STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

Robert Wilson	)	Opinion No. 02-05WC
	)	
	)	By: Margaret A. Mangan
v.	)	Hearing Officer
	)	
Liberty Mutual, Insurer for	)	
Hostein Associates of USA, Inc.	)	For: Laura Kilmer Collins
	)	Commissioner
	)	
	)	State File No. K-17249

Pretrial conference held on November 3, 2004; status conference held on June 24, 2004
Hearing held on October 12, 2004
Record Closed on November 2, 2004

APPEARANCES:

Ron A. Fox, Esq., for the Claimant
Eric N. Columber, Esq., and Keith J. Kasper, Esq., for the Defendant

ISSUES:

1. Was the cervical fusion surgery claimant had on November 4, 2003 a reasonable procedure compensable under 21 V.S.A. § 640(a)?

2. If so, is claimant entitled to attorney fees and costs?

EXHIBITS:

Joint Exhibit I: Medical Records

Claimant's Exhibit 1: Deposition of John B. Wahlig, M.D., with deposition exhibits:
- Copy of flexion x-ray
- Copy of extension x-ray
- Article by Auguste White, et. al.

Defendant's Exhibit A: Deposition of Michael J. Kenosh, M.D.

STIPULATION:

The parties agree that the cervical fusion which claimant underwent on November 4, 2003 was related to his work injury which occurred on February 14, 1997.

FINDINGS OF FACT:

1. Claimant has worked as a field representative for Holstein Associates since 1991. He drives 40,000 to 50,000 miles per year covering his territory of Eastern New York and all of New England.

2. On February 14, 1997, claimant suffered a work-related upper back and shoulder injury when the pickup truck he was driving was in an accident.

3. The employer accepted the claim and paid benefits.

4. Initial treatment was conservative, including physical therapy, massage and pain management. Non-surgical treatment continued with trigger point injections, medications and acupuncture. Those conservative treatments offered only temporary relief.

5. In 2002, when claimant was finding that his pain interfered with driving, he consulted with a neurosurgeon, John B. Wahlig, M.D.

6. At first, Dr. Wahlig determined that claimant was not a surgical candidate. However, after reviewing x-rays, Dr. Wahlig suggested that claimant might get relief if his neck were surgically stabilized with a fusion.

7. A spinal fusion is an appropriate procedure in the presence of instability, fracture, dislocation, trauma and tumor. The only criterion applicable to this case is the first, instability.

8. The workers' compensation carrier denied the claim for the surgery.

9. Claimant decided to go ahead with the surgery. Then, on November 4, 2003 Dr. Wahlig performed a discectomy at C6-7 for a herniated disc and a fusion at that level.

10. Dr. Wahlig based his decision to proceed with the surgery on several factors: the mechanics of the motor vehicle accident; claimant's continuing pain; clear pathology at the level of C6-7 compared to other cervical disc levels, stating "that disk is herniated backwards and pushing on that C7 nerve root;" and instability at C6-7. Dr. Whalig described that disc space as deranged in a way that far exceeded normal degenerative changes.

11. Six months after the surgery, claimant described his pain as 70% improved. The fusion was confirmed by x-ray. Dr. Whalig would have considered a 50% improvement a success. Claimant was released from Dr. Wahlig's care with instructions to follow up as needed.

12. In support of its denial, the defendant relies on the opinion of Michael Kenosh, M.D., who specializes in the area of physical medicine and is certified by the American Academy of Disability Evaluating Physicians. Dr. Kenosh treats many patients with chronic pain in his practice.

13. Based on the medical literature, experience and review of x-rays, Dr. Kenosh determined that the procedure performed by Dr. Wahlig was not reasonable because on the x-rays he reviewed he did not find the requisite cervical instability necessary to justify the procedure.

14. Claimant's clinical improvement after surgery did not change Dr. Kenosh's opinion.

15. Claimant submitted evidence of his contingency fee agreement with his attorney, and evidence of $1,149.48 in costs.

PRETRIAL RULING

1. In a pretrial ruling, the hearing officer ruled over a defense objection that evidence of the success of the fusion surgery would be admitted at hearing. The objection was based on decisions in which this Department held that a determination of reasonableness is judged by what was known at the time that decision was made. *Morrisseau v. Vermont Agency of Transportation*, Opinion No. 19-04WC(2004); *Jacobs v. Biebel Builders*, Opinion No. 17-03WC (2003).

2. Indeed, for one deciding to have a procedure, for an insurer's assessment regarding payment and for some hearing decisions, the only evidence on which to base a decision is what is known preoperatively. In the same vein, everyone can recall instances where an undisputedly reasonable decision to have a procedure was made preoperatively, yet the procedure failed, as guarantees are never made.

3. The pretrial motion in this case presented a different question. The fusion surgery was disputed from the outset. The claimant had decided to undergo the procedure without the approval of the insurer. In such a situation, one way to settle the controversy is "to let the result turn on whose diagnosis proved to be right." 5 Larson's Workers' Compensation Law. § 94.02[5] (citation omitted). As the following discussion demonstrates, however, the success of the surgery was one factor to be considered, it did not dictate a result.

CONCLUSIONS OF LAW:

4. 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). The claimant must establish by sufficient credible evidence the character and extent of the injury and disability as well as the causal connection between the injury and the employment. *Egbert v. Book Press*, 144 Vt. 367 (1984).

5. There must be created in the mind of the trier of fact something more than a possibility, suspicion or surmise that the incidents complained of were the cause of the injury and the inference form the facts proved must be the more probable hypothesis. *Burton v. Holden & Martin Lumber Co*., 112 Vt. 17 (1941).

6. Under the workers' Compensation Act, the employer must furnish "reasonable surgical, medical and nursing services in an injured employee." 21 V.S.A. § 640(a).

7. In considering conflicting expert opinions, this Department has traditionally examined the following criteria: 1) the length of time the physician has provided care to the claimant; 2) the physician's qualifications, including the degree of professional training and experience; 3) the objective support for the opinion; and 4) the comprehensiveness of the respective examinations, including whether the expert had all relevant records. *Miller v. Cornwall Orchards*, Op. No. WC 20-97 (Aug. 4, 1997); *Gardner v. Grand Union* Op. No. 24-97WC (Aug. 22, 1997).

8. This Department has held that an academic disagreement between experts will not defeat a claim for medical or surgical treatment. See *Galbicsek v. Experian Information Solutions*, Opinion No. 30-04WC (2004); Lappas *v. Stratton Mountain*, Op. No. 55-03WC (2003).

9. In this case, the differing opinion come from a treating neurosurgeon, Dr. Whalig, and consulting physiatrist, Dr. Kenosh. Dr. Whalig, as the treating physician, has the advantage with the first of the *Miller* criteria. As a neurosurgeon, he has the advantage with the second and third criteria as well. Neurosurgery is the preferred area of qualification given the clinical complexity involved. And Dr. Wahlig provided crucial objective support for his opinion, having linked all aspects of the clinical picture including mechanism of injury and contrasting claimant's situation to one who has normal degenerative changes. Although both physicians had the necessary relevant records and performed comprehensive evaluations, Dr. Whalig has the advantage overall.

10. The reasons supporting Dr. Wahlig's decision to perform the surgery lead to the conclusion that the fusion at C6-7 was reasonable and, therefore, compensable. 21 V.S.A. § 640(a).

11. As a prevailing claimant, Robert Wilson is awarded attorney fees of 20% of the total award. 21 V.S.A. § 678(a) and the necessary costs claimed.

12. Claimant is awarded interest on the award from the date the surgery was proposed until paid. 21 V.S.A. § 664.

ORDER:

Therefore, based on the forgoing findings of fact and conclusions of law, the defendant is ordered to pay:

1) For the surgical fusion surgery;
2) Attorney fees of 20% of the total award;
3) Interest at 12% annum from date surgery was proposed to the present.

Dated at Montpelier, Vermont this 14th day of January 2005.

_____
Laura Kilmer Collins
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.