IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2004 MTWCC 66

WCC No. 2004-1094

RAYMOND M. CUNNINGTON

Petitioner

vs.

UNINSURED EMPLOYERS' FUND

Respondent

and

MIKE GAUB, d/b/a

ZEBRA CONSTRUCTION

Respondent/Employer.

DECISION AND JUDGMENT

Summary: Unhappy with the recommendations of his treating physician and the second opinion of another physician, the claimant seeks yet a third opinion.

Held: Neither an insurer nor the Uninsured Employers' Fund are required to pay for a third medical evaluation and opinion merely because a claimant is unhappy with the first two opinions. To obtain a further opinion paid for by the insurer or UEF, the claimant must demonstrate the medical necessity and reasonableness of such opinion and must do so with medical evidence.

Topics:

> Benefits: Medical. A claimant is not entitled to payment for endless medical evaluations and opinions merely because he is unhappy with the opinions of his treating physician.
>
> Benefits: Medical. Where a claimant seeks payment for a third evaluation, he must present medical evidence demonstrating that such evaluation is medically necessary and reasonable.

¶1 This case is submitted for decision based on the Petition for Emergency Hearing, the Response to Petition, and copies of documents and depositions attached to the response.

The sole issue is whether the Uninsured Employers' Fund (UEF) must pay for a third medical opinion requested by the claimant.

Facts

¶2 The pleadings establish that the claimant injured his ankle while working for Mike Gaub (Gaub), who was doing business as Zebra Construction. The injury occurred on September 12, 2002. Gaub was uninsured at that time and the claimant submitted his claim for compensation to the UEF, which accepted liability under a reservation of rights. The UEF has been paying medical and indemnity benefits with respect to the injury.

¶3 The claimant's ankle injury was serious. It involved both a fracture and dislocation and he underwent an open reduction internal fixation of the ankle immediately after the injury. (Ex. A to Response to Petition.)

¶4 On July 10, 2003, the claimant was declared at maximum medical improvement (MMI) by Dr. Donald P. Ericksen, a Kalispell physician who performed the original surgery and treated the claimant thereafter. At the time of MMI, Dr. Ericksen noted that the claimant still had significant pain. He further opined that "some further surgery will need to be done in the future to try to improve his situation" and recommended an ankle fusion as a better surgical alternative to an ankle replacement. (*Id*. at 1.)

¶5 The claimant sought a second opinion from Dr. G.J. Jarrett, a Missoula surgeon. Dr. Jarrett offered the claimant conservative options including doing nothing to trying a special brace. (Ex. B to Response to Petition.) Beyond the conservative options, he agreed with Dr. Ericksen that fusion surgery (an arthrodesis) was preferable to an ankle replacement (arthroplasty). (*Id*.)

¶6 The claimant, however, is unhappy with both opinions and "has identified orthopedic surgeons in San Francisco, California, Portland, Oregon and Salt Lake City, Utah that are practiced in and offer cartilage replacements as an alternative to [the] more radical surgeries [recommended by Drs. Ericksen and Jarrett]." (Petition for Emergency Hearing at 2.) The claimant demands that the UEF pay for an out-of-state examination and evaluation by those surgeons. (*Id*. at 4.)

¶7 In a deposition taken in a civil case filed by the claimant against his employer, Dr. Ericksen testified that an ankle replacement of the sort proposed by the claimant would be temporary and that he would ultimately require an ankle fusion. He indicated that ankle replacement surgery is "not mainstream treatment . . . and would probably fall under the almost experimental kind of treatment . . . ." (Response to Petition, Ex. E at 25.)

¶8 The claimant testified by way of deposition in a civil action he brought against his employer. In his testimony, he indicated dissatisfaction with recommended fusion surgery

and a preference for an ankle replacement surgery using cadaver cartilage which he has read about. (*Id.*, Ex. D at 80.)

¶9 On March 23, 2004, the claimant's attorney wrote to the UEF and requested that it authorize and pay for an examination by Dr. Roger A. Mann, an orthopedic surgeon specializing in foot and ankle surgery. Dr. Mann practices in Vail, Colorado, and San Francisco, California. (*Id.*, Ex. F.) The UEF refused to authorize the visit and the claimant thereafter filed the present petition. (*Id.*, Ex. G.)

Discussion

¶10 The claimant has already obtained two opinions, one from his treating physician and a second opinion from Dr. Jarrett. Section 39-71-704, MCA (2001), requires an insurer to pay for reasonable medical treatment and evaluation. It is not required to pay for endless evaluations merely because the claimant is unhappy with the recommendations of his treating physicians. The recommendations of Drs. Ericksen and Jarrett establish the *prima facie* reasonableness of ankle fusion over ankle replacement. It is therefore the claimant's burden to provide medical evidence establishing that ankle replacement is a reasonable alternative. He is free to seek such evidence but is not entitled to do so at the UEF's expense.

¶11 The claimant's research into alternatives to fusion surgery does not constitute medical evidence supporting his position. Since he has provided no medical evidence demonstrating the necessity and reasonableness of a third evaluation and opinion, his petition must be dismissed.

JUDGMENT

¶12 The claimant is not entitled to have the UEF pay for a third medical opinion and evaluation. His petition is dismissed with prejudice.

¶13 This JUDGMENT is certified as final for purposes of appeal.

¶14 Any party to this dispute may have twenty days in which to request a rehearing from this Decision and Judgment.

DATED in Helena, Montana, this 24th day of September, 2004.

(SEAL)

Mike McCarter
JUDGE

c: Mr. Stephen C. Pohl
Mr. Julia Swingley

Mr. Mike Gaub
Submitted: August 18, 2004