

In the ORS 656.327 Medical Treatment Dispute of

**Dennis J. Dickens, Claimant**

Contested Case No: 10-059H

**PROPOSED & FINAL ORDER**

October 13, 2010

DENNIS J. DICKENS, Petitioner

BROADSPIRE SERVICES, Respondent

Before Keith Kekauoha, Administrative Law Judge

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Hearing was scheduled for July 13, 2010 before the undersigned Administrative Law Judge (ALJ). 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, Barbara Dickens (Transport Leasing), and its claims administrator, Broadspire, are represented by their attorney, Thomas Huynh. Exhibits 1-74 were admitted into evidence. After receipt of written closing arguments and claimant's waiver of a reply argument, the record closed on September 14, 2010.

**ISSUE**

Medical Treatment Dispute. Claimant requested a hearing on the Workers' Compensation Division's (WCD's) Administrative Order dated March 10, 2010, which determined that the L5-S1 fusion proposed by Dr. Sales is inappropriate.

**SUMMARY OF FACTS**

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

Claimant sustained a compensable injury on July 15, 1999. His claim was ultimately accepted for a lumbar strain and L5-S1 disc herniation. He came under the care of multiple providers and underwent numerous procedures over the years.

In January 2009, claimant was referred to Dr. Sales, a neurosurgeon, for a consultation regarding his low back pain extending into the right lower extremity. Dr. Sales initially recommended an anterior interbody fusion of L4 to S1.

In March 2009, claimant was seen at the hospital for right leg weakness and urinary and bowel problems. Dr. Sales performed right L4-5 and L5-S1 microdiscectomies and laminotomies with decompression of exiting nerve roots.

Postoperatively, Dr. Sales noted overall improvement of claimant's symptoms with some weakness in the leg which was less profound than it was before surgery. He indicated that he did not believe claimant would not eventually require the fusion surgery he had previously recommended.

In May 2009, Dr. Rosenbaum, a neurosurgeon, reviewed the medical record at the employer's request. He opined that the major cause of claimant's need for the surgery was the preexisting pathological process, rather than the 1999 injury, and that consideration of a lumbar fusion would also be related to the preexisting condition.

In September 2009, Dr. Sales noted that a recent MRI showed a large right-sided disc herniation at L5-S1 and requested authorization for an L5-S1 posterior lumbar interbody fusion and decompression.

In October 2009, Dr. Keizer and Dr. Bell reviewed the medical record and examined claimant at the employer's request. They opined that there was no current indication for fusion and stabilization of the lumbar spine. They saw no sign of instability or any other condition that required fusion. As alternative suggestions, they recommended muscle strengthening of the lower extremities and further time after the decompression discectomies to allow some stabilization of the lower lumbar spine. They further indicated there could be some value in the use of stabilization brace, which may show some decrease in back pain and discomfort due to active motion that would be benefitted by stabilization.

In November 2009, the employer sent Dr. Keizer and Dr. Bell's report to Dr. Sales and asked whether he agreed with their findings or wanted to continue to recommend surgery. In January 2010, Dr. Sales indicated that agreement could not be reached and that further effort to resolve the request for elective surgery would be futile.

The employer requested Administrative Review concerning Dr. Sales' recommendation for fusion surgery, asserting that the proposed elective surgery was excessive, inappropriate and/or ineffectual.

In January 2010, Dr. Rosenbaum concurred with Dr. Keizer and Dr. Bell's findings.

In March 2010, Dr. Ballard reviewed the medical record and examined claimant at the Director's request. He did not feel that the recommendation for a lumbar fusion was appropriate, reasoning that claimant did not have the clinical indications to warrant a fusion. He found no documentation or radiographic evidence of lumbar instability, and noted that claimant had not used a rigid back brace or underwent any low back rehabilitation. He instead proposed conservative treatment, as recommended by Dr. Keizer and Dr. Bell, and stated that claimant should be placed into a physical therapy program and work on lumbar stabilization exercises.

### **CONCLUSIONS OF LAW AND OPINION**

The WCD, acting as the Director's designate, determined that the L5-S1 fusion surgery proposed by Dr. Sales is 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 L5-S1 fusion to be inappropriate, claimant relies on the medical opinion of Dr. Sales, the neurosurgeon who proposed the procedure to treat claimant's axial back pain that was severely limiting him. (Ex. 60).

Dr. Keizer, an orthopedic surgeon, and Dr. Bell, a neurologist, reviewed the medical record and examined claimant. They concluded that claimant did not have the clinical indications to warrant fusion surgery, reasoning that he had no sign of lumbar instability or any other condition that required fusion. They recommended muscle strengthening of the lower extremities and further time after the decompression discectomies to allow some stabilization of the lower lumbar spine. They also recommended a stabilization brace to determine if stabilization would reduce his back pain. (Ex. 61-9).

Dr. Rosenbaum, a neurosurgeon who reviewed the medical record, concurred with Dr. Keizer and Dr. Bell's opinions. (Ex. 64-2). Dr. Ballard, an orthopedic surgeon who reviewed the medical record and examined claimant at the Director's request, agreed with Dr. Keizer and Dr. Bell's recommendation of conservative treatment, in lieu of the proposed surgery. He

identified the indications for a lumbar fusion and concluded that claimant did not demonstrate clinical evidence consistent with the indications. Specifically, he stated that, although claimant had low back pain, he had not had any low back rehabilitation, had not used a rigid back brace, and had not been proven or shown to have lumbar instability. (Ex. 67-15).

The WCD was ultimately persuaded by the opinions of Dr. Keizer, Dr. Bell, Dr. Rosenbaum and Dr. Ballard, and found that the proposed L5-S1 fusion is inappropriate. After reviewing the medical opinions in this record, I conclude that a reasonable factfinder could have made the finding that the proposed surgical procedure is 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 10, 2010 is affirmed.