

VIRGINIA:  
IN THE WORKERS' COMPENSATION COMMISSION

RONALD R. WISNIEWSKI, Claimant

Opinion by

JAMES

Chairman

v. VWC File No. 133-33-31

FAIRFAX COUNTY SCHOOL BOARD, Employer  
SELF INSURED

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REVIEW on the record before the Full Commission at  
Richmond, Virginia.

This case comes at the request of the claimant for Review  
of the December 12, 1991 Opinion of the Deputy Commissioner  
suspending compensation benefits effective June 23, 1991 for  
refusing to undergo surgery offered by the defendants.

This fifty-five year old art teacher fell backwards from  
a stool on January 6, 1988 causing injury to his right foot,  
lower left back and left hip. He was earning a stipulated  
average weekly wage of \$1,023.85. The employer accepted the  
case as compensable and paid claimant for total work  
incapacity for the period January 7th through January 24, 1988  
and from February 3, 1988 through June 23, 1991 at a rate of

\$344.00.

The sole issue before the Commission on Review is whether the evidence supports a suspension of weekly benefits effective June 23, 1991 for unjustified refusal to undergo surgery.

At the hearing on November 3, 1991, the claimant defended the case on the grounds there was no unjustified refusal of surgery for three reasons:

1. The difference of opinions between the treating physicians;
2. That the possibility that he could in fact be worsened by surgery;
3. That even with the best case scenario he would be unable to return to his regular employment.

The claimant, who was called by employer's counsel as an adverse witness, testified he was initially treated for his herniated disk by Dr. Robert Gaughan, Orthopedist. He was then referred by Dr. Gaughan to Dr. Terry Watkin, a neurologist. He was then referred by Dr. Watkin to Dr. James Preuss, a neurosurgeon. Subsequent to that, he was referred to Dr. Sam Wiesel, for a one-time examination. Claimant testified he had also seen Dr. Joyce Paulk, a chiropractor and had continued to see Dr. Preuss from time to time.

Dr. Preuss recommended a hemilaminectomy with a discectomy and asked claimant to consider it. Although claimant states Dr. Preuss only suggested the hemilaminectomy

and discectomy as a "possibility," in his January 25, 1990 report, Dr. Preuss stated:

Various alternatives were discussed with the patient, at this point. He could, of course, continue living with the pain, as he has been doing, but I think that this is not feasible, since he finds he cannot carry on with normal activity or do his work. Other measures: Physical therapy, steroid injections, I think, would not be of any benefit, considering the length of time that has been involved, and the fact that therapy has already been tried. We discussed the various aspects of surgery, hemilaminectomy and discectomy, Chymopapain injection, percutaneous discectomy, and the pros and cons of each. I would favor a hemilaminectomy, with discectomy.

Also, in his January 11, 1990 report, Dr. Watkin reported:

Today, I performed an EMG on Ronald Wisniewski which was consistent with a chronic right S1 radiculopathy. His repeat MRI revealed no interval change from his previous one with degeneration at L5-S1 and a small subligamentous herniation of nuclear material that flattens the S1 root sleeve on the left. Therefore, I think he really has a fixed anatomic lesion and short of decompression, nothing is going to help him especially with him being so far out and having gone through a long course of conservative therapy. To this end, I've referred him to one of our neurosurgeons for further evaluation.

Claimant admitted he had not had the steroid injections or the myelogram which Dr. Preuss recommended. He further stated he had refused the surgery because the doctor could not

guarantee it would be one-hundred percent successful. Claimant further admitted that Dr. Preuss told him there was an eighty-percent chance if he did have the surgery that it would be successful and he would be able to return to his job as an art teacher. However, he does not want to have the surgery unless it's guaranteed one-hundred percent. Instead, he prefers to remain in chiropractic treatment even though he is not getting better and the treatment is only "maintaining him on a plateau." He further admitted he has discontinued many of his previous activities such as golf, tennis, gardening and mowing. He stated he has pain every day, uses a heating pad, sits in a recliner, does not walk or carry anything and has pain with driving. He further stated he is not able to work and even though he has tried working twice, he couldn't perform his previous activities. Finally, he agreed he had accepted the fact that the chiropractic treatment he is receiving now will never restore his ability to work.

Under questioning by his counsel, claimant described his previous duties before his injury and stated he would have to lift in excess of one-hundred pounds on a daily basis. He also stated his chiropractor, Dr. Paulk, had recommended against the surgery. Claimant stated that surgery was only

one of the options Dr. Preuss had suggested and that he suggested as one possibility to stay under the care of Dr. Paul and be "maintained," and he chose that option.

When asked about his visit with Dr. Wiesel to whom he was sent by the employer, claimant stated the doctor only spent two or three minutes with him. Under re-direct by employer's counsel, he reiterated he had told Dr. Preuss more than once he did not want to have the surgery since he did not want to be among the twenty percent of the population who had such surgery and got worse.

In reviewing the medical, we note that not only has Dr. Preuss recommended surgery, but he has suggested therapeutic steroid blocks as an alternative on July 12, 1990. However, claimant has also refused that. As indicated in his July 25, 1990 report, Dr. Preuss states that claimant will not get better without the surgery. He states:

The patient does not want any surgery. His alternatives, therefore, are just to live with the pain, to continue physical therapy, and also give some consideration to a therapeutic epidural steroid block. In view of the long-standing nature of his symptoms and failure to improve with the treatments that he's had in the past, I think it's likely that the present symptoms will continue for an indefinite period of time. With the degree of limitation that he reports, I think it's unlikely that he could return to any type of meaningful employment at this time. The patient will

continue follow up as necessary with Dr. Watkin and Dr. Paulk, He'll return to see me only on a prn basis.

Code Section 65.1-88 (now § 65.2-603) penalizes an employee who unjustifiably refuses reasonable and necessary medical treatment by suspension of compensation benefits for so long a period of time as the unjustified refusal continues.

The Deputy Commissioner, upon considering the testimony of the claimant and the statements of the physicians in this case, suspended compensation benefits effective June 23, 1991 due to the claimant's unjustified refusal of surgery which was recommended by Drs. Watkin and Preuss.

At the hearing, claimant testified that Dr. Preuss had not guaranteed him the surgery would be one-hundred percent successful and that he would only say there was an eighty percent chance the surgery would be successful. He does not want to be among the twenty percent who has the surgery and gets worse. Claimant prefers to remain under treatment with Dr. Paulk, the chiropractor, even though such treatment is only maintaining him and he is not able to return to his employment and has had to curtail or discontinue many of his previous activities.

We do not find a difference in the medical opinions as to the need for surgery. It is true that Dr. Paulk wishes to

continue maintenance-type chiropractic treatment which she has been performing since September 1988, but she does not expect any alleviation of the claimant's problem or improvement in his productivity. There is always some degree of risk in surgery. We agree with the finding of the Deputy Commissioner that the medical evidence does not have to establish that before surgery can be found reasonable, the surgeon must be able to state it will allow an employee to return to his regular employment. Certainly, the Commission will not order surgery, but we cannot order the employer or carrier to continue payments for disability during the time claimant elects not to accept the only mode of treatment which will allow him to return to productive employment.

After careful consideration of the entire record, we agree with the finding of the Deputy Commissioner that the claimant has not provided reasonable justification for refusal of surgery in this case. The Opinion of the Deputy Commissioner suspending compensation benefits on the ground of unjustified refusal of medical care is AFFIRMED.

This case is removed from the Review Docket.