STATE OF VERMONT
DEPARTMENT OF LABOR

Michael Bebon	)	Opinion No. 64-05WC
	)	
	)	By: Margaret A. Mangan
v.	)	Hearing Officer
	)	
Safety-Kleen/Sedgwick CMS	)	For: Patricia A. McDonald
	)	Commissioner
	)	
	)	State File No. T-14916

Pretrial conference on May 11, 2005
Hearing Held in Montpelier on July 21, 2005
Record Closed on September 21, 2005

APPEARANCES:

Christopher McVeigh, Esq., for the Claimant
Christopher Callahan, Esq., for the Defendant

ISSUES:

1. Is the lumbar fusion surgery Dr. Michael Meriwether proposes reasonable medical treatment?

2. Should the commission totaling $1,490.49 which claimant earned from April 20, 2003 through May 17, 2003 (Sales Period 5) be included in his average weekly wage calculation?

EXHIBITS:

Joint I: Medical Records

Defendant A: Dr. Padar's curriculum vitae
Defendant B: Job Offer

FINDINGS OF FACT:

1. A few years before he started working at Safety-Kleen, claimant injured his low back at L4-5 while working as a laborer for another employer. A November 28, 1998 MRI revealed a small central disc bulge.

2. Claimant moved to Florida where, in December 1999, Dr. Michael Meriwether, a neurosurgeon educated at Duke University and Bethesda Medical Hospital, performed laser disc surgery at L4-5 and L5-S1. Postoperatively, Dr. Meriwether noted that an MRI showed mild disc desiccation at L4-5 and L5-S1. He recommended continued pain management care. Claimant continued with low back pain and left sided sciatica, although the pain was "somewhat improved."

3. In April 2000 claimant was placed at medical end result with a 10% whole person impairment. Claimant later returned to Vermont.

4. Claimant started working at Safety-Kleen on April 5, 2001 as a customer service representative. The job required that he drive a truck to customer locations to service equipment and sell product. It required lifting and carrying materials and moving a tailgate up and down.

5. During the week of May 12, 2003 while working, claimant backed his truck into pole, jolting his back and neck. He felt stiffness but missed no time from work.

6. On May 19, 2003 claimant was moving the rear door of his truck while working in Brattleboro when the door jammed, jolting him. Although he felt pain in his neck and back, claimant finished his work and drove to Barre where he reported the incident and sought medical care.

7. On May 22, 2003, Dr. Christopher Meriam took a history from the claimant about the work related incident and performed a thorough physical examination. Among his findings were that claimant had limited range of motion and stiffness. He also noted that the motor testing in the lower extremities was "difficult to interpret." Claimant demonstrated breakaway weakness, yet could walk without assistance. Sensation was affected in both feet. Dr. Meriam commented, "complaints on exam today are not consistent with any single structural injury." He took claimant out of work and recommended an MRI performed on June 11th. That scan revealed minimal broad based bulge of the L3-4 disc with no focal disc herniation.

8. In June 2003 Dr. Meriam noted that claimant had "pain all over." After examining the claimant and interpreting the MRI results, the doctor noted, "I do not appreciate any single structure abnormality of either cervical or lumbar spine that could explain all of these patient's symptoms. I suspect cervical strain." Dr. Meriam recommended minimal narcotics, muscle relaxants, anti-inflammatory medication, and a second opinion with Dr. Ciongoli, a neurologist.

9. Since May of 2003 claimant has had low back and neck pain. He has sought care from an orthopedist, neurologists, occupational physicians, and pain management physicians, without the improvement he expects.

10. In a letter to Dr. Merriam in July 2003, Dr. Raymond Cody of the New England Spine Institute opined that claimant was suffering in part from symptom magnification.

11. In October 2003, Dr. Ciongoli noted "he seems to have a herniated disk at L4-L5 and a bulging disk at L3-L4."

12. On February 20, 2004, Dr. Smith-Horn noted claimant's report of severe pain and lack of sleep. She prescribed pain and sleeping medications and predicted that he would need surgery.

13. By March of 2004 claimant was still taking pain medication, but with little relief. Physical therapy was discontinued because he was making no progress.

14. An April 11, 2004 MRI revealed disc narrowing at L4-5 and L4-S1 secondary to disc degeneration and a "global disc bulge" without focal disc herniation.

15. In an April 2004 letter, Dr. Ciongoli wrote that he could find no clear reasons for claimant's symptoms and that surgery was not recommended.

16. On May 13, 2004, Dr. Ciongoli released claimant to light duty work.

17. Claimant moved back to Florida in June 2004.

Medical Experts

18. After a July 23, 2003 independent medical examination, Dr. Jonathan Fenton opined that claimant suffered a lumbar strain/sprain at work. He noted that claimant's "severe symptom magnification/pain amplification, coupled with obvious depression, makes it difficult at this time to know it there truly is any radiculopathy." Dr. Fenton recommended several follow up tests to rule out radiculopathy. Finally, he opined that even if surgery were recommended, claimant would be a poor candidate because of "nonphysiologic signs, symptom magnification, and obvious depression."

19. In June 2004 claimant returned to Florida where he again consulted with Dr. Michael Meriwether, Dr. Meriwether examined the claimant and reviewed his medical records. He concluded that a POLAR instrumentation fusion would provide a medical benefit to the claimant. The goal of the surgery is to stabilize the unstable parts of the spine that are causing the claimant pain. Dr. Meriwether recommends such surgery only after a course of conservative treatment has failed.

20. Dr. Meriwether opined that claimant's May 2003 work related accident aggravated his preexisting low back condition, with resultant symptoms that were not present before that incident.

21. Dr. Stephen Padar, also a neurosurgeon, testified for the defendant. Dr. Padar has not been in active neurosurgical practice for more than a decade but has years of experience in neurosurgery. He reviewed claimant's medical records, took a history from claimant and physically examined him.

22. Dr. Padar concluded that claimant suffered a low back sprain at work in 2003 and that the strain has resolved. He attributes claimant's current symptoms to degenerative disease that was present years before claimant began working at Safety-Kleen and the natural progression of that disease, unrelated to the work incident. In addition, Dr. Padar opined that claimant's symptoms are not consistent with the documented pathology in his spine. They are nonanatomical. For example, signs of weakness were inconsistent during a physical examination and claimant's reports of global weakness could not be reconciled with localized compression noted on testing. Finally, Dr. Padar opined that the proposed surgery is not reasonable. He recited a proverb: "Do not strike a bug on your friend's forehead with an ax," when explaining his reasons for opposing the surgery. The surgery is extreme for the problem claimant has which not likely to be improved by it. Instead, treatment should be nonsurgical, including medication, stretching and strengthening exercises.

Average Weekly Wage

23. At Safety-Kleen claimant earned a base salary plus monthly commissions.

24. Claimant's average weekly wage at the time of the injury was $866.13 (without the disputed bonus) for an initial compensation rate of $597.41, including $20.00 for two dependents.

25. Claimant received paychecks every two weeks. Commission payments accrued during four-week sales cycles, then were paid at the next scheduled biweekly pay date.

26. Claimant received commission payments during the 12 weeks prior to the injury, even though the first of those payments had been earned earlier. For the sales period from April 20, 2003 to May 17, 2003, the bonus was not paid until the next pay date, which was May 30, 2003 and was not used for the calculation of average weekly wage, although it had been earned during the 12 weeks before the injury.

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. Pursuant to 21 V.S.A. § 640, this claimant is entitled to reasonable surgical services for injuries causally related to his work related injury, a subject that requires medical evidence since it is beyond the ken of laypersons. See *Lapan v. Berno's Inc*., 137 Vt. 393 (1979).

3. The record in this case is replete with expert medical opinions, although not all are couched in expert terms. Some are conflicting.

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. Dr. Meriam, Dr. Ciongoli and Dr. Meriwether have all treated the claimant. Dr. Meriam saw claimant closer in time to the events at issue and observed him over time. Dr. Ciongoli also observed the claimant on several occasions. Although Dr. Meriwether performed surgery on the claimant, he has not had a long relationship with this claimant. All physicians involved are well qualified to render opinions. Dr. Padar provided the most comprehensive of the evaluations since he reviewed all relevant records over several years.

6. The ultimate conclusion on the compensability of the proposed surgery depends on all the medical records, not simply those from the neurosurgeons in order to appreciate the symptomatology and claimant's response to various treatments. Opinions from Dr. Fenton and Dr. Padar and records from Dr. Meriam and Dr. Ciongoli combine to demonstrate that claimant has symptom magnification and symptoms that are nonanatomical, that is they do not correspond to positive findings on objective tests. Surgery is not likely to help such symptoms.

7. In sum, I cannot find that the surgery is reasonable and, therefore, compensable under 21 V.S.A. § 640(a).

Average Weekly Wage

27. Claimant argues that he should receive compensation based on salary plus commissions received during the twelve weeks before the injury (what was paid) plus commissions earned during that period, but not paid until after the twelve weeks.

28. Section 650(a) of Title 21 provides that "[a]verage weekly wages shall be computed in such manner as is best calculated to give the average weekly earnings of the worker during the twelve weeks preceding an injury…" Workers Compensation Rule 15.4000 provides that wages be recorded on a wage statement and that the total be divided by the requisite number of weeks. "In addition, the Wage Statement shall also include the following for each of the twelve weeks preceding the injury: …any bonuses paid, due or received." (emphasis added). WC Rule 15.4120.

29. The plain language of § 650 (a) and use of the disjunctive "or" in Rule 15.4120 when viewed together support the defense position that a claimant's AWW cannot be based on both the bonuses received but not necessarily earned and those earned but not received during the twelve weeks before an injury. The computation is intended to best calculate what was earned during that period. To include bonuses beyond what claimant earned during the 12 weeks in such a calculation would exceed the statutory l2 week limitation. Furthermore, Rule 15.4120 provides that bonuses paid, due "or" received be included in the calculation. Claimant's theory would change the "or" to an "and," which we cannot do. The carrier properly based the AWW on what the claimant received during that period.

30. The commission totaling $1,490.49 which claimant earned from April 20, 2003 through May 17, 2003 was properly excluded from the calculation of claimant's average weekly wage.

ORDER:

Therefore, based on the foregoing findings of fact and conclusions of law, the claims for the proposed surgery and for an increase in the claimant's average weekly wage are DENIED.

Dated at Montpelier, Vermont this 4th day of November 2005.

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Patricia A. McDonald
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.