IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2002 MTWCC 66

WCC No. 2002-0581

WILLIAM BURTON

Petitioner

vs.

ARCO

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Claimant, who is permanently totally disabled and who suffers continual back pain, seeks an order directing his self-insured employer to buy him a robotic massage chair.

Held: The request is denied since claimant provided no medical evidence that the chair is medically reasonable. His physician approved the chair but only based upon claimant's report that it made him feel better. The physicians acknowledged that he had no experience with the chair, had never previously prescribed one, and knew of no scientific basis showing it is therapeutic.

Topics:

> **Benefits: Medical Benefits: Reasonableness of Services.** Claimant must show that medical services, devices or appliances are medically reasonable, not just that by his own report and limited usage they make him feel better.
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> **Benefits: Medical Benefits: Reasonableness of Services.** Request for a robotic massage chair denied where physician approving it has no experience with the chair, has never prescribed it, knows of no scientific basis to indicate it is therapeutic, and approved it only because the claimant said it made him feel better.

¶1 At the suggestion of the Court following the filing and briefing of a motion for summary judgment, this matter is submitted to the Court based upon depositions and exhibits. The depositions are of claimant, claimant's wife (Linda Burton), and Dr. Richard Wise. The exhibits are attached to Dr. Wise's deposition and consist of his medical records and a brochure for a massage chair sought by claimant.

¶2 The claimant, who is permanently totally disabled and suffers from back pain, requested the insurer to pay for a robotic massage chair to ameliorate his pain. His time-of-injury employer (ARCO), which is self insured, refused. Claimant then brought the present petition seeking an order of the Court directing ARCO to pay for the chair. He also seeks attorney fees and a penalty.

¶3 Having considered the Pretrial Order, the deposition testimony and exhibits, and the contentions of the parties, the Court makes the following:

FINDINGS OF FACT

¶4 Claimant is presently 50 years old.

¶5 On October 5, 1984, while employed at the aluminum plant in Columbia Falls, Montana, claimant injured his low back and was found to have an L5-S1 disc bulge with left S1 radiculopathy. (Uncontested Fact 1; (February 10, 2000 report of Dr. John V. Stephens.)) Nearly a year later, he underwent a hemilaminectomy, facetectomy, and foraminotomy at L5-S1, with discectomy at L5-S1 and interbody fusion at L5-S1, posterolateral fusion at L4-S1. (Dr. Stephen's Report.)

¶6 At the time of the claimant's industrial injury, ARCO operated the aluminum plant and was self insured. (See Uncontested Fact 2.) It accepted liability for the claim. It has determined that claimant is permanently totally disabled and is paying him permanent total disability benefits. (See Uncontested Fact 3.)

¶7 Claimant continues to suffer constant pain in his back and leg. The degree of his pain is reflected by the fact that he takes multiple medications on a regular basis, including a narcotic (methadone).

¶8 Claimant has flare-ups where his muscles spasm and his pain increases. (W. Burton Dep. at 45.) In past years he has obtained some relief from massage and from physical therapy. (W. Burton Dep. at 33; Wise Dep. at 10.) However, at the time of his deposition he had not had physical therapy for over a year. (W. Burton Dep. at 38.)

¶9 Claimant also has a TENS unit which he uses on occasion. (*Id*. at 35.)

¶10 A local store has a robotic massage chair. Claimant has sat in the chair at the store and testified that the chair helps take the edge off his pain and "calm down" his muscle spasms "the same as if I was to go to a massage therapist or physical therapist." (*Id*. at 35, 46.) Claimant did not indicate how many times he has tried the chair or how long he used it.

¶11 Claimant wants ARCO to pay for a robotic massage chair so he can have it at home. The cost of the chair is $2,824. (Page 3 of exhibits to Dr. Wise Dep.) He urges that ARCO would save more than that in future physical therapy bills. (W. Burton Dep. at 33.)

¶12 Dr. Richard Wise is a family practitioner. He has treated claimant for back pain since the mid-1980s. (Wise Dep. at 6.) He was asked about the massage chair. He testified that he has not seen the chair, has no experience with the chair, has never previously prescribed the chair, and knows of "no scientific basis for why the chair would help a patient's spasm one way or another." (*Id*. at 8-9, 13-14.) On the other hand, he testified that claimant's purchase and use of the chair is "reasonable in light of his [claimant's] reported pain relief from trying the chair." (*Id*. at 13.)

¶13 Dr. Wise's testimony fails to establish that the chair is a recognized and accepted medical treatment for the claimant's pain. To the contrary, he acknowledges that it is not ordinarily prescribed and that he knows of no scientific basis for the use of the chair in treatment.

¶14 ARCO did not act unreasonably when it denied the claimant's request for the massage chair.

CONCLUSIONS OF LAW

¶15 This case is governed by the 1983 version of the Montana Workers' Compensation Act since that was the law in effect at the time of the claimant's industrial accident. *Buckman v. Montana Deaconess Hospital,* 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¶16 Claimant bears the burden of proving by a preponderance of the evidence that he is entitled to the benefits he seeks. *Ricks v. Teslow Consolidated,* 162 Mont. 469, 512 P.2d 1304 (1973); *Dumont v. Wicken Bros. Construction Co.*, 183 Mont. 190, 598 P.2d 1099 (1979).

¶17 Section 39-71-704, MCA (1983), governs medical benefits. It provides that the employer or insurer shall furnish "reasonable services by a physician or surgeon, reasonable hospital services, and medication when needed, and such other treatment as may be approved by the division for the injuries sustained." The section also provides for payment for eyeglasses, contact lenses, hearing aids and dentures, but those devices are not involved in this case. The question therefore presented is whether the robotic massage chair qualifies under the quoted language. I find it does not.

¶18 Claimant acknowledges that the chair has not been approved by the Department but argues that it falls under the "services of a physician" since Dr. Wise approved it. Assuming that it falls under "physician's services," claimant must still demonstrate that it is a "reasonable" service. He has not done so. Dr. Wise was unfamiliar with the chair, knew of no scientific basis for saying it is medically therapeutic, and approved it only based on claimant's report that it made him feel better. He provided no medically reasonable basis for prescribing the chair. Moreover, claimant provided little evidence to support his contention that the chair will aid him in the long run. There was no showing that claimant tried the chair on a sustained and regular basis while having muscle spasms.

¶19 Claimant's most forceful argument for the chair is that it will save ARCO money in the long run since fifteen physical therapy treatments per year were approved for claimant in 1991 and claimant's use of the chair will alleviate his need for physical therapy. That may well be claimant's hope, but there is no medical evidence to support the contention.

¶20 I therefore conclude that ARCO is not obligated to pay for the massage chair.

¶21 Since ARCO has prevailed claimant is not entitled to either attorney fees or a penalty. See sections 39-71-611, -612, and -2907, MCA (1983).

JUDGMENT

¶22 Claimant is not entitled to have ARCO pay for or provide a robotic massage chair. His petition is **dismissed with prejudice**.

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

¶24 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 20th day of December, 2002.

(SEAL)

/s/ MIKE McCARTER
JUDGE

c: Ms. Laurie Wallace
Mr. Leo S. Ward
Submitted: August 22, 2002