it was totally incased in bone and obviously more damage would be done to the scaphoid if attempted removal."

Following this surgery, on May 20, 2020, claimant began a course of physical therapy with Trinity Rehabilitation. It appears there was a total of thirteen visits, with the final visit occurring on August 14, 2020, this course of treatment did not seem to provide claimant any relief. (CL.X.15)

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<sup>1</sup> While claimant had already exercised his one-time change of physicians, the parties agreed at the hearing that the treatment by Dr. Kelly had been authorized by respondent as a referral from Dr. Yakin.

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However, on June 2, 2020, claimant again was operated on by Dr. Kelly to address a subcutaneous suture infection. A capsulotomy was performed during the surgery (R.X.137)

When claimant failed to respond as Dr. Kelly had hoped, on August 17, 2020, there was the following office progress note entry:

“I had a discussion with him and told him I think at this point my next recommendation would be to complete a scaphoid excision four corner fusion. I really want him to think thoroughly about this and even encouraged him to get a second opinion before he would jump into that process. If he decides he would like to proceed, as I have told him how the procedure is done, once [sic] involved and perspective outcomes, he needs to contact our office and we will get him back in to discuss procedure again and answer any questions before we schedule him for surgery.” (R.X.146)

Dr. Kelly referred claimant to SERC Physical and Hand Therapy in Fayetteville, Arkansas for a third functional capacity evaluation, which was performed on November 23, 2020. Under the section that says reliability and consistency of effort, the examiner recorded “the result of this evaluation suggests that Mr. Bergthold gave a self-limited effort during testing that would not be considered a valid representation of his actual abilities. This client demonstrated patterns of movement and physiological responses were inconsistent with maximal effort. There was inconsistency between the test results and the referral diagnosis.” (R.X.147)

Following an impairment recommendation from Trinity Rehabilitation and Sports Medicine, Dr. Kelly assessed a permanent impairment rating of 18% to the right upper extremity based on the Fourth Edition of the AMA Guidelines on December 7, 2020.

The records conclude with notes from the Hand Center in Gulf Breeze, Florida where claimant went outside of his workers’ compensation case. This visit occurred on December 1, 2021. Dr. Stephen Kronlage concluded with this entry under his impression/plan:

“I do not know what is going on with this patient and I do not think an MRI would help because of the signal void the screw would make. I recommend getting his previous records and doing that tele-health

conversation. In addition to that, he has multiple allergies so we could possibly consider using his screw made of the same material tied around his neck to see if he has an allergic reaction to it. At any rate, these would be things that would need to happen prior to any type of surgical intervention. We will see him back via tele-health once records have been made available and he is able to see us for workers' compensation.”

#### NON-MEDICAL RECORDS

Respondents submitted the Change of Physician Order dated January 9, 2019, as well as the indemnity log and medical payment log. There was also an e-mail from claimant to Andrea Sayre, the claims representative with the Arkansas Municipal League in which claimant advised that the patch test that he had taken showed that he was not allergic to the metal in the screw that Dr. Johnson inserted. Finally, the record of payments respondent has made in connection with this claim was submitted.

#### ADJUDICATION

Claimant requested that he be allowed to continue with his medical treatment on his compensable injury to his right wrist. Respondents denied the request, asserting that claimant had not shown the necessity to return for additional medical treatment.

In this matter, it was stipulated that claimant suffered a compensable injury. Once that has been established, a claimant is not required to offer objective medical evidence to prove entitlement to additional benefits, *Ark. Health Ctr. v. Burnett*, 2018 Ark. App. 427, at 9, 558 S.W.3d 408, 414. Injured employees do have the burden of proving by a preponderance of the evidence that the medical treatment sought is reasonably necessary for the treatment of the compensable injury. *Owens Plating Co. v. Graham*, 102 Ark. App. 299, 284 S.W. 3d 537 (2008). Treatments to reduce or alleviate symptoms resulting from a compensable injury, to maintain the level of healing achieved, or to prevent further deterioration of the damage produced by the compensable injury are considered reasonable medical services. *Foster v. Kann Enterprises*, 2019 Ark. App. 746, 350 S.W.2d 796 (2009).

I find claimant has met his burden of proving that he is entitled to additional medical treatment for the injury to his right upper extremity. The December 7, 2020, report in which Dr. Kelly assessed an 18% rating for claimant's entire wrist impairment concluded with "he will be seen back on a when necessary basis." When this is coupled with the earlier recommendation that claimant should consider a fusion of his wrist, but perhaps after getting a second opinion<sup>2</sup>, I disagree with respondent's contention that there was no "current physician recommending further treatment." To the contrary, that is precisely what Dr. Kelly recommended in his report of August 17, 2020. Further, when he realized that he was not getting better without medical care, claimant testified that he tried to get respondent to approve a physician in Florida before he paid to see Dr. Kronlage in December, 2021. The records from Dr. Kronlage also support claimant's request to receive additional medical benefits.

Claimant's reluctance to have yet another surgery is understandable, and he took perhaps a rather hopeful approach to his situation by delaying further treatment to see if his injury would improve with the passage of time. Unfortunately, time was not an ally for claimant. Nonetheless, I cannot find his initial reluctance to have a fifth operation on his wrist is a bar to future treatment for his compensable injury.

#### ORDER

Claimant has met his burden of proving by a preponderance of the evidence that he is entitled to additional medical treatment for the injury to his right wrist as directed by Dr. Kelly. As Dr. Kelly believes such to be prudent, a second opinion by a hand and wrist specialist is to be considered as part of that additional medical treatment.

Pursuant to A.C.A § 11-9-715(a)(1)(B)(ii), attorneys fees are awarded "only on the amount of

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<sup>2</sup> I find it significant that it was Dr. Kelly that recommended a second opinion rather than claimant requesting one. As noted above, claimant had already exercised his right to change physicians.



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compensation for indemnity benefits controverted and awarded." In this case, there was no claim that indemnity benefits have been controverted, and as such, no attorney's fee can be awarded in this matter at this time. Claimant's attorney is free to voluntarily contract with medical provider pursuant to A.C.A. § 11-9-715(a)(4).

Respondent is responsible for paying the court reporter her charges for preparation of the transcript.

IT IS SO ORDERED

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JOSEPH C. SELF  
ADMINISTRATIVE LAW JUDGE