

In the ORS 656.327 Medical Treatment Dispute of

**Thomas L. Bair, Claimant**

Contested Case No: 10-058H

**PROPOSED & FINAL ORDER**

September 20, 2010

THOMAS L. BAIR, Petitioner

SAIF CORPORATION, Respondent

Before Keith Kekauoha, Administrative Law Judge

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Hearing was scheduled for July 13, 2010 before Administrative Law Judge (ALJ) Keith Kekauoha. The parties agreed to submit this matter on the documentary record, in lieu of personally appearing at hearing. Claimant is represented by his attorney, Jeffrey Ratliff. The employer, Michael A. Becker General Contractor, and its insurer, SAIF Corporation, are represented by their attorney, Jeff Gerner. Exhibits 1-97 were admitted into evidence. Claimant's Proposed Exhibit 98 was excluded.<sup>1</sup> After receipt of written closing arguments and claimant's waiver of a reply argument, the record closed on August 23, 2010.

**ISSUE**

Medical Treatment Dispute. Claimant requested a hearing on the Workers' Compensation Division's (WCD's) Administrative Order dated March 11, 2010, which ordered that SAIF is not liable for the T9-10 laminectomy for a dorsal column stimulator (DCS) trial, and implantation of the DCS battery, as proposed by Dr. Schneider.

**SUMMARY OF FACTS**

The following summary of facts is taken from the "Findings of Fact" portion of the WCD's order.

On September 21, 1995, claimant sustained a compensable injury, which SAIF ultimately accepted for a disabling L5-S1 disc herniation and erectile dysfunction.

On August 9, 2009, Dr. Schneider requested authorization to perform a T9-10 laminectomy for DCS trial, and implantation of the DCS battery.

On November 11, 2009, Dr. Dietrich and Dr. Glass performed an Independent Medical Examination (IME) at SAIF's request. Dr. Dietrich, who performed the medical portion of the IME, opined that claimant was not a good surgical candidate, reasoning that it is unnecessary to

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<sup>1</sup>In medical treatment disputes under ORS 656.327, "[n]ew medical evidence or issues may not be admitted or considered." OAR 436-001-0225(2). Proposed Exhibit 98 is an April 16, 2010 letter from Dr. Schneider to claimant's attorney, which addresses the appropriateness of performing a spinal cord stimulator via percutaneous lead placement rather than the method he has proposed. Because this letter is medical evidence that was generated after issuance of the Administrative Order, it is inadmissible and may not be considered in this hearing.

do a laminectomy for trial lead placement. Dr. Glass, who performed the psychiatric portion of the IME, opined that claimant was not a good candidate for a stimulator.

On November 17, 2009, SAIF denied the request for the proposed surgery, reasoning that a laminectomy to pursue a DCS trial is not medically necessary.

Based on SAIF's refusal to authorize surgery, Dr. Schneider discontinued providing care to claimant and wrote a letter expressing his negative experience using percutaneous lead placement.

On November 30, 2009, claimant, through his attorney, requested Administrative Review by the Director. On December 11, 2009, SAIF also requested Administrative Review by the Director, asserting that that it is excessive to perform a laminectomy to pursue a DCS trial.

At the Director's request, Dr. Liu, a neurosurgeon, evaluated claimant and reviewed the record. He opined that claimant's symptoms met the indications for a DCS trial, but that performing a T9-10 laminectomy to implant the device is not appropriate.

### CONCLUSIONS OF LAW AND OPINION

The WCD, acting as the Director's designate, upheld SAIF's refusal to authorize the surgery proposed by Dr. Schneider, reasoning that a T9-10 laminectomy for a DCS trial, and implantation of the DCS battery, is excessive and inappropriate. Claimant contends that the WCD erred in its determination and seeks approval of the proposed surgery. Based on the following opinion, I affirm the WCD's determination.

The standard for reviewing the Director/WCD's Administrative Order is set forth in ORS 656.327(2), which provides that "[t]he administrative order may be modified at hearing only if it is not supported by substantial evidence in the record or if it reflects an error of law." See OAR 436-001-0225(2); *Liberty Northwest Ins. Corp. v. Mundell*, 219 Or App 358, 362 (2008). Claimant does not assert any error of law. I therefore review the record to determine if the order is supported by substantial evidence.

Substantial evidence supports 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). In reviewing a finding to determine whether it is supported by substantial evidence, the reviewing entity must "evaluate evidence against the finding as well as evidence supporting it to determine whether substantial evidence exists to support that finding. If a finding is reasonable in light of countervailing as well as supporting evidence, the finding is supported by substantial evidence." *Garcia v. Boise Cascade Corp.*, 309 Or 292, 295 (1990). As the Court of Appeals has explained, "'substantial evidence' review is not what has been referred to as the 'any evidence' rule \* \* \* but it is also *not de novo* review." *Liberty Northwest Ins. Corp. v. Kraft*, 205 Or App 59, 62 (2006) (quoting *Armstrong v. Asten-Hill Co.*, 90 Or App 200, 206 (1988)) (emphasis in original).

In *Mundell*, the court explained that

“in reviewing the [WCD’s] order for substantial evidence, the ALJ was limited to evaluating the evidence in the record to determine whether, based on that evidence, a reasonable factfinder in the [WCD’s] position could have made the findings that the [WCD] actually made. The ALJ does not have authority to determine whether the record could support findings different from those reached by the [WCD], nor does the ALJ have authority to reweigh the evidence and substitute its view of the evidence for that of the [WCD].” 219 Or App at 363.

In asserting that the WCD erred in finding the proposed surgical procedure to be excessive and inappropriate, claimant relies on the medical opinion of Dr. Schneider, the neurosurgeon who proposed the procedure. He proposed a T9-10 laminectomy for DCS trial and implantation of DCS battery. (Ex. 59).

Dr. Dietrich, who performed an IME at SAIF’s request, disagreed with Dr. Schneider’s proposal. He opined that claimant was not a good candidate for DCS, reasoning that this modality tends to be ineffective in workers’ compensation claimants who are on opioids and having primarily back pain and that the likelihood of a good result is less than 25 percent. He also opined that it is generally unnecessary to do a laminectomy for a trial DCS and that such a procedure is not reasonable and necessary. (Ex. 66, pp. 12-13).

Dr. Liu, a neurosurgeon who examined claimant and reviewed the records at the WCD’s request, opined that claimant was an appropriate candidate for a trial of DCS implantation, but that the implantation should be via percutaneous lead placement rather than open laminectomy at T9-10. (Ex. 92).

The WCD was ultimately persuaded by the opinion of Dr. Liu and found that the proposed laminectomy for lead placement for a DCS trial is excessive and inappropriate. After reviewing this record, I conclude that a reasonable factfinder could have made the finding that the proposed surgical procedure is excessive and inappropriate. Consequently, the WCD’s order is supported by substantial evidence and must be affirmed.

### **ORDER**

Claimant’s request for relief is denied, and the WCD’s Administrative Order dated March 11, 2010 is affirmed.