COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 013165-96**

Robert J. Smith	Employee
Kingston Oil and Gas	Employer
Great American Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Wilson, McCarthy & Smith)

APPEARANCES
Juliane Soprano, Esq., for the employee
Mary Ann Calnan, Esq., for the insurer

WILSON, J. The insurer appeals from a decision in which the administrative judge denied its complaint to modify or discontinue the employee's weekly benefits for total and temporary incapacity, based on her finding that the employee's refusal to undergo cervical disc surgery was not unreasonable. Because there are sufficient findings and evidence to support the judge's conclusion, we affirm the decision.

Mr. Smith, forty-five years old at the time of hearing, worked as a boiler technician for this employer for approximately eight years. On March 11, 1996, he injured his neck and low back while lifting a seven hundred pound boiler. The insurer accepted liability, paying weekly benefits pursuant to §34 from the date of injury. (Dec. 2, 3.)

The employee initially sought medical treatment with his internist, who performed diagnostic tests and referred him to a neurosurgeon. He also treated with an orthopedic surgeon. He next consulted a second neurosurgeon, Dr. Blume, who ordered extensive diagnostic testing and recommended cervical disc surgery in February 1997. As a result of discussion with the neurosurgeon about surgery and possible complications, the

employee became extremely fearful and decided not to undergo the surgical procedure.[1] Although Mr. Smith is in a great deal of discomfort and is highly restricted in his activities, he has had no further medical treatment. (Dec. 3-4.)

The insurer filed a complaint to modify or discontinue the employee's benefits. Following a § 10A conference denial of that request, the insurer appealed to a hearing de novo. Pursuant to § 11A of the Act, the employee was examined by Dr. Richard Seibert. He concurred with Dr. Blume's diagnosis and recommendation of surgery on the employee's C5-6 midline disc herniation, which was impinging on his spinal cord. Dr. Seibert opined that, while there was a high probability of surgical success, in the range of ninety to ninety-five percent, successful surgery would still leave the employee restricted. In Dr. Seibert's opinion, however, the possible complications included death, quadriplegia, significant blood loss, infection, nerve root injury, esophageal perforation, anesthesia complications, cerebral-spinal fluid leak and recurrent laryngeal nerve injury. The § 11A examiner also stated that he was unaware of any discussions between Dr. Blume and the employee regarding possible surgical complications and did not recall having a conversation himself with the employee about possible surgical complications. Regarding physical disability, Dr. Seibert opined that the employee has no present physical capacity to engage in work and that without surgical intervention he is presently at a medical end result. (Dec. 5-7.) As neither party moved to submit additional medical evidence, Dr. Seibert's report and deposition comprise the sole medical testimony.

The administrative judge concluded that the employee is totally incapacitated and that his decision to forego surgery is not unreasonable "given that the Employee is genuinely fearful of having surgery as a result of his having been informed of the potential complications which are undeniably serious." (Dec. 8.) The judge stated further:

[1] We note that the employee testified that Dr. Blume couldn't be sure of the outcome, there were risks of paralysis, loss of spinal fluid and voice, cardiac arrest, stroke or permanent nerve damage, and the surgery would require anesthesia. (Tr. 28-31.)

> I find, based upon the totality of the circumstances in this matter, given the undisputed medical testimony regarding potential problems if the surgery were to be unsuccessful, (notwithstanding the Impartial's medical opinion that the surgery was highly likely to be successful), that this particular Employee has the right to decline this particular surgery, at this particular time, and maintain his workers' compensation benefits."

(Dec. 9.)

The insurer asserts on appeal that the employee's refusal to undergo surgery was unreasonable due to the high likelihood of success and, therefore, the hearing judge should have assigned an earning capacity consistent with the restrictions that Dr. Seibert opined would remain after surgery.

In our view, Massachusetts case law supports the conclusion of the administrative judge. In Snook's Case, 264 Mass. 92 (1928), the Supreme Judicial Court declined to disturb the conclusion of the fact finder that the employee's refusal to undergo knee surgery was not unreasonable. Two experts testified that the probable outcome of the surgery, while uncertain, would be beneficial but that the contemplated surgery was major. The Court stated that a person entitled to workers' compensation incapacity benefits cannot claim those benefits if the incapacity could be lessened by medical or surgical intervention *where such intervention is not attended with serious risk to life or member and if a beneficial outcome is reasonably expected*. "The test is not his willingness to submit to operation, but his right to guard life and limb from unreasonable peril." Id. at 93. The Court went on to state that the assessment of risk and benefit is generally a question of fact and that as a matter of law the Court could not say that substantial gain would result from the proposed surgery. Id. at 94.

In Burns' Case, 298 Mass. 78 (1937), the fact finder denied the insurer's request to discontinue the employee's weekly compensation. The insurer's complaint was based on the employee's refusal to undergo the amputation of his small finger, which became deformed as a result of his industrial injury and interfered with the function of his remaining fingers. Expert medical evidence was presented showing that removal of the small finger would render his adjacent ring finger one-half to two-thirds normal. In

upholding the fact finder's conclusion that the employee's refusal to undergo operation was reasonable the Court stated:

> Commonly, refusal of a surgical operation is deemed unreasonable, if the operation involves no substantial danger to life or health and no extraordinary suffering, and if it fairly appears that substantial gain will result from submitting to it. If, however, the operation is a serious one and the benefit problematical, refusal may be found not unreasonable, even though medical opinion may, on the whole, favor the attempt.

Id.at 79. Without addressing any risk factors involved, the Court upheld the finding below that the employee's refusal was reasonable, as the potential for substantial benefit from the proposed surgery was sufficiently doubtful. Id. at 80.

In the present case, the administrative judge emphasized the impartial examiner's testimony and made the following explicit findings as to the risks and the potential benefits of the proposed surgery:

4. The impartial opined . . . that the complications attendant to the particular surgery under discussion include:
   a. the worst scenario is death
   b. quadriplegia
   c. significant blood loss
   d. infection
   e. injury to a nerve root
   f. perforation of the esophagus
   g. complications related to anesthesia
   h. cerebral-spinal fluid leak
   i. injury to the recurrent laryngeal nerve
5. The impartial described the actual surgical procedure at great length on pages 18 to 22. The surgery requires that the surgeon take an anterior approach to the cervical spine.

   > You actually plane between the esophagus and the trachea, the windpipe medially, and the common carotid artery laterally, and put in self retaining retractors to move the structures out of the way exposing the anterior aspect of the spine.

   This portion of the Impartial's thorough four page description of the recommended surgery is highlighted because it comports with the Employee's credible assertion that he has particular fears about surgery in which a surgeon enters his spine through his neck.

5. (sic) The Impartial notes in his report that the Employee revealed to him that the Employee's father had surgery on his lumbar spine and is in a wheelchair.
6. The Impartial opined that successful surgery would leave the Employee with fewer restrictions but not restriction free.

(Dec. 6-7.) Although the judge maintained perhaps undue focus on the employee's fears, rather than the legal standard to be met in an analysis of unreasonable refusal of surgery, see Snook's Case, supra at 93, the above findings as well as the findings on the employee's discussion of risks with Dr. Blume clearly illustrate the rational basis for those fears and lend ample support to her final conclusion. We affirm the decision.

The insurer shall pay employee counsel a fee of $1,193.20 under §13(A)(6).

So ordered.

Sara Holmes Wilson
Administrative Law Judge

Filed: June 24, 1999

William A. McCarthy
Administrative Law Judge

Suzanne E.K. Smith
Administrative Law Judge