

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

STEVE D. EVANS,)
)
 Claimant,)
)
 v.)
)
 POTLATCH CORPORATION,)
)
 Employer,)
)
 and)
)
 WORKERS COMPENSATION)
 EXCHANGE,)
)
 Surety,)
)
 Defendants.)
 _____)

IC 1999-000743

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND RECOMMENDATION**

Filed November 30, 2007

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-referenced matter to Referee Michael E. Powers, who conducted a telephonic hearing from Boise on October 30, 2007. Claimant did not participate but was represented by John R. Tait of Lewiston. Scott M. Chapman, also of Lewiston, represented Employer/Surety. Oral and documentary evidence was presented. The parties filed post-hearing briefs and this matter came under advisement on November 15, 2007.

ISSUES

By agreement of the parties, the issues to be decided are:

1. Whether Surety should be responsible for the costs associated with a myoelectric prosthetic device recommended by Northwest Prosthetics and Orthotic Clinic (“NWP”) in Seattle, Washington.
2. Whether Claimant is entitled to an award of attorney fees for Surety’s unreasonable

delay in authorizing NWP as the facility best suited to accomplish the manufacture and installation of Claimant's myoelectric arm, or in not timely offering a viable alternative facility.

CONTENTIONS OF THE PARTIES

Claimant contends that Surety should authorize continued treatment for Claimant at a Seattle-based prosthetic facility that is uniquely qualified to address issues regarding the fabrication, installation, and training in the use of a myoelectric arm Surety has agreed to purchase for him. He also argues that Surety's inaction in finding an alternative to the Seattle facility is unreasonable and he should be awarded his attorney fees.

Surety contends that there is a facility in the Spokane area that is capable of providing services similar to the Seattle facility that would be less expensive than sending Claimant there as Claimant lives in Lewiston. Surety does not address the attorney fee issue.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file.
2. Claimant's Exhibit A admitted at hearing.

BACKGROUND

Surety had intended to call as a witness at the October 30, 2007, hearing a representative of a prosthetic/orthotic facility in Spokane. However, when Surety's counsel attempted to arrange for his telephonic testimony, the representative inexplicably made himself unavailable to testify. On November 14, 2007, Surety filed a Motion to Re-Open. Claimant filed his objection on November 15, 2007. On November 20, 2007, the undersigned filed an Order Denying Motion to Reopen and assessed attorney fees, finding that Surety's motion did not demonstrate good cause to reopen and was frivolous.

FINDINGS OF FACT

1. On January 1, 1999, Claimant was involved in a serious industrial accident resulting in an above-elbow amputation of his right arm, among other serious injuries.

2. During the course of Claimant's treatment and rehabilitation, Surety agreed to provide Claimant with a myoelectric prosthetic right arm.

3. Surety authorized Claimant to travel to Seattle and visit with staff at Harborview Medical Center as well as Mr. Ryan Blanck, vice president of NWP, regarding the fabrication, fitting, etc., of the arm.

4. Rather than authorizing NWP to continue with the fabrication/installation of the arm, on December 1, 2006, Surety sent NWP the following facsimile message:

“Your request to provide Mr. Evans a right ABA is declined. Mr. Evans will be requested through his attorney to obtain his myoelectric arm from Thompson Orthotic in Spokane Washington. Obtaining his arm closer to home will allow Mr. Evans the availability to obtain adjustments and repairs more easily. Thank you.”

Exhibit 5 to Claimant's Motion for Emergency Hearing for Payment of Medical Expenses and Travel Expenses, filed March 26, 2007.

5. Since that denial, Claimant has been attempting, through Surety, to obtain information regarding whether Thompson Orthotic (Thompson) in Spokane was as qualified as NWP to provide services surrounding the myoelectric arm. If so, Claimant indicated a willingness to give Spokane a try.

6. When no information from Thompson was forthcoming, a hearing was set for October 30, 2007, to allow both parties the opportunity to present evidence regarding the “Seattle versus Spokane” issue.

7. Claimant called Ryan Blanck to testify at the hearing. Mr. Blanck is the vice president of NWP and obtained a bachelor of science degree in prosthetics and orthotics from the

University of Washington in 1998. He is certified by the American Board of Prosthetics and Orthotics. He has ten years of experience and training in the “hands-on” work with complicated higher-level myoelectric prostheses. He is the only dynamic arm practitioner certified by the component manufacturer for the prosthetic recommended for Claimant, the Ottobock system, in the entire state of Washington. He is aware of an occupational therapist in Spokane, Bob Hocter, who may be able to undertake Claimant’s occupational therapy needs post-fitting.

DISCUSSION AND FURTHER FINDINGS

Idaho Code § 72-432(1) obligates an employer to provide an injured employee reasonable medical care as may be required by his or her physician immediately following an injury and for a reasonable time thereafter. It is for the physician, not the Commission, to decide whether the treatment is required. The only review the Commission is entitled to make is whether the treatment was reasonable. *See, Sprague v. Caldwell Transportation, Inc.*, 116 Idaho 720, 779 P.2d 395 (1989).

An injured worker shall be reimbursed for his or her expenses of necessary travel in obtaining medical care under this section. Idaho Code § 72-432(13).

8. The evidence regarding NWP’s qualifications and expertise with all aspects of the recommended and authorized myoelectric arm is persuasive and unrebutted. On the other hand, there is no evidence regarding Thompson’s qualifications. The Referee finds that Surety is responsible for any and all reasonable and necessary costs associated with, including but not limited to, the fabrication, fitting, training in the use of, and maintaining the recommended myoelectric arm through NWP in Seattle, as well as associated medical treatment or consultation as needed by the staff of Harborview Medical Center. In the event suitable arrangements can be made, Claimant may receive occupational therapy through Mr. Hocter in Spokane. Otherwise, Claimant will receive occupational therapy through a therapist recommended by Mr. Blanck.

9. Claimant has requested an award of attorney fees based on Surety’s unreasonable

denial of medical care and its failure to provide any information or evidence in support of that denial. Claimant's request is well taken. Surety has had almost one full year to produce some evidence that its proposal for treatment in Spokane regarding an extremely complicated high-level prosthetic device meets the reasonable medical care obligation of Idaho Code § 72-432(1). Claimant has had to file at least one motion for the payment of certain medical expenses. Then on March 2, 2007, Claimant was forced to prepare and file a motion for an emergency hearing for Surety's failure to pay other medical expenses and failure to authorize the myoelectric arm requested by NWP. During a telephone conference with Claimant's counsel and the undersigned on April 16, 2007, Surety's counsel indicated that the information regarding Thompson's ability to provide the prosthetic would be forthcoming so that Claimant's counsel could have NWP review it; the information never came. In another telephone conference on May 22, 2007, Surety's counsel again indicated the sought-after information would be forthcoming; the information never came. A hearing was set in order to give Surety the opportunity to present the requested information in that forum; the information never came.

10. Claimant's reluctance to accede to Surety's "demand" that he obtain the myoelectric arm from Thompson is understandable, especially in light of the fact that Thompson had previously fitted him with a mechanical "hook" arm and failed to properly train him in its use. Consequently, Claimant, according to his counsel, used the arm as a "shirt stuffer." Surety has given no reason whatsoever as to why it could not supply Claimant's counsel, or the Commission, with information relevant to Claimant's inquiries regarding Thompson's qualifications. Surety had more than ample time to obtain the information and its failure to ever provide the information has had the effect of denying Claimant the opportunity to be fitted with and trained in the use of the myoelectric arm with the goal of improving his functionality and, hopefully, his productivity. For this unwarranted delay and/or refusal, ostensibly to save some money in travel costs, Claimant is entitled to an award of

attorney fees and costs incurred in being forced to litigate this matter.

CONCLUSIONS OF LAW

1. Claimant is entitled to the myoelectric arm recommended by NWP in Seattle and Surety is responsible for all costs associated with whatever NWP deems reasonable in making the arm suitable for Claimant's use, including, but not limited to, consultations with the staff of Harborview Medical Center.

2. If suitable arrangements can be made, Mr. Bob Hocter of Spokane may provide occupational therapy services to Claimant. If not, an occupational therapist of NWP's choosing will provide those services.

3. Claimant is entitled to an award of attorney fees pursuant to Idaho Code § 72-804 for Surety's unreasonable denial/failure to authorize NWP to provide the myoelectric arm.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, the Referee recommends that the Commission adopt such findings and conclusions as its own and issue an appropriate final order.

DATED this __21st__ day of ____November____, 2007.

INDUSTRIAL COMMISSION

____/s/_____
Michael E. Powers, Referee

ATTEST:

____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __30th__ day of ____November____, 2007, a true and correct copy of the **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

JOHN R TAIT
PO DRAWER E
LEWISTON ID 83501

SCOTT CHAPMAN
PO BOX 446
LEWISTON ID 83501-0446

_____/s/_____

ge

JOHN R TAIT
PO DRAWER E
LEWISTON ID 83501

SCOTT CHAPMAN
PO BOX 446
LEWISTON ID 83501-0446

2. If suitable arrangements can be made, Mr. Bob Hctor of Spokane may provide occupational therapy services to Claimant. If not, an occupational therapist of NWP's choosing will provide those services.

3. Claimant is entitled to an award of attorney fees pursuant to Idaho Code § 72-804 for Surety's unreasonable denial/failure to authorize NWP to provide the myoelectric arm.

4. Claimant is also entitled to his costs associated with litigating this matter as a sanction under Rule 16 JRP. Defendants were unprepared for the hearing and offered no evidence or rebuttal to Claimant's requested relief.

5. Claimant is entitled to attorney fees and costs as provided herein. Unless the parties can agree on an amount for reasonable attorney fees and costs, Claimant's counsel shall, within twenty-one (21) days of the entry of the Commission's decision, file with the Commission a memorandum of attorney fees and costs incurred in counsel's representation of Claimant in connection with these benefits, and an affidavit in support thereof. The memorandum shall be submitted for the purpose of assisting the Commission in discharging its responsibility to determine reasonable attorney fees and costs in this matter. Within fourteen (14) days of the filing of the memorandum and affidavit thereof, Defendants may file a memorandum in response to Claimant's memorandum. If Defendants object to any representation made by Claimant's counsel, the objection must be set forth with particularity. Within seven (7) days after Defendants file the above-referenced memorandum, Claimant may file a reply memorandum. The Commission, upon receipt of the foregoing pleadings, will review the matter and issue an order determining attorney fees and costs.

6. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all issues adjudicated.

DATED this __30th__ day of ____November____, 2007.

INDUSTRIAL COMMISSION

____/s/_____
James F. Kile, Chairman

____/s/_____
R. D. Maynard, Commissioner

____/s/_____
Thomas E. Limbaugh, Commissioner

ATTEST:

____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __30th__ day of __November____, 2007, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following persons:

JOHN R TAIT
PO DRAWER E
LEWISTON ID 83501

SCOTT CHAPMAN
PO BOX 446
LEWISTON ID 83501-0446

____/s/_____

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