

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F013563

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

OPINION FILED NOVEMBER 21, 2007

Upon review before the FULL COMMISSION in Little Rock, Pulaski County, Arkansas.

Claimant represented by the HONORABLE EDDIE H. WALKER, JR., Attorney at Law, Fort Smith, Arkansas.

Respondents represented by the HONORABLE TOM HARPER, JR., Attorney at Law, Fort Smith, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

Respondents appeal an opinion and order of the Administrative Law Judge filed September 20, 2007. In said order, the Administrative Law Judge made the following findings of fact and conclusions of law:

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.
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.

We have carefully conducted a de novo review of the entire record herein and it is our opinion that the Administrative Law Judge's decision is supported by a preponderance of the credible evidence, correctly applies the law, and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

We therefore affirm the September 20, 2007, decision of the Administrative Law Judge, including all

findings of fact and conclusions of law therein, and adopt the opinion as the decision of the Full Commission on appeal.

All accrued benefits shall be paid in a lump sum without discount and with interest thereon at the lawful rate from the date of the Administrative Law Judge's decision in accordance with Ark. Code Ann. § 11-9-809 (Repl. 2002).

Since the claimant's injury occurred prior to July 1, 2001, the claimant's attorney's fee is governed by the provisions of Ark. Code Ann. § 11-9-715 as it existed prior to the amendments of Act 1281 of 2001. Compare Ark. Code Ann. § 11-9-715 (Repl. 1996) with Ark. Code Ann. § 11-9-715 (Repl. 2002). For prevailing on this appeal before the Full Commission, claimant's attorney is hereby awarded an additional attorney's fee in the amount of \$250.00 in accordance with Ark. Code Ann. § 11-9-715(b) (Repl. 1996).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

PHILIP A. HOOD, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I must respectfully dissent from the majority opinion finding that the claimant proved by a preponderance of the evidence that he was entitled to additional medical benefits in the form of a spinal cord stimulator. Based upon my de novo review of the record, I find that the claimant has failed to meet his burden of proof.

The claimant sustained an admittedly compensable injury to his back on August 15, 2000. As a result of that injury, the claimant underwent lumbar fusion surgery by Dr. Robert Capocelli in December of 2001. The claimant was off of work for seven months and was released by Dr. Capocelli to return to work on July 19, 2002 with a permanent anatomical impairment of 13% and with permanent restrictions. The claimant is currently working full time for the respondent employer.

The claimant continued to complain of pain and Dr. Capocelli referred him to Dr. Swicegood for pain management. Dr. Swicegood performed a series of lumbar injections which only provided short term relief. A report dated September 6, 2004, from Dr. Swicegood suggests that the claimant consider implantation of a

spinal cord stimulator. Dr. Capocelli has also suggested that the claimant was an excellent candidate for a spinal cord stimulator.

The claimant was examined and evaluated by Dr. J. K. Smelz on December 2, 2005. Dr. Smelz, along with a physiatric physician, a physical therapist, an occupational therapist and a kinesiotherapist, examined the claimant and performed testing. The report submitted by Dr. Smelz was the result of a team conference after the examinations were performed. Dr. Smelz opined that the placement of a spinal cord stimulator or morphine pump was not in the claimants best interest and indeed was "simply a case of throwing more interventional technology at Mr. Hedges in a random attempt to control his expressed subjective pain." Dr. Smelz and her team found no evidence of the apparent source of the claimant's pain. Electrodiagnostic testing was normal and there was no evidence of neuropathic origin for the claimant's pain. Dr. Smelz found no objective evidence of arachnoiditis. Further, she opined that "placing a morphine pump or back stimulator is fraught with the possibility of complications, is highly unlikely to succeed, and without any reasonable determination of pain origin, is simply not reasonable, necessary or medically justified."

Dr. Smelz addressed the claimant's degenerative condition and stated:

...the etiology of his subjective pain complaints is unclear. The only objective finding, those in his back MRI, are degenerative changes only, and were most likely there long before the August 2000 incident of increased pain. He himself stated today that there was no difference in the nature of the pain even after all of this intervention, which makes one seriously question if the pain arises from the back.

If his subjective pain complaints did arise from his back and there was an organic etiology, this would be solely due to degenerative disease, and the aggravation in 2000 would have been temporary, and would be considered resolved at this point. He is therefore, at maximum medical improvement.

The minimally increasing canal stenosis above the fused portion of the back, mentioned by Dr. Capocelli, is simply a continuation of his previous degenerative changes, brought on by life and aging. Given the absence of any findings of neuropathic processes on EMG as noted above, and on physical examinations, as well as on MRI, it is unlikely that he would benefit from further treatment for his complaints of back pain, and in fact, is statistically more likely to have decreasing results with increasing intervention.

It is clear from Dr. Smelz's report that she is of the opinion that the claimant's continued problems

are due to his degenerative condition not his compensable injury. She also stated that the claimant told her that he was not any better after the surgery. The claimant denied telling Dr. Smelz this but I note he also told Dr. Standefer the same thing when he evaluated the claimant. Dr. Standefer examined the claimant on March 25, 2006. Dr. Standefer also reviewed the claimant's medical records and the report of Dr. Smelz. He stated:

... Dr. Smelz' note indicated that the patient advises that the surgery did not alleviate his pain in any way. This is exactly the sequence of events provided to me by Mr. Hedges....

In a letter dated April 4, 2006, Dr. Standefer opined that the spinal cord stimulator or morphine pump was not appropriate therapy for the claimant. He opined that a reasonable treatment option for the claimant was non-narcotic, anti-inflammatory medication on an as needed basis.

The respondent's submitted the claimant's medical records for review by Robert Barth Ph.D., a neuropsychologist. Dr. Barth's report is extensive and contains scientific and medical sources supporting his position and conclusions. Dr. Barth concluded that a spinal cord stimulator was not reasonable and necessary

medical treatment. In reaching this conclusion, Dr. Barth stated that there is a general lack of scientific credibility for spinal cord stimulation because the proposed treatment carries an elevated risk of doing more harm than good. He cites The Chochran Collaboration report of 2007 which reviewed the use of spinal cord stimulation in chronic pain patients as support of his position. The study concluded that there was not sufficient evidence to assess the benefits and harm to the spinal cord stimulation for relief of chronic pain. There has been a failure to implement an definitive scientific trails and/or investigation of treatment using spinal cord stimulation. In addition, spinal cord stimulation has been singled out as a prime of example of poor stewardship of the healthcare system in literature from the American Academy of Neurology. Spinal cord stimulation is categorized as over-treatment. The guidelines of the American College of Occupational Environmental Medicine warn that over-treatment for chronic pain presents a greater risk for the patient than under treatment and is specifically noted to be associated with irreparable harm to the patients socio-economic status, home life, personal relationships and quality of life. He noted that spinal cord stimulation creates life long health problems

because of the maintenance required for the stimulator and it is also associated with the worsening of pain complaints as well as depression and psychosis.

Dr. Barth's review of the claimant's records indicated that the proposal for the spinal cord stimulator had not utilized any of the normal evaluations to predict if the claimant would actually benefit. He cited a long list of factors predicting treatment failure for spinal cord stimulation and a worsening of the claimant's condition subsequent to implantation, but stated that none of the factors had been considered and the medical records do not provide answers to why these factors have not been considered.

Dr. Barth cited scientific literature that demonstrates that a trial implantation is not indicative of permanent implantation. He notes that Dr. Capocelli appears to have already reached the conclusion to implant the spinal cord stimulator regardless of the outcome of the psychological evaluation or trial. He noted that Dr. Capocelli mentions several times that he thinks the claimant is an "excellent candidate for stimulation."

In his report, Dr. Barth opined that the claimant was already suffering from the effects of over treatment. He noted that Dr. Capocelli was strongly

encouraging the claimant to quit working. Returning to work is always in any patients best interest.

Further, the medical records, Dr. Barth stated, do not provide an explanation of why there are no objective assessments of the claimant's pain complaints, only subjective opinions that the claimant's complaints warrant extensive and invasive medical treatment. Dr. Barth stated that the claimant's pain severity ratings are objectively more consistent with exaggeration than with an honest presentation of pain.

Dr. Barth concluded his report by recommending an appropriate spinal cord stimulation evaluation plan, which can help identify if spinal cord stimulation is a viable option for the claimant. Dr. Barth recommended that this evaluation be conducted by an independent examiner so as not to be compromised by any financial conflict of interest and lack of objectivity on the part of the claimant's treating physician.

The claimant deposed Dr. Capocelli and offered his testimony into the record. Dr. Capocelli stated that he only "hopes" that the spinal cord stimulator would reduce the claimant's pain. He offers no opinion and he fails to mention any of the pros and cons of the proposed treatment. Dr. Swicegood's treatments failed to offer the claimant any lasting relief. It appears that

this is a last ditch effort by Dr. Capocelli to reduce the claimant's pain.

The Commission has a duty to translate the evidence on all the issues before it into findings of fact. Weldon v. Pierce Bros. Const. Co., 54 Ark. App. 344, 925 S.W.2d 179 (1996). Moreover, the Commission has the authority to resolve conflicting evidence and this extends to medical testimony. Foxx v. American Transp., 54 Ark. App. 115, 924 S.W.2d 814 (1996). The Commission has the duty of weighing the medical evidence as it does any other evidence, and the resolution of any conflicting medical evidence is a question of fact for the Commission to resolve. Emerson Electric v. Gaston, 75 Ark. App. 232, 58 S.W.3d 848 (2001); CDI Contractors McHale, 41 Ark. App. 57, 848 S.W.2d 941 (1993); McClain v. Texaco, Inc., 29 Ark. App. 218, 780 S.W.2d 34 (1989).

Although the Commission is not bound by medical testimony, it may not arbitrarily disregard any witness's testimony. Reeder v. Rheem Mfg. Co., 38 Ark. App. 248, 832 S.W.2d 505 (1992). However, it is well established that the determination of the credibility and weight to be given a witness's testimony is within the sole province of the Workers' Compensation Commission. Wal-Mart Stores, Inc. v. Sands, 80 Ark. App. 51, 91 S.W.3d 93 (2002). The Commission is not required

to believe the testimony of the claimant or any other witness, but may accept and translate into findings of fact only those portions of the testimony it deems worthy of belief. McClain, supra.

The Commission is never limited to medical evidence in arriving at its decision. Moreover, it is well within the Commission's province to weigh all the medical evidence and determine what is most credible. Smith-Blair, Inc. v. Jones, 77 Ark. App. 273, 72 S.W.3d 560 (2002). The Commission is entitled to review the basis for a doctor's opinion in deciding the weight and credibility of the opinion and medical evidence. Id. In addition, the Commission has the authority to accept or reject a medical opinion and determine its medical soundness and probative force. Green Bay Packaging v. Bartlett, 67 Ark. App. 332, 999 S.W.2d 695 (1999). The Commission's resolution of the medical evidence has the force and effect of a jury verdict. McClain, supra.

The Commission is entitled to review the basis for a doctor's opinion in deciding the weight of the opinion. Further, a medical opinion based solely upon claimant's history and own subjective belief that a medical condition is related to a compensable injury is not a substitute for credible evidence. Brewer v. Paragould Housing Authority, Full Commission Opinion,

January 22, 1996 (Claim No. E417617). The Commission is not bound by a doctor's opinion which is based largely on facts related to him by claimant where there is no sufficient independent knowledge upon which to corroborate the claimant's claim. Roberts v. Leo-Levi Hospital, 8 Ark. App. 184, 649 S.W.2d 402 (1983).

Moreover, the Commission need not base a decision on how the medical profession may characterize a given condition, but rather primarily on factors germane to the purposes of the Workers' Compensation Law. Weldon v. Pierce Bros. Constr., 54 Ark. App. 344, 925 S.W.2d 179 (1996).

After considering the evidence, I find that the claimant has failed to prove by a preponderance of the evidence that the spinal cord stimulator is reasonable and necessary medical treatment. The opinions of Dr. Smelz, Dr. Standefer and Dr. Barth are overwhelming evidence that the likelihood that the spinal cord stimulator would produce favorable results is slim to none. I give these opinions more weight than I do the opinion of Dr. Capocelli. They have no vested pecuniary interest in the claimant's case and therefore are without bias. Therefore, for all the reasons set forth herein, I must respectfully dissent from the

Hedges - F013563

14

majority opinion.

KAREN H. MCKINNEY, Commissioner