

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F113710 (08/10/01) & F113474 (11/25/01)

BOBBY EMERY, EMPLOYEE	CLAIMANT
AUTOZONE, INC., EMPLOYER	RESPONDENT
LIBERTY MUTUAL INS. CO., CARRIER	RESPONDENT

OPINION FILED JANUARY 26, 2005

Hearing before ADMINISTRATIVE LAW JUDGE ANDREW L. BLOOD, on December 9, 2004, at Little Rock, Pulaski County, Arkansas.

Claimant represented by the HONORABLE GARY DAVIS, Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE MICHAEL R. MAYTON, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted in the above-styled claims to determine the claimant's entitlement to additional workers' compensation benefits.

On October 12, 2004, a pre-hearing conference was conducted in this claim, from which a Pre-hearing Order of the same date was filed. The Pre-hearing Order reflects stipulations entered by the parties, the issue to be addressed during the course of the hearing, and the parties' contentions relative to same. The Pre-hearing Order is herein designated a part of the record as Commission Exhibit #1.

The testimony of Mr. Bobby Emery, coupled with medical reports, and other documents

comprise the record in this claim. Previously, on October 30, 2003, a hearing was conducted in these claims. The record generated as a result of the prior hearing is incorporated in the present hearing record.

DISCUSSION

Bobby Tim Emery, the claimant, with a date of birth of June 20, 1969, is a high school graduate with one year of vo-tech education. Claimant commenced his employment with respondents on October 14, 1998.

Claimant has suffered two (2) injuries arising out of and in the course of his employment with respondents. There is not a dispute regarding the compensability of the claimant's injuries. In describing the mechanics of the injuries, claimant testified:

I don't remember which one happened first but August the 8th I was injured with a battery or an engine, I'm pretty sure it was the engine. I was helping a customer unload a engine core out of the back of a truck. It was raining. And the customer dropped his side and left me with the engine going down to the ground and that was that. And then on the other date, the battery, I took and lifted a battery off of a counter and was trying to carry it around for a customer to be tested and that's when my back went out there. (T. 9).

Previously, claimant had undergone surgeries on his back back under the care of Dr. Steven Cathey in 1994, and Dr. Thomas Fletcher in 1995. Claimant had done relatively well following the surgeries until he suffered the injuries in the employment of respondents.

Following the injuries in the employment of respondents claimant again came under the care and treatment of Dr. Cathey, who on January 4, 2003, performed a back fusion surgery in the treatment of the compensable injuries. The testimony reflects that claimant continued to have problems attributable to the injuries which required medication and return visit to Dr. Cathey.

Claimant is a resident of Tuckerman, Arkansas. Dr. Randall Hunt, the claimant's primary care physician, provided prescription medication relative to the compensable injuries pursuant to the directions of Dr. Cathey. Claimant noted that Dr. Cathey initially wanted him to be seen by some at Delton Pain Management, however agreed to Dr. Hunt so long as the medication afforded claimant appreciable relief of pain. Claimant testified that once the pain progressed to the point that he could no longer stand it, Dr. Cathey recommended that he see Dr. Garlapati.

The testimony of the claimant reflects that he was evaluated by Dr. Garlapati on August 20, 2003, pursuant to the referral of Dr. Cathey. Dr. Garlapati recommended that claimant further treatment in the form of an infusion pain pump or a spinal cord stimulator. In furtherance of the afore, Dr. Garlapati noted that a psychological evaluation would have to be performed before claimant underwent the recommended procedure.

Shortly prior to a scheduled October 30, 2003, hearing before the Arkansas Workers' Compensation Commission regarding the medical necessity of the psychological evaluation, respondents agreed to pay the cost of the evaluation. An Agreed Order was entered. On June 2, 2004, claimant underwent a psychological evaluation under the direction of Dr. Kenneth Counts. While the evaluation by Dr. Counts concluded that there were no contraindications in the claimant's psychological make to prevent him from a candidate for the procedure recommended by Dr. Garlapati, respondents continued to decline authorization.

Pursuant to the directions of respondents, claimant was seen by Dr. Barry Baskin, a physiatrist, and Dr. A.J. Zolten, a psychologist. Claimant was seen by Dr. Zolten on December 2, 2004. Dr. Zolten's evaluation of the claimant was consistent with that of Dr. Counts relative to the recommended procedure.

On December 2, 2004, claimant was also evaluated by Dr. Baskin. Claimant had a discussion with Dr. Baskin regarding the procedure, the pump and stimulator, neither of which he performs or recommends. Claimant also underwent a clinical examination by Dr. Baskin. In describing the examination, claimant's testimony reflects:

He stated out with one procedure where he lifts the leg up and pushes it back in toward my chest. And when he got to one point I told him that it was hurting my back, you know, I asked him to stop. And he went on and continued and when he got done with that leg he started on the other leg and again when he got to a certain point I told him it was hurting and he continued pushing and I told him a couple of times it was hurting. When he got done with that one he had me to swing my legs over the table and get down and bend as far as I could and try to touch my toes. When I bent as far as I could, I told him it was starting to hurt at this point and he took and put his hand on my back and said well, go a little bit farther. And I said, no, you know, it's hurting, you know. He said, well I need to be able to complete all these tests to be able to give you an answer, a yes or no on either one, the pump or the stimulator. And that was most of the procedure. (T. 14).

During the December 2, 2004, visit, Dr. Baskin informed claimant that he did not all the reports from Dr. Garlapati and that he did not have any of the films. Claimant's testimony reflects:

. . . He said he was going to need them [reports and films] and I told him that the insurance company was suppose to see to it that he had gotten them and he said he hadn't and that he was going to be needing them to give me an evaluation. (T.15).

The testimony of the claimant reflects that he sought medical treatment at the emergency room because of severe pain on several occasions, to include February 17, 2003, subsequent to his surgery by Dr. Cathey, as well as August 1, 2003, shortly prior to his visit with Dr. Garlapati. In describing his pain, claimant noted that it is located in his lower back and radiates down into his thighs, which at times feel as though they are going to explode. Claimant added that the

pain, sharp stabbing, is the most that he has ever had in his life. Claimant noted that the same severe pain has produced at least four visits to the emergency room in 2004.

The testimony in the record reflects that claimant's last effort at physical therapy was pursuant to the direction of Dr. Hunt in August prior to his surgery. Claimant does walk three times a day, approximately 3/4 of an acre or 20 to 25 minutes, in terms of exercise. Prior to the recommendation regarding the stimulator/pump, claimant underwent epidural steroid injections under the care of Dr. Garlapati. Claimant testified that while the first one seemed to help, the second one did not and the last one he took had no impact on his pain. Claimant explained that only three injections in a six month period. (T. 24-25).

Claimant continues to take medication in an effort to address his symptoms relative to the compensable injuries. Claimant's testimony reflects with respect to difficulties encountered with the insurance carrier securing his medication:

No, they don't refuse but like this month everything went fine. The month before it may take two trips and phone calls to get them to pay for the same medicine that they've been paying for for three years. That they said that I never was on to begin with. (T. 17).

Claimant noted that while the medication he is currently taking affords him some pain relief, there are a number of side effects to include dry mouth, dizziness, every two hours he has to take some type of pill, having to lay down due to weakness. Regarding his desire to proceed with the procedure recommended by Dr. Garlapati, claimant testified:

If it's going to get me off the medicine that I'm on now and make it to where I'm not in the pain that I've been in. Because right now there's nothing that's helping it, other than them giving me Morphine and bed rest. Nothing works. (T. 18).

Claimant acknowledged that he was aware that neither the stimulator or pump would provide

complete and total pain relief, and that he may have to continue taking medication. However, claimant is hopeful that with the procedure, he will not have to take as much medication.

The testimony of the claimant reflects that he worked for respondents from May 2003, until March 2004. Claimant explained that he was trying to do the same job as he was doing before the surgery. Claimant was allowed to bring a stool and sit down behind the counter. Claimant ceased working in March 2004, because the pain became unbearable. Claimant is of the opinion that in his present status, without the procedure, he will continue to be unable to work. Conversely, claimant is hopeful that with the procedure he will be able to return to work. Claimant's source of income since March 2004, has been a long-term disability insurance policy that he purchase when he returned to work. Claimant added that his wife is also working two jobs.

The medical in the record reflects that claimant was seen by Dr. Steven Cathey on July 28, 2003, in follow-up to the prior spinal surgical procedure. The July 28, 2003, Clinic Note of Dr. Cathey reflects, in pertinent part:

ASSESSMENT/PLAN: I am certainly disappointed with Mr. Emery's long-term outcome with regard to his most recent lumbar decompression/PLIF at L4-L5. Unfortunately, I don't believe he is a candidate for any additional spinal surgery or other neurosurgical intervention. I have discussed with him a variety of chronic coping mechanisms and have also arranged for him to see Dr. Butch Garlapati for consideration of epidural steroids, trigger point injections and other comprehensive pain management. (RX. #1, p. 54).

On August 20, 2003, claimant was evaluated by Dr. Butchaiah Garlapati, pursuant to the recommendation of Dr. Cathey. Thereafter, Dr. Garlapati assumed medical treatment relative to the claimant's compensable injury. During the initial evaluation, Dr. Garlapati recommended the

infusion pump or spinal cord stimulator as treatment measures to address claimant's pain complaints. The need for a psychological evaluation of the claimant was noted by Dr. Garlapati before proceeding with the recommendation.

On June 2, 2004, claimant underwent a psychological evaluation under the direction of Dr. D. Kenneth Counts, pursuant to the recommendation of Dr. Garlapati. Following his evaluation of the claimant, Dr. Counts authored a June 2, 2004, report which concludes:

Therefore, it is my opinion that this man is without any psychological defect or disorder that would prohibit him from benefitting from a pain management procedure. (CX. #1, p. 3).

While awaiting authorization to proceed with the August 20, 2003, recommendations, claimant continued conservative pain management treatment measures under the care of Dr. Garlapati, to include epidural steroid injections. (CX. #1, p. 5).

On December 2, 2004, claimant was evaluated by Dr. A.J. Zolten, a psychologist, at the request of respondents. The December 2, 2004, report of Dr. Zolten reflects, in pertinent part:

Tim presents today at the request of Workman's Compensation to receive psychological testing to clear him for a pain pump to be surgically placed into his spine. He previously was seen by Dr. Ken Counts for the same purpose, but review of this evaluation suggests that it was minimal at best. Tim reports that he has had problems getting Worker's Compensation to reimburse him for expenses and that this has caused significant financial stress on the family and marital stress. He and his wife describe having very expensive medications that are not always being covered to the pharmacy, 30 miles from their home, requiring that they drive back home and get on the phone and make multiple long distance calls to attempt to find out why the medications were not covered. Their phone bills have been unreasonable, and they have not always been able to pay them because of this. They have not always been able to receive their disability checks on a timely basis, and Tim reports that he has contacted the state insurance commissioner and his state representatives to complain because of the problems he has experienced. (CX. #1, p. 7).

The report further reflects claimant's expectations relative to the recommended procedure, the behavioral observations of the claimant by Dr. Zolten, and the results of the test administered.

The report concludes:

SUMMARY:

Bobby "Tim" Emory is a 35-year-old male who presents for psychological testing to rule out psychological disturbance that would prevent him from being a candidate for a spinal nerve stimulator/pain pump. Current interview indicates no significant psychiatric history and adequate adjustment given his rather chronic and severe pain problems. MMPI results indicate an individual who is depressed and has in excess interpersonal psychosocial disruption with underlying depression and severe somatic concerns with some worries and concerns. The findings on the MMPI are completely within the realm of expectation given his problems.

I would have no hesitation to qualify Tim for the procedures being considered at the present time. He appears to have realistic expectations for the outcome and is not at risk given the current interview and testings. (CX. #1, p. 8-9).

Claimant was also seen by Dr. Barry D. Baskin, a Little Rock psychiatrist, on December 2, 2004, at the request of respondents. Dr. Baskin points out that the claimant is in litigation involving respondent-carrier. After noting the objective of his evaluation, following the review of prior medical and physical examination, which is to "render opinions regarding if I feel an infusion pump for intrathecal pain medication and fusion or a spinal cord stimulator is reasonable and necessary medical expenses for the patient", Dr. Baskin concluded:

. I have been asked to comment on Mr. Emory's need for an intrathecal pain delivery system or a spinal cord stimulator. I do not actually see in the records that Dr. Garlapati has proposed a spinal cord stimulator.

In my experience, patient's with chronic pain on high dose narcotic analgesics that I have seen status post implantation of an intrathecal pain delivery system have without exception continued to take

oral narcotic analgesics. . . .

I have seen multiple patients with implantable spinal cord stimulators and the results have been universally less than satisfactory. . . In an ideal situation, Dr. Garlapati's proposition of implanting an intrathecal device to reduce oral pain medication is a good idea. However, as I have stated above, in my experience, patients with intrathecal pain delivery systems and spinal cord stimulator have almost universally continued with oral medications in addition to the implantable devices.

My plan for Mr. Emery would not include an intrathecal pain device or a spinal cord stimulator. . . . I do not feel that further pain procedures, i.e., epidural steroid injections, caudal blocks, facet blocks, etc., are going to provide any long term relief for Mr. Emery at this stage of the game. (RX. #1, p.73-74).

Treatment recommendation of Dr. Baskin consisted to continued conservative measures, to include work-hardening, and a home exercise program.

After a thorough consideration of all of the evidence in this record, to include the testimony of the claimant, review of medical reports and other documentary evidence, along the application of the appropriate statutory provision and case law, I make the following:

FINDINGS

1. The Arkansas Workers' Compensation Commission has jurisdiction of these claims.
2. At all times pertinent hereto, the employee, employer, carrier relationship existed among the parties.
3. On August 10, 2001, and November 25, 2001, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$252.00/\$189.00, for temporary total/permanent partial disability.

4. On August 10, 2001, and November 25, 2001, the claimant sustained injuries arising out of and in the course of his employment.

5. The medical treatment as recommended by Dr. Butchaiah Garlapati is reasonably necessary medical treatment in connection with the compensable injuries sustained by the claimant.

6. The respondent shall pay all reasonable hospital and medical expenses arising out of the claimant's compensable injuries of August 10, 2001, and November 25, 2001.

7. The respondents have controverted the claimant's entitlement to the recommended medical treatment as offered by Dr. Garlapati, to include the stimulator/pump.

CONCLUSIONS

The compensability of the claimant's August 10, 2001, and November 25, 2001, injuries is not disputed. Claimant asserts that as a result of the afore injuries further medical treatment has been recommended and that respondents have refused to provide same. Respondents assert that the recommended treatment is not reasonably necessary medical treatment in connection to claimant's injuries. The present claim is one governed by the provisions of Act 796 of 1993, in that claimant asserts entitlement to additional workers' compensation benefits as a result of injuries having been sustained subsequent to the effective date of the afore provisions.

Since having suffered his injuries in the employment of respondent clamant has undergone several surgeries, to inclusion a spinal fusion. A review of the evidence in the record reflects that claimant has been compliant with his treating physicians' recommendations. Claimant was referred by his treating neurosurgeon, Dr. Steven Cathey, to a pain management specialist, Dr. Butchaiah Garlapati, after claimant continued to experience severe pain in his low

back and legs subsequent to the fusion.

While claimant continued to work subsequent to the fusion surgery from May 2003, through March 2004, the credible evidence reflects that claimant's pain became so severe that he was unable to continue his employment despite the accommodations made by respondent-employer. The evidence further reflects that claimant's pain has been such that he has been seen at the emergency room of Newport Hospital on several occasions.

Following his August 20, 2003, evaluation of the claimant, Dr. Garlapati recommended consideration of a spinal cord stimulator or infusion pump to address claimant's pain complaints. Claimant has undergone a psychological evaluation by two different examiners, both of whom found him qualified to undergo the procedure. Claimant has undergone surgery, medication, epidural steroid injections, attempts at physical therapy, home exercises all to no avail with respect to reducing his debilitating pain symptoms. The psychological evaluations and evidence in the record reflect that claimant has a realistic expectation regarding the benefits to be realized from undergoing the implant procedure.

Ark. Code Ann. § 11-9-508 (a) requires employers to provide such medical services as may be reasonably necessary in connection with the employee's injury. The issue is not whether a recommended procedure is "a reasonable and necessary medical expense". Whether a medical procedure or device is reasonable and necessary is a question of fact to be decided by the Commission. *Air Compressor Equipment v. Sword*, 69 Ark. App. 162, 11 S.W.3d 1 (2000). In the instant claim, the evidence preponderates that the recommended procedure is reasonably necessary in connection with the injuries received by the claimant.

Claimant is currently unable to work due to his debilitating pain, despite the use of

conservative measures from exercise, oral medication, and injections. Further, the claimant's current treatment regiment entail the use of medications with adverse side affects of weakness, dizziness. Claimant appreciates the fact that the placement of the stimulator or pump will not eliminate his pain or need for continued oral narcotic medication, but is hopeful that the same will reduce the severity of his pain as well as the amount of the oral medications. Respondents have controverted the recommended medical procedure, which is reasonably necessary in connection with the treatment of the claimant's compensable injuries.

AWARD

Respondents are herein ordered and directed to pay all reasonably necessary medical, hospital, nursing, and other apparatus expenses arising out of the claimant's compensable injuries of August 10, 2001, and November 25, 2001, to include the cost associated with the treatment recommended Dr. Butchaiah Garlapati regarding the spinal cord stimulator or infusion pain pump, as well as medical related travel.

Maximum attorney fees are herein award to the claimant's attorney, pursuant to Ark. Code Ann. § 11-9-715, on the controverted portion of this award with respect to indemnity benefits growing therefrom.

This award shall bear interest at the legal rate pursuant to Ark. Code Ann. § 11-9-809, until paid.

IT IS SO ORDERED.

Andrew L. Blood, Administrative Law Judge