STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

Michael Lappas	)	Opinion No. 55-03WC
	)	
	)	By: Margaret A. Mangan
v.	)	Hearing Officer
	)	
Stratton Mountain	)	For: Michael S. Bertrand
	)	Commissioner
	)	
	)	State File No. B-04361

Hearing held in Montpelier on September 17 and September 22, 2003
Record Closed on October 7, 2003

APPEARANCES:

Steven P. Robinson, Esq., for the Claimant
William J. Blake, Esq., for the Defendant

ISSUE:

Is the proposed posterior lumbar interbody fusion reasonable under 21 V.S.A. § 640(a)?

EXHIBITS:

Joint Exhibit I:	Medical Records
Claimant's Exhibit 1:	Curriculum Vitae of Ryan Scott Glasser, M.D.
Defendant's Exhibit A:	Videotape
Defendant's Exhibit B:	Curriculum of John Richard Cassidy, M.D.

FINDINGS OF FACT:

1. In 1988 claimant sustained a compensable work-related injury while employed as a golf professional at Stratton Mountain. Before that injury, he had had two back operations. Afterwards, he had another, at the level of L5-S1. His surgeon then told him there was nothing more to be done for him. He was placed at medical end result and received an award based on a Form 14, a settlement with medical benefits left open.

2. Sometime after the injury, claimant moved to Bredenton, Florida where he now lives. In the mid-1990s claimant gave up golf completely.

3. In 2001 claimant sought treatment from Dr. Ryan Glasser, a board certified neurosurgeon in Sarasota, for complaints of back and left leg pain. Based on an MRI that suggested a recurrent disc herniation, Dr. Glasser recommended a discectomy and posterior interbody fusion, which the carrier refused to cover. Since then, claimant has become dependent on Percocet and Soma, medications he takes for pain.

4. At the carrier's request, Dr. John Cassidy, also a neurosurgeon, examined claimant in September of 2002. Because he did not think the MRI films were clear enough, he ordered another set, which were taken in January 2003. Those films were negative for herniated disc or nerve root impingement. Either the herniation seen two years earlier reabsorbed or there never was one.

5. Based on the 2003 MRI, Dr. Glasser revised his surgical recommendation to eliminate the discectomy since there was no herniated disc, but to proceed with the fusion based on his opinion that the fusion would correct spinal instability.

6. Dr. Glasser predicts a 75% success rate with the surgery he proposes, measured by a meaningful diminution in back pain and the creation of long-term stability to an area where three prior surgeries have been performed. Claimant opted to proceed with the surgery, mindful of the risks and with the hope that the fusion would reduce his pain and break his current addiction to pain medication.

7. Conversely, Dr. Cassidy, for the defense, opined that a surgical fusion in this case is not reasonable because it would not help the claimant. He explained that a fusion is indicated when there is: 1) positive nerve impingement; 2) spinal instability defined by slippage of one vertebral body onto another; 3) presence of an infection; or a tumor. He noted that claimant's pain is back pain, not the radicular pain a fusion would relieve. Although there is a reference to instability in the medical records, there is not evidence of the slippage of one vertebra over the other, in the sense Dr. Cassidy uses the term "instability."

8. The employer offered a video surveillance of the claimant taken over six days. The tape shows the claimant getting in and out of a car, walking, smoking cigarettes outside, driving to and from work and standing without apparent difficulty.

9. Claimant submitted a request for costs totaling $1,693.37, which includes a $1,000 charge for expert testimony, and an attorney fee request based on 33.6 hours.

DISCUSSION

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 (1963).

2. The Workers' Compensation Act (Act) includes the requirement that employer furnish "reasonable surgical, medical and nursing services to an injured employee." 21 V.S.A. § 640(a).

3. "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 back symptoms and maintain [his] functional abilities." *Quinn v. Emery Worldwide* Opinion No. 29-00WC, Concl. ¶ 4 (2000).

4. Such a claim will not be defeated on a purely academic disagreement with a treating physician in a situation such as this where there are two equally reasonable courses.

5. In this case there are two well qualified, board certified neurosurgeons, one of whom has a more optimistic view for the proposed surgery than the other. Dr. Glasser has been treating claimant for more than two years; Dr. Cassidy had only a single interaction with him.

6. It is the long-standing practice to construe the Act liberally. *Close v. Superior Excavating Co.*, 166 Vt. 318, 324 (1997), citing *St. Paul Fire & Marine Ins. Co. v. Surdam*, 156 Vt. 585, 590 (1991); *Packett v. Moretown Creamery Co.*, 91 Vt. 97, 101 (1917). With such a construction and on the unique facts of this case, I accept the opinion of the treating physician, Dr. Glasser, based on his relationship with the claimant and expectation that a fusion will stabilize the claimant's spine and reduce his pain.

7. Because he has prevailed due to the efforts of his attorney and because the total number of hours worked, 33.6, is reasonable given the nature of the dispute, claimant is awarded a total attorney fee of $3,024.00. 21 V.S.A. § 678(a); WC Rule 10.000. However, the award of costs will be deferred until the claimant confirms that the expert fee request conforms to the Rule 40 fee schedule.

CONCLUSION AND ORDER:

Claimant has sustained his burden of proving that the proposed surgery is reasonable pursuant to 21 V.S.A. § 640 (a). Accordingly, he is awarded:

1. Benefits associated with the proposed surgery;
2. Attorney fees of $3,024.00.

Claimant has 30 days from the date this order is mailed to clarify the request for fees.

Dated at Montpelier, Vermont this 22nd day of December 2003.

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Michael S. Bertrand
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.