STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

Christopher Moyer	)	State File No. M-24765
	)	
	)	By: Margaret Mangan
v.	)	Hearing Officer
	)	
	)	For: R. Tasha Wallis
	)	Commissioner
Miller Building Systems	)	
	)	Opinion No. 22-01WC

Hearing held at Bennington, Vermont, on April 23, 2001 and June 25, 2001
Record closed on June 27, 2001

APPEARANCES:

Jonathan M. Cohen, Esq. for the claimant
Andrew W. Goodger, Esq. for the defendant

ISSUE:

Whether the claimant's requested surgery is reasonable and therefore compensable under the Worker's Compensation Act.

EXHIBITS:

I. Joint Medical Exhibit

FINDINGS OF FACT:

1. Claimant is 47 years old and is married. He lives with his wife and their son.

2. Claimant has had a varied work history but most of his work has been in the construction field.

3. Since 1992, claimant has worked for Miller Building Structures. Miller Building Structures builds office trailers, construction trailers, and school buildings. Claimant has worked for Miller Building Structures as a carpenter and service man/swing man for the last nine years.

4. In the early 1980's, claimant had three surgeries on his lumbar spine, and ultimately one disk was removed and another was operated on. After these surgeries, he returned to work in the construction field without incident. Since the surgeries, claimant has been employed primarily in the construction field and was able to perform heavy-duty manual labor.

5. In June 1992, claimant was employed by Miller Building Structures and was on a ladder which broke, causing him to fall to the ground. Claimant injured his lower back and right hip. No work was missed as a result of this incident but it took him approximately five weeks to recover from the fall. Claimant did not display significant back symptoms after this injury and was able to fully function at home and at work.

6. On June 11, 1999 claimant was working for Miller Building Structures when he reached down to pick up a piece of thermoply. He experienced extreme pain in his lower back and was incapacitated for a short period of time. This incident occurred on a Friday and claimant spent the weekend at home, without participating in any physical activity.

7. The following Monday, claimant went to his primary care doctor, Dr. David King, at Shaftsbury Medical Associates, and was referred to physical therapy at Southwestern Vermont Medical Center. Claimant described his pain to Dr. King as emanating from the bottom of his shoulder blades down to his buttocks. Claimant went to physical therapy for approximately one week and was then referred to Bennington Physical Therapy by Dr. King. Claimant began therapy with Bennington Physical Therapy on June 22, 1999 and attended approximately 30 physical therapy sessions through September 1999. The physical therapy gave claimant more movement and improved his symptoms, but at the end of the three months of physical therapy, the claimant's pain had improved only marginally.

8. During the course of claimant's physical therapy treatments, Dr. King referred him to Dr. Daniel Robbins, an orthopedic surgeon since 1988. Claimant had been to Dr. Robbins's practice, Orthopedic and Hand Surgery, for a cut on his finger in 1998 and for treatment of neck and back pain as a result of an automobile accident in 1997.

9. Dr. Robbins continued claimant's physical therapy. After claimant had completed physical therapy and had not markedly improved, Dr. Robbins requested approval for a MRI. The approval for the MRI was delayed as the insurance company required claimant to see Dr. Alec Kloman, a neurologist in Bennington. Dr. Kloman examined claimant on September 2, 1999.

10. As a result of Dr. Kloman's examination, the insurance company approved an MRI. The MRI was performed at the end of September 1999. Claimant returned to see Dr. Robbins on October 12, 1999. Dr. Robbins then recommended and requested approval for a diskography. This procedure involved determining the pain responses of the patient. The insurance company initially denied this request. They contacted Dr. Kloman for an opinion regarding the use of diskography. Dr. Kloman wrote a letter dated November 9, 1999 indicating that he never used diskography as a diagnostic test and therefore was unable to state whether this was a legitimate procedure.

11. Claimant described part of his symptoms to Dr. Kloman as pain in his right hip, including a locking feeling and a popping sound in the hip, as if gears were skipping, a ratcheting locking/unlocking phenomenon.

12. The insurance company agreed to a diskography procedure and one was performed on an outpatient basis under local anesthetic on December 15, 1999. During this procedure, Dr. Robbins found that L2-3 was positive for pain.

13. Dr. Robbins testified that diskography is an imperfect test that has been vilified, but stated that it is the best test available, although the diskography can generate false negatives and false positives.

14. After the diskography, Dr. Robbins discussed options with the claimant. The claimant indicated that he was in extreme pain and wanted to have surgery to alleviate his pain.

15. Dr. Robbins then performed a facet block to determine the source of the claimant's pain and whether it was associated with facet or posterior elements. After the facet blocks, Dr. Robbins concluded that surgery was appropriate and requested approval for an anterior lumbar interbody fusion with BAK cages at the L2-3 level. Dr. Robbins requested approval for surgery in January 2000. The claimant did not go to any other physicians for a second opinion to help him determine whether the proposed surgery would help alleviate his back pain.

16. The insurance company denied the request for the recommended surgery and sent the claimant to meet with Dr. Gilbert Fanciullo, an anesthesiologist and pain management specialist, and the second IME to evaluate the claimant. He is also the Director of Anesthesiologist and Palliative Medicine at Dartmouth-Hitchcock Medical Center. He testified that he examined the claimant on January 26, 2001 and reviewed claimant's MRI films. While Dr. Fanciullo stated he does not use diskography because of the possibility of false positives, he thought the results in this case were relevant to treatment recommendations. Dr. Fanciullo stated that given Dr. Robbins' history with the claimant, the MRI results and diskography results, it was reasonable for Dr. Robbins to suggest the anterior lumbar interbody fusion with BAK cages, although he does not believe the surgery will alleviate the pain.

17. Dr. Fanciullo testified that his examination of the claimant led him to the diagnosis of arachnoiditis. He stated that another physician in his office who reviewed the films corroborated his diagnosis. He further testified that there is no surgical treatment for arachnoiditis.

18. The claimant returned to Bennington after his appointment with Dr. Fanciullo. He was then told to appear for another appointment on April 5, 2000 by the insurance company. The insurance company had made an appointment for him to see Dr. Hussein Huraibi. Dr. Huraibi diagnosed the claimant with possible diskogenic pain as well as arachnoiditis (inflammation of the arachnoid membrane, which covers the brain and spinal cord and gets its name from a cobweb appearance. Stedman's Medical Dictionary, 25th Edition). Dr. Huraibi did not physically examine the claimant and met with him for a brief period of time.

19. Dr. Robbins disagreed with Dr. Huraibi's diagnosis of arachnoiditis as he felt it was improbable that arachnoiditis would develop 15 years after surgery. Dr. Robbins stated that neurologists have a limited scope and the claimant's pain is not about the nerve. He also stated he did not believe the SI joint was involved in the production of the lower back pain. Dr. Robbins stated that he feels that his proposed surgery will alleviate the claimant's pain and that the proposed surgery is reasonable and necessary. He holds his opinion to a reasonable degree of medical certainty.

20. The claimant has been on pain medication for approximately 1-½ years. Dr. Robbins took the claimant off of this medication on March 23, 2001 because he was concerned about possible addiction.

21. As a result of being taken off of the medication, the claimant has been in extreme pain. The claimant's supervisor at Miller Building Structures, John Hardwood, stated that after the claimant was taken off his pain medication, he was unable to perform his duties at work. The claimant's last day of work was March 30, 2001, approximately one week after he stopped taking the pain medication.

22. The claimant's symptoms consist of extreme pressure in his lower back. The claimant has testified that he wants the surgery to help relieve his pain.

23. Between July, 1999 and April 2001 the claimant has seen Dr. Robbins approximately 10 times. The claimant stated that he has confidence in Dr. Robbins and wishes Dr. Robbins to follow through on his treatment recommendations.

24. After the June, 1999 injury, the claimant's wife noticed a change in the claimant's emotional and physical state. The claimant was unable to perform many of the jobs around the house that he used to perform. Further, after the claimant was taken off medication, the wife noticed a substantial decline in his ability to cope with his pain.

25. Dr. Richard Levy, an IME and neurologist from Exeter, New Hampshire testified that after reviewing the claimant's records, he disagreed that the procedure would be helpful and doubted the validity and specificity of diskography in determining sources of pain. He stated that the claimant's back pain was most likely caused by multiple factors. He agreed with Dr. Fanciullo and Dr. Huraibi's citation of arachnoiditis as the possible cause of the claimant's pain.

26. Dr. Levy testified that the proposed anterior interbody fusion with BAK cages and screw fixation is a big operative procedure in that the disk is taken away and replaced by fused bone. He also indicated that it would take the claimant up to one year of physical therapy to see and enjoy satisfactory results. Significantly, however, Dr. Levy agreed with Dr. Fanciullo in stating that for someone who believed in the diskography test, the recommendation of surgery is in good faith and reasonable from his viewpoint.

CONCLUSIONS OF LAW:

1. In worker's compensation cases, the claimant has the burden of establishing all facts essential to the rights asserted. *Goodwin v. Fairbanks, Morse Co*., 123 Vt. 161 (1963). The claimant must establish by sufficient credible evidence the character and extent of the injury as well as the causal connection between the injury and the employment. *Egbert v. The Book Press,* 144 Vt. 367 (1984).

2. In the instant case, the claimant carries the burden of establishing, as the more probable hypotheses, that the subject surgical procedure was reasonable pursuant to 21 V.S.A.§640, which states that an employer is obligated under the Worker's Compensation Act to provide a claimant with reasonable surgical, medical and nursing services. The statute places no other limitation on the receipt of benefits. Yet, a proposed surgery cannot be accepted as reasonable when it lacks an objective foundation or basis. *Beaudin v. H.P. Hood, Inc.*, Opinion No. 39-99WC (Sep. 3, 1999). On the other hand, a treatment is not necessarily unreasonable because it is experimential. *Briggs v. Maytag Homestyle Repair, Inc.*, Opinion No. 57-96WC (Oct. 5, 1996).

3. Under Vermont Worker's Compensation Act, a claimant is entitled to medical benefits and disability benefits for any condition which is a natural outgrowth of the work- related injury. 21 V.S.A.§640. *Andreescu v. Blodgett Supply Company*, Opinion No. 33-94WC (Nov. 3, 1994).

4. Whether a medical procedure or device is reasonable and necessary treatment is a question of fact to be decided by the Commissioner.

5. In determining what is reasonable under §640(a), the decisive factor is not what the claimant desires or what he believes to be the most helpful. Rather, it is what is shown by competent expert evidence to be reasonable to relieve the claimant's symptoms and maintain his functional abilities. *Quinn v. Emery Worldwide,* Opinion No. 29-00WC (Sep. 11, 2000).

6. With respect to the reasonableness of proposed medical treatment, expert testimony is necessary as a lay-person would have no well- grounded opinion on the issue. *Miller v. IBM*, Opinion No. 53-95WC (August 18, 1995). Accordingly, each party has proffered expert testimony in support of their respective positions. The claimant relies on the opinion of Dr. Robbins , where as defendant has submitted the opinion of Dr. Levy, Dr. Fanciullo and Dr. Kloman to advance its theory.

7. In considering the weight to be given different expert opinions, this Department has traditionally examined the following criteria: 1) the relationship the claimant has had with the health care provider, including 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*, Opinion No. 20-97WC (Aug. 4, 1997).

8. Under this analysis, all of the physicians have comparable professional training and experience. The foremost difference between the doctors is their areas of expertise. While Dr. Robbins is an orthopedic surgeon, the rest of the doctors specialize in other areas. Therefore, each of the above factors must be carefully considered to determine the most appropriate medical opinion in this case.

9. "These terms are legal rather than purely medical terms. To determine which applies requires close consideration of medical evidence, but ultimately the determination is a legal one." *Cote v. Vermont Transit*, Opinion No. 33-96WC, quoting *Bushor v. Mower's News Service*, Opinion No. 75-95WC (October 16, 1995).

10. In this case, many factors indicated that Dr. Robbins's medical opinion is the most appropriate opinion presented. Dr. Robbins has been the claimant's treating physician from July 1999 and April 2001. In this time, Dr. Robbins developed a relationship with the claimant and became very familiar with the claimant's pain symptoms. The claimant clearly trusts and respects Dr. Robbins and desires the surgery. Dr. Fanciullo met with the claimant on only one occasion, whereas Dr. Levy never saw him.

11. Additionally, Dr. Robbins has had access to all of the claimant's treatment records and has physically examined the claimant several times. Again, Dr. Fanciullo, Dr. Levy and Dr. Kloman have only viewed incomplete medical records. Furthermore, the opinion of Dr. Robbins is based on the test results of both the MRI and diskography. This objective medical evidence, while somewhat controversial, supports the reasonableness of Dr. Robbins's proposed action. Both Dr. Fanciullo and Dr. Levy acknowledged that while neither trust in the validity of diskography, well-respected surgeons have used the test and successfully relied on the results. Although it is disputed whether the claimant's pain stems from an orthopedic issue or a neurological issue, Dr. Robbins has experience in spine surgery and therefore the necessary skills to properly render treatment to the claimant.

12. Finally, the most significant factor in determining the reasonableness of the proposed surgery is that both Dr. Fanciullo and Dr. Levy testified that given the results of the controversial diskography and the MRI, the proposed surgery is reasonable. Therefore, after appraising the thoroughness of and objective support for the submitted expert opinions, it is apparent that Dr. Robbins's assessment of the source of the claimant's pain and the necessary treatment is the more probable.

ORDER:

Based on the Foregoing Findings of Fact and Conclusions of Law, I conclude that the claimant's request for surgery is reasonable. As such, the defendant is ORDERED to cover all medical expenses associated with the proposed surgery and pay attorney's fees in the amount of $2,515.50 and costs in the amount of $1,061.34.

Dated at Montpelier, Vermont this 20th day of July 2001.

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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 (county) court or questions of law to the Vermont Supreme Court. 21 V.S.A.§§ 670, 672.