Labella, Iva

TREATMENT

Failure to obtain prior authorization

Proper and necessary medical and surgical services (RCW 51.36.010)

The nature of the treatment pursued and the reasonableness of the worker's doing so will be considered in determining whether the worker is entitled to benefits. Where worker knew surgery was not authorized, and that benefits had been suspended, Department properly denied responsibility for treatment benefits as well as denying award for time - loss compensation and/or permanent partial disability award arising from the surgery. **….*In re Iva Labella*, BIIA Dec., 89 3586 (1991)** [*Editor's Note*: *Cf. In re Arvid Anderson*, BIIA Dec., 65,170 (1986). *Compare In re Zbiegniew Krawiec*, BIIA Dec., 90 2281 (1991). The Board's decision was appealed to superior court under Spokane County Cause No. 91-2-04329-3.**]**

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: IVA J. LABELLA	**)**	**DOCKET NO. 89 3586**
	)	
CLAIM NO. T-087351	**)**	**DECISION AND ORDER**

APPEARANCES:

Claimant, Iva J. Labella, by
Maxey Law Offices, P.S., per
Dana C. Madsen

Employer, Central Valley School District No. 356, by
Lukins and Annis, per
Edgar L. Annan

This is an appeal filed by the claimant on August 23, 1989 from an order of the Department of Labor and Industries dated August 2, 1989 which denied responsibility for a C5-6 anterior fusion and discectomy performed on March 24, 1989 because: the surgery was not authorized by the self-insured employer; a second opinion was not obtained; and there was not proof the surgery was required as a result of the industrial injury of November 5, 1987. The August 2, 1989 order also denies all time loss compensation, treatment and permanent partial disability which resulted from the March 24, 1989 surgery. **AFFIRMED**.

DECISION

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on a timely Petition for Review filed by the claimant to a Proposed Decision and Order issued on January 24, 1991 in which the Department order was affirmed.

The Board reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed and said rulings are hereby affirmed.

The general nature and background of this appeal are as set forth in the Proposed Decision and Order and will be reiterated only briefly here. The issues on this appeal are whether the Department properly denied responsibility for Ms. Labella's March 24, 1989 cervical surgery because her physician failed to follow Department regulations governing authorization for such treatment; whether the treatment was medically necessary for Ms. Labella's condition arising from the industrial injury; and whether the Department properly denied Ms. Labella all time loss compensation, treatment and permanent partial disability which resulted from the March 24, 1989 surgery.

RCW 51.36.010 provides that:

> Upon the occurrence of any injury to a worker entitled to compensation under the provisions of this title, he .... shall receive proper and necessary medical and surgical services at the hands of a physician of his or her own choice ....(Emphasis added)

In order to insure that treatment recommended by a claimant's chosen physician meets the requirement that it be "proper and necessary", the Department of Labor and Industries promulgated regulations requiring that certain procedures be specifically authorized (WAC 296-20-03001) and supported by a consulting opinion from a "qualified doctor with experience and expertise in the subject" (WAC 296-20-045). Surgery on the cervical spine is one such procedure (WAC 296-20-03001(2)). It is clear from the record that Ms. Labella's attending neurosurgeon, Dr. Henry Gerber, performed an anterior cervical fusion and discectomy at C5-6 on the claimant without obtaining authorization and without providing the requisite second opinion. WAC 296-20-125 provides:

> All services rendered must be in accordance with the medical aid rules. The Department or self-insured employer may reject bills for services rendered in violation of these rules. The injured worker may not be billed for services rendered in violation of these rules.

Our industrial appeals judge correctly concluded that the Department properly denied financial responsibility for Dr. Gerber's services in connection with the surgery. However, he did not address the question of whether the surgery was medically necessary, assuming that the physician's failure to adhere to the Department's regulations operated to automatically deprive Ms. Labella of the right to time loss compensation, further treatment, and any future award of permanent partial disability associated with the surgery. The only regulation assessing penalties for failure to follow the medical aid rules is WAC 296-20-125 cited above. The only penalty recited in the regulation is addressed to the non-complying physician. By prohibiting the physician from billing the client for his services, the regulation insulates the claimant from any financial sanction imposed under the medical aid rules. Significantly, the sanction applies to the physician without reference to whether the services provided were, in fact, medically necessary.

There is no logical inference to be drawn from the language of the medical aid rules to support the conclusion that the claimant should be denied benefits which flow from proper and necessary medical treatment of an industrially related condition simply because her attending physician is subject to sanction under the medical aid rules. It is necessary, under these circumstances, to consider the nature of the treatment provided and the claimant's reasonableness in pursuing the treatment.

Ms. Labella suffered an industrial injury to her neck and back in March 1986 which lighted up pre-existing, asymptomatic degenerative disc disease of her cervical spine at the C5-6 level. Fourteen months after that injury, Dr. Henry Gerber determined that she was a candidate for cervical fusion of that interspace. Ms. Labella declined surgery and returned to work as a school bus driver. In the course of that employment, she suffered the industrial injury of November 5, 1987 giving rise to this claim, further aggravating her cervical spine condition.

In October 1988, the self-insured employer informed Ms. Labella, and her family practice physician, Dr. James Ayers, that medical benefits were terminated based on the results of panel examinations conducted in August and September of that year. Dr. H.G. Copsey, a neurologist, participated in an August 1988 panel examination which arrived at industrial injury related diagnoses of cervical and dorsolumbar strain and degenerative joint disease at C5-6 pre-existing, but temporarily aggravated by, the industrial injury. The examination revealed no objective findings surrounding the C5-6 area and no evidence of neurological damage at that site. He considered Ms. Labella's subjective responses on examination to be inconsistent with the level of objective findings. He found her condition to be medically fixed and stable, not requiring surgery or any other form of treatment.

Dr. John R. Clark, a neurologist, participated in panel examinations of Ms. Labella in February and September of 1988. He diagnosed a cervical strain related to the March 1986 injury and aggravated by the November 1987 injury. He saw evidence of degenerative disc disease at C5-6 and C6-7 which preexisted the industrial injury of March 1986 and was aggravated further by the November 1987 accident. He noted that there was significant narrowing of the joint space at C5-6 with osteophytic changes. However, Ms. Labella's neck was not unstable and MRI and CT scans did not, in his opinion, reveal any evidence of a disc rupture or nerve root compression. Ms. Labella displayed no muscle spasm of the neck or upper back.

At the September examination, Dr. Clark added the diagnosis of tension headaches related to the industrial injury. He did not relate the headaches to nerve root involvement at the site of the degenerative disc disease at C5-6 because the nerves which serve the head arise at the C3-4 level or higher. Nerve root encroachment at the C5-6 level would have given rise to pain along the lateral aspect of the arm and into the thumb. Ms. Labella's only arm complaints were in the fourth and fifth finger of the right hand, the result of an unrelated ulnar injury. He did not consider her a candidate for surgery.

Dr. Gerber disagreed with the panel examiners, relying on an apparently ambiguous CT scan performed on December 8, 1988. According to the radiologist who interpreted the films, the scan revealed "a question of a herniated disc" on the left side at C5-6. Dr. Gerber's own interpretation of the films was more conservative. He believed the scan revealed spondylosis, or degenerative disc disease. Gerber dep. at p.14. He concluded that surgery was the best option because Ms. Labella was having intractable pain, occasional muscle spasm and symptomatic degenerative disc disease. Gerber dep. at p.17. The findings on neurological examination were all within normal limits, with no evidence of nerve root involvement or encroachment of the spinal cord.

Dr. James E. Ayers, a general practitioner, who referred Ms. Labella to Dr. Gerber and followed her case both pre- and post-surgery after the referral, supported Dr. Gerber's conclusion. However, Dr. Ayers' testimony shows that he arrived at his understanding of Dr. Gerber's diagnosis and recommendations through statements made by the claimant. He testified that the "severity of symptoms and development of newer symptoms" made surgery urgent. He referenced general "symptoms suggesting nerve root irritation", but provided no testimony as to objective findings in support of that conclusion. In any event, Dr. Ayers hardly demonstrated expertise in the subject of spinal disorders when, on cross examination, he was unable to distinguish between spondylosis (degenerative disc disease) and spondylolisthesis (the slipping forward of one vertebra over another).

On March 24, 1989, without having obtained prior authorization and without having provided the self-insured employer with a second opinion from a qualified doctor with expertise and experience in the subject, Dr. Henry Gerber performed a C5-6 cervical anterior fusion and discectomy on Ms. Labella.

The medical testimony concerning Ms. Labella's physical condition causally related to the industrial injury of November 5, 1987 is essentially consistent. All of the physicians concluded that she suffered from degenerative disc disease at C5-6 which was aggravated by the November 5, 1987 industrial injury. They differ only on the question of whether surgical treatment was necessary for that condition. Although Dr. Gerber is Ms. Labella's attending physician and actually performed a cervical fusion on her on March 24, 1989, his testimony regarding the necessity for that surgery is not persuasive. The deference accorded the opinion of an attending physician under Groff v. Dep't of Labor & Indus., 65 Wn.2d 35 (1964) does not mean that his opinion regarding treatment must be accepted where that opinion lacks the support of objective medical data. Intractable pain is not an objective finding. Occasional muscle spasm and x-ray findings of degenerative disc disease do not

make a persuasive case for surgery absent objective findings of nerve root or spinal cord encroachment.

Six months passed between the last panel examination and the surgery. There is no testimony, even by Dr. Gerber, to show that there was any worsening of Ms. Labella's condition in terms of objective findings. Dr. Gerber asserts that he found intermittent muscle spasm, but this finding in the absence other corroborative objective findings, does not support radical invasive treatment such as surgery. Ms. Labella failed to carry the burden of proving by a preponderance of the evidence that the surgery was medically necessary as a result of the November 5, 1987 industrial injury.

Relying on the holding of In re Arvid Andersen, BIIA Dec., 65,170 (1986), one might argue that, even absent a showing that the surgery was proper and necessary for treatment of Ms. Labella's industrially related cervical condition, she should be entitled to benefits associated with her temporary and permanent residuals, if any, flowing from the surgery. The holding in Andersen, after all, is that the consequences of treatment for an industrial injury are part and parcel of the injury itself. In that case, the stress of undergoing authorized surgery for a cervical condition gave rise to cardiac complications requiring separate medical treatment. Had Ms. Labella been unaware that the surgery was not authorized and innocently relied on her physician's assertion that it was medically necessary, the situation might be likened to an instance of medical malpractice in the treatment of an industrial injury, certainly a covered circumstance under Andersen. Under the actual circumstances of this case, however, Anderson is distinguishable.

Ms. Labella was well aware that the surgery was not authorized. She knew that as of 1988 medical benefits were suspended. She knew that she was released for work following the panel examinations. She knew the self-insured employer had specifically informed Dr. Gerber that the cervical fusion and discectomy was not authorized. She personally contacted both the self-insured employer and the Department seeking authorization. She did not seek a second opinion in support of the surgery. She had available to her another source of insurance that paid for the surgery without the necessity of a second opinion and she opted to rely on that source rather than pursue a challenge of the self-insured employer's determination.

Given Ms. Labella's awareness of the situation, her election to proceed with surgery not objectively demonstrated to be proper and necessary for her industrial injury removes her from the realm of innocent reliance on her physician. By pursuing the unauthorized and unnecessary treatment under these circumstances, Ms. Labella broke the chain of causation leading from the industrial injury

to the benefits she seeks. The Department's determination to deny time-loss compensation, medical treatment and permanent partial disability arising from the March 24, 1989 surgery was correct.

We adopt from the Proposed Decision and Order Findings of Fact Nos. 1, 2 and 3. In addition, we make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

4. The cervical injuries sustained by Ms. Labella on November 5, 1987 in the course of her employment consist of a cervical strain and aggravation of pre-existing degenerative disc disease at C5-6 and C6-7.

5. The C5-6 anterior cervical fusion and discectomy performed on the claimant on March 24, 1989 was not medically necessary for treatment of her physical condition causally related to the November 5, 1987 industrial injury.

6. Any physical conditions arising from the C5-6 anterior cervical fusion and discectomy performed on Ms. Labella on March 24, 1989 are not causally related to the industrial injury, but are due solely to that unauthorized and medically unnecessary surgery.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and the subject matter to this appeal.

2. Neither the claimant nor her physician satisfied the requirements of WAC 296-20-03001, 296-20-045 and 296-20-051 before undergoing surgery for an anterior fusion and discectomy at C5-6 on March 24, 1989.

3. The C5-6 anterior cervical fusion performed on Ms. Labella on March 24, 1989 was not proper and necessary medical treatment related to her November 5, 1987 industrial injury, within the meaning of RWC 51.36.010.

4. The order of the Department of Labor and Industries dated August 2, 1989, which denied responsibility for the claimant's C5-6 anterior cervical fusion and discectomy and all time-loss compensation, medical treatment, and permanent partial disability resulting from the surgery, is correct and should be affirmed.

It is so ORDERED.

Dated this 20th day of August, 1991.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/
S. FREDERICK FELLER Chairperson

/s/
PHILLIP T. BORK Member