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In the ORS 656.260 Managed Care Dispute of

**Daniel N. Hanson, Claimant**

Contested Case No: 10-046H

**PROPOSED & FINAL ORDER**

July 20, 2010

DANIEL N. HANSON, Petitioner

SAIF CORPORATION, Respondent

Before Martha J. Brown, Administrative Law Judge

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Pursuant to notice, a hearing was held and the record closed on June 23, 2010 in Salem, Oregon before Administrative Law Judge Martha J. Brown. Claimant was present and was represented by his attorney, Donald Beer. The employer, Jenks Olsen Farms, Inc., and its insurer, the SAIF Corporation, were represented by their attorney, Janelle Irving.

At hearing, Exhibits 1 through 64 were admitted into the record.

**ISSUES**

1. Medical Services. Claimant has appealed the February 26, 2010 Administrative Order that found that proposed artificial disc replacement at L4-5 and interbody fusion at L5-S1 was not appropriate/compensable. (Ex. 63).
2. Assessed attorney fees.

**FINDINGS OF FACT**

Claimant was compensably injured on July 1, 2003. SAIF accepted the claim as an L4-5 herniated disc. On November 17, 2003, claimant underwent surgery at L4-5 and L5-S1, performed by Dr. Collada.

Claimant participated in physical therapy and on August 25, 2004, PT Carp reported that claimant could be discharged from therapy.

On September 13, 2004, claimant was examined by his family doctor, Dr. White, who found that claimant was medically stationary but with a need for continuing pain management and vocational services.

On September 30, 2004, Dr. Matteri examined claimant on behalf of SAIF. Dr. Matteri found that claimant was medically stationary with regard to the L4-5 condition. He diagnosed lumbar degenerative disc disease, spondylolisthesis at L5-S1, failed back syndrome characterized by non-organic pain behavior and somatization, and chronic dependence on narcotic pain medication.

A February 14, 2005 Opinion and Order affirmed SAIF's denial of claimant's degenerative disc disease at L5-S1. The denial of left foraminal stenosis at L5-S1 was set aside. The Opinion and Order was affirmed by a September 13, 2005 Order on Review.

On September 16, 2005, claimant was examined by Dr. Karasek who recommended discography. Dr. Karasek also recommended that, prior to discography, claimant undergo a nerve root block and psychological examination.

On October 11, 2005, SAIF accepted claimant's preexisting arthritic foraminal stenosis left L5-S1 as a combined condition.

On November 21, 2001, claimant was examined by a psychologist, Dr. Davies. Dr. Davies reported that there were contraindications for an elective surgical procedure for claimant.

On February 16, 2006, claimant was examined by Dr. Keenan who recommended an L5-S1 foraminotomy and discectomy in order to fully decompress the L5 nerve root.

On January 9, 2007, claimant had a worsening of his L4-5 disc symptoms and left L5 nerve root impingement. Dr. White requested authorization for a repeat lumbar MRI.

On January 15, 2007, claimant was examined by Dr. Lorber who reported that low back and leg pain intensity was the same, but claimant's left leg was more symptomatic than the right. Dr. Lorber also reported that claimant showed marked pain behavior.

On February 5, 2007, claimant was examined by Dr. Hook, who noted verbal and non-verbal pain behavior. Dr. Hook recommended repeat EMG testing.

On February 14, 2007, an Opinion and Order found that the proposed L5-S1 surgery for claimant was causally related to the accepted conditions.

On March 12, 2007, claimant was examined by Dr. Loganbill who found that claimant had weakness and intractable pain, which were two indications for spinal surgery.

On May 9, 2007, Dr. Keenan reported that claimant might not do well with surgery, but there were no other options at that time. On May 15, 2007, Dr. Keenan requested OHS pre-certification for surgery at L4-5 and L5-S1. OHS disapproved the surgery, and claimant appealed.

At the director's request, claimant was examined and his medical records were reviewed by Dr. Lewis. Dr. Lewis concluded that claimant did not show clinical evidence consistent with the indications for surgery, and surgery was not appropriate.

On May 21, 2007, an Administrative Order was issued by the director that found that the L5-S1 foraminotomy and discectomy surgery was not appropriate. The disapproval was upheld in a final decision in a July 12, 2007 order.

Claimant appealed the OHS order and the issue was transferred to the Board.

In the fall of 2007, claimant began to treat with Dr. Ouellette for his low back and leg symptoms. In the spring and summer of 2008, Dr. Ouellette reported that claimant had signs of spinal instability and could only stand for an hour at a time.

On August 1, 2008, an Opinion and Order found that the proposed L4-5 and L5-S1 fusion surgery was causally related to the accepted claim.

In the fall of 2008, Dr. Borman reviewed claimant's records with regard to the appropriateness of the proposed surgery. Dr. Borman concluded that the surgery was appropriate treatment for claimant and an Administrative Order dated November 28, 2008 held that the proposed fusion was appropriate treatment for claimant.

On February 4, 2009, Dr. Keenen requested precertification from OHS for artificial disc replacement at L4-5 and interbody fusion at L5-S1 for claimant.

On April 20, 2009, the OHS review committee upheld the disapproval of the proposed L4-5 artificial disc replacement and L5-S1 interbody fusion. Claimant appealed the decision and requested administrative review by the director.

On May 11, 2009, Dr. Lewis reviewed claimant's records on behalf of SAIF. Dr. Lewis reported that claimant was not a surgery candidate because the pain generator had not been identified.

On May 26, 2009, a Defer and Transfer Order deferred a decision on the appropriateness of the surgery, and referred the causal relationship issue to the Board.

In June 2009, Dr. Silver reviewed claimant's records and found that claimant was an appropriate candidate for decompression and fusion at L5-S1, but he declined to offer an opinion about which procedure would be best for claimant.

On September 2, 2009, Dr. Keenen reported that claimant's psychological testing should not exclude him from the proposed procedure.

On November 18, 2009, an Opinion and Order issued that found that the proposed surgery was causally related to the accepted claim.

SAIF responded to the medical resolution team's request and contended that claimant was not a surgical candidate as he had significant psychiatric issues, the artificial disc was at a level above spondylolisthesis, a partial facetectomy was part of the November 2003 surgery, and multiple level disc degeneration was present.

On January 8, 2010, the resolution team issued an administrative order which held that the proposed artificial disc replacement at L4-5 was not compensable. Claimant moved for abatement and reconsideration and the motion was granted. On February 26, 2010, an

Administrative Order on Reconsideration issued, which found that the proposed L4-5 artificial disc replacement was not a compensable service under OAR 436-009-0015(6), and SAIF Corporation was not liable for the procedure.

Claimant requested a hearing.

### CONCLUSIONS OF LAW AND OPINION

Claimant argues that the Administrative Order is not supported by substantial evidence. Accordingly, he asks that the order be set aside and that the proposed surgery be approved. SAIF, however, contends that the order is supported by substantial evidence and therefore must be affirmed.

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. *Liberty Northwest Insurance Co. v. Kraft*, 205 Or App 59 (2006); *Armstrong v. Asten-Hill Co.*, 90 Or App 200, 206 (1988).

Claimant argues that the order is not supported by substantial evidence with regard to the conclusion that he is excluded from the proposed artificial disc replacement surgery in light of the fact that he had not undergone a minimum of 6 months unsuccessful exercise based rehabilitation. *See* OAR 436-009-0015(6)(C). The administrative order relied on chart notes from various physical therapists and doctors, however, that showed that claimant's overall condition and symptoms had improved during physical therapy. (Ex. 63-13). Accordingly, I conclude that the finding is reasonable and is supported by substantial evidence.

Claimant next contends that the evidence does not support a finding that he has a psychosocial disorder that makes such surgery inappropriate pursuant to OAR 436-010-0230(14)(i). The administrative order relied on reports from Dr. Davies, a psychologist, and other physicians who have commented with regard to psychological issues. After evaluating evidence from claimant's family doctor against the findings, as well as the evidence supporting the finding (such as Dr. Davies' report), I conclude that substantial evidence exists to support the finding made in the order.

Finally, claimant argues that the administrative order's finding with regard to the prior surgery is not supported by substantial evidence. Pursuant to OAR 436-010-0230(13)(i) lumbar artificial disc replacement is inappropriate for workers who have had prior fusion, laminectomy involving any part of the facet joint, or facetectomy at the same level as the proposed surgery. Here, the proposed surgery is for level L4-5 and the order relied on surgical reports that claimant previously had a hemilaminotomy at L4-5 in 2003, with a foraminotomy that involved removal of bone on the facet structure, which was also referred to by some doctors as a facetectomy. Under the circumstances, I conclude that a reasonable person could have made the findings that were made based on this evidentiary record.

Accordingly, I conclude that the record, when viewed as a whole, would permit a reasonable person to make the findings that have been made in this case. Therefore, there is substantial evidence to support the administrative order and the decision that the surgery is not appropriate/compensable must be affirmed.

**ORDER**

**IT IS HEREBY ORDERED** that the February 26, 2010 Administrative Order issued in this matter is affirmed and SAIF's denial of the proposed artificial disc replacement surgery at L4-5 is approved.