

APPELLATE PANEL DECISION AND ORDER
OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

WCC FILE NO. 0412441

Ernest Alvin Taylor, Employee,
..... Claimant/Appellant,

v.

Fieldstone Center Inc./Fieldstone Center of Charleston, Employer,

and

Association Insurance Company c/o
Builders Insurance Group, Carrier,
..... Defendants/Respondents.

Appellate Panel Review held in Columbia, South Carolina
on November 18, 2014 per notices timely
and properly served upon all parties of interest.

Appellate Panel Decision and Order Filed:

January 13, 2015

APPEARANCES: Claimant/Appellant represented by Thomas W. Greene, Esquire of
Thomas W. Greene, Attorney at Law

Defendants/Respondents represented by Regan A. Cobb, Esquire of
McAngus Goudelock & Courie, LLC

RECEIVED

FEB 17 2015

SC Court of Appeals

STATEMENT OF THE CASE

The Claimant suffered an admitted injury to his low back on August 6, 2004. Defendants provided appropriate and causally related medical treatment including lumbar spine surgery at the L3-4 disc space on August 17, 2005 performed by Dr. Donald Johnson. Claimant was ultimately released at maximum medical improvement on May 10, 2006, and assigned a 30% impairment to the whole person by Dr. Johnson. The parties then entered into a Settlement Agreement and Consent Order approved on September 18, 2006, agreeing Claimant qualified for permanent and total disability, was entitled to casually related medical care pursuant to S.C. Code Ann. §42-15-60, and that no further temporary or permanent disability compensation shall hereafter ever be owed or payable by the Defendants. After approval of the Settlement Agreement and Consent Order, Claimant continued to receive medical treatment with Dr. Marc N. Dubick, for pain management. Dr. Dubick contacted Defendants on September 20, 2012 indicating Claimant requested a return visit to Dr. John Johnson for further evaluation. Defendants authorized the evaluation with Dr. Johnson who indicated Claimant had chronic low back pain with failure of pain management and recommended an updated MRI. Defendants approved the MRI which was done on February 14, 2013.

Claimant then filed a Motion for a Change of Physician dated March 7, 2013 requesting that Dr. Johnson be confirmed as the Claimant's authorized treating physician in order to determine if a spinal cord stimulator trial is necessary. Defendants filed a reply to Claimant's Motion for a Change of Physician dated March 13, 2013 asserting Dr. Johnson specifically recommends pain management for Claimant which Dr. Dubick has been providing as the authorized treating physician since 2008 and further assert that under S.C. Code Ann. §42-15-60, Defendants are entitled to direct medical care and treatment and they have directed that the

evaluation for continued pain management go back to the original authorized treating physician who is most familiar with Claimant's claim, which is Dr. Dubick. Defendants did not deny Claimant's ability to get a spinal cord stimulator trial, as recommended by Dr. Johnson, and instead indicated that Claimant should return to Dr. Dubick for his opinion regarding the same.

A Motion hearing was held via telephone before the undersigned on April 3, 2013 at which time Claimant withdrew his Motion in order to file a Form 50 as the contents of the Motion addressed the merits of this claim. A Form 50 was filed on April 3, 2013 alleging injury to Claimant's back and request for a change of physician. Defendants filed their Form 51 on May 3, 2013, with a denial of Dr. Netherton as a treating pain management physician and asserted Defendants are entitled to retain control of Claimant's medical treatment including authorizing future pain management physicians. An Amended Form 50 was filed on May 6, 2013 including not only injury to Claimant's low back but adding a psyche injury. Defendants filed an Amended Form 51 on May 16, 2013, denying the psyche injury, and continue to assert that their direction of medical care is proper pursuant to S.C. Code Ann. §42-15-60.

A hearing was set for July 2, 2013 on the Claimant's Form 50 pursuant to a Hearing Notice on May 8, 2013 and then rescheduled for July 11, 2013. On July 10, 2013, Claimant's attorney withdrew his Form 50 Hearing request and the hearing was cancelled.

On December 2, 2013, Claimant's attorney requested the Commission reset the hearing based on his original Form 50 filed on April 10, 2013. A hearing was then set for April 25, 2014 before the undersigned Commissioner. During the course of the hearing, it was agreed that the sole purpose of the hearing before the undersigned was to determine whether or not Claimant is entitled to reimbursement for a spinal cord stimulator. It was Claimant's position that he experienced the 90% reduction in his pain level following implementation of the spinal cord

stimulator. Claimant further asserted that he underwent spinal cord stimulator implantation with Dr. Netherton at the direction and referral from Dr. Johnson who was the authorized treating physician. As such, Claimant contends he did not go outside of the South Carolina Workers' Compensation Act as he was treated by a physician recommended by an authorized treating physician. Claimant conceded he had been previously treating for over six years by Dr. Dubick for pain management but due to a breakdown in the relationship between himself and Dr. Dubick he did not want to go back to that physician for additional treatment. Based upon those arguments, Claimant asserted the Workers' Compensation Insurance Carrier should reimburse Claimant for payment of the spinal cord stimulator.

It was Defendants' position that any benefits for the spinal cord stimulator should be denied. Defendants contend this treatment is entirely outside the parameters of the South Carolina Workers' Compensation Act. It was Defendants' position that they have not, at any time, denied treatment or evaluations for Claimant with regard to his admitted low back injury and the potential for a spinal cord stimulator trial or permanent implantation. Defendants assert the Claimant has been seeing Dr. Dubick for six years of pain management and there was no indication for the need of a spinal cord stimulator recommended by the doctor or asked by the Claimant to Dr. Dubick. The last treatment with Dr. Dubick discussed a different procedure. Defendants further assert that there was no change in the physician ordered by the Commission and that one the Claimant went outside of the treating parameters and went on his own to Dr. Netherton, who was not authorized, that the spinal cord stimulator and the issue is outside of the workers' compensation arena. In fact, Defendants authorized the referral to Dr. Johnson, the subsequent recommendation for an updated lumbar MRI, and Dr. Johnson's referral that Claimant undergo a pain management evaluation to determine if he needed a trial spinal cord

stimulator. Defendants assert they attempted to set up the pain management referral with Claimant's authorized treating physician, Dr. Dubick. However, Claimant refused to return to Dr. Dubick so Defendants then pursued a pain management evaluation for a second opinion due to Claimant's issue with Dr. Dubick with Dr. Keffer with a request to him on May 29, 2013. Unbeknownst to Defendants, Claimant proceeded to treat with Dr. Netherton and had a spinal cord stimulator implanted. This treatment was without authorization from the Carrier and at the Claimant's own direction. Defendants assert Claimant was on notice that Dr. Netherton was not authorized by way of Defendants' Reply Motion, conference call with the Commission during the Motion hearing, both Form 51's and several correspondences regarding Dr. Dubick and Dr. Keffer. Based upon those arguments, Defendants assert the Defendants should not be responsible for the unauthorized treatment from Dr. Netherton from the first time he went to see Dr. Netherton up until the continued treatment he gets with Dr. Netherton, and any and all of the treatments that was unauthorized should not be the responsibility of the Defendants. Should the Commission order any continued treatments under the original Settlement Agreement, it should still be at the control of the Defendants with the doctor of their choice in regards to the admitted low back injury pursuant to the explicit terms of the Settlement Agreement which require additional medical treatment pursuant to S.C. Code Ann. §42-15-60.

Both attorneys relied on case law they submitted to support their statements of the case. Claimant's attorney submitted *Hall v. United Rentals, Inc.*, 371 S.C. 69, 636 S.E. 2d. 876 (Ct. App. 2006) and *Risinger v. Knight Textiles*, 353 S.C. 69, 577 S.E. 2d. 222 (Ct. App. 2002). Defendants submitted *McKinney v. Kimberly Clark, Corp.*, 376 S.C. 636, 658 S.E. 2d. 112 (Ct. App. 2008), and *Turner v. S.C. Dep't of Health & Envtl. Control*, 377 S.C. 540, 661 S.E. 2d. 118.

STIPULATIONS AT THE SINGLE COMMISSIONER LEVEL

The parties stipulated at the hearing the following:

1. The South Carolina Workers' Compensation Commission has jurisdiction over this claim.
2. Notice of hearing was timely and properly served upon all parties of interest.
3. Venue and jurisdiction are proper in Summerville, South Carolina.
4. The Claimant's average weekly wage is \$514.62, with a corresponding compensation rate of \$343.10.

APA EVIDENTIARY SUBMISSIONS AT THE SINGLE COMMISSIONER LEVEL

Claimant's Submissions:

1. Medical records from Marc N. Dubick, M.D. dated March 22, 2012 through October 3, 2012 consisting of 4 pages.
2. Medical records from Southeastern Spine Institute dated March 18, 2013 through May 30, 2013 consisting of 27 pages.
3. Medical records from William G. Kee, Ph.D. dated April 15, 2013 consisting of 16 pages.
4. Settlement Agreement and Consent Order dated September 22, 2006 consisting of 4 pages.
5. Medical bills (to be submitted upon receipt).

Defendants' Submissions:

1. Defendants reply to Claimant's Motion for Change of Physician consisting of 8 pages.
2. Correspondence to the Claimant's attorney dated April 8, 2013, consisting of 1 page.

3. Correspondence from the Claimant's attorney dated April 9, 2013, consisting of 1 page.
4. Correspondence to Dr. Keffer dated May 29, 2013, consisting of 2 pages.
5. E-mail correspondence to the Claimant's attorney dated June 20, 2013, consisting of 1 page.
6. Correspondence to the Claimant's attorney dated June 21, 2013, consisting of 1 page.
7. Correspondence to Dr. Keffer dated June 26, 2013 consisting of 1 page.
8. E-mail correspondence from Claimant's attorney dated June 24, 2013, consisting of 1 page.
9. Cypress Care medication list consisting of 4 pages.
10. Correspondence to the Claimant's attorney dated September 16, 2013, consisting of 1 page.
11. Correspondence from the Carrier to East Cooper Medical Center denying payment of bill dated September 20, 2013, consisting of 1 page.
12. Correspondence from the Carrier to Columbia Service Center dated September 30, 2013, consisting of 1 page.
13. Settlement Agreement and Consent Order dated September 22, 2006, consisting of 4 pages.
14. Medical records from Marc N. Dubick, M.D. of Pain Center and Natural Medicine dated February 11, 2008 through October 3, 2012, consisting of 15 pages.
15. Medical records from Donald R. Johnson, M.D. of Southeastern Spine Institute dated August 17, 2005 through March 18, 2013, consisting of 18 pages.

16. Medical records from Kindred Hospital of Charleston dated November 15, 2005, consisting of 2 pages.
17. Medical records from Bon Secours St. Francis Hospital dated February 14, 2008 through April 17, 2008, consisting of 7 pages.
18. Medical records from John Davis, M.D. dated August 15, 2005 through February 10, 2012, consisting of 37 pages.
19. Medical records from Charleston Neurosurgical Associates dated June 28, 2013, consisting of 4 pages.
20. Medical records from William G. Kee, M.D. dated March 5, 2014, consisting of 1 page.

EVIDENCE OF THE CASE

Claimant's testimony:

The Claimant testified as the only witness at the hearing. The Claimant is 67-years old. (Hr. Tr. p. 20, ll. 15-16) The Claimant confirmed he was injured on August 6, 2004 and underwent surgery with Dr. Johnson at L3-4 on August 17, 2005. (Hr. Tr. p. 20, ll. 19-23) Claimant testified he began seeing Dr. Dubick on February 11, 2008, for pain management following surgery. Claimant testified Dr. Dubick provided two back injections and only prescribed Lyrica to treat his ongoing symptoms. Claimant specifically testified he did not ever try any other drugs to alleviate Claimant's pain. (Hr. Tr. p. 21, ll. 4-25) This testimony is contradictory to the medical evidence presented by the parties. Claimant confirmed he had been a patient of Dr. Dubick from a pain management perspective for six years and that Dr. Dubick had been writing him a prescription for Lyrica for those six years. (Hr. Tr. p. 23, ll. 9-18) This testimony is contradictory to the medical evidence submitted by the parties.

Claimant testified that on October 13, 2012, he presented to Dr. Dubick after calling the physician reporting he lost his recent prescription for Lyrica and requested a refill of that prescription. Claimant testified Dr. Dubick advised Claimant he does not write prescription for Lyrica for the Claimant and scheduled Claimant to come in for an evaluation. (Hr. Tr. p. 22, ll. 3-25) Claimant testified he and his wife went to Dr. Dubick's office at which time his prescription for Lyrica was filled, but Claimant requested his care be transferred back to Dr. Johnson, his back surgeon. (Hr. Tr. p. 24, ll. 17-24) Claimant testified that he then presented back to Dr. Johnson who advised Claimant he was a candidate for a spinal cord stimulator trial and referred Claimant to Dr. Netherton for consideration of a spinal cord stimulator trial. (Hr. Tr. p. 26, ll. 3-10 and p. 31, ll. 17-21) Claimant testified he then presented to Dr. Netherton for consideration of a spinal cord stimulator trial and underwent the trial procedure which provided relief to his ongoing low back symptoms. (Hr. Tr. p. 31, ll. 21-25 and p. 32, ll. 1-17) Claimant confirmed his attorney advised him the Defendants were refusing to authorize Dr. Netherton and refused to authorize the spinal cord stimulator, but he proceeded with permanent implementation of the same as it provided him relief. (Hr. Tr. p. 33, ll. 18-25 and p. 34, ll. 1-4)

On cross-examination, Claimant testified that prior to his October 2012 appointment with Dr. Dubick he did not ask to have another doctor treat him for pain management. (Hr. Tr. p. 38, ll. 13-16) Claimant testified that when he first went to Dr. Dubick for his initial visit on February 11, 2008 he was already taking Lyrica prescribed by Dr. Johnson. (Hr. Tr. p. 36, ll. 16-21) Claimant testified that in the fall of 2012 he had misplaced his prescription Lyrica bottle and called Dr. Dubick's office for a refill. At that time, Dr. Dubick's office informed him they do not write prescriptions of Lyrica for Claimant and Claimant went in to see Dr. Dubick at which time Claimant testified Dr. Dubick was rude and very arrogant. (Hr. Tr. p. 37, ll. 1-18)

Claimant testified that the reason he requested to be transferred back to Dr. Johnson was the fact that Dr. Dubick was rude to him and was not aware what prescription medication he was providing as he informed Claimant he was not writing prescriptions for Lyrica for Claimant. (Hr. Tr. p. 38, ll. 17-25) Claimant testified that he has been prescribed Lyrica since 2006, and every time he was prescribed Lyrica either his family physician, Dr. John Davis, or Dr. Johnson wrote him the prescription not Dr. Dubick. (Hr. Tr. p. 41, ll. 1-7) Claimant acquiesced that the first time Dr. Dubick wrote Claimant a prescription for Lyrica as October 9, 2012 after he demanded Dr. Dubick write the same. (Hr. Tr. p. 41, ll. 8-11)

Claimant testified that he was aware in March of 2013 that his attorney filed a Motion asking for the Commission to grant his request to transfer medical treatment and further testified he was probably aware that Defendants did a response that said the Defendants would provide a spinal cord evaluation with a doctor, but specifically denied Dr. Netherton as the evaluating physician. (Hr. Tr. p. 44, ll. 4-20) Claimant testified that he was not aware Defendants filed a response to his hearing request specifically stating Defendants did not agree to provide an evaluation with Dr. Netherton for the spinal cord stimulator trial and was further unaware that the parties had a conference call with the Commissioner at which time it was discussed and explicitly stated that the Carrier was denying Dr. Netherton and that the Claimant was not supposed to be going to Dr. Netherton for any evaluations. (Hr. Tr. p. 46, ll. 3-12) Claimant testified he was aware that the Carrier scheduled a return appointment with Dr. Dubick but refused to go back to that appointment. (Hr. Tr. p. 46, ll. 13-18)

Medical Evidence and Exhibits:

The parties entered into a Settlement Agreement and Consent Order approved by the Commission on September 18, 2006 whereby Defendants and Claimant resolved the indemnity

portion of this claim for payment by Defendants to Claimant of \$114,378.08 and further agreeing that Claimant is entitled to ongoing causally related medical benefits pursuant to S.C. Code Ann. §42-15-60. (Defendants' APA pp. 24-27)

Defendants provided Claimant a reply to Claimant's Motion for Change of Pondition dated March 13, 2013 at which time Defendants addressed Dr. Johnson's referral for pain management and the MRI report with a hand written note indicating a request for authorization of pain management evaluation with Dr. Mark Netherton for a spinal cord stimulator. (Claimant's APA No. 1) Through the Motion, Defendants request that the Commission deny Claimant's request to make Dr. Donald Johnson the authorized treating physician for the purpose of determining whether or not a spinal cord stimulator is medically beneficial to him as this is not the request by Dr. Johnson, and it is Defendants choice under S.C. Code Ann. §42-15-60, with whom the Claimant is to treat. Defendants further requested that a finding be made that the authorized treating physician remain to be Dr. Dubick, as he has been the authorized treating physician for pain management since 2008, and Defendants have approved for the Claimant to return to Dr. Dubick to determine if a spinal cord stimulator trial is medically necessary and causally related to his claim. (Defendants' APA No. 1) In written correspondence to Claimant's attorney dated April 8, 2013, the Defendants confirmed they had made arrangements for Claimant to see Dr. Dubick on April 17, 2013. (Defendants' APA No. 2) On April 9, 2013, Claimant's attorney wrote Defendants advising that Claimant is not going back to Dr. Dubick for personal reasons. (Defendants' APA No. 3)

In written correspondence dated May 29, 2013, Defendants requested Dr. Keffer evaluate Claimant's records and perform a physical examination to obtain Dr. Keffer's opinion regarding future medical treatment, specifically, Defendants requested Dr. Keffer's opinion on whether

Claimant was initially evaluated by Dr. Marc Dubick on February 11, 2008 for pain management following surgery with Dr. Johnson. (Defendants' APA p. 28) Dr. Dubick notes Claimant's current medications include Lyrica, Mepergan/Promethazine, and Lidocaine. (Defendants' APA p. 29) Dr. Dubick recommends an anti-inflammatory injection of the right-sided lumbar facets at L3-4, L4-5, and L5-S1. (Defendants' APA p. 30) Claimant returned to Dr. Dubick on February 25, 2008 following the injection and reported "excellent pain relief with resolve of his severe burning type pain." (Defendants' APA p. 31) Because of the excellent result with the anti-inflammatory injection, Dr. Dubick planned a radiofrequency dorsal facet rhizotomy at L2-3 through L5-S1. (Defendants' APA p. 31) Claimant returned on June 2, 2008 reporting his symptoms were exacerbated by recent round of physical therapy at which time Dr. Dubick recommended Claimant stop physical therapy altogether. Dr. Dubick notes Claimant has been taking medication prescribed by his primary care physician, Dr. John Davis, including Lidoderm and Lyrica. Claimant reported doing well with the initial radiofrequency procedure. Dr. Dubick notes he will request his primary care physician, Dr. Davis, to write his prescription for "Mepergan Fortis once per month, and therefore, he can have all of his medications written by his primary care physician." (Defendants' APA p. 33) Claimant returned to Dr. Dubick on February 18, 2009 noting continued discomfort especially into his right leg and notes that with activity and weight gain Claimant's pain worsens. Dr. Dubick again specifically notes the Claimant is prescribed 200 milligrams of Lyrica per day written by Dr. John Davis, his primary care physician. (Defendants' APA p. 34) Claimant returned again on September 15, 2010 following a lumbar facet block the week prior. Claimant reports good pain relief from the procedure and notes Dr. John Davis continues to write Claimant's medications. (Defendants' APA p. 36) Claimant returned to Dr. Dubick on March 22, 2012 noting that over the last months

SINGLE COMMISSIONER'S FINDINGS OF FACT

Based on a review of the evidence presented, the Single Commissioner issued the following Findings of Fact, pursuant to the Order dated July 10, 2014:

1. The parties hereto are subject to and bound by the South Carolina Workers' Compensation Act.
2. Claimant's average weekly wage is \$514.62, with a corresponding compensation rate of \$343.10.
3. The Claimant suffered an admitted injury to his low back arising out of and in the course and scope of his employment with Defendants on August 6, 2004.
4. Claimant is 67-years of age. This finding is based upon the testimony of the Claimant.
5. The indemnity portion of this claim was settled by way of a Settlement Agreement and Consent Order entered into by both parties and approved by the South Carolina Workers' Compensation Commission on September 18, 2006. As a material term to that Settlement Agreement and Consent Order, the parties agreed Claimant was entitled to causally related medical care pursuant to S.C. Code Ann. §42-15-60. This finding is based upon Defendants' APA No. 13.
6. There is no separate provision in the Settlement Agreement and Consent Order for psychological care or treatment for the Claimant. This finding is based upon Defendants' APA No. 13.
7. The Settlement Agreement and Consent Order does explicitly state that Claimant "(d) was *evaluated* by Dr. Pelic while in Kindred Hospital for a psychiatric evaluation for depression." However, the agreement is silent as to whether depression is a

compensable or admitted component of this claim. The Settlement Agreement and Consent Order goes on to say “based upon these facts (i.e., including “d”) Claimant is permanently and totally disabled.” (emphasis added) This finding is based upon Defendants’ APA submission No. 13.

8. Dr. Dubick is the authorized treating physician for Claimant’s pain management, and has been serving as the authorized pain management physician since February 11, 2008. This finding is based upon Claimant’s testimony, the medical record as a whole, specifically Defendants’ APA No. 14, p. 28.
9. Defendants have timely authorized all medical treatment as recommended by Dr. Dubick and have not withheld or delayed any treatment or recommendations provided by the authorized treating physicians throughout the life of this claim. This factor is very important to my decision. This finding is based upon the testimony of the Claimant, and the medical record as a whole.
10. Claimant testified that he never requested to have his care transferred to another pain management physician throughout the entirety of his treatment with Dr. Dubick until his last visit with Dr. Dubick in October of 2012. This finding is based upon Claimant’s testimony (Hr. Tr. p. 38, ll. 13-16)
11. Claimant testified that he decided not to return to Dr. Dubick for ongoing pain management following his October 2012 appointment as he did not like Dr. Dubick’s perceived attitude towards Claimant when Claimant confronted Dr. Dubick about the prescription for Lyrica and demanded Dr. Dubick refill his prescription. This finding is based upon the medical evidence as a whole, specifically Defendants’ APA No. 3, page 10, Defendants’ APA No. 14, pp. 28 and 39-43 and Hr. Tr. pp. 46 and 55).

12. In fact, Dr. Dubick had not prescribed Claimant's Lyrica at any point prior to his last evaluation in October of 2012, and all prior prescriptions for Lyrica were filled by his primary care physician, Dr. Davis, or his surgeon, Dr. Johnson. This finding is based upon the medical evidence as a whole, specifically, Defendants' APA pp. 17-20, pp. 28, 33, 34 and 36.
13. I find that Dr. Dubick was in fact receptive to Claimant's complaints and requests. Although it was Dr. Davis and Dr. Johnson who wrote Claimant's prescription for Lyrica, Dr. Dubick agreed, upon Claimant's request, to write the Lyrica prescription for several months (at least). This finding is based upon the medical record as a whole, specifically Defendants' APA No. 14, p. 42.
14. Claimant received extensive pain management treatment on several occasions with Dr. Dubick from February 11, 2008 through October 3, 2012, and at no time is there any reference in any record from Dr. Dubick as to the need for a spinal cord stimulator trial. This finding is based upon the medical evidence in its entirety, specifically Defendants' APA No. 14.
15. Furthermore, there is no record of any kind in the entirety of Dr. Dubick's medical records which would indicate Claimant had problems with concerns over the treatment being recommended and provided by Dr. Dubick. This finding is based upon the medical record as a whole, specifically Defendants' APA No. 14.
16. Furthermore, I find that Claimant's testimony that Dr. Dubick never prescribed any drugs aside from Lyrica is refuted by the medical evidence, as Dr. Dubick also prescribed Lidoderm patches. This finding is based upon Defendants' APA No. 14, p. 42 and Hr. Tr. pp. 21-22.

17. At Claimant's request, Defendants authorized a follow-up appointment with Dr. Johnson, Claimant's prior surgeon, who ultimately recommended an updated lower back MRI. It is undisputed that Defendants readily provided the updated MRI scan as recommended by Dr. Johnson. This finding is based upon the medical record as a whole, Claimant's testimony and Defendants' APA No. 15, pp. 48-50.
18. Based upon Dr. Johnson's review of the MRI scan, a recommendation was made for referral to a pain management doctor in order to determine if the Claimant needed a spinal cord stimulator. Dr. Johnson recommended a visit to Dr. Netherton, who is not an authorized physician, for *consideration* of a spinal cord stimulator trial. This finding is based upon Defendants' APA No. 15, p. 50.
19. The Defendants timely agreed to authorize a pain management evaluation to determine if a spinal cord stimulator was appropriate; however Defendants did not agree to authorize Dr. Netherton to provide such evaluation as he was not a previous authorized treating physician and was also not the Claimant's pain management doctor for the past six years. This finding is based upon the pleadings in this claim, correspondence from Defense counsel and the medical record as a whole.
20. Defendants scheduled a return appointment for Claimant with Dr. Dubick for consideration of a spinal cord stimulator trial, but Claimant refused to attend the appointment. This finding is based upon Defendants' APA No. 2, p. 9; Defendants' APA No. 3, p. 10 and Claimant's testimony.
21. Claimant has presented no evidence which would justify his refusal to attend an appointment with his authorized pain management physician as scheduled by the

Defendants. This finding is based upon the medical record as a whole and Claimant's hearing testimony.

22. Nevertheless, based upon Claimant's refusal to attend the appointment with Dr. Dubick, the authorized treating pain management physician, Defendants arranged an independent medical evaluation appointment with Dr. Keffer for consideration of a spinal cord stimulator trial. This finding is based upon Defendants' APA No. 4, pp. 11-12; Defendants' APA No. 5, p. 13; Defendants' APA No. 6, p. 14; Defendants' APA No. 7, p. 15, and Defendants' APA No. 8, p. 16.
23. Prior to the appointment with Dr. Keffer, Claimant underwent the spinal cord stimulator trial implantation with Dr. Netherton. This finding was based upon Defendants' APA No. 8, p. 16 and No. 7, p. 15.
24. Defendants never authorized the spinal cord stimulator trial or implementation with Dr. Netherton, and specifically denied treatment by Dr. Netherton for any pain management in this matter. Nor had any authorized pain physician recommended a spinal cord stimulator trial prior to its implementation. This finding is based upon Defendants' APA No. 10, p. 21 and Defendants' APA No. 11, p. 22.
25. Pursuant to S.C. Code Ann. §42-15-60, authorized physicians are not empowered to choose other providers and direct Claimant's treatment.
26. Defendants did not fail to provide treatment or timely pursue recommendations made by the authorized treating physician. This finding is based upon the medical evidence and submissions of the parties as a whole.
27. I find Claimant was fully aware that Defendants were denying treatment with Dr. Netherton and that Dr. Netherton was an unauthorized physician when Claimant

chose to nonetheless undergo the spinal cord stimulator trial. Defendants reply to Claimant's Motion for a change of condition clearly states that Defendants have the right to direct the evaluation for continued pain management back to the original authorized treating physician who is most familiar with Claimant's claim, which is Dr. Dubick. Moreover, Defendants' Form 51 dated May 3, 2013 contained a denial of Dr. Netherton as the authorized treating physician and assertion that Defendants get to control who provides Claimant with pain management. A second Form 51 was filed on May 16, 2013 asserting that Defendants retain the right to direct Claimant's medical care pursuant to S.C. Code Ann. §42-15-60 and that they get to pick who the Claimant sees to determine if Claimant was entitled to a spinal cord stimulator. Finally, I find Claimant's attorney's knowledge of Defendants' denial with respect to any treatment or evaluation by Dr. Netherton as an unauthorized physician is imputed to Claimant. This finding is based upon the pleadings in this case and Hr. Tr. pp. 44-50.

28. Claimant has thus far had a good outcome with his spinal cord stimulator. However, a good outcome in medical treatment is not dispositive as to the issue before the undersigned Commissioner. If a good outcome from medical treatment undergone with an unauthorized physician were determinative or dispositive, then S.C. Code Ann. §42-15-60 would be rendered meaningless or significantly abridged. Moreover, if Claimant's theory of this claim prevails, claimants could be entitled to choose their own providers and direct their own medical treatment as long as the claimant could prove that the outcome was successful. This finding is based upon the medical records as a whole and Claimant's testimony.

29. Dr. Johnson recommended only the “consideration” of a spinal cord stimulator trial. Dr. Johnson did not definitively make a recommendation that Claimant was a candidate for a spinal cord stimulator. In addition, Dr. Johnson did not recommend a spinal cord stimulator on an emergency basis. Furthermore, Defendants have not withheld or delayed any treatment in this case. These factors are very important in rendering my decision. This finding is based upon Defendants’ APA No. 15, p. 50 and the medical record as a whole along with Claimant’s hearing testimony.
30. In rendering my decision, I consider the fact that Dr. Keffer states that, according to Claimant, the spinal cord stimulator was a success.
31. Although the undersigned is greatly sympathetic to Claimant, to rule otherwise in this case would have the practical effect of encouraging Claimants to venture outside the structure and dictates of the South Carolina Workers’ Compensation Act to direct their own treatment and choose their own providers even when treatment is being provided by authorized providers on a timely basis and in an appropriate fashion.
32. If Defendants had declined or delayed treatment, the result in this case might be vastly different. If the modality involved, in this case a spinal cord stimulator, was provided on an emergency basis, the result in the case might be vastly different. However, the Defendants were promptly providing all treatment recommended by the authorized providers and at no time denied any treatment for Claimant, and the need for the spinal cord stimulator in this claim was not an emergency. This finding is based upon the medical record as a whole.
33. Claimant’s request for reimbursement for the spinal cord stimulator is denied.

34. Claimant did not present any compelling or persuasive reason to grant a change of physician. However, nothing in this Order prohibits Claimant from filing further pleadings for adjudication of this issue.

35. Any claim for psychological benefits is held in abeyance as the issue before the undersigned was the reimbursement of the spinal cord stimulator.

SINGLE COMMISSIONER'S CONCLUSIONS OF LAW

Upon the foregoing Findings of Fact, the Single Commissioner issued the following Conclusions of Law, pursuant to the Order dated July 10, 2014:

1. Pursuant to S.C. Code Ann. §42-1-160, Claimant suffered an admitted injury by accident to the low back on August 6, 2004.
2. Pursuant to S.C. Code Ann. §42-15-60, Defendants have provided all appropriate and causally related medical treatment from an orthopedic and pain management standpoint in a timely fashion.
3. Pursuant to *McKinney v. Kimberly Clark, Corp.*, 376 S.C. 636, 658 S.E. 2d. 112 (Ct. App. 2008), S.C. Code Ann. §42-15-60 and §42-9-10 establishes the rights of the employer and the employee with regards to payment for treatments. This statute does not give a unilateral right to Claimants to select their treating physician, and such an unencumbered right undermines the authority of the Appellate Panel, as prescribed by the legislature. See also *Turner v. S.C. Dep't of Health & Envtl. Control*, 377 S.C. 540, 661 S.E. 2d. 118. I find the *McKinney* and *Turner* case to be controlling in this instance.
4. I further find Claimant's reliance on *Hall v. United Rentals, Inc.*, 371 S.C. 69, 636 S.E. 2d. 876 (Ct. App. 2006) and *Risinger v. Knight Textiles*, 353 S.C. 69, 577 S.E.

2d. 222 (Ct. App. 2002) to be misplaced and inapplicable to the facts of this case. Specifically, distinguishable from the *Risinger* and *Hall* case is the fact that in both of those cases the Carrier had denied the Claimant treatment recommended by a physician or ordered by the Commission. In the present case, Defendants have never denied Claimant any recommended treatment including attempting to provide an evaluation with a pain management physician for consideration of a spinal cord stimulator trial which is the treatment directly in question here.

5. Pursuant to S.C. Code Ann. §42-15-60, authorized physicians are not empowered to choose other providers as authorized physicians.
6. Pursuant to S.C. Code Ann. §42-15-60, Claimant's request for a change in authorized physician and reimbursement for the spinal cord stimulator implementation is denied.

SINGLE COMMISSIONER'S DECISION AND ORDER

IT IS HEREBY ORDERED that Claimant's request for reimbursement for the spinal cord stimulator is hereby denied.

IT IS FURTHER ORDERED that Claimant's request for a change in authorized physicians is hereby denied.

IT IS FURTHER ORDERED that pursuant to S.C. Code Ann §42-15-60, Defendants retain the right to direct and control Claimant's treatment with regard to his admitted low back injury.

APPEAL TO THE FULL COMMISSION

Within the statutory period, Claimant filed an Application for Review (Form 30) in the case, appealing the Single Commissioner's rulings.

FULL PANEL'S FINDINGS OF FACT

Based upon the oral argument, APA Submissions and Record on Appeal, the Appellate

Panel makes the following Findings of Fact:

1. The parties hereto are subject to and bound by the South Carolina Workers' Compensation Act.
2. Claimant's average weekly wage is \$514.62, with a corresponding compensation rate of \$343.10.
3. The Claimant suffered an admitted injury to his low back arising out of and in the course and scope of his employment with Defendants on August 6, 2004.
4. Claimant is 67-years of age. This finding is based upon the testimony of the Claimant.
5. The indemnity portion of this claim was settled by way of a Settlement Agreement and Consent Order entered into by both parties and approved by the South Carolina Workers' Compensation Commission on September 18, 2006. As a material term to that Settlement Agreement and Consent Order, the parties agreed Claimant was entitled to causally related medical care pursuant to S.C. Code Ann. §42-15-60. This finding is based upon Defendants' APA No. 13.
6. There is no separate provision in the Settlement Agreement and Consent Order for psychological care or treatment for the Claimant. This finding is based upon Defendants' APA No. 13.
7. The Settlement Agreement and Consent Order does explicitly state that Claimant "(d) was *evaluated* by Dr. Pelic while in Kindred Hospital for a psychiatric evaluation for depression." However, the agreement is silent as to whether depression is a

compensable or admitted component of this claim. The Settlement Agreement and Consent Order goes on to say “based upon these facts (i.e., including “d”) Claimant is permanently and totally disabled.” (emphasis added) This finding is based upon Defendants’ APA submission No. 13.

8. Dr. Dubick is the authorized treating physician for Claimant’s pain management, and has been serving as the authorized pain management physician since February 11, 2008. This finding is based upon Claimant’s testimony, the medical record as a whole, specifically Defendants’ APA No. 14, p. 28.
9. Defendants have timely authorized all medical treatment as recommended by Dr. Dubick and have not withheld or delayed any treatment or recommendations provided by the authorized treating physicians throughout the life of this claim. This factor is very important to our decision. This finding is based upon the testimony of the Claimant, and the medical record as a whole.
10. Claimant testified that he never requested to have his care transferred to another pain management physician throughout the entirety of his treatment with Dr. Dubick until his last visit with Dr. Dubick in October of 2012. This finding is based upon Claimant’s testimony (Hr. Tr. p. 38, ll. 13-16)
11. Claimant testified that he decided not to return to Dr. Dubick for ongoing pain management following his October 2012 appointment as he did not like Dr. Dubick’s perceived attitude towards Claimant when Claimant confronted Dr. Dubick about the prescription for Lyrica and demanded Dr. Dubick refill his prescription. This finding is based upon the medical evidence as a whole, specifically Defendants’ APA No. 3, page 10, Defendants’ APA No. 14, pp. 28 and 39-43 and Hr. Tr. pp. 46 and 55).

12. In fact, Dr. Dubick had not prescribed Claimant's Lyrica at any point prior to his last evaluation in October of 2012, and all prior prescriptions for Lyrica were filled by his primary care physician, Dr. Davis, or his surgeon, Dr. Johnson. This finding is based upon the medical evidence as a whole, specifically, Defendants' APA pp. 17-20, pp. 28, 33, 34 and 36.
13. We find that Dr. Dubick was in fact receptive to Claimant's complaints and requests. Although it was Dr. Davis and Dr. Johnson who wrote Claimant's prescription for Lyrica, Dr. Dubick agreed, upon Claimant's request, to write the Lyrica prescription for several months (at least). This finding is based upon the medical record as a whole, specifically Defendants' APA No. 14, p. 42.
14. Claimant received extensive pain management treatment on several occasions with Dr. Dubick from February 11, 2008 through October 3, 2012, and at no time is there any reference in any record from Dr. Dubick as to the need for a spinal cord stimulator trial. This finding is based upon the medical evidence in its entirety, specifically Defendants' APA No. 14.
15. Furthermore, there is no record of any kind in the entirety of Dr. Dubick's medical records which would indicate Claimant had problems with concerns over the treatment being recommended and provided by Dr. Dubick. This finding is based upon the medical record as a whole, specifically Defendants' APA No. 14.
16. Furthermore, we find that Claimant's testimony that Dr. Dubick never prescribed any drugs aside from Lyrica is refuted by the medical evidence, as Dr. Dubick also prescribed Lidoderm patches. This finding is based upon Defendants' APA No. 14, p. 42 and Hr. Tr. pp. 21-22.

17. At Claimant's request, Defendants authorized a follow-up appointment with Dr. Johnson, Claimant's prior surgeon, who ultimately recommended an updated lower back MRI. It is undisputed that Defendants readily provided the updated MRI scan as recommended by Dr. Johnson. This finding is based upon the medical record as a whole, Claimant's testimony and Defendants' APA No. 15, pp. 48-50.
18. Based upon Dr. Johnson's review of the MRI scan, a recommendation was made for referral to a pain management doctor in order to determine if the Claimant needed a spinal cord stimulator. Dr. Johnson recommended a visit to Dr. Netherton, who is not an authorized physician, for *consideration* of a spinal cord stimulator trial. This finding is based upon Defendants' APA No. 15, p. 50.
19. The Defendants timely agreed to authorize a pain management evaluation to determine if a spinal cord stimulator was appropriate; however Defendants did not agree to authorize Dr. Netherton to provide such evaluation as he was not a previous authorized treating physician and was also not the Claimant's pain management doctor for the past six years. This finding is based upon the pleadings in this claim, correspondence from Defense counsel and the medical record as a whole.
20. Defendants scheduled a return appointment for Claimant with Dr. Dubick for consideration of a spinal cord stimulator trial, but Claimant refused to attend the appointment. This finding is based upon Defendants' APA No. 2, p. 9; Defendants' APA No. 3, p. 10 and Claimant's testimony.
21. Claimant has presented no evidence which would justify his refusal to attend an appointment with his authorized pain management physician as scheduled by the

- Defendants. This finding is based upon the medical record as a whole and Claimant's hearing testimony.
22. Nevertheless, based upon Claimant's refusal to attend the appointment with Dr. Dubick, the authorized treating pain management physician, Defendants arranged an independent medical evaluation appointment with Dr. Keffer for consideration of a spinal cord stimulator trial. This finding is based upon Defendants' APA No. 4, pp. 11-12; Defendants' APA No. 5, p. 13; Defendants' APA No. 6, p. 14; Defendants' APA No. 7, p. 15, and Defendants' APA No. 8, p. 16.
 23. Prior to the appointment with Dr. Keffer, Claimant underwent the spinal cord stimulator trial implantation with Dr. Netherton. This finding was based upon Defendants' APA No. 8, p. 16 and No. 7, p. 15.
 24. Defendants never authorized the spinal cord stimulator trial or implementation with Dr. Netherton, and specifically denied treatment by Dr. Netherton for any pain management in this matter. Nor had any authorized pain physician recommended a spinal cord stimulator trial prior to its implementation. This finding is based upon Defendants' APA No. 10, p. 21 and Defendants' APA No. 11, p. 22.
 25. Pursuant to S.C. Code Ann. §42-15-60, authorized physicians are not empowered to choose other providers and direct Claimant's treatment.
 26. Defendants did not fail to provide treatment or timely pursue recommendations made by the authorized treating physician. This finding is based upon the medical evidence and submissions of the parties as a whole.
 27. We find Claimant was fully aware that Defendants were denying treatment with Dr. Netherton and that Dr. Netherton was an unauthorized physician when Claimant

chose to nonetheless undergo the spinal cord stimulator trial. Defendants reply to Claimant's Motion for a change of condition clearly states that Defendants have the right to direct the evaluation for continued pain management back to the original authorized treating physician who is most familiar with Claimant's claim, which is Dr. Dubick. Moreover, Defendants' Form 51 dated May 3, 2013 contained a denial of Dr. Netherton as the authorized treating physician and assertion that Defendants get to control who provides Claimant with pain management. A second Form 51 was filed on May 16, 2013 asserting that Defendants retain the right to direct Claimant's medical care pursuant to S.C. Code Ann. §42-15-60 and that they get to pick who the Claimant sees to determine if Claimant was entitled to a spinal cord stimulator. Finally, we find Claimant's attorney's knowledge of Defendants' denial with respect to any treatment or evaluation by Dr. Netherton as an unauthorized physician is imputed to Claimant. This finding is based upon the pleadings in this case and Hr. Tr. pp. 44-50.

28. Claimant has thus far had a good outcome with his spinal cord stimulator. However, a good outcome in medical treatment is not dispositive as to the issue before the undersigned Commissioners. If a good outcome from medical treatment undergone with an unauthorized physician were determinative or dispositive, then S.C. Code Ann. §42-15-60 would be rendered meaningless or significantly abridged. Moreover, if Claimant's theory of this claim prevails, claimants could be entitled to choose their own providers and direct their own medical treatment as long as the claimant could prove that the outcome was successful. This finding is based upon the medical records as a whole and Claimant's testimony.

29. Dr. Johnson recommended only the “consideration” of a spinal cord stimulator trial. Dr. Johnson did not definitively make a recommendation that Claimant was a candidate for a spinal cord stimulator. In addition, Dr. Johnson did not recommend a spinal cord stimulator on an emergency basis. Furthermore, Defendants have not withheld or delayed any treatment in this case. These factors are very important in rendering our decision. This finding is based upon Defendants’ APA No. 15, p. 50 and the medical record as a whole along with Claimant’s hearing testimony.
30. In rendering our decision, we consider the fact that Dr. Keffer states that, according to Claimant, the spinal cord stimulator was a success.
31. Although the undersigned are greatly sympathetic to Claimant, to rule otherwise in this case would have the practical effect of encouraging Claimants to venture outside the structure and dictates of the South Carolina Workers’ Compensation Act to direct their own treatment and choose their own providers even when treatment is being provided by authorized providers on a timely basis and in an appropriate fashion.
32. If Defendants had declined or delayed treatment, the result in this case might be vastly different. If the modality involved, in this case a spinal cord stimulator, was provided on an emergency basis, the result in the case might be vastly different. However, the Defendants were promptly providing all treatment recommended by the authorized providers and at no time denied any treatment for Claimant, and the need for the spinal cord stimulator in this claim was not an emergency. This finding is based upon the medical record as a whole.
33. Claimant’s request for reimbursement for the spinal cord stimulator is denied.

34. Claimant did not present any compelling or persuasive reason to grant a change of physician. However, nothing in this Order prohibits Claimant from filing further pleadings for adjudication of this issue.

35. Any claim for psychological benefits is held in abeyance as the issue before the undersigned was the reimbursement of the spinal cord stimulator.

FULL PANEL'S CONCLUSIONS OF LAW

Accordingly, as provided in the South Carolina Workers' Compensation Act, based on the Appellate Panel's Findings of Fact, the Appellate Panel makes the following Conclusions of Law:

1. Pursuant to S.C. Code Ann. §42-1-160, Claimant suffered an admitted injury by accident to the low back on August 6, 2004.
2. Pursuant to S.C. Code Ann. §42-15-60, Defendants have provided all appropriate and causally related medical treatment from an orthopedic and pain management standpoint in a timely fashion.
3. Pursuant to *McKinney v. Kimberly Clark, Corp.*, 376 S.C. 636, 658 S.E. 2d. 112 (Ct. App. 2008), S.C. Code Ann. §42-15-60 and §42-9-10 establishes the rights of the employer and the employee with regards to payment for treatments. This statute does not give a unilateral right to Claimants to select their treating physician, and such an unencumbered right undermines the authority of the Appellate Panel, as prescribed by the legislature. See also *Turner v. S.C. Dep't of Health & Envtl. Control*, 377 S.C. 540, 661 S.E. 2d. 118. I find the *McKinney* and *Turner* case to be controlling in this instance.

4. I further find Claimant's reliance on *Hall v. United Rentals, Inc.*, 371 S.C. 69, 636 S.E. 2d. 876 (Ct. App. 2006) and *Risinger v. Knight Textiles*, 353 S.C. 69, 577 S.E. 2d. 222 (Ct. App. 2002) to be misplaced and inapplicable to the facts of this case. Specifically, distinguishable from the *Risinger* and *Hall* case is the fact that in both of those cases the Carrier had denied the Claimant treatment recommended by a physician or ordered by the Commission. In the present case, Defendants have never denied Claimant any recommended treatment including attempting to provide an evaluation with a pain management physician for consideration of a spinal cord stimulator trial which is the treatment directly in question here.
5. Pursuant to S.C. Code Ann. §42-15-60, authorized physicians are not empowered to choose other providers as authorized physicians.
6. Pursuant to S.C. Code Ann. §42-15-60, Claimant's request for a change in authorized physician and reimbursement for the spinal cord stimulator implementation is denied.

FULL PANEL'S ORDER


IT IS HEREBY ORDERED that Claimant's request for reimbursement for the spinal cord stimulator is hereby denied.

IT IS FURTHER ORDERED that Claimant's request for a change in authorized physicians is hereby denied.

IT IS FURTHER ORDERED that pursuant to S.C. Code Ann §42-15-60, Defendants retain the right to direct and control Claimant's treatment with regard to his admitted low back injury.


IT IS THEREFORE ORDERED by the Full Panel a **FULL AFFIRMATION** of the Single Commissioner's Decision and Order.

AND IT IS SO ORDERED.

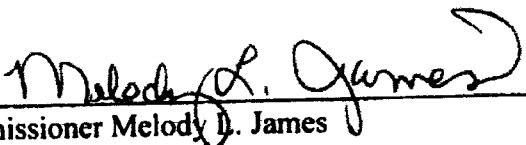


Commissioner Gene McCaskill
For the Appellate Panel

WE CONCUR:



Commissioner T. Scott Beck



Commissioner Melody L. James

CERTIFICATE OF SERVICE

This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).

By Kim Falls on January 13, 2015