

In the Managed Care of
Douglas H. Brown, Claimant
Contested Case No: 07-044H
PROPOSED & FINAL ORDER

July 19, 2007

DOUGLAS H. BROWN, Petitioner
SAIF CORPORATION, Respondent

Before Jill M. Riechers, Administrative Law Judge

The hearing convened on June 19, 2007 before Administrative Law Judge Jill M. Riechers in Bend, Oregon. Claimant was present and represented by Glen J. Lasken. The employer, Golden Harvest Farms, and its insurer, SAIF Corporation, were represented by Thomas A. Sieg. Chae Ha, M.D., Oregon Health Systems (“OHS”) and the Workers’ Compensation Division (“WCD”) Tech Coordinator did not appear, nor did any representative appear on their behalf.

Claimant timely filed a request for hearing challenging the Administrative Order issued by the WCD, Case Number MTX 07-012, issued March 2, 2007. (Exs 106, 107; agency file). On March 20, 2007, the WCD referred the request to the Workers’ Compensation Board for hearing, under ORS 656.704(2)(a) and OAR 436-001-0019. The WCD provided an exhibit list to the parties and to the Board on April 3, 2007, consisting of Exhibits 1 through 109. Exhibits 1 through 109 were admitted at hearing.

ISSUE

Claimant contests the March 2, 2007 Administrative Order, MTX 07-012, which concluded that surgical procedures proposed by Dr. Ha were not appropriate for claimant’s compensable condition, and that, if provided, SAIF Corporation would not be liable.

FINDINGS OF FACT

The Findings of Fact in the Administrative Order beginning on page one and continuing through page seven, until the Conclusion and Opinion section, are hereby incorporated into this Proposed and Final Order by reference. (Ex 106-2 – -7). See *Liberty Northwest Ins. Corp. v Kraft*, 205 Or App 59, 62-63 (2006) (“Nothing in our understanding of ‘substantial evidence’ review comports with an adjudicator rendering findings of fact.”)

CONCLUSIONS OF LAW AND OPINION

Claimant asserts that the Administrative Order is not supported by substantial evidence. He asks that the Order be set aside, and that the proposed surgery be approved. Employer/SAIF maintain that the Administrative Order is supported by substantial evidence, and consequently, must be affirmed.

The accepted condition is a left L5-S1 disc herniation. On April 27, 2005, Kent Yundt,

M.D. performed a left L5-S1 micro lumbar discectomy. An MRI performed August 19, 2005 was interpreted as showing satisfactory postoperative findings at the lumbosacral junction from the previous left discectomy. There were no findings of recurrent lower lumbar disc herniation or postoperative spondylodiscitis. Mild degenerative changes were present at L3-4 and L4-5 without focal anterior extradural defect.

On February 2, 2006, Dr. Ha requested authorization for the surgery at issue in this matter, L5-S1 posterior instrumentation and fusion, lumbar decompression (foramenotomy), iliac crest bone graft and transforaminal lumbar interbody fusion (TLIF). Dr. Ha noted that claimant continued to have back pain without radiculopathy on April 27, 2006. Physical examination revealed intact sensation, motor strength and reflexes. Dr. Ha opined that claimant was having discogenic pain, most likely from L5-S1, but a discogram showed claimant was also having pain at L4-5. Dr. Ha recommended an L4-5 and L5-S1 fusion without decompression, but a transforaminal lumbar interbody graft at L5-S1.

The managed care organization (“MCO”) involved in this case, OHS, notified Dr. Ha that the proposed surgery was approved as medically necessary on May 22, 2006. SAIF appealed that determination. The OHS medical review committee met on July 11, 2006 and voted unanimously to overturn the approval of the pre-certification for the surgical procedure proposed by Dr. Ha. This committee consisted of three board-certified orthopedic surgeons, two board-certified spine surgeons and one board-certified physiatrist.

The committee found that claimant’s clinical findings did not match OHS’s evidence-based guidelines for lumbar fusion. These guidelines stated that there needed to be evidence of significant degenerative disc disease at one or more levels. Particularly significant findings included 50 percent loss of disc height over what would be normal for the particular disc and/or modic endplate changes on MRI. Neither of these findings was observed at L4-5 or L5-S1. Further, the discogram had demonstrated three levels of spondylosis, and the committee believed there was a high likelihood of failure to relieve pain as a result of the proposed fusion, given the fact that the L3-4 level already demonstrated degenerative disease. The committee also noted that claimant was not a good candidate for fusion based on the fact that he was described as obese in several clinical notes.

Dr. Ha stated on September 22, 2006 that he thought claimant suffered from two level disease although the MRI demonstrated three level disease. While he agreed that significant findings included loss of disc height and/or modic endplate changes, he believed there were other factors to consider, including hydration of the disc, presence of annular tears and/or instability.

On December 11, 2006, Dr. Ha stated that claimant was suffering from disc degeneration at L4-5 and L5-S1, producing claimant’s back pain. He added that the requested surgery was meant to treat the L4-5 and L5-S1 disc degeneration.

On February 15, 2007, John Ballard, M.D., reviewed the medical record at the request of the Director. Dr. Ballard did not believe that claimant had clinical evidence consistent with indications for surgery, noting that the MRI showed no collapse of disc height and no degenerative changes in the disc. Claimant had a normal-appearing disc even though he had a

positive discogram. He did not believe there was any indication to do a fusion on a disc that appeared normal on MRI and had no evidence of collapse or degenerative changes.

Daphne Girod, R.N., the medical reviewer who reviewed the case on behalf of the WCD, found Dr. Ballard's opinion well-reasoned and persuasive, and supported by the decision of the OHS medical review committee. Therefore, the Director concluded that the proposed surgical procedures were not appropriate.

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OAR 436-001-0225(2) provides:

In medical service and medical treatment disputes under ORS 656.245, 656.247(3)(a), and 656.327, and managed care disputes under ORS 656.260(16), the administrative law judge may modify the director's order only if it is not supported by substantial evidence in the record or if it reflects an error of law. New medical evidence or issues may not be admitted or considered.

Substantial evidence exists to support a finding of fact when the record, viewed as a whole, would permit a reasonable person to make that finding. ORS 183.482(8)(c). Under "substantial evidence" review, the reviewing tribunal "looks at the whole record with respect to the issue being decided, rather than at one piece of evidence in isolation. If an agency's finding is reasonable, keeping in mind the evidence against the finding as well as the evidence supporting it, there is substantial evidence. *Kraft*, 205 Or App at 62, citing *Armstrong v. Asten-Hill Co.*, 90 Or App 200, 206 (1988).

In looking at the record, including the opinions of Dr. Ha, Dr. Ballard, the OHS medical review committee and the findings set forth in the August 19, 2005 MRI report, I find there is substantial evidence to support the decision of the Director in this case. Dr. Ha did not dispute the conclusions of the OHS committee that significant findings upon which to base a decision to perform the proposed procedures would include loss of disc height and/or modic endplate changes. No loss of disc height or modic endplate changes are documented.

Dr. Ha also stated there were other factors to consider, including hydration of the disc, presence of annular tears and/or instability. Dr. Ha, on December 11, 2006, stated that the surgical request was meant to treat L4-5 and L5-S1 disc degeneration. Thus, Dr. Ha himself did not identify any of the additional findings he stated would be suggestive of the need for surgery, including hydration of the disc, presence of annular tears and/or instability, in his argument in favor of surgery.

Dr. Ballard, after reviewing all of the evidence, concluded that the MRI showed no collapse of disc height or other indications for surgery. Dr. Ballard did not believe there was any indication to perform fusion on a disc that appeared normal on MRI without evidence of collapse or degenerative changes.

Considering the evidence, as a whole, the WCD's finding and conclusion that the proposed surgery was not appropriate was reasonable. I find that substantial evidence supports

the findings and conclusions set forth in the Administrative Order.

PROPOSED AND FINAL ORDER

IT IS THEREFORE ORDERED that the Workers' Compensation Division's Administrative Order No. MTX 07-012, issued March 2, 2007, is affirmed.