

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

Thomas Porwitzky)	State File No. F-07833
)	
)	By: Margaret A. Mangan
)	Hearing Officer
v.)	
)	For: Tasha Wallis
)	Deputy Commissioner
State of Vermont)	
Department of Corrections)	Opinion No. 20-00WC

Hearing held in Montpelier on May 16, 2000
Record closed on May 23, 2000

APPEARANCES:

Thomas F. Porwitzky, pro se
Keith J. Kasper, Esq. for the defendant

ISSUES:

1. Whether the proposed bilateral reduction mammoplasty surgery is included within the defendant's responsibilities for compensation as set forth in the June 3, 1994 Form 14 Settlement agreement between the parties.
2. If the proposed surgery is included within the agreement, whether it is reasonable and necessary medical treatment for claimant's work-related injury.

EXHIBITS:

Joint Exhibit I:	Stipulations
Joint Exhibit II:	Transcript of deposition of Dr. David Leitner, May 10, 2000
Joint Exhibit III:	Medical Records
Claimant's Exhibit 1:	Booklet entitled "Surgery for Severe Obesity"
Claimant's Exhibit 2:	Modified Form 14 Settlement agreement, June 1994
Claimant's Exhibit 3:	January 18, 1999 letter from Laurie Spaulding, M.D. to claimant
Defendant's Exhibit A:	May 6, 1994 letter from Attorney Pelkey to Attorney Kasper
Defendant's Exhibit B:	September 21, 1999 letter and agreement between parties

STIPULATION:

1. On October 10, 1992 claimant suffered an injury to his right knee, which arose out of and in the course of his employment.
2. On October 10, 1992 claimant was an employee of defendant within the meaning of the Workers' Compensation Act ("Act").
3. On October 10, 1992, defendant was an employer within the meaning of the Act.
4. On June 3, 1994 the parties entered into a Modified Form 14 Settlement agreement to allow the claimant to undergo gastric bypass surgery so as to be able to effectively treat claimant's compensable knee injury.
5. On January 26, 1996 claimant was found to be at a medical end result for his knee condition with a 7% impairment to the right lower extremity which was paid by defendant.
6. In September of 1996, claimant underwent an abdominoplasty, a procedure paid by the defendant.
7. On August 26, 1999 claimant had a thighplasty paid for by the defendant.
8. On September 21, 1999, the parties agreed to settle their dispute as to defendant's responsibility for the August 26, 1999 surgery.
9. Pursuant to an interim order of this Department, defendant has authorized payment for claimant's proposed bilateral reduction mammoplasties now scheduled for June 29, 2000.
10. Defendant seeks relief from the interim order and reimbursement for any funds expended for medical treatment of claimant's bilateral reduction mammoplasties.
11. The parties agree to the submission of a Joint Medical Exhibit.
12. The Department may take judicial notice of all official forms in its files, specifically, but not limited to the settlement agreements between the parties of June 3, 1994 and September 21, 1999.

FINDINGS OF FACT:

1. In the early 1980's claimant consulted with physicians about his obesity, requested gastric bypass surgery, and was judged to have been a candidate for that surgery for weight reduction. The medical records suggest that the surgery was not done at that time because his health insurer refused to authorize payment.
2. Claimant injured his knee while working as a correctional officer. According to a Spine Institute note, he slipped and fell on a wet floor at work on October 10, 1992. A University Orthopaedics note of July 1993 described the work-related accident as one that resulted from claimant's having twisted his knee when he squatted.

3. At the time of claimant's fall, his physicians described him as having morbid obesity with a weight of 400 pounds and height of 6 feet 8 inches.
4. After the work-related knee injury, Dr. Foerster in St. Albans performed a knee arthroscopy. During that procedure he found a lesion and full thickness degeneration and removed the cartilage. Claimant's pain, largely activity related, continued after the surgery. With the hampered physical activity, his weight increased further to 460 pounds.
5. On October 26, 1992, the physician who saw claimant at the Spine Institute diagnosed a medial collateral ligament strain, prescribed physical therapy, and predicted a rapid recovery.
6. In a July 22, 1993 office note, Dr. Robert Johnson at University Orthopaedics noted the difficulty claimant was having with his knee as a result of his obesity. For example, he was not recovering as expected after surgery because the exercise needed for the recovery of the knee required weight bearing that caused pain because of his heavy body weight. Dr. Johnson noted that every effort should be made to help him lose weight.
7. By December of 1993 the claimant and his physicians agreed that gastric bypass surgery, commonly called "stomach stapling" was the treatment of choice for his obesity. That treatment was expected to facilitate recovery of his knee injury. On December 21, 1993, Dr. Laurie Spaulding met with the claimant in her Obesity Clinic, which claimant testified is the Metabolic Clinic. The doctor determined that he was definitely a candidate for bariatric surgery. At that visit, Dr. Spaulding gave claimant a pamphlet, admitted as Claimant's Exhibit 1, that outlined the role of surgery, description of the two types of operations, possible risks, complications and expected outcomes of the surgery.
8. Early complications were listed as anastomotic leak, wound disruption, wound infection, pneumonia, pulmonary embolism, deep vein thrombosis, and death. Late complications were listed as vitamin deficiency, hair loss, staple line disruption, stomal stenosis, marginal ulcer, gallstones, and incisional hernia.
9. At the end of the Category entitled "What are the Expected Results?" is the statement, "When you do lose weight, it may be desirable at a later date to remove excess skin folds with plastic surgery."
10. In May 27, 1994 the claimant and the insurer, with their attorneys, entered into a Modified Form 14 Settlement agreement. That agreement specified that "the parties recognize that this is a disputed claim involving the appropriateness of the proposed gastric surgery" The defendant agreed to authorize payment for "the proposed gastric surgery and all associated testing, preparatory work, and post surgical treatment with the Metabolic Clinic associated with the Medical Center Hospital of Vermont, as well as a one time payment for costs and attorney fees. In addition, the defendant agreed to "continue to make all appropriate payments to claimant for workers' compensation benefits, permanent partial disability benefits, and ongoing medical benefits related to claimant's compensable injury."

11. By the terms of the 1994 agreement, the claimant agreed to "release defendant from any and all complications peculiar to or inherent in the particular proposed gastric surgery." He specifically exclude[d] from the release "any and all complications, which although relevant to gastric surgery, are also risks inherent in and common to other general surgical procedures." Finally, in the case of any future dispute "as to whether or not the particular resulting complication falls within the exclusion reserved by claimant in this clause, all such disputes shall be resolved by the opinion of the treating surgeon or other treating health care professional of the claimant." Because I conclude that the excess skin is not a "complication" as intended by the parties at the time they entered into the agreement, that section of the agreement is not determinative.
12. On June 24, 1994 Dr Spaulding performed the gastric bypass surgery. In her notes following the surgery, she specified that follow up care included a postoperative visit at three weeks, six weeks and twelve weeks, every three months for the first year, every six months for the second year, and every year thereafter to monitor any complications from the surgery with a surgeon trained in Bariatric surgery. In addition, he needed evaluations by a dietician and psychologist.
13. In 1995 because he had problems with skin irritation and dressing from excess abdominal skin, claimant had an abdominoplasty, which Dr. Spaulding described as essential. In 1998 he had redundant skin removed from his inner thigh because of chafing and irritation. After some controversy, the defendant paid for both procedures.
14. At the hearing, John Hoy, who adjusted this claim for the defendant, testified that he was involved in the modified Form 14 Settlement agreement. According to Mr. Hoy, the parties agreed that the insurer would pay only for the surgery itself. Nowhere in their contemplation, he explained, was the thought that the insurer would be responsible for subsequent cosmetic surgery. In his judgment, removal of redundant skin could not be characterized as post surgical treatment.
15. Introduced into evidence is a May 6, 1994 letter from claimant's attorney to the defense attorney which expressly states that "Mr. Porwitzky is prepared to limit the liability of the Department of Corrections for complications specific to the surgery." (emphasis in the original).
16. The claimant testified that the only complications not covered by the modified Form 14 agreement were those unique to the gastric bypass surgery, not those common to all surgical procedures. For example, he did not expect the carrier to cover vitamin deficiency, hair loss or staple line disruption, complications he characterized as specific to gastric bypass. But he expected the carrier to cover the common surgical complications of wound infection and deep venous thrombosis.
17. Dr. David Leitner is the plastic surgeon who removed extra skin in two procedures and who will perform the bilateral mammoplasties if approved. Dr. Leitner testified generally that by removing extra skin after gastric bypass surgery, he provides a psychological improvement to a patient who lost a great deal of weight. He testified further that extra skin in the breasts is an expected situation once somebody has had

gastric bypass surgery. In this case, he explained it was the claimant himself who requested the breast reduction surgery because of self-consciousness.

18. At his deposition, Dr. Leitner testified that he was not aware that claimant had received any psychiatric treatment since the 1984 surgery. In fact, claimant has elected not to see a counselor.
19. As a result of the bypass surgery, claimant lost 230 pounds.
20. Claimant produced a January 18, 1999 letter from Dr. Spaulding which states in its entirety: "In response to your letter of 12/30/98, I agree that the question of excess skin flaps would not be considered a complication of gastric bypass surgery."
21. At the hearing, Dr. Susan Hetman, an occupational health physician, testified that she reviewed claimant's medical records and photographs. In her opinion, the bilateral mammoplasties are not medically necessary. She testified that no adverse health effects would result were the surgery not performed. Although she conceded that in some instances cosmetic surgery would be considered medically necessary, she contrasted plastic surgery on one's face after a burn as medically necessary with the situation at issue in the instant case which she describes as a personal preference, not medical necessity.
22. No mental health professional has recommended the proposed surgery.

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, Morse Co.*, 123 Vt. 161 (1963).
2. The parties agree that the claim for gastric bypass surgery was disputed. The Modified Form 14 was a compromise that allowed the claimant to receive that surgery while limiting the liability of the carrier.
3. Prior to the hearing and over the employer's objections, the hearing officer refused to exclude Dr. Spaulding's pamphlet entitled "Surgery for Severe Obesity" because she found the modified Form 14's use of the term "complication" sufficiently ambiguous to justify the admissibility of extrinsic evidence. At the hearing, claimant relied on that pamphlet when he testified that the redundant skin was not a "complication" and therefore payment for its surgical removal is not precluded by the agreement.
4. Nothing in the medical records, in the testimony, or in the obesity booklet would support a conclusion that redundant skin is an immediate surgical "complication" of gastric bypass surgery. The early complications listed in the obesity brochure were all acute physiologic changes; the late ones were more chronic ones that required surgical treatment or medication. Nowhere is redundant skin listed as a complication. Therefore, to extent that the modified Form 14 relieved the carrier of liability for many of those complications, I agree that redundant skin was not covered by that part of the agreement.

5. However, the agreement provided other limitations. For example, it clearly and unambiguously provided that the "defendant will authorize payment for the proposed gastric surgery and all associated testing, preparatory work and post surgical treatment with the Metabolic Clinic associated with the Medical Center Hospital of Vermont."
6. The claimant has not proven that the proposed surgery is "post surgical treatment" as contemplated by the parties. The post surgical follow-up described in Dr. Spaulding's notes included evaluations by a dietician and psychologist; it did not include cosmetic surgery. And no psychologist has recommended the surgery. By limiting the treatment covered by the agreement to the Metabolic Clinic, the parties excluded treatment that would be provided in other settings by other specialists. No one asserts that Dr. Leitner's treatment, which is limited to plastic surgery, is within the Metabolic Clinic. It is not, therefore, "post surgical treatment" as that term was used in the agreement between the parties.
7. Clearly, the Form 14 agreement precludes coverage of the proposed surgery as evidenced by its express terms and obvious intent.
8. Furthermore, the claimant has not presented medical evidence to sustain his burden of proving the reasonableness of the surgery under 21 V.S.A. § 640. Because no physiologic justification has been advanced for the surgery, the clinical justification would have to be psychological. Claimant's personal belief and the speculation of his plastic surgeon are insufficient. Such a burden can be sustained only with credible testimony from a mental health professional, which claimant has not produced. See, *Lapan v. Berno's Inc.*, 137 Vt. 393 (1979) (expert testimony necessary to lay the foundation for an award).

ORDER:

Based on the foregoing Findings of Fact and Conclusions of Law, the claimant's request that the employer pay for bilateral reduction mammoplasties is hereby DENIED.

Dated at Montpelier, Vermont, this 22nd day of June 2000.

Tasha Wallis
Deputy Commissioner