

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F013563

NELSON HEDGES	CLAIMANT
WHIRLPOOL CORPORATION	RESPONDENT
HELMSMAN MANAGEMENT SERVICES, INC. INSURANCE CARRIER	RESPONDENT

OPINION FILED SEPTEMBER 20, 2007

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH DANIELSON in Fort Smith, Sebastian County, Arkansas.

Claimant represented by EDDIE H. WALKER, JR., Attorney, Fort Smith, Arkansas.

Respondent represented by TOM HARPER, JR., Attorney, Fort Smith, Arkansas.

STATEMENT OF THE CASE

A hearing was held on February 22, 2007, in Fort Smith, Arkansas.

A pre-hearing conference was held in this claim, and as a result a pre-hearing order was entered in the claim on January 23, 2007. This pre-hearing order set forth the stipulations offered by the parties, the issues to litigate and the contentions thereto.

The following stipulations were submitted by the parties and are hereby accepted:

1. The Arkansas workers' Compensation Commission has jurisdiction of this claim.

2. On all pertinent dates, the relationship of employee-employer-carrier existed between the parties.

3. The claimant sustained a compensable injury to his back on August 15, 2000.

4. The claimant is entitled to a weekly compensation rate of \$297.00 for temporary total disability and \$223.00 for permanent partial disability.

5. The respondents accepted and paid a 13 percent impairment to the body as a whole.

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

1. Is a spinal cord stimulator reasonable and necessary medical treatment for the claimant's compensable injury?

In regard to the foregoing issues the claimant contends that his primary treating physician has recommended additional treatment for which the respondents will not accept liability. The claimant contends that his primary treating physician is in the best position to know whether additional treatment is reasonably necessary and that the Commission should give the opinion of his treating physician more weight than the opinion of physicians who have been hired by the respondents and performed one time evaluations. The claimant contends that his attorney is entitled to an appropriate attorney's fee.

In regard to the foregoing issues the respondents contend that they are uncertain whether Dr. Capocelli recommends a morphine pump and/or dorsal column stimulator. In the event he has made, or makes, such recommendation, respondents submit that neither device is medically reasonable or necessary treatment for claimant. Respondents submit that independent physicians, other than claimant's treating physician, are more likely to possess unbiased

opinions in this regard since they have no personal or financial interest in providing either of these devices for claimant.

The documentary evidence submitted in this matter consists of the Commission's pre-hearing order marked Commission's Exhibit No. 1. The claimant submitted documentary evidence marked Claimant's Exhibit No. 1, and the deposition of Dr. Capocelli marked Claimant's Exhibit No. 2. The respondents submitted documentary evidence marked Respondents' Exhibit No. 1 and Respondents' Exhibit No. 2. The respondents submitted a report from Robert J. Barth, Ph.D. marked Respondents' Exhibit No. 3. All these exhibits were admitted without objection.

An opinion was rendered in this matter on May 9, 2007, at that time Respondents' Exhibit No. 3, a report from Robert J. Barth, Ph.D, was admitted into evidence as Respondents' Exhibit No. 3 but inadvertently not blue booked to the record. The Full Commission remanded the matter back with the specific instructions to review the documents in the file and settle the record to include all the exhibits. All documents have now been reviewed and Respondents' Exhibit No. 3 is now blue booked to the record for review.

DISCUSSION

The claimant testified that he has been working for the respondent for approximately seven years and five months as of the date of this hearing. The claimant testified and it has been stipulated by the parties that he sustained a compensable injury to his low back on August 15, 2000. The claimant testified that the respondents sent him to the company doctor the day of his injury

but he ultimately ended up seeing Dr. Capocelli, a neurosurgeon. The claimant agreed that he underwent back surgery by Dr. Capocelli in December 2001 and as a result of this surgery was off work for approximately seven months. The claimant testified that he returned to work part time, working four hours a day and attending physical therapy four hours a day. The claimant testified that eventually he returned to work full time and is currently working for the respondent. The claimant testified that his current job requires that he stand eight hours a day. The claimant testified that he has continued to have low back pain and pain into his left leg. The claimant testified that it is a burning tingling sensation. The claimant testified that his foot gets to hurting so bad he will have to stomp it to keep it from feeling like it is falling asleep. The claimant testified that this pain is constant and he takes Aleve at work but takes his prescription pain medications at home. The claimant testified that his pain is increasing and it is getting more difficult for him to sleep noting that he sleeps only two hours at a time. The claimant testified that the longer he lays down or sits his pain begins to throb and hurt more. The claimant testified that the pain medication which is prescribed for him does not completely relieve his pain but makes it tolerable. The claimant testified that the last time he saw Dr. Capocelli he increased the dosage for his pain medications. The claimant testified that his back surgery did help in that he felt better and he could get around better. The claimant testified

that over time his pain has increased and that Dr. Capocelli referred him to Dr. Swicegood for pain management.

The claimant testified that Dr. Swicegood worked with him for a year or more and gave him all kinds of injections. The claimant testified that these injections might help for a day or two but then his pain would increase. The claimant stated that Dr. Swicegood advised him that he had done all that he could do and referred him back to Dr. Capocelli for a possible dorsal column stimulator. The claimant testified that when he saw Dr. Smelz he reported to her that he was hurting more now than he did before his surgery. The claimant testified that he understands the risk associated with a spinal cord stimulator. The claimant testified that he is very interest in being able to continue to work. The claimant testified that without some kind of relief he does not think he is going to be able to continue to work. The claimant testified that his constant pain has affected his relationship noting that his wife says that he is hard hearted and grumpy. The claimant testified that he has gone to see every doctor which the respondents have referred him to and that all he wants is some relief so he can carry on with his day.

On cross examination, the claimant testified that prior to going to work for the respondent he had had a heart attack but made the respondent aware of this during the application process. The claimant agreed that he had back problems while in the military in the 1980s and he also agreed that he was seen by Dr. Dennis Carter in 1999 for lumbar pain. The claimant testified that he has talked

with Dr. Capocelli about the pros and cons of a spinal cord stimulator and he also had looked it up on the internet. The claimant testified that he was unaware that the spinal cord stimulator might make him worse. The claimant testified that initially it would be an external device to see if it would improve the level of his pain. The claimant testified that Dr. Capocelli told him that it would not totally get rid of his pain. The claimant testified that he was aware that Dr. Standefer as well as Dr. Smelz have indicated that he does not need a spinal cord stimulator. The claimant testified that he currently is smoking three quarters of a pack of cigarettes a day and agreed that every doctor will tell you to quit smoking. The claimant testified that his surgery helped him because he is getting around a little better than he was prior to his surgery but he is hurting more as each day goes by. The claimant testified that he would guesstimate that his pain is about the same as it was in 2000 before his surgery. The claimant testified that it was his understanding from Dr. Capocelli that his body produces more scar tissue than a normal person and it is the scar tissue build up that is causing his problems. The claimant testified that he does home exercises in order to not lose his strength. The claimant testified that he does not workout with weights because he has a weight lifting limitation. The claimant testified that currently he is taking six medications. The claimant testified that he preferred a spinal cord stimulator to a morphine drip because the morphine drip would prevent him from working for the respondent and he wanted to keep working.

On redirect examination, the claimant testified that it was his understanding that a temporary trial of a spinal cord stimulator would be done prior to having one implanted. The claimant agreed that if the temporary placement does not work there would be no need to have the spinal cord stimulator implanted. The claimant testified that he has mental side affects from the pain he endures on a daily basis indicating that he snaps at his wife as well as at his children and then has to apologize for his irritable behavior. The claimant testified that his lack of sleep due to his pain causes emotional problems. The claimant testified that to his knowledge the surgery which Dr. Capocelli performed on him was successful in fusing his back so that the disc in his back would not continue to collapse.

On recross examination, the claimant testified that even if he had to undergo a psychological evaluation he would go through this process prior to having the spinal cord stimulator implanted.

The medical records set forth that the claimant was seen by Dr. Capocelli on February 5, 2002, some six weeks after his lumbar fusion. Dr. Capocelli notes that the claimant reports significant low back symptoms with occasional radiation to his buttock region. Physical therapy and medications were recommended for the claimant. On July 19, 2002, Dr. Capocelli writes that the claimant continues to have ongoing low back pain with some radiation into his left leg which has significantly reduced his ability to perform his work duties. The doctor notes that the claimant reports that this is generally worse when he sits for a period of time and cannot change

positions. Dr. Capocelli writes that the claimant has reached maximum medical improvement and put the claimant on a permanent restriction of no lifting more than twenty pounds frequently and no bending, climbing, squatting, or repetitive twisting. Dr. Capocelli recommended that the claimant could return to work eight hours and he rated the claimant with a 13 percent whole body impairment rating. On September 12, 2003, Dr. Capocelli recommended that the claimant begin receiving a series of injections for his pain management and he prescribed Neurotin for the claimant as well. The claimant began being treated by Dr. John Swicegood on January 7, 2004, for his left lumbar radiculopathy. The medical records set forth that the claimant received regular pain management treatments from Dr. Swicegood throughout 2004. The claimant began physical therapy at the River Valley Rehab Center on November 17, 2004, and underwent thirteen treatments up through December 17, 2004. The claimant was seen by Dr. Swicegood on April 7, 2004, for additional pain management treatments. Dr. Capocelli writes on June 29, 2005, that the claimant has had fairly chronic pain problems noting that he has been treated with multiple injections. Dr. Capocelli writes that the claimant is probably a candidate for a pain pump and referred him to Dr. Swicegood. Dr. Capocelli writes on August 23, 2005, that he has reviewed the claimant's mylogram which shows excellent results as a result of the surgery. Dr. Capocelli notes that there is mild narrowing at the L3-4 level which is unchanged from the previous studies. Dr. Capocelli writes that there is some evidence of arachnoiditis in

the lower lumbar levels and it is the doctor's opinion that a lot of the claimant's neuropathic pain syndrome is related to this and will not respond to any kind of surgery. Again, Dr. Capocelli writes that the claimant is an excellent candidate for a dorsal column stimulator and notes that they will continue to treat him as to his degenerative disc disease. On August 14, 2005, Dr. Capocelli rated the claimant with a 14 percent whole body impairment based on the A.M.A. Guides, Forth Edition. Dr. Capocelli writes that the claimant is probably going to need on going medical care as it relates to his work injury.

On December 2, 2005, Dr. Smelz along with a team of other physicians and therapists evaluated the claimant and reviewed his medical records. Dr. Smelz addressed a series of questions but in summary he indicates that the claimant does not need any further medical treatment of any kind and certainly not a morphine pump or a dorsal cord stimulator. Dr. Smelz based these opinions on his review of the medical records indicating that there are no objective medical findings on which to continue to treat this claimant. On March 24, 2006, the claimant underwent a medical examination and review of his past medical history by Dr. Michael Standefer. Dr. Standefer writes on April 4, 2006, in response to the respondents' attorney's letter that he does not believe that a dorsal column stimulator or morphine pump is appropriate for the claimant and recommended non narcotic inflammatory medication on an as needed basis for the claimant. Dr. Standefer writes that the claimant's current pain complaints are probably a combination of

underlying degenerative problems and associated musculoligamentous sources. Dr. Standefer notes that the claimant is a definite risk to develop an adjacent level pathology as a result of his lumbar fusion. Dr. Standefer notes that any future spinal surgery at the adjacent level would at least have to be considered as an extension of the claimant's original workers' compensation claim. Dr. Standefer recommended that the claimant's restrictions be increased as to his lifting to no more than thirty-five to forty-five pounds on an occasional basis otherwise the claimant's restrictions seem to be reasonable.

Dr. Robert J. Barth is an Ph.D. in psychology and according to his Vitae has had an impressive career. Dr. Barth writes in a report at the request of the respondents on April 20, 2007, that this report does not represent an attempt to talk about the claimant directly but instead is limited to the evidence presented in the records which were sent to him and the relevant scientific and professional issues. It is very evident from reading Dr. Barth's report that he is not high on spinal cord stimulators and in fact considers them to do more harm than good. Based on a review of the record sent to Dr. Barth concerning the claimant, he writes that before this procedure should be considered the claimant should go through an extensive battery of testing and that an extensive evaluation process needs to take place in order to determine whether there is any reason to hope that the claimant might benefit from a spinal cord stimulator. Dr. Barth then proceeds to list out thirty-two different factors which should be

investigated concluding with a comprehensive review of the claimant's entire life's medical records. Dr. Barth also sets forth that, in his opinion, Dr. Capocelli's recommendation that the claimant quit work is an attempt to shorten the claimant's life and his recommendation for a spinal cord stimulator is for financial gain for the doctor. Dr. Barth, in his report, definitely does not recommend that a spinal cord stimulator be used by this claimant and that perhaps other more conservative measures should be followed.

Dr. Anthony Capocelli, in his deposition, sets forth that he performed a lumbar laminectomy and fusion on the claimant and ultimately referred him to Dr. Swicegood for pain management. Dr. Capocelli agreed that a report from Dr. Swicegood dated April 10, 2005, sets forth that in Dr. Swicegood's opinion steroids are known to hasten degenerative joint disease. Dr. Capocelli stated that in his opinion the degenerative condition is going to deteriorate over time anyway and that the steroids may hasten it. Dr. Capocelli was asked if based in his examinations of the claimant, did he have a scar tissue problem? Dr. Capocelli responded that based on the various studies and his examination, the claimant demonstrated scar tissue from the surgical area as well as the probability of some clumping of his nerve roots which may be consistent with arachnoiditis or scar tissue within the nerve roots. Dr. Capocelli reviewed one of Dr. Swicegood's reports dated September 6, 2004, where Dr. Swicegood diagnosed the claimant with having significant adhesions or scar tissue that he was planning a procedure to

alleviate. Dr. Capocelli testified that scar tissue is an objective finding on a test. Dr. Capocelli testified that in his opinion the claimant has chronic pain syndrome. Dr. Capocelli was asked what was causing the claimant's chronic pain syndrome and he responded, scarring in the claimant's nerve roots. Dr. Capocelli testified that there is some bit of debate within his profession as to whether or not a lumbar fusion can hasten the development of adjacent degeneration at the level next to the lumbar fusion. Dr. Capocelli testified that the mechanism that would cause that phenomena to occur is presumably biomechanical. Dr. Capocelli explained that a rigid fixation of several levels causes more stress on the associated level. Dr. Capocelli testified that the claimant underwent several treatments for pain management but these treatments prove to be short lived. On June 29, 2005, Dr. Capocelli writes that in hopes of getting the claimant some sort of long term pain relief, he recommended the claimant as a candidate for a pain pump. Dr. Capocelli testified that a dorsal column stimulator is similar to a pain pump in that its mechanics dulls the nerves in the spine, therefore reducing the pain. The doctor testified that the trial test prior to the permanent device being implanted would be done by a pain management doctor such as Dr. Swicegood. Dr. Capocelli stated that he would place the final pump if one is indicated. Dr. Capocelli was asked about his August 23, 2005, progress note where he indicates that the claimant has evidence of arachnoiditis. Dr. Capocelli testified that this is scar tissue explaining that it is scar tissue that is sort of

within the nerves within the spine. Dr. Capocelli testified that there is no known surgical treatment that is beneficial for arachnoiditis. Dr. Capocelli was asked how a diagnosis of arachnoiditis is made. Dr. Capocelli testified that a patient will have symptoms of neuropathic pain syndrome and it can be a radiographic diagnosis indicating that an MRI or myelogram will indicate nerve root clumping which is a hallmark of arachnoiditis. Dr. Capocelli agreed that his diagnosis was based on objective findings which he personally verified. Dr. Capocelli testified that since the claimant was not a candidate for any sort of surgical treatment, he concluded that the claimant would benefit from a more permanent and long lasting effect, such as a spinal cord stimulator. Dr. Capocelli testified that in his opinion the claimant is highly motivated noting that he has followed through with every recommendation, treatment program, physical therapy or pain management treatments and still worked except when it was recommended that he be off.

On cross examination, Dr. Capocelli testified that before the claimant would undergo the implantation of a spinal cord stimulator he would undergo a psychological evaluation by a psychiatrist. Dr. Capocelli testified that there is nothing in the claimant's history that would contraindicate putting in a spinal cord stimulator. The doctor testified again that he would not recommend a stimulator until the claimant had followed through with the regular protocol, psychiatric and temporary evaluation. Dr. Capocelli testified that one thing that makes the implantation of a spinal cord stimulator

reasonable and indicated for the claimant is because he has continued to work and wants to work. Dr. Capocelli agreed that keeping a person employed is a good treatment for anyone with chronic pain syndrome, stating again that he recommended a spinal cord stimulator for this claimant for exactly that reason. There was some discussion about varying pain, noting that the claimant had reported that his pain was a nine out of ten. Dr. Capocelli indicated that this was not unusual that pain will wax and wain and it might average from a seven to a ten or a five to a ten over a course of time. The doctor explained that this variance in pain could be caused by the time of day, his medication wearing off, or not having taken his medication at that time. Dr. Capocelli was asked if any of the claimant's treatment protocols had worked and the doctor responded that yes Dr. Swicegood's injections and various manipulations, the claimant's medications such as Neurotin and basically everything they have done has helped. Dr. Capocelli stated that there is probably some progression in the claimant's condition worsening over time. Dr. Capocelli testified that he did not think that the claimant exhibited any of the factors to indicate malingering. Dr. Capocelli testified that what he hoped to accomplish by implanting a spinal cord stimulator for the claimant was to reduce his day to day pain level.

On redirect examination, Dr. Capocelli testified that it was his experience that patients who suffer with chronic pain syndrome often complain of disruption with their sleep patterns.

After a complete review of this entire record, I find that the claimant has proven by a preponderance of the evidence that he is entitled to additional medical treatment in the form of a spinal cord stimulator if in fact after a trial test has been made and all the appropriate evaluations have been undergone he is a recommended candidate for such treatment. It is noted that Dr. Smelz did not recommend a spinal cord stimulator for this claimant after a review of the claimant's medical records and evaluation of the claimant. Dr. Smelz indicates that there is no objective medical findings on which to continue to treat the claimant. It is noted that the claimant had a spinal fusion performed by Dr. Capocelli and as a result of that fusion has been assessed with and the respondents have accepted a 13 percent whole body impairment rating. It does not seem unlikely that additional medical treatment would be likely for this claimant whether conservative or more invasive. Dr. Standefer also evaluated the claimant and indicated that he would not recommend a dorsal column stimulator but does write that the claimant is a candidate for additional medical treatment as a result of his lumbar fusion noting that the adjacent levels to the fusion will most likely degenerate more rapidly requiring attention. Dr. Barth, a Ph.D. in psychology would not recommend a spinal cord stimulator for anyone considering them to do more harm than good. Dr. Barth set forth all the various tests and evaluations which this claimant should go through before a spinal cord stimulator should be considered. It is particularly noted that Dr. Barth was disrespectful to Dr. Capocelli and indicated

that Dr. Capocelli was trying to shorten the claimant's life and was primarily interested in the profit he would receive from implanting a spinal cord stimulator for the claimant rather than any benefit that it might have for the claimant. Although I am sure each of these gentlemen, Dr. Smelz, Dr. Standefer, and Dr. Barth are all well intended, I do not find that their opinion should carry the same weight as that of the claimant's long term treating physician, Dr. Capocelli. Dr. Capocelli set forth in his deposition that there were objective findings of nerve root scarring which was nonsurgical and in his desire to keep this claimant working and alleviate his pain level, he was recommending a spinal cord stimulator or at least to test the claimant to see if he would be a candidate for such a device.

FINDINGS & CONCLUSIONS

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On all pertinent dates, the relationship of employee-employer-carrier existed between the parties.
3. The claimant sustained a compensable injury to his back on August 15, 2000.
4. The claimant is entitled to a weekly compensation rate of \$297.00 for temporary total disability and \$223.00 for permanent partial disability.
5. The respondents accepted and paid a 13 percent impairment to the body as a whole.

6. The claimant has proven by a preponderance of the evidence that he is entitled to additional medical treatment in the form of a spinal cord stimulator as recommended by his treating physician, Dr. Anthony Capocelli. See discussion above.

7. The respondents have controverted the claimant's entitlement to additional medical treatment.

8. The claimant's attorney is entitled to the maximum statutory attorney's fee based on the benefits awarded herein. It is noted that the law as to attorney's fee changed on July 1, 2001. This compensable injury occurred on August 15, 2000, therefore the claimant's attorney is entitled to a fee on the claimant's medical treatment.

ORDER

The claimant has proven by a preponderance of the evidence that he is entitled to additional medical treatment in the form of a spinal cord stimulator.

The respondents should pay for the cost of the claimant's additional medical treatment.

The claimant's attorney is entitled to the maximum statutory attorney's fee based on the medical treatment recommended or provided herein.

The respondents shall pay to the claimant's attorney the maximum statutory attorney's fee on the additional benefits awarded herein, with one half of said attorney's fee to be paid by the respondents in addition to such benefits and one half of said

attorney's fee to be withheld by the respondents from such benefits.

All benefits herein awarded which have heretofore accrued are payable in a lump sum without discount.

This award shall bear the maximum legal rate of interest until paid.

IT IS SO ORDERED.

ELIZABETH DANIELSON
ADMINISTRATIVE LAW JUDGE