

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. H104448

LEVI YOUSEY, Employee	CLAIMANT
BLACKHAWK AUTO & TIRE, Employer	RESPONDENT
TRAVELERS INDEMNITY COMPANY, Carrier	RESPONDENT

OPINION FILED JULY 11, 2023

Hearing before ADMINISTRATIVE LAW JUDGE ERIC PAUL WELLS in Springdale, Washington County, Arkansas.

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

Respondents represented by GUY ALTON WADE, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

On April 11, 2023, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on February 6, 2023, and a Pre-hearing Order was filed on February 7, 2023. A copy of the Pre-hearing Order has been marked Commission's Exhibit No. 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 relationship between employee-employer-carrier existed between the parties on May 14, 2021.
3. The claimant sustained a compensable injury to his right upper extremity on May 14, 2021.
4. The claimant's weekly compensation rates will be determined at a later date.

By agreement of the parties the issues to litigate are limited to the following:

1. Whether Claimant is entitled to surgery for his compensable right upper extremity injury in the form of surgery as recommended by Dr. James Kelly.

Claimant's contentions are:

“Claimant contends he is entitled to surgery for his right upper extremity as recommended by Dr. Kelly. Claimant reserves all other issues.”

Respondents' contentions are:

“Respondents contend that they accepted the claim as compensable and have paid all applicable medical and indemnity benefits. The treatment subsequently suggested by claimant's change of physician, Dr. James Kelly's evaluation is not reasonable, necessary or related to the work injury.”

The claimant in this matter is a 26-year-old male who sustained a compensable injury to his right upper extremity on May 14, 2021. At the time of his injury the claimant was employed by the respondent as a “lube tech.” His job required him to perform automobile oil changes and change and balance tires. The claimant testified that the work required heavy lifting and use of his hands. The claimant gave direct examination testimony about his abilities prior to the accident and the incident itself as follows:

Q Did you have any trouble doing that work prior to your accident?

A No.

Q Did you have any type of weakness in your right arm at all?

A No.

Q And what happened on May 14th of 2021?

A I was going to balance a tire and as I was picking it up to put it on the tire machine, it exploded in my hands.

Q And what injuries did you sustain?

A I broke my radius. It burned my arm and broke my pinky, as well. And just multiple cuts and bruises.

Q Okay. Now, did you go to the emergency room?

A Yes.

Q Which hospital?

A Northwest in Bentonville.

Q And how did you get there?

A Ambulance.

The claimant eventually began treatment for his compensable right upper extremity injury with Dr. Jeff Johnson. Dr. Johnson performed surgery on the claimant on May 25, 2021, at Precision Surgical Center of Northwest Arkansas. Following is a portion of Dr. Johnson's operative report:

PREOPERATIVE DIAGNOSES:

1. Injury caused by exploding tyre [sic].
2. Right radial shaft fracture, closed.
3. Right small finger proximal phalanx fracture, closed.

POSTOPERATIVE DIAGNOSES:

1. Injury caused by exploding tyre [sic].
2. Right radial shaft fracture, closed.
3. Right small finger proximal phalanx fracture, closed.

PROCEDURES PERFORMED:

1. Open reduction and internal fixation right radial shaft fracture.
2. Closed reduction and percutaneous pin fixation right small finger proximal phalanx fracture.

The claimant continued to treat with Dr. Johnson after his surgical intervention. The claimant was seen by Dr. Johnson on July 8, 2021. At that time, the claimant "notes that his pain

is well controlled.” Dr. Johnson ordered six weeks of physical therapy and put the claimant in a cock-up wrist splint. The claimant was restricted to lifting no greater than 10 lbs. with his right hand and no repetitive gripping with his right hand.

The claimant was again seen by Dr. Johnson on August 19, 2021. The History of Present Illness portion of that report states:

HPI

Mr. Yousey returns today for a recheck after right radial shaft ORIF, right small finger proximal phalanx closed reduction and pinning 5/25/2021. His injury date was 5/14/2021.

He notes that he is no longer having much in the way of pain. He has been working with therapy and feels that has helped a great deal. He no longer has any numbness or tingling in his arm except for right over the area of the blast wound. Furthermore he notes that the only stiffness he really feels is over the small finger.

The claimant was continued on physical therapy twice a week for six weeks and was told to stop his splint use. The claimant’s restrictions were removed, and he was returned to full duty.

On October 14, 2021, the claimant was again seen by Dr. Johnson. Following is a portion of that medical record:

HPI

Mr. Yousey returns today for a recheck after right radial shaft ORIF, right small finger proximal phalanx closed reduction and pinning 5/25/2021. His injury date was 5/14/2021. He feels like therapy has helped quite a lot. He does not feel particularly stiff in his hand. He still has a very small area of numbness directly over the blast wound. There is some tattooing in his forearm at this area of skin loss.

Assessment/Plan

1. Fracture of proximal phalanx of finger – Right – This appears to have healed quite nicely and there is residual issue with the small finger.
S62.616A: Displaced fracture of proximal phalanx of right little finger, initial encounter for closed fracture.

2. Fracture of shaft of radius – Right –

1. Work restrictions: Full duty no restrictions.

2. I believe that he has reached maximal medial improvement. Based on the guides to the evaluation of permanent impairment, fourth edition, his impairment rating is as follows:

Using figure 35 page 41, he has a 1% impairment of the forearm related to a loss of pronation.

This is a 1% impairment of the upper extremity. Using table 3 page 20 this is a 1% impairment of the whole person.

3. I do not anticipate any long-term needs although if he were to have problems with this plate I certainly would recommend that that be covered as part of his initial injury. I will discharge him from clinic at this point.

S52.321A: Displaced transverse fracture of shaft of right radius, initial encounter for closed fracture.

The claimant was asked on direct examination about difficulties he was having at the time of his October 14, 2021, release by Dr. Johnson and if those difficulties continued as follows:

Q Did Dr. Johnson release you on October 14th of 2021?

A Yes.

Q And at the time of your release, were you still having any symptoms or problems?

A Yes.

Q What kind of problems?

A I was having numbness in my hand and arm. I couldn't really grip ahold of anything. I was dropping things a lot.

Q Okay. Now, the numbness in your hand, tell us more about that. When would that normally happen?

A It mostly happens when I sleep. I thought it was because I was sleeping on it or something, but it just goes numb.

Q Did you try various things to see if the problem was sleeping on it?

A Yea, I mean I would sleep in different positions, try not to lean on that arm too much, but using it less or more, either way, it still made it go numb.

Q And the numbness in your arm, where is that numbness?

A In my forearm.

Q Do you have any other symptoms?

A Just my grip strength and being able to squeeze and hold on to things. And I have pain in there sometimes as well as in my forearm.

Q Okay. And I think my initial question was what were your symptoms when Dr. Johnson released you. Have those changed since that time or are they still the same?

A They are still the same.

The claimant was questioned on cross-examination about the difficulties he was experiencing during his treatment with Dr. Johnson as follows:

Q Now, during the time that you were continuing to follow with Dr. Johnson, there is an indication in the notes that you are no longer having much in the way of pain. He has been working with therapy. Feels that has helped a great deal. He no longer has numbness and tingling in his arm except right over the area of the blast wound. Would that be the forearm?

A Yes. I believe just where everything occurred, yes.

Q Okay. So that is what you reported to Dr. Johnson during the time you were following with him; correct?

A I told him I had some – I had been having pain and numbness in my hand and he never really ever mentioned anything about it. I believe he gave me more physical therapy, which was the last part of my physical therapy, for it.

Q So did the numbness and tingling with the exception of the area in your forearm improve or is this note not correct?

A It improved. I mean I never had any numbness or anything when I was wrapped up after my surgery, really, whenever I was in a big, giant cast directly after my surgery. But during the physical therapy and everything else, that is when the numbness and everything started occurring.

Q Okay. I am looking at an office visit and I am reading the note and it was in August. So that would have been three months, roughly, after your surgery?

A Yes.

Q And at that point it indicates that you are no longer having any numbness or tingling in your arm with the exception of the blast wound area.

A That is where my numbness is. I remember telling him about the numbness.

Q Okay. So has the numbness always been in your forearm?

A Yes.

Q Okay. It's not down in your hand?

A It is my hand and my forearm.

Q Okay. This note doesn't indicate any problem in your hand; does it?

A No.

Again, on re-direct the claimant was questioned about the difficulties he was experiencing as follows:

Q So you testified that you told Dr. Johnson about the symptoms you were still having of the numbness in your forearm and in your hand. Do you feel that he responded to that? Did he do anything about that?

A I believe he just ordered more physical therapy.

Q Well, on October 14th of 2021 when he released you finally, did you tell him you were still having those symptoms?

A I believe – I figured I was getting as good as I was going to get so I didn't say thing to him about it.

Q And do you feel that the physical therapy did help the stiffness in your hand?

A It did help me limber up after my surgery and everything; but it was never back to normal.

Q Do you feel that the physical therapy helped the numbness in your arm or your hand?

A No. It never really did anything for the numbness of my arm or my hand.

The claimant testified that after he was released by Dr. Johnson to full duty, he returned to work but not for the respondent. On direct examination the claimant testified as to why he did not return to work for the respondent as follows:

Q Now, after you were released by Dr. Johnson, did you go back to Blackhawk?

A No.

Q Why not?

A Because I knew I wasn't going to be able to do the work that I used to do before my accident there.

Q And why was that? What would have prevented you from doing that kind of work?

A The heavy lifting and holding on to 25- to 30 pounds all day for eight hours a day.

Q Why did you think you would not be able to do that?

A Because my arm, my right arm would get tired and go numb and I didn't think it would help the cause any.

Q Now, since your accident happened, has there ever been a time that your right hand and arm have felt normal?

A No.

The claimant began working for his father-in-law at Josh Worley Painting. The claimant's work duties when he started included prep work and taping of windows, doors, and baseboards. The claimant eventually moved into painting, a job duty he was performing at the time of the hearing in this matter. The claimant testified that he was able to do the work of a painter. Even though he is right-hand dominate, he considers himself ambidextrous. The claimant testified on direct examination about his ability to work as a painter as follows:

Q Okay. And how has that been with your right hand and arm?

A It's a lot easier on it. I can paint with my right hand. I also switch off with my left hand. I can do it well with both. But I do drop a lot of things with my right hand, so I take more breaks and use my left hand more than my right.

The claimant requested and then received a Change of Physician from the Commission on September 21, 2022. The claimant's Change of Physician allowed him to see Dr. James Kelly, who practices plastic and reconstructive surgery along with hand and microsurgery.

Dr. Kelly saw the claimant in October of 2022 and authored a letter regarding the claimant. That letter is found at Respondents' Exhibit 1, pages 41-42. Following is the body of that letter:

Thank you very much for referring Levi Yousey for consultation. As you are aware, he is a 25-year-old gentleman who on 5/14/2021 had a tire blow up and injure his right arm. He was an employee of Blacklock auto and tire at the time. This required ORIF of an open fracture to his right radial shaft as well as pinning of his right 5th proximal phalanx. This was completed by Dr. Jeff Johnson in Bentonville. The fracture went on to heal well both in the finger

and the forearm. He went through post operative therapy for about two months. He presents today with two different complaints. First of all, he is getting numbness, predominately in the 1st, 2nd, and 3rd fingers, that wakes him at night. This happens multiple times a week. He also gets aching pain in the volar forearm when he is using and complains of weakness in the arm and forearm. States he drops objects.

In examining him, he had a positive compression test over the pronator tunnel. He also had positive Tinel's, Phalen's and compression test at the wrist. His sensation was about 7 mm in the median distribution of the right hand. Costal compression and cervical examinations were negative. His x-rays were examined and showed excellent healing and anatomical alignment of the radius.

I think this gentleman has pronator tunnel plus or minus carpal tunnel syndrome. Carpal tunnel is likely given the numbness when he is sleeping. The weakness and pain in the forearm when he is using his arm would be more related to pronator tunnel syndrome. With a midshaft radial fracture it is not uncommon to see these types of problems due to postoperative scarring and scarring from the actual injury itself. I am going to order EMG/NCV studies to be completed on him. I want to see him back here in the office to review the results. I will make appropriate recommendations there afterwards. I will of course be following him through his care.

On November 2, 2022, the claimant underwent an EMG of his right upper extremity with Dr. Miles Johnson of Northwest Arkansas EMG Clinic. Following is a portion of that diagnostic report:

CHIEF COMPLAINT: Right upper extremity pain, numbness, tingling, and weakness.

HISTORY OF PRESENT ILLNESS: Patient is a 25-year-old right-handed male who sustained a right radius fracture at work on May 14, 2021 when a tire exploded. He has undergone ORIF. He is now noticing pain in the extremity when he lifts objects. He gets intermittent numbness and tingling in the hand which is often worse at night. There is some improvement with shaking the extremity. He denies any neck pain. Patient has been seen by Dr. Kelly and is referred for electrodiagnostic testing of the right upper extremity.

SUMMARY: Right median, radial, and ulnar motor studies are normal. Right median ulnar orthodromic sensory latency difference is normal. Medial sensory response to the third digit revealed normal distal latency, amplitudes, forearm and elbow conduction velocities. Right radial sensory response of the first digit was normal. Right lateral antebrachial cutaneous sensory response was normal. EMG examination of the right upper extremity was within normal limits.

ASSESSMENT: Mild right carpal tunnel syndrome. There is no electrodiagnostic evidence of radiculopathy, plexopathy, generalized peripheral neuropathy or other peripheral nerve entrapment syndromes. Specifically no evidence of a proximal median neuropathy.

PLAN: Patient has been counseled regarding the above findings and has been instructed to schedule a followup appointment in your office for further evaluation in order to utilize these results in the treatment/management of their condition.

On November 9, 2022, the claimant was again seen by Dr. Kelly. Following is a portion of that progress notes:

Mr. Yousey presents to the office today in follow-up after having had EMG/NCV studies completed. I suspect that he does have right carpal tunnel syndrome. He of course also has a positive compression test over the pronator and that would be compatible with pronator tunnel syndrome which he gets aching pain in the forearm when he uses his arm. With him having a midshaft radial fracture, with that approach, it is not uncommon to see this. My plans therefore are to take him the OR, we will do a right endoscopic carpal tunnel release and fascial release of the forearm. We will also explore the median nerve through the pronator tunnel and likely release the constriction at the supinator. Patient understands the plan and I will make arrangements to get this done and I will be seeing him back here in the office of course in follow-up. He will be on one handed duties for 2 weeks and light duties for 2 weeks. At 4 weeks, he will be free to do anything he would like with no restrictions on the hand.

The claimant has asked the Commission to determine whether he is entitled to surgery for his compensable right upper extremity injury as recommended by Dr. James Kelly. It is the claimant's burden to prove that the surgery recommended by Dr. Kelly is reasonable necessary treatment for his compensable injury.

The respondent introduced a document dated December 13, 2022, from a company called genex that is titled, "Physician Advisor Report." That document is signed by Dr. Victoria Knoll, who is licensed in Texas, and that document can be found at Respondents' Exhibit 1, pages 50-53. Following is a portion of that document:

Diagnosis: Diagnosis: mild right carpal tunnel syndrome.

Treatment Requested: Right Endoscopic Carpal Tunnel Release & Facial release forearm, & right pronator tunnel release CPT-29848, 25020, 29125, 64708 Body side/parts: right lower arm, right upper arm, right fingers, right upper leg, right chest.

Requesting Provider Name: James Kelly, MD.

Determination: Adverse Determination.

Summary of Clinical Condition

This case involves a 25-year-old with a history of an occupational claim from 5/14/2021. The mechanism of injury was described as a motor vehicle accident. The current diagnosis includes mild right carpal tunnel syndrome. Comorbidities were documented as history of right midshaft radial fracture, history of right radial open reduction and internal fixation (ORIF) with pinning of fifth proximal phalanx. 10/17/2022 letter indicated the claimant has numbness in the 1st-3rd right fingers that wakes the claimant up at night multiple times a week, as well as pain in the volar forearm with use, weakness in the hand and forearm, resulting in dropping objects. Physical exam of right upper extremity noted a positive compression test over pronator tunnel, positive Tinel's, Phalen's and compression test at the wrist. Progress note dated 11/09/2022 indicated the claimant has had aching pain in the right forearm with use, has a positive compression test over the pronator, fascial release of the forearm, as well as exploration of the median nerve through the pronator tunnel with possible release of constriction at

the supinator. 11/02/2022 Electromyogram (EMG)/Nerve conduction study (NCS) of right upper extremity noted mild right carpal tunnel syndrome. This review pertains to the request of right endoscopic carpal tunnel release and fascial release forearm, and right pronator tunnel release for the right lower arm, right upper arm, right fingers, right upper leg, right chest, per CPT codes 29848, 25020, 29125, 64708.

The respondent also introduced a letter that is authored by a respondent carrier employee, Tracy Hogan, RN. That letter is dated December 14, 2022, and is addressed to Dr. James Kelly. The document is found at Respondents' Exhibit 1, pages 54-56. It appears to be advising Dr. Kelly of Dr. Knoll's Physician Advisor Report of December 13, 2022. That letter does a good job of summarizing the longer Physician Advisor Report's adverse determination as follows:

Based upon the information obtained, it has been determined that the proposed treatment does not meet medical necessity guidelines.

The principle reason for the determination is:

Official Disability Guidelines conditionally recommend carpal tunnel release surgery for carpal tunnel syndrome. Guidelines indicate surgery for non-severe carpal tunnel syndrome (CTS) with abnormal Katz hand diagram scores, nocturnal symptoms, Flick sign, positive testing on physical exam, with failure of 3 types of conservative care such as activity modification, night wrist splint, nonprescription analgesia, home exercise program. 10/17/2022 letter indicated the claimant has numbness in the 1st-3rd right fingers that wakes the claimant up at night multiple times a week, as well as pain in the volar forearm with use, weakness in the hand and forearm, resulting in dropping objects. Treatments have included postoperative physical therapy. Records do not indicate the presence of abnormal Katz diagram scores, Flick sign, or the failure of conservative care. Therefore, the request for right endoscopic carpal tunnel release, per CPT code 29848, is noncertified.

Official Disability Guidelines conditionally recommend Dupuytren, fasciectomy, or fasciotomy for the forearm, wrist, and hand conditions. Guidelines indicate Dupuytren release for contracture of the proximal or distal interphalangeal joint, the metacarpophalangeal joint that interferes with hand function, rapid progression of finger contracture, or symptomatic worsening

fibromatosis in the hand. A progress note dated 11/09/2022 indicated the claimant has had aching pain in the right forearm with use and has a positive compression test over the pronator. Treatment has included post-operative physical therapy. Records do not indicate the presence of contracture or fibromatosis in the hand. Therefore, the request for the right hand endoscopic fascial release forearm, per CPT code 25020, is noncertified.

Official Disability Guidelines do not recommend surgery for radial tunnel syndrome. Guidelines indicate surgery is not recommended except after 6 months of conservative care with abnormal electrodiagnostic studies (EDS) studies and objective signs of functional loss, noting outcomes associated with workers' compensation have been predictably worse. 10/17/2022 letter indicated the claimant has numbness in the 1st-3rd right fingers that wakes the claimant up at night multiple times a week, as well as pain in the volar forearm with use, weakness in the hand and forearm, resulting in dropping objects. A physical exam of the right upper extremity noted a positive compression test over pronator tunnel, positive Tinel's, Phalen's, and compression test at the wrist. The request is not consistent with the guidelines. Therefore, the request for right endoscopic pronator tunnel release, per CPT code 64708 is noncertified.

Official Disability Guidelines recommend splints for forearm, wrist, and hand conditions. Guidelines indicate the use of splints for displaced fractures. 10/17/2022 letter indicated the claimant has numbness in the 1st-3rd right fingers that wakes the claimant up at night multiple times a week, as well as pain in the volar forearm with use, weakness in the hand and forearm, resulting in dropping objects. Treatments have included post-operative physical therapy. Records do not indicate the medical necessity of the request. Therefore, the request for the right lower arm, CPT 29125, is noncertified.

Dr. Knoll's Physician Advisor Report is in clear disagreement with the recommendation of Dr. Kelly's November 9, 2022, progress note, which was issued after the claimant's EMG and second examination by Dr. Kelly. In that progress note, Dr. Kelly makes a recommendation of surgical intervention. Dr. Knoll, who is licensed in Texas, has never seen the claimant and has no doctor/patient relationship with the claimant. Given the claimant's continued symptoms of

numbness, even after Dr. Johnson’s surgical intervention and conservative after-care which included at least 18 physical therapy visits from July 30, 2021, to October 12, 2021, and splinting of the claimant’s right upper extremity, I find Dr. Kelly’s surgical recommendations reasonable necessary medical treatment for the claimant’s compensable right upper extremity injury. Certainly, Dr. Kelly is in a superior position to make recommendations for the claimant’s medical treatment as Dr. Knoll has never seen the claimant. As such, I give much more weight to Dr. Kelly’s surgical recommendations than the recommendations of Dr. Knoll.

From a review of the record as a whole, to include medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witness 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 the pre-hearing conference conducted on February 6, 2023, and contained in a Pre-hearing Order filed February 7, 2023, are hereby accepted as fact.

2. The claimant has proven by a preponderance of the evidence that he is entitled to surgery for his compensable right upper extremity injury as recommended by Dr. James Kelly.

ORDER

The respondents shall pay the costs associated with the surgical intervention of the claimant’s compensable right upper extremity as recommended by Dr. James Kelly, including the claimant’s after-care.

Pursuant to A.C.A. §11-9-715(a)(1)(B)(ii), attorney fees are awarded “only on the amount of compensation for indemnity benefits controverted and awarded.” Here, no indemnity

benefits were controverted and awarded; therefore, no attorney fee has been awarded. Instead, claimant's attorney is free to voluntarily contract with the medical providers pursuant to A.C.A. §11-9-715(a)(4).

If they have not already done so, the respondents are directed to pay the court reporter, Veronica Lane, fees and expenses within thirty (30) days of receipt of the invoice.

IT IS SO ORDERED.

**HONORABLE ERIC PAUL WELLS
ADMINISTRATIVE LAW JUDGE**