STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

Peggy Pelckmann	)	Opinion No. 11-05WC
	)	
	)	By: Margaret A. Mangan
v.	)	Hearing Officer
	)	
Brookhaven/Liberty Mutual	)	For: Laura Kilmer Collins
	)	Commissioner
	)	
	)	State File No. U-13829

Pretrial conference held on April 28, 2004
Hearing held on October 27, 2004
Depositions of experts taken on November 15, 2004 and November 17, 2004
Record Closed on January 7, 2004

APPEARANCES:

Christopher McVeigh, Esq., for the Claimant
Keith J. Kasper, Esq., for the Defendant

ISSUE:

Was the lumbar fusion surgery performed in August of 2004 a compensable medical treatment causally related to claimant's March 17, 2004 work-related back injury?

EXHIBITS:

Joint I: Medical Records

Claimant 1: Deposition of Leonard Rudolph, M.D.

Defendant A: Deposition of Victor Gennaro, D.O.

STIPULATION:

1. On March 17, 2004 claimant was an employee of defendant within the meaning of the Vermont Workers' Compensation Act (Act).

2. On March 17, 2004 defendant was the employer of claimant within the meaning of the Act.

3. On March 17, 2004 claimant suffered a personal injury by accident to her low back, arising out of and in the course of her employment with defendant.

4. On September 10, 2004, defendant filed a Form 2 denying compensability of the proposed lumbar fusion surgery.

5. On September 14, 2004 claimant filed a Form 6 contesting the denial of the compensability of the proposed surgery.

6. Claimant underwent the surgery performed by Dr. Rudolph on August 11, 2004.

7. The parties agree that the matter may be heard on the testimony of claimant, her father, a Joint Medical Exhibit and deposition transcripts of Dr. Rudolph and Dr. Gennaro.

8. The parties agree that the hearing officer may take judicial notice of all official forms in the department's file in this matter.

CLAIM:

Claimant seeks a determination that her surgery was compensable medical treatment for her work-related injury; payment, pursuant to WC Rule 40, of all medical bills associated with that surgery and, if successful, an award of fees and costs of litigation.

FINDINGS OF FACT:

1. Claimant injured her back in the course of her employment with Brookhaven on March 17, 2004.

2. An MRI in April 2004 revealed a minimal central and slight leftward protrusion at L4-5.

3. Dr. Manadottir, who had performed back surgery on claimant in the past, did not see a role for surgery to treat the March 2004 injury.

4. In May 2004, Dr. Coombs recommended a "diagnostic block series" to treat the claimant's pain. Dr. Coombs proceeded to administer the injection therapy and then in June 2004 discharged her in good condition.

5. An examination following nerve conduction studies in June 2004 revealed no radiculopathy.

6. On July 12, 2004, Dr. Phillips noted that claimant's examination was normal except for a point of tenderness at L5-S1. He introduced to her a surgical option "as a possibility without necessarily enthusiastically endorsing it."

7. Claimant first saw Leonard Rudolph, M.D. on July 26, 2004 for back pain. Dr. Rudolph is an orthopedic surgeon with considerable experience performing spinal fusion surgery. On his history and physical examination, Dr. Rudolph noted claimant's acknowledged hypersensitivity to pain, significant symptoms and restrictions in movement and activities. She had loss of expected lumbar spine movement as well as difficulty arching backwards and side bending. An MRI revealed facet arthropathy at L5-S1. Dr. Rudolph diagnosed facet syndrome and instability at L5-S1. He then recommended a fusion because the "pain was generated from movement of the facet joint which was abnormal."

8. Claimant accepted the surgical option because she had had good results in the past. Although the insurer denied the claim for the surgery, claimant proceeded with the fusion, performed by Dr. Rudolph on August 11, 2004.

9. Postoperatively, claimant had less pain and was able to return to some of her previous activities.

10. On August 9, 2004 Victor Gennaro, D.O., also an orthopedic surgeon, examined claimant for the defendant in this case. He determined that the findings in her back were minimal, that she had a heightened pain response and that she manifested slight pain behaviors. He was "not convinced that she has had the full benefit of non-operative care." Had Dr. Gennaro treated this claimant, he would not have offered the fusion surgery at the time Dr. Rudolph did, although he agreed that reasonable minds differ on this point.

11. Claimant submitted support for her claim for attorney fees based on 60.9 hours worked and costs totaling $1,412.48.

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 (1962). 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).

2. 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 from the facts proved must be the more probable hypothesis. *Burton v. Holden & Martin Lumber Co*., 112 Vt. 17 (1941).

3. 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).

4. 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).

5. This Department has held that an academic disagreement between experts will not defeat a claim for medical or surgical treatment. See *Wilson v. Holstein Associates of* USA Opinion No. 02-05WC (2005); *Galbicsek v. Experian Information Solutions*, Opinion No. 30-04WC (2004); *Lappas v. Stratton Mountain*, Op. No. 55-03WC (2003).

6. In this case, Dr. Rudolph has the advantage as the treating physician. Both experts have comparable training and experience; both reviewed relevant records. Both provided objective support for their opinions. The crucial difference lies in their judgments as to when a fusion should be recommended, not whether it is a reasonable option for one with claimant's symptoms. Therefore, under the precedent of *Wilson, Galbicsek* and *Lappas*, this is a compensable claim.

7. As a prevailing claimant, Ms. Pelckmann is entitled to a discretionary award of reasonable attorney fees and mandatory award of costs. 21 V.S.A. § 678(a). Given the time and expertise necessary to litigate this claim, the 60.9 hours claimed are reasonable and the accrued $1,412.48 in costs was necessary. Interest is awarded on medical and surgical fees since the date incurred until payment. 21 V.S.A. § 664.

ORDER:

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

1. For the fusion surgery performed by Dr. Rudolph and all related expenses;
2. Attorney fees of $5,481.00 ($90 x 60.9) and costs of $1,412.48;
3. Interest at the statutory rate from the date the costs were incurred until paid.

Dated at Montpelier, Vermont this ____ 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.