IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2005 MTWCC 51

WCC No. 2005-1242

SCOTT SHERWOOD

Petitioner

vs.

WATKINS & SHEPARD TRUCKING

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: One of the claimant's physicians recommended an occipital nerve stimulator to control the claimant's headaches. The insurer denied liability for the procedure based on the opinion of another of the claimant's physicians that the stimulator was not warranted and on a similar opinion of a medical panel which examined the claimant and reviewed his medical history.

Held: The occipital nerve stimulator is neither medically necessary nor reasonable. Therefore, the insurer is not liable for it.

Topics:

Benefits: Medical. An insurer is required to pay for only necessary and reasonable medical treatment.

Benefits: Medical. Where one of the claimant's treating physicians opines that implantation of an occipital nerve stimulator for control of the claimant's headaches is not medically reasonable; that opinion is supported by a panel of physicians consisting of a neurosurgeon, a neurologist, and a psychiatrist; and the panel neurologist provides persuasive and reasoned testimony supporting a finding that the procedure is not medically reasonable, the Court finds that in fact it is not medically reasonable and denies the claimant's petition requesting the Court to order the insurer to authorize and pay for the procedure.

¶1 The trial in this matter was held on May 9, 2005, in Helena, Montana. The petitioner, Scott Sherwood, was present and represented by Mr. Norman H. Grosfield. The respondent, Watkins & Shepard Trucking, was represented by Mr. Kelly M. Wills.

¶2 Exhibits: Exhibits 1 through 12 and 14 were admitted without objection. Mr. Wills objected to Exhibit 13 but after colloquy with the Court, withdrew his objection; the exhibit was admitted. Subsequent to trial, Mr. Wills submitted a motion for leave to file an additional exhibit, which is an April 28, 2005 "Follow-Up Consultation" note of Dr. Michael H. Schabacker. Mr. Grosfield was contacted and did not object. The note has been admitted as Exhibit 15.

¶3 Witnesses and Depositions: Mark W. Knight and Dr. Lennard S. Wilson testified at trial. No depositions were submitted.

¶4 Issues Presented: The Court restates the issues set forth in the Pretrial Order as follows:

> ¶4a Whether the petitioner should be allowed to have an occipital nerve stimulator implanted in accordance with Dr. John C. Oakley's recommendation.
>
> ¶4b Whether the respondent has been unreasonable in denying authorization for payment of the occipital nerve stimulator, and whether the petitioner is entitled to a penalty, attorney fees, and costs.

¶5 Having considered the Pretrial Order, the testimony presented at trial, the demeanor and credibility of the witnesses, the exhibits, and the arguments of the parties, the Court makes the following:

FINDINGS OF FACT

¶6 On November 4, 1993, and May 14, 1996, the petitioner (claimant) suffered industrial injuries arising out of and in the course of his employment with Watkins & Shepard Trucking (Watkins & Shepard). (Pretrial Order at 2, Uncontested Fact 1.)

¶7 At the time of the accidents, Watkins & Shepard was self-insured. Liability for the injuries was accepted and various medical and compensation benefits have been paid by the respondent. (Pretrial Order at 2, Uncontested Fact 2.)

¶8 The claimant has received extensive medical care as a result of his industrial injuries.

¶9 The claimant has suffered headaches as a result of the injury sustained in the November 4, 1993 industrial accident. Over the years, his headaches have been treated by numerous physicians and specialists without satisfactory resolution. (Ex. 8.)

¶10 In 2001 the third-party administrator for the respondent referred the claimant to Dr. John C. Oakley to evaluate the claimant and determine whether a subcutaneous occipital nerve stimulator that had been recommended by another physician was medically appropriate. (Ex. 3 at 2.) Dr. Oakley noted that the claimant was suffering from chronic pain in three areas: "He has interscapular lower neck pain radiating into the arms, he has occipital headaches, right greater than left, and he has lower back pain and leg pain." (*Id*.) The claimant ranked his pain complaints among the three areas as "65% for interscapular and arm pain, 25% headache, and 15% for lumbar pain . . . ." (*Id*.) Dr. Oakley concluded that a spinal cord stimulator "would be very unlikely to give him any type of long-term control and improvement of this pain syndrome" and recommended implanting an intrathecal catheter with a drug administration pump. (*Id*. at 4-5, 10.) Thereafter, on January 22, 2002, the catheter and pump were in fact implanted. (*Id*. at 11.)

¶11 The claimant continues to be treated for his pain syndrome through the use of the intrathecal catheter and drug administration pump. Drs. Oakley and Schabacker continue to provide medical care to the claimant. Dr. Oakley is primarily responsible for management of the intrathecal catheter and drug administration pump, and Dr. Michael H. Schabacker is responsible for treatment of the claimant's ongoing headache complaints. (*Id*.) The doctors are in the same medical practice.

¶12 On October 13, 2004, the claimant was again seen by Dr. Oakley. In his treatment notes, Dr. Oakley stated that "I think that Scott is a candidate, in spite of already having an implantable device in place, is a candidate for stimulator to treat the occipital neuritis." He recommended a "screening trial of one to two weeks . . . to determine efficacy before implanting an [sic] radiofrequency receiver." (Ex. 8 at 413.) No further explanation was given by Dr. Oakley for his recommendation.

¶13 On December 3, 2004, the claimant's attorney demanded that the respondent authorize implantation of the stimulator. (Ex. 1.) The respondent advised the claimant's attorney on December 14, 2004, that it had contacted Dr. Oakley's office to determine if the stimulator needed to be approved on an expedited basis due to an emergency situation, and was advised that it was not an emergency situation and that the stimulator was more of an experimental procedure. The letter also explained that the respondent intended to write to Dr. Oakley to ask him to explain the basis for his recommendation and how he believed it would assist the claimant with his headaches. (Ex. 2.)

¶14 On December 14, 2004, the respondent wrote to Dr. Oakley asking for the basis of his recommendation of the occipital nerve stimulator. (Ex. 5.) Dr. Oakley did not respond,

so on January 11, 2005, the claimant's counsel wrote to Dr. Oakley requesting that he respond. (Ex. 11.)

¶15 On January 27, 2005, Dr. Schabacker responded to the respondent's December 14, 2004 letter. In his letter, Dr. Schabacker noted that the claimant's headaches may be multifactorial:

> Mr. Sherwood reports chronic daily headache. The headaches, from his perspective, impact his ability to function. The specific type of headache has not been definitively established. It is not uncommon for a patient to have more than one headache type; however, in the setting of ongoing high dose opioid use, the issue of rebound headache is not easily ruled out. Migraine headache as a contributing factor is also not easily ruled out, although the description of the pain is not characteristic of migraine headache.

(Ex. 6 at 1.) The Court notes that the reference to opioid use is with respect to the claimant's use of opioid medications to treat his pain; his high use of opioids has been questioned by his physicians at various times. (Exs. 3 and 8.)

¶16 In his January 27, 2005 letter, Dr. Schabacker went on to question the potential effectiveness of an occipital nerve stimulator:

> The issue of occipital neuralgia remains unresolved. Had Mr. Sherwood responded consistently to the blocks, the potential role of occipital neuralgia as a primary contributing factor to his headaches would be clear. Placement of an occipital nerve stimulator may modify the headache due to occipital neuralgia; however, if Mr. Sherwood is also suffering from a component of opioid rebound headache, then he may not have satisfactory resolution of his headaches with a stimulator.

(Ex. 6 at 2.) Clearly, Dr. Schabacker was not confident that an occipital nerve stimulator would reduce the claimant's headache pain. At best, he believed it was **possible** the occipital nerve stimulator may be helpful. "Placement of an occipital nerve stimulator **may** modify the headache due to occipital neuralgia . . . ." (*Id.* (emphasis added).)

¶17 The claimant was also examined by a medical panel designated by the respondent. The panel evaluation was initially scheduled for February 22, 2005, but apparently took place on March 29 and April 8, 2005. The panel consisted of a neurosurgeon (Dr. Henry H. Gary), a neurologist (Dr. Lennard S. Wilson), and a psychiatrist (Dr. William Stratford). The panel found that the claimant's "headaches do not conform to any migrainous disorder, cluster headache, intracranial hypo- or hypertension, occipital neuralgia, cervicogenic

headache, with rebound not able to be absolutely excluded." (Ex. 8 at 6.) The panel further observed that the claimant

> appears to have a widespread chronic pain syndrome requiring large amounts of narcotics. There is little relationship between his chronic pain findings and objective findings, particularly with regard to headache . . . .

(*Id*.) With respect to the implantation of an occipital nerve stimulator, the panel found no basis for the procedure:

> We do not think that this patient's condition supports the use of a stimulator, as he has not responded to any provocative measures, namely blocks, medications, or physical therapy. We would not support the use of an occipital nerve stimulator although the patient relates that Dr. Oakley has had excellent responses.

(*Id*. at 8.)

¶18 The panel report was faxed to Dr. Schabacker, who was asked whether he believed if "an occipital nerve stimulator is a reasonable and necessary medical treatment for the headache problems Mr. Sherwood suffers as a result of the industrial injuries . . . ." Dr. Schabacker responded on April 30, 2005, "No." (Ex. 12.) Dr. Schabacker's office note for an April 28, 2005 office visit with the claimant sets out the rationale for his response:

> Headaches remain problematic. To date, Mr. Sherwood has not undergone an opioid-free period to rule out component of rebound headache.
>
> . . . .
>
> The issue of occipital nerve stimulator was briefly raised. There is very little discussion. I found on the chart a copy of the panel review of Mr. Sherwood's industrial injury. The panel advised against occipital nerve stimulator. Additionally, the panel review suggested that Mr. Sherwood reported a three-month hiatus from opioids in an effort to rule out rebound headache. **That is incorrect information as Mr. Sherwood has not, since I have been working with him, been off of the opioids. Consequently, there is insufficient evidence to suggest that rebound headache is not a factor**.
>
> Putman and Associates have forwarded a letter asking if I concur with the conclusion that occipital nerve stimulator is not medically necessary. **At this time, I do not feel that greater occipital nerve stimulation is a reasonable consideration for several reasons**. For one, Mr. Sherwood is unwilling or unable to trial himself off of the opioids to rule out rebound

> headache. Additionally, he has proven to be quite perseverative on a number of issues and is now convinced that there is some problem with the drug administration pump when, in fact, there is not. Additionally, he has continued to use oral opioids despite placement of the drug administration pump and relatively high doses of intrathecal opioids. Consequently, despite the addition of this type of technology, **it is clear that Mr. Sherwood is not willing to give up the oral opioids and consequently, . . . there is high likelihood that even with the addition of the occipital nerve stimulator that his behavior relative to the pain would not change**. Therefore, I indicated on that form that I did not feel that an occipital nerve stimulator was medically necessary.

(Ex. 15 (emphasis added).)

¶19 On May 5, 2005, Dr. Oakley finally responded to the inquiries asking for him to justify the stimulator. The doctor wrote that the claimant was having "occipital headaches" and probably a "transform migraine-type of headache." (Ex. 13.) He noted the hesitancy to proceed with the stimulator "because of the drug administration system with adding medications" but went on to state:

> The treatment described in the literature and having been done through our clinic in many patients now is a subcuticular peripheral nerve type stimulator for the occipital nerve distribution. This has had an 80% effectiveness in controlling these occipital type head pains and would be indicated in this patient.

(*Id*.) Dr. Oakley recommended a "screening trial of the stimulator" to be followed by actual implantation of a pulse generator if the trial proved successful. (*Id*.)

¶20 Dr. Oakley did not testify either at trial or by deposition. However, Dr. Wilson, a neurologist and one of the panel members, did. He testified unequivocally that the proposed procedure is unwarranted. His review of literature from the International Headache Society supports this determination. Other medical literature he reviewed also confirmed that the diagnostic criteria for use of an occipital nerve stimulator are not met here. His testimony was reasoned and persuasive.

¶21 Based on Dr. Wilson's testimony and the opinions of Dr. Schabacker, I find that the implantation of an occipital nerve stimulator is not medically reasonable or necessary.

¶22 The respondent's refusal to authorize the implantation of a stimulator was reasonable.

CONCLUSIONS OF LAW

¶23 This case is governed by the 1993 and 1995 versions of the Montana Workers' Compensation Act since that was the law in effect at the time of the claimant's industrial accidents. *Buckman v. Montana Deaconess Hosp.,* 224 Mont. 318, 321, 730 P.2d 380, 382 (1986). Under both versions, the respondent is required to pay for reasonable medical care for conditions caused by the claimant's industrial injuries. The claimant bears the burden of proving by a preponderance of the evidence that the medical procedure he seeks is reasonable. *See Ricks v. Teslow Consol.,* 162 Mont. 469, 512 P.2d 1304 (1973); *Dumont v. Wickens Bros. Constr. Co.*, 183 Mont. 190, 598 P.2d 1099 (1979). He has failed in that burden. Even Dr. Schabacker, the physician primarily responsible for treating the claimant's headaches and a member of the same medical practice as Dr. Oakley, deems the procedure unreasonable. While the claimant is free to proceed with the procedure at his own cost, he is not entitled to have the procedure paid for by the respondent.

¶24 The claimant may recover a penalty and attorney fees only if he can prove that the insurer's denial of payment for the occipital nerve stimulator implant was unreasonable. §§ 39-71-612 and -2905, MCA (1993-1995). The claimant must first prevail on the merits, which he has not. Even if he had, the respondent's denial was reasonable. The claimant is therefore not entitled to attorney fees or a penalty.

JUDGMENT

¶25 The claimant is not entitled to payment for implantation of an occipital nerve stimulator or to the stimulator trial recommended by Dr. Oakley. His petition is therefore **dismissed with prejudice**.

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

¶27 Any party to this dispute may have twenty days in which to request a rehearing from these Findings of Fact, Conclusions of Law and Judgment.

DATED in Helena, Montana, this 22nd day of August, 2005.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. Norman H. Grosfield
Mr. Kelly M. Wills
Submitted: June 23, 2005