Krawiec, Zbiegniew

TREATMENT

Failure to obtain prior authorization

Proper and necessary medical and surgical services (RCW 51.36.010)

The Board will consider a worker's post-surgical improvement in determining whether treatment originally denied by the Department or self-insured employer was reasonable and necessary, despite the surgeon's failure to obtain prior authorization or second opinion. **….*In re Zbiegniew Krawiec*, BIIA Dec., 90 2281 (1991)** [dissent] [*Editor's Note*: *Compare In re Iva Labella*, BIIA Dec., 89 3586 (1991).]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: ZBIEGNIEW KRAWIEC	**)**	**DOCKET NO. 90 2281**
	)	
CLAIM NO. T-016522	**)**	**DECISION AND ORDER**

APPEARANCES:

Claimant, Zbiegniew Krawiec, by
Maxey Law Offices, per
Dana C. Madsen

Employer, Key Tronic Corporation, by
Lukins & Annis, per
Edgar L. Annan

This is an appeal filed by the claimant on April 30, 1990 from an order of the Department of Labor and Industries dated April 11, 1990 which determined that the claimant's industrially related condition was fixed and stable and denied the claimant's request for low back surgery. **REVERSED AND REMANDED.**

PROCEDURAL AND EVIDENTIARY MATTERS

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 May 7, 1991 in which the order of the Department dated April 11, 1990 was **AFFIRMED**.

The Board has reviewed the evidentiary rulings in the record and overrules the objection at p. 49, line 14 of the January 23, 1991 transcript of proceedings on the grounds that the employer's counsel introduced the subject of Mr. Krawiec's July 18, 1990 surgery during cross examination. With respect to the balance of evidentiary rulings, the Board finds that no prejudicial error was committed and said rulings are hereby affirmed.

ISSUE

As of April 11, 1990, was the claimant's industrially related condition fixed and stable such that low back surgery was medically unnecessary? Answer: No.

DISCUSSION

On April 20, 1987, Zbiegniew Krawiec experienced a low back injury while employed by Key Tronic Corporation. Approximately two months later, the Department of Labor and Industries issued an order allowing the claim for medical treatment and such other benefits as authorized by law.

On September 23, 1987, Mr. Krawiec underwent low back surgery. His surgeon, Dr. John Demakas, performed a laminectomy/discectomy at L4-5 on the left to repair what the doctor described

as a rather large disc rupture. Despite the surgery, Mr. Krawiec failed to improve as hoped and continued to complain of pain and numbness.

By March of 1989, Dr. Demakas felt there was evidence that Mr. Krawiec had a recurrent disc herniation and that a second low back surgery might be necessary. In October of 1989, he discussed scheduling the surgery with Mr. Krawiec. However, before scheduling could be completed, investigators for the employer produced surveillance videotapes of Mr. Krawiec which persuaded Dr. Demakas that he (Mr. Krawiec) had not been accurate about the symptoms reported. Dr. Demakas withdrew his recommendation for further surgery because of the discrepancies between Mr. Krawiec's claims of pain and physical limitation and his movements in the videotape.

In January of 1990, Mr. Krawiec saw Dr. James Williams, certified orthopedic surgeon, who independently concluded that Mr. Krawiec was a candidate for surgical exploration of the L4-5 interspace. Dr. Williams based his opinion on examination findings and on a recently performed myelogram, CT scan, and MRI study. Dr. Williams wrote the employer's service representative and explained that if Mr. Krawiec did not respond to conservative care surgical intervention would be indicated. However, the employer declined to authorize surgery. Thus, on April 11, 1990, the Department issued the order under appeal here denying the claimant's request for low back surgery.

On April 30, 1990, the claimant filed his appeal from the April 11, 1990 order with the Board of Industrial Insurance Appeals. Specifically, Mr. Krawiec asked that the Department be reversed and the second low back surgery be authorized.

On July 18, 1990, before the appeal could be resolved, Dr. Williams proceeded with Mr. Krawiec's second low back surgery. He did not obtain a further formal second opinion and did not secure prior authorization from the employer. Significantly, however, the surgery was successful. Dr. Williams found objective evidence of low back pathology including two disc fragments the size of the tip of a person's little finger. In his words, the amount of herniated disc material removed would be consistent with a great deal of pain. Additionally, Mr. Krawiec has reported some subsequent improvements in his complaints.

This case is presently before us, in part, because of Dr. Williams failure to secure a second opinion and authorization before proceeding with the July 18, 1990 surgery. As a starting point in our analysis, we recognize and affirm the positive public policy the Department of Labor and Industries serves in regulating surgeries. Although RCW 51.36.010 states that a worker shall receive proper and necessary medical services during the period of his or her disability, WAC 296-20-010002 defines

those health services that are medically necessary. That section states that health services are medically necessary which, in the opinion of the director are (a) proper and necessary for the diagnoses and curative or rehabilitative treatment of an accepted condition; and (b) reflective of accepted standards of good practice within the scope of the provider's license or certifications; and (c) not delivered primarily for the convenience of the claimant, the claimant's attending doctor, or any other provider; and (d) provided at the least cost and in the least intensive setting of care consistent with the other provisions of this definition.

The Washington Administrative Code is reasonably clear that a physician shall obtain authorization before proceeding with surgery. WAC 296-20-03001(2) states, in relevant part,

> The Department may designate those inpatient hospital admissions that require prior authorization.

Similarly, WAC 296-20-03001(15) states,

> Where a worker has a medical condition which necessitates a hospital admission, prior approval of the Department or self-insurer must be obtained.

As our hearings judge ably pointed out, the Washington Administrative Code is also clear that a physician shall obtain a concurring opinion before proceeding with surgery. Restated, the decision to proceed with surgery must be supported by a consulting opinion from a qualified doctor with experience and expertise on the subject. WAC 296-20-045. Surgeries requiring second opinions include non-emergent back surgery (WAC 296-20-045(1), repeat non-emergent major surgery (WAC 296-20-045(2), and non-emergent surgery on patients with serious emotional or social problems (WAC 296-20-045(3).

However, this analysis is not dispositive of the present appeal. Even as we acknowledge the above sections, we recognize a tension in the law. RCW 51.12.010 states,

> This title shall be liberally construed for the purpose of reducing to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment.

In Gaines v. Dep't of Labor & Indus., 1 Wash.App. 547, 552 (1969) the court wrote,

> The entire statute shall be liberally construed to advance the remedy provided by the Act . . . . to conform to the spirit as well as the letter of the Act . . . . and that any doubt as to the meaning of the statute should be resolved in favor of the claimant for whose benefits the Act was passed.

Id. 552.

And, our Supreme Court wrote in Sacred Heart Medical Center v. Carrado, 92 Wn.2d 631 (1975),

> It must be kept in mind that the Industrial Insurance Act, while it changes the common law, is remedial in nature and is to be liberally applied to achieve its purpose of providing compensation to all covered persons injured in their employment.

Id. 635.

In light of the above, we find it to be of questionable value to review the appropriateness of a successful surgery solely in terms of whether a physician obtained prior "authorization" or prior "concurring surgical opinion".

Professor Larson has observed, difficult questions can arise when there is a difference of opinion about treatment, as in the situation where an employer's doctor recommends conservative measures while the injured worker's doctor advises surgery. Professor Larson noted that one way to settle this kind of controversy is to let the result turn on whose diagnoses proved to be right. A. Larson, The Law of Workmen's Compensation, § 61.12(e), at 10-707.

In the California case of McCoy v. Industrial Accident Commission, the employer had discontinued medical treatment on the advice of a physician. The claimant went to her own doctor who diagnosed a possible ruptured disc. The diagnosis proved to be correct after surgery. The claimant was held entitled to be reimbursed for the self-procured treatment, since the employer had denied liability for further treatment, and the claimant was not required to provide the employer with another opportunity to provide surgery after the diagnoses made by her doctor. McCoy v. Industrial Accident Commission, 64 Cal.2d 82 (1966). Our neighboring state of Oregon has decided this issue in a similar manner. There, a claimant had surgery despite a preoperative disagreement about the claimant's need for such. The surgeon, testifying to the claimant's improvement after the surgery, reported that the operation had been necessary to remove the claimant's constant pain. In affirming medical benefits for the surgery, the court held that the Board properly considered the claimant's post-surgical improvement in determining whether the treatment was reasonable and necessary. Linn Care Center v. Cannon, 74 Or.App. 707; 704 P.2d 539 (1985).

A review of the evidence in this case indicates that Dr. Williams' testimony was uncontroverted concerning the findings established by surgery. Specifically, Dr. Williams removed two large disc fragments from the L4-5 disc which would be consistent with Mr. Krawiec experiencing a great deal of pain. Regardless of how strong the opinions might be from the other physicians who testified, Dr.

Williams had the benefit of first hand observation of Mr. Krawiec's herniated disc. Equally important, Mr. Krawiec said his condition was improved by the surgery.

We are aware of the disputed credibility of Mr. Krawiec's reports of his physical condition. In light of the findings during surgery, he had a physical basis for some pain complaints even though others may have been exaggerated. Likewise, the removal of the disc fragments provides a basis to lend some credibility to his report of improvement.

We will act with the advantage of hindsight and allow this surgery where the claimant has proven by a preponderance of the credible medical evidence, some of it based on objective findings, that the surgery was medically necessary. We recognize that the Department of Labor and Industries, however careful, deliberate, and well intentioned, will err from time to time in evaluating a given claimant's need for surgery. To fail to provide recourse for the claimant and physician who proceed with a successful surgery, despite an absence of authorization and/or a consulting opinion, is to place simplistic, mechanical adherence to the medical aid rules above the requirement that the Industrial Insurance Act be liberally construed. Such a purely mechanical approach is ill founded and will not be followed here.

In this case, Dr. Williams and Mr. Krawiec took a chance. Had Dr. Williams failed to find a surgically correctable lesion causally related to the industrial injury or had he failed to improve Mr. Krawiec's industrially related condition, there is little question but that the allowance of the surgery would be denied. Our decision here is not an endorsement given to physicians to proceed with surgery based on nothing more than medical whimsy and a hope of good results. To the contrary, our decision is limited in scope to the facts of this particular case!

We wish, again, to note that we have reviewed the exhibits presented and are well aware of the discrepancies between Mr. Krawiec's physical complaints and his demonstrated abilities. Mr. Krawiec has made an effort to embellish his symptoms to his attending physicians and others. We understand the reticence if Dr. Demakas in proceeding with surgery where his confidence in the outcome was shaken. However, the fact that Mr. Krawiec embellished his symptoms does not defeat the fact that some of his complaints were evidently genuine. Mr. Krawiec's surgery of July 18, 1990 objectively demonstrated a basis for his complaints that cannot be ignored. We again recall that the Act is to be construed to reduce to a minimum the suffering and economic loss arising from industrial injuries. Here the statutory mandate of liberal construction requires a decision in Mr. Krawiec's behalf.

Findings of Fact Nos. 1, 2, 3, and 4 as stated in the Proposed Decision and Order are hereby adopted as this Board's findings. Likewise, Conclusion of Law No. 1 as stated in the Proposed Decision and Order is adopted. In addition, we make the following findings and conclusions:

FINDINGS OF FACT

5. The exploration of the claimant's lumbosacral spine at L4-5 on July 18, 1990 was medically necessary for treatment of the claimant's industrially related condition.

CONCLUSIONS OF LAW

2. As of April 11, 1990, the claimant's industrially related condition was not fixed and stable within the meaning of the Industrial insurance Act.

3. The re-exploration of the herniated disc at L4-5 performed on July 18, 1990 was proper and necessary medical treatment within the meaning of RCW 51.36.010.

4. The order of the Department of Labor and Industries dated April 11, 1990 which determined that the claimant's condition was fixed and stable and which further denied his request for low back surgery, is incorrect and is reversed and this matter is remanded to the Department of Labor and Industries with directions to issue an order determining that the claimant's condition was not fixed and stable and that further surgery to the claimant's lumbosacral spine should be authorized and appropriate benefits shown to be causally related to said surgery be allowed and paid.

It is so ORDERED.

Dated this 17th day of October, 1991.

BOARD OF INDUSTRIAL INSURANCE APPEAL

/s/
S. FREDERICK FELLER Chairperson

/s/
FRANK E. FENNERTY, JR. Member

DISSENT

I am not at all persuaded to disturb the thorough and thoughtful Proposed Decision and Order. I would adopt all the reasoning therein, as well as the proposed findings and conclusions.

While it may be proper, in appropriate cases, to utilize hindsight in determining whether invasive surgery such as occurred here should be considered as proper and necessary, I am nowhere near as persuaded, as the majority seems to be, that this surgery was "successful" in improving

claimant's low back condition, in light of the claimant's extreme functional component and obvious prior exaggerations of subjective complaints. Our industrial appeals judge, based on observations of claimant's demeanor, was clearly not persuaded by Mr. Krawiec's off-hand remark that he was "glad" he had the controversial surgery. Nor am I. That does not translate into a determination that the surgery had proven to be necessary and helpful.

I would affirm the Department order of April 11, 1990.

Dated this 17th day of October, 1991.

/s/
PHILLIP T. BORK Member