

**STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY**

Lolita Clement)	State File No. H-06553
)	
)	By: Margaret A. Mangan
)	Hearing Officer
v.)	
)	For: R. Tasha Wallis
)	Commissioner
National Hanger Corporation)	
)	Opinion No. 15-02WC

Hearing held in Manchester, Vermont on January 24, 2002
Record Closed on March 20, 2002

APPEARANCES:

Sam Mason, Esq. for the claimant
Glenn S. Morgan, Esq. and Marion T. Ferguson, Esq. for the defendant

ISSUE:

Is the proposed rib resection a medically reasonable surgical service for which the employer is liable under 21 V.S.A. § 640(a).

EXHIBITS:

Joint Exhibit I:	Medical Records in 5 volumes
Claimant's Exhibit 1:	Supplemental Medical Records, RRMC
Claimant's Exhibit 2:	Medical Records from Mary McClellan Hospital
Defendant's Exhibit A:	Curriculum Vitae of Walter Borden, M.D.
Defendant's Exhibit B:	Curriculum Vitae of Edwin Mohler, M.D.
Defendant's Exhibit C:	Supplemental Medical Records

FINDINGS OF FACT:

1. Judicial notice is taken of all forms filed in this action and the exhibits are admitted into evidence.
2. In October 1994 claimant Lolita Clement was an "employee" and National Hanger/AVE Insurance her "employer" as those terms are defined in the Workers' Compensation Act and Rules.

3. At the hearing, claimant presented as a personable, articulate and debilitated woman. She was in a wheelchair wearing a binding back brace and an arm splint. She holds her left arm tightly against her torso. Apparently any movement causes her pain.
4. On October 26, 1994 claimant sustained a work-related injury to her low back and left extremity. The injury occurred when she was operating a molding machine at National Hanger Company. In the process she was filling boxes and stacking them on a skid. When the skid was full and boxes stacked very high, she jumped up and threw boxes onto the skid. When she threw the last box, she turned, landed on her left leg and felt something in her shoulder blades pop. She also felt a pop in her low back and numbness and tingling in her feet. At that point half of her body was on the machine and her left shoulder was thrown forward. Claimant has not worked since.
5. After the injury, claimant first treated at the Southwestern Vermont Medical Center, then with Dr. Joseph Kratzer, a neurologist and with Dr. Robert Block, an orthopedic surgeon.
6. On March 16, 1995 Dr. Block injected the costovertebral joints of the 10th, 11th and 12th ribs with Xylocaine and Celestone after which he noted complete remission of her mid-back and rib cage pain for ten days following the injection.
7. Dr. Block continued to treat the claimant with physical therapy and a shoulder support brace and injections in her left shoulder. Dr. D'Aquila, a chiropractor and Dr. Martha Stitleman, her family physician, also treated her.
8. Dr. Oakley Frost is a general and vascular surgeon with an interest in science and management of pain.
9. Dr. Frost uses the term "rib resection" as meaning "denervating the joint by removal of the neck and head of the rib." He has been performing rib resection surgery for approximately twenty years, having performed approximately sixty-eight rib resections on fifty-four patients. From his experience he has noted that 90 to 95% of patients need a second or more rib resection. Although he characterizes his rib resection work as an ongoing study and has submitted data to several journals for publication, he has never adhered to common medical guidelines for the conduction of medical studies and has not had a paper accepted for publication. The original intent of the study focused on the removal of one rib. However, he has since expanded the study to include the removal of multiple ribs. Because Dr. Frost does not have privileges to perform the rib resection surgery at the Southwestern Vermont Medical Center, he performs the procedure at Mary McClellan Hospital in Cambridge, New York.

10. When he examined the claimant on March 14, 2000 Dr. Frost diagnosed “left 4th costovertebral joint arthritis with pain syndrome from C2 through L3, [and] chronic depression secondary to chronic pain.”
11. On December 4, 2000, Dr. Frost diagnosed “severe arthritis of the left 7th costovertebral joint with costovertebral joint pain syndrome.” He then surgically removed the claimant’s 7th rib in an effort to manage her continuing pain. The seventh rib was removed although Dr. Frost’s original findings and diagnosis identified the fourth rib as the cause of the pain. Claimant had temporary relief of her pain after the 2000 surgery, but the pain returned.
12. Dr. Frost observed that with the exception of two weeks after the first rib resection, he has not seen the claimant without pain.
13. Because of claimant’s insistence that a small band at the level of the first surgery remains pain free, Dr. Frost and the claimant consider it a success even though the rest of her back, limbs and trunk are painful.
14. In January 2001 the claimant presented to Dr. Frost again with a complaint of continuing pain. Dr. Frost identified her 10th costoverteral joint as the primary source of the pain, and the 12th as another painful site. He then did a CT guided needle injection of the 10th and 12th costovertebral joints and prescribed resection of the 10th and 12th ribs.
15. At the hearing, Dr. Frost examined the claimant, demonstrating tender areas she has in her back. Claimant stood up and moved slowly while positioning herself for the examination.
16. Claimant has a long and complex medical and psychiatric history. She has continued to treat for ongoing pain complaints.
17. Dr. Frost knows of no other doctor in the United States who performs the proposed surgery.
18. Dr. Frost testified that claimant needs a second rib resection to relieve her pain. And he conceded that she could need a third if the proposed surgery does not work.
19. Given the claimant’s profound psychological problems, claimant’s sensation of physical pain is preferable to her feeling the psychological pain, as Dr. Borden, the defense expert testified.
20. Dr. Walter Borden, a psychiatrist who testified for the defense, concluded that the claimant is suffering from a somatoform disorder that is fueled by allowing or encouraging self-destructive behavior, such as the proposed surgery.

21. Dr. Mohler, an orthopedic surgeon, testified for the defense. He concluded that the proposed surgery was not indicated on physical or psychological grounds. In his opinion, an abnormal psychological profile precludes the surgery, as does a chronic pain syndrome where one is dealing the complexities of pain. Finally he opined that the proposed surgery is not causally related to the original injury and is “doomed to fail.”
22. Claimant submitted documentation supporting her claim for attorney fees for 59.05 hours and costs of \$1926.05.

CONCLUSIONS OF LAW:

1. In workers’ compensation cases, the claimant has the burden of establishing all facts essential to the rights asserted. *Goodwin v. Fairbanks*, 123 Vt. 161 (1963).
2. When an injury arises out of and in the course of employment, the employer “shall furnish reasonable surgical, medical and nursing services and supplies to an injured employee.” 21 V.S.A. § 640(a). A treatment does not become unreasonable simply because it will not resolve all the claimant’s complaints, nor is it necessarily unreasonable because it is experimental. *Briggs v. Maytag Homestyle Repair*, Opinion No. 57-9WC (Oct. 5, 1996). However, it cannot be accepted as reasonable when it lacks an objective basis or foundation. *Beaudin v. H.P. Hood, Inc.*, Opinion No. 39-99WC (Sept. 3, 1999).
3. Professor Larson suggests that one way to settle the controversy presented by a difference of opinion on diagnosis or appropriate treatment is “to let the result turn on whose diagnosis proved to be right.” 5 Larson’s Workers’ Compensation Law, § 94.02[5] (citation omitted).
4. In this case, the results of the first rib resection are clear—it did not result in lasting pain relief and by all accounts, the claimant is clinically worse today than she was prior to that surgery. This is not to say that the surgery necessarily harmed her, but it did not help her. Claimant’s and Dr. Frost’s testimony that the first operation was a “success” is contradicted by the claimant’s presentation and all the medical records.
5. The credible medical testimony in this case demonstrates that the claimant’s profound psychological distress accounts for her refractory pain, and that despite her sincere hope, a rib resection will not relieve that pain.
6. Accordingly the propose rib resection surgery cannot be considered reasonable.

ORDER:

THEREFORE, Based on the Foregoing Findings of Fact and Conclusions of Law, this claim is DENIED.

Dated at Montpelier, Vermont this 2nd day of April 2002.

R. Tasha Wallis
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.