

Brad Bowen v. Ethan Allen Inc

(October 23, 2012)

**STATE OF VERMONT  
DEPARTMENT OF LABOR**

Brad Bowen

Opinion No. 26-12WC

v.

By: Jane Woodruff, Esq.  
Hearing Officer

Ethan Allen, Inc.

For: Anne M. Noonan  
Commissioner

State File Nos. J-04270 and P-02005

**OPINION AND ORDER**

Hearing held in Montpelier, Vermont on August 10, 2012

Record closed on September 13, 2012

**APPEARANCES:**

Steven Robinson, Esq., for Claimant

Corina Schaffner-Fegard, Esq., for Defendant

**ISSUE:**

Is the proposed permanent implantation of a spinal cord stimulator reasonable medical treatment for Claimant's work related injury?

**EXHIBITS:**

Joint Exhibit I: Medical records

Claimant's Exhibit 1: Dr. Rehman deposition, July 26, 2012 (with attached exhibits)

Claimant's Exhibit 2: Letter from Dr. Zweber, July 20, 2012

Claimant's Exhibit 3: Letter from Dr. Moreland, August 3, 2012

Defendant's Exhibit A: Dr. Binter addendum, July 25, 2012

Defendant's Exhibit B: Turner, J., *et al.*, Spinal cord stimulation for patients with failed back syndrome or complex regional pain syndrome: a systematic review of effectiveness and complications, *Pain*, 2004; 108:137-147

Defendant's Exhibit C: Turner, *et al.*, Spinal cord stimulation for failed back surgery syndrome: Outcomes in a workers' compensation setting, *Pain*, 2010; 148(1):14-25

Defendant's Exhibit D: Letter from Dr. Drukteinis, July 31, 2012

**CLAIM:**

Medical benefits pursuant to 21 V.S.A. §640

Costs and attorney fees pursuant to 21 V.S.A. §678

**FINDINGS OF FACT:**

1. At all times relevant to these proceedings, Claimant was an employee and Defendant was his employer as those terms are defined in Vermont's Workers' Compensation Act.
2. Judicial notice is taken of all relevant forms contained in the Department's file relating to this claim.
3. Claimant started work for Defendant in 1994 as a rip saw operator. The nature of this job required him to bend and twist while he was lifting planks of lumber to place on the saw.
4. Over the course of time Claimant began to develop low back pain, for which he ultimately sought treatment in July 1995. No single incident or event caused his pain to develop; rather, it was a gradual onset injury. Defendant accepted this injury as compensable and paid workers' compensation benefits accordingly.

**Claimant's Course of Treatment**

5. Claimant began treating with Dr. Birge, an osteopath at the Northeast Kingdom Health Center, in July 1995. He diagnosed Claimant with low back pain of neuromuscular origin. Over the course of the summer and fall, Claimant's treatment consisted of medications and physical therapy. Dr. Birge thought depression played a significant role in Claimant's discomfort. He treated Claimant with psychotropic drugs for both pain and depression.
6. In December 1995 Claimant underwent an MRI that revealed a herniated disc. As a result of these findings, Dr. Phillips performed an L5-S1 discectomy in April 1996. Claimant reported that this surgery was successful.
7. After this initial surgery, Claimant was referred to physical therapy. Initially he attended and participated, but he did not complete the course as directed. Over the ensuing year and a half, his medical professionals encouraged him to participate in physical therapy and a work hardening program, as he could not tolerate his job requirements and was deconditioned. Claimant did not follow these recommendations.
8. From May through September 2003 Claimant underwent several epidural steroid injections, a lumbar facet joint block and radiofrequency ablation, none of which yielded significant relief of his low back pain. This conservative treatment having failed, in January 2005 he underwent additional surgery, again at L5-S1 but this time performed by Dr. Abdu.

9. Post surgery, Dr. Abdu referred Claimant to physical therapy in February 2005. It is apparent from Dr. Abdu's March 2005 office note that Claimant participated, but the medical record is silent as to whether he successfully completed this course of therapy.
10. Claimant began treating with Dr. Rehman in October 2008. Dr. Rehman is board certified in physical and rehabilitation medicine as well as pain medicine. Initially he prescribed Neurontin and Celebrex to address Claimant's pain. Claimant reported that these medications helped him manage his pain and improve his quality of life, with minimal side effects. Throughout 2009, Dr. Rehman also administered a series of epidural steroidal injections and lumbar facet blocks, but Claimant did not derive any substantial pain relief from these procedures.
11. In May 2010 Claimant underwent a third surgery at L5-S1, this time a decompression and fusion performed by Dr. Haycook, an orthopedic surgeon. Thereafter, he reported that his left leg pain had significantly improved. In July 2010 Dr. Haycook's physician's assistant wanted to transition him to work conditioning. Claimant did participate in physical therapy, although once again he did not complete the entire prescribed course. Claimant also discontinued his use of both Neurontin and Celebrex during this time, though no doctor had recommended that he do so.
12. In June 2011 Dr. Haycook placed Claimant at end medical result with respect to his surgical care and referred him back to Dr. Rehman for further pain management, including a possible spinal cord stimulator trial.
13. With Dr. Rehman, Claimant underwent additional lumbar facet blocks, lumbar hardware blocks and radiofrequency ablation. He experienced some transient relief from these procedures, but did not achieve sustained pain relief. As Dr. Rehman felt he had exhausted all conservative measures, in March 2011 he recommended that Claimant undergo a spinal cord stimulator trial to address his unresolved pain.
14. In April 2012 Claimant underwent the spinal cord stimulator trial. Subsequently he reported that his low back pain had improved by 70 percent, and his left leg pain by 50 percent. Given these results, Dr. Rehman recommended that the spinal cord stimulator be permanently implanted.

Claimant's Current Status

15. Claimant is currently 37 years old. He has not been employed since his January 2010 fusion surgery. He was released to return to work full-time, full duty in October 2010, but his then-employer wanted him to undergo a functional capacity evaluation.
16. In May 2011 Claimant completed a functional capacity evaluation. He was credible when he stated he gave his full effort during the evaluation. Claimant demonstrated a work capacity in the heavy physical demand category as to both lifting and carrying. Specifically, he was able to lift 70 pounds occasionally and carry 50 pounds occasionally. Leaning forward from the waist caused him the most pain. Even with that, he reported that during the evaluation his pain level did not exceed a two on a ten-point analog scale.

17. During the course of a typical day Claimant does housework, walks the family dog several times and reads.
18. Claimant credibly stated that when Defendant's attorney deposed him in conjunction with the pending claim, his pain level at the end was a two out of ten. The record does not indicate for how long his deposition lasted. Nevertheless, it is reasonable to assume from this experience that he is capable of sitting for some length of time without suffering any increase in symptoms or pain.
19. As to the possibility of treating his pain with a spinal cord stimulator, Claimant credibly testified as follows:
  - While undergoing the trial implantation, his pain did not exceed a two out of ten;
  - He understands that a permanently implanted stimulator likely will limit his ability to function in some respects;
  - He understands that his body may reject the device and that it may not be successful, but he wants to pursue permanent implantation anyway; and
  - His goal for this treatment is to reduce his pain, hopefully to a level where he will no longer require narcotic pain medications. This will enable him to work as a truck driver.

Expert Medical Opinions

20. All of the medical experts in this case agree that Claimant suffers from failed back syndrome.

(a) Dr. Rehman

21. Dr. Rehman has been conducting spinal cord stimulator trials for at least the past four years. When he refers a patient for spinal cord stimulator implantation, his purpose is to improve the patient's functionality and ability to perform activities of daily living. Though he has not undertaken any formal statistical analysis, anecdotally Dr. Rehman estimates that approximately 90 percent of his trial stimulator patients have realized success with permanent implantations as well.
22. In Dr. Rehman's opinion, Claimant is a good candidate for a permanently implanted stimulator. This is because (a) he has had two spine surgeries, yet his back pain continues to affect his life; (b) his pain is not biomechanical and is not originating either from the facet joints or from any surgical hardware; and (c) his stimulator trial successfully reduced his pain.

23. Dr. Rehman concluded that permanent implantation of a spinal cord stimulator is medically necessary in Claimant's case. In his opinion, Claimant has tried and failed all other conservative treatments, including medications, steroid injections, nerve blocks and surgeries. According to Dr. Rehman, Claimant has reached the option of last resort, therefore. However, Dr. Rehman does not address the fact that Claimant has never undergone a complete course of physical therapy, particularly one that focuses on active core strengthening, nor has he attempted a functional restoration program. I find this omission troublesome.

*(b) Dr. Zweber*

24. Dr. Zweber specializes in orthopedic and physical and rehabilitative medicine. At Claimant's request he performed a medical records review in July 2012. He reviewed all of the pertinent records prior to rendering his opinions.
25. In Dr. Zweber's opinion, in specific circumstances spinal cord stimulators are reasonable and necessary treatment for failed back syndrome. In this case, Dr. Zweber believes that Claimant has reasonable expectations of the stimulator's potential outcomes, and is focusing not just on pain relief but also on improved functioning. The fact that the trial implantation was successful makes permanent implantation even more reasonable. For these reasons, according to Dr. Zweber the stimulator is a reasonable and necessary treatment option for Claimant to pursue.
26. In forming their opinions as to the medical necessity of a permanently implanted stimulator, neither Dr. Rehman nor Dr. Zweber appears to have considered the fact that Claimant already is capable of functioning at a relatively high physical demand level, as evidenced by his May 2011 functional capacity evaluation. Nor do they seem to have accounted for the fact that he consistently has reported his pain level as only a two out of ten on an analog pain scale. With these considerations in mind, it is difficult for me to comprehend how much positive gain they reasonably believe Claimant will realize from a permanently implanted stimulator.

*(c) Dr. Binter*

28. Dr. Binter is a board certified neurological surgeon. At Defendant's request, in June and July 2012 she reviewed Claimant's medical records. Later, she reviewed both his and Dr. Rehman's depositions as well. Dr. Binter did not examine Claimant.

29. In Dr. Binter's opinion, a permanently implanted spinal cord stimulator is neither reasonable nor necessary treatment for Claimant's work-related injury. She based this opinion in part on the fact that he has not yet exhausted all conservative treatment options for his low back pain, such as:
- Replacing his current opiate medications, which become less effective the longer they are used, with Neurontin and Celebrex, both of which were effective for him in the past, and possibly methadone or buprenorphine as well;
  - Engaging in active physical therapy, to include weight training and a functional restoration program, which will improve his core strength and spine stability; and
  - Removing the hardware at the L5-S1 surgical site, which likely will ameliorate the pain he reports when bending forward at the waist.
30. Dr. Binter particularly questioned the utility of a spinal cord stimulator in Claimant's case given that he already is functioning at a fairly high physical demand level. As she correctly observed, even during a rigorous functional capacity evaluation the highest pain level Claimant reported was only a two out of ten. A permanently implanted stimulator likely would reduce rather than increase that level of functionality.<sup>1</sup>
31. Finally, Dr. Binter concluded from her review of the medical literature that randomized, controlled studies of adequate duration have not shown spinal cord stimulators to be a safe and effective treatment for low back pain. What studies there are indicate that at best the devices are effective for only two years. In light of Claimant's young age, in Dr. Binter's opinion this is an insufficient benefit to justify the procedure. I find this rationale persuasive.

*(d) Dr. Ensalada*

32. Dr. Ensalada is board certified in anesthesiology and pain management. At Defendant's request, he reviewed Claimant's medical records in August 2011.
33. In Dr. Ensalada's opinion, the implantation of a spinal cord stimulator is neither reasonable nor necessary medical treatment for Claimant's work related injury. Scientific research has not yet established the devices to be safe and effective. What studies there are indicate that while stimulators might be effective at controlling radiating leg pain, they play no role in the treatment of low back pain. Yet Claimant's primary complaint, as evidenced by Dr. Rehman's treatment, has been low back pain, not radiating leg pain. For this reason, according to Dr. Ensalada, a permanently implanted stimulator is likely to be ineffective in Claimant's case.

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<sup>1</sup> Dr. Binter did not explain in what manner a permanently implanted stimulator would reduce Claimant's functional capacity. No contrary evidence was presented on this point, however, and Claimant testified that he understood this to be the case. With no reason to disbelieve Dr. Binter, I accept her conclusion in this regard as true.

34. I find Dr. Ensalada's opinion credible. Throughout the medical record, Claimant's treatment has focused on low back pain, not leg pain. This is particularly true with respect to Dr. Rehman. As Dr. Ensalada correctly observed, all of the treatments Dr. Rehman has administered, including epidural steroid injections, hardware blocks and radiofrequency ablation, have been directed entirely at addressing Claimant's low back pain, not his radiating left leg pain. This underscores the minor nature of the latter symptoms. Given that spinal cord stimulators have been shown to be less effective for low back pain, Dr. Ensalada's conclusion that the device is not reasonable and necessary treatment for Claimant's condition is persuasive.

Expert Psychological Opinions

(a) Dr. Moreland

35. Dr. Moreland, a psychologist, evaluated Claimant in June 2012 to determine whether from a psychological perspective he was an appropriate candidate for a permanently implanted spinal cord stimulator. As part of his evaluation, Dr. Moreland interviewed Claimant and also administered the Minnesota Multiphasic Personality Inventory-2 Restructured Form and the Battery for Health Improvement tests. Dr. Moreland later supplemented his report with a follow-up letter in August 2012.
36. In Dr. Moreland's opinion Claimant is an appropriate candidate for a permanently implanted spinal cord stimulator. He did not exhibit excessive somatization or psychopathology that might interfere with the device's utility, and responded positively to a trial implantation. In addition, he has a strong family support network and, except for his fusion surgery, successfully returned to work following previous treatments.
37. I find Dr. Moreland's analysis persuasive. It is based both on personal observation and on standardized psychological testing.

(b) Dr. Drukteinis

38. Dr. Drukteinis is board certified in psychiatry and neurology. At Defendant's request, he reviewed Claimant's pertinent medical records in July 2012. Dr. Drukteinis' review included Dr. Moreland's June 2012 report, but not his August 2012 follow-up letter.
39. In Dr. Drukteinis' opinion, Dr. Moreland did not screen Claimant adequately for psychiatric or psychological factors that might impede treatment for his physical condition. He took only a limited psychosocial history. Thus, he was unaware that as early as July 1995 Dr. Birge had determined that depression was playing a significant role in Claimant's discomfort and therefore prescribed psychotropic drugs as part of his treatment plan. According to Dr. Drukteinis, had Dr. Moreland conducted a more thorough review of Claimant's past physical and psychological history, he would have known this. As a consequence, during the course of his evaluation he might have questioned whether Claimant was being truthful when he denied any prior history of treatment for mental health issues.

41. I do not find Dr. Drukteinis' opinion persuasive. I find more convincing Claimant's explanation for the omission – that he thought the medications Dr. Birge had prescribed were solely for pain and that he did not view himself as being depressed at the time. Dr. Moreland concurred with this analysis, and felt that Claimant's failure to mention the issue during his interview with him was not significant.
42. Based on the evidence presented, I find that Claimant is an appropriate psychological candidate for a spinal cord stimulator. He does not suffer from any significant psychopathology and he has realistic expectations.

#### **CONCLUSIONS OF LAW:**

1. Vermont's workers' compensation statute obligates an employer to pay only for those medical treatments that are determined to be both "reasonable" and causally related to the compensable injury. 21 V.S.A. §640(a); *MacAskill v. Kelly Services*, Opinion No. 04-09WC (January 30, 2009). The Commissioner has discretion to determine what constitutes "reasonable" medical treatment given the particular circumstances of each case. *Id.* A treatment can be unreasonable either because it is not medically necessary or because it is not related to the compensable injury. *Baraw v. F.R. Lafayette, Inc.*, Opinion No. 01-10WC (January 20, 2010).
2. The treatment issue here revolves solely around the medical necessity question. The parties' experts disagree whether surgical implantation of a spinal cord stimulator is medically appropriate treatment for Claimant's work injury.
3. Where expert medical opinions are conflicting, the Commissioner traditionally uses a five-part test to determine which expert's opinion is the most persuasive: (1) the nature of treatment and the length of time there has been a patient-provider relationship; (2) whether the expert examined all pertinent records; (3) the clarity, thoroughness and objective support underlying the opinion; (4) the comprehensiveness of the evaluation; and (5) the qualifications of the experts, including training and experience. *Geiger v. Hawk Mountain Inn*, Opinion No. 37-03WC (September 17, 2003).
4. Based primarily on the third factor, I conclude here that Dr. Binter's opinion is the most persuasive. Dr. Binter's analysis was grounded in large part on Claimant's objectively measured performance during his functional capacity evaluation. He demonstrated there that he was capable of functioning at a heavy physical demand level, with pain that did not exceed a two on a ten-point analog scale. With due regard for Claimant's age, Dr. Binter also convincingly concluded that to implant a device that is likely to be effective for only two years is not justifiable, particularly where conservative treatment options, such as more active physical therapy and functional restoration, have not been fully exhausted. Considering these factors, Dr. Binter's analysis was clearer, more thorough and better supported objectively than the analyses put forth by Claimant's experts.



5. I conclude that Claimant has failed to sustain his burden of proving that a permanently implanted spinal cord stimulator is likely either to relieve his most troublesome symptoms or to maintain or increase his functional abilities. The credible evidence, including Claimant's own testimony, establishes that his pain level has remained relatively static, through both a rigorous functional evaluation and even a trial period with the stimulator. The determination whether a treatment is reasonable must be based primarily on evidence establishing the likelihood that it will improve the patient's condition. *Quinn v. Emery Worldwide*, Opinion No. 29-00WC (September 11, 2000). I cannot conclude that the stimulator will likely achieve that result here.
6. Finally, citing *Cahill v. Benchmark Assisted Living*, Opinion No. 13-12WC (April 27, 2012), as support, Claimant argues that he should be able to direct his own treatment course when two equally reasonable options have been presented. That is, Claimant argues that permanently implanting a spinal cord stimulator is just as reasonable a treatment option as, for example, participating in an active core strengthening and/or functional restoration program might be. I disagree. The permanent implantation of a spinal cord stimulator is an invasive procedure. Claimant is a young man, and what research data there is suggests that the device likely will lose its effectiveness after two years. As compared with the option of undergoing conservative therapies that have not yet been fully explored, the stimulator option is a less reasonable alternative, not an equally viable one. Therefore, *Cahill* does not avail Claimant in this case.
7. I conclude that Claimant has not sustained his burden of proving that a permanently implanted spinal cord stimulator constitutes reasonable treatment for his work-related injury.
8. As Claimant has failed to prevail on his claim for benefits, he is not entitled to an award of costs or attorney fees.

**ORDER:**

Based on the foregoing findings of fact and conclusions of law, Claimant's claim for medical benefits associated with the permanent implantation of a spinal cord stimulator is hereby **DENIED**.

**DATED** at Montpelier, Vermont this 23<sup>rd</sup> day of October 2012.

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Anne M. Noonan  
Commissioner

**Appeal:**

Within 30 days after copies of this opinion have been mailed, either party may appeal questions of fact or mixed questions of law and fact to a superior court or questions of law to the Vermont Supreme Court. 21 V.S.A. §§ 670, 672.