

In the ORS 656.260 Managed Care Dispute of

Isidra Juarez-Vega, Claimant

Contested Case No: 09-184H

PROPOSED & FINAL ORDER

May 24, 2010

ISIDRA JUAREZ-VEGA, Petitioner

SAIF CORPORATION , Respondent

Before Elizabeth Fulsher, Administrative Law Judge

Pursuant to notice, a hearing was scheduled for March 2, 2010 in Bend, Oregon before Administrative Law Judge Fulsher. Prior to the date of the hearing, the parties agreed to submit this matter for a decision on the documentary record with written closing arguments. Claimant is represented by her attorney, Philip Garrow. Specialty Seeds of Oregon and its insurer, SAIF Corporation, are represented by their attorney, James Booth. The record closed on April 22, 2010 following receipt of claimant's supplemental reply argument.

Exhibits A and 1 through 26, including 2A, 3A through 3E, 4A through 4E, 6A, 6B, 8A through I, 9A through 9H, 10A, 10B, 15B, 16A, 17AA, 17AB, 17A and 17B have been submitted without objection and are admitted into the record. SAIF withdrew Exhibit 15A.

ISSUE

Whether claimant is entitled to medical services consisting of bilateral L5-S1 facet injections performed by Dr. Andrews on May 26, 2009.

FINDINGS OF FACT

Claimant was compensably injured on July 22, 2003. (Ex. 1). Ultimately, SAIF accepted the claim for right costochondritis, lumbar strain, thoracic strain, lumbar strain combined with L5-S1 spondylolisthesis, and T5-6 and T6-7 disc herniations. (Ex. 26).

Dr. Andrews saw claimant on May 18, 2009 and noted that claimant had chronic back pain that may be due to facet arthropathy at L5-S1. He scheduled bilateral L5-S1 facet injections to address the pain. (Ex. 11). On May 26, 2009, Dr. Andrews performed bilateral L5-S1 facet joint injections. (Ex. 13). The injection was approved as medically necessary by Oregon Health Systems on May 27, 2009. (Ex. 14). On June 25, 2009, Dr. Andrews agreed that claimant's accepted claim had resolved and the current condition and need for treatment was her underlying pars defect and mild spondylolisthesis or lumbar facet osteoarthritis. (Ex. 15).

On June 30, 2009, claimant saw Ms. Dennis, FNP, who reported that claimant had chronic low back pain that was at least in part facetogenic. Claimant had benefitted significantly with 90 percent improvement in her pain after the recent bilateral L5-S1 facet joint injections. (Ex. 15B). On July 30, 2009, Dr. Andrews noted that claimant had responded well to facet joint injections. He was planning to schedule a repeat injection. (Ex. 16A).

On August 31, 2009, Dr. Andrews indicated that he was continuing to treat claimant's

workers' compensation claim. He agreed that the May 26, 2009 injection was directed to the accepted conditions or conditions that are a direct result of claimant's injury. (Ex. 17B).

On November 10, 2009, the Director dismissed claimant's request for administrative review of the medical service dispute over the May 26, 2009 injection. The Director's order reasoned that claimant had not requested acceptance of a new or omitted condition. (Ex. 23). Claimant requested a hearing regarding the Order of Dismissal. (Ex. 24). In a stipulation approved on November 25, 2009, SAIF withdrew its August 13, 2009 denial of claimant's combined condition. (Ex. 26).

CONCLUSIONS OF LAW AND OPINION

Claimant argues that the May 26, 2009 injection was performed on a diagnostic basis and resulted in the diagnosis of the pain being in part facetogenic. Claimant notes that Dr. Andrews explained that the injection was directed to the accepted conditions or conditions that are a direct result of claimant's injury. SAIF argues that Dr. Andrews did not explain how L5-S1 facet arthropathy or facet arthritis might be related to the compensable injury. SAIF further argues that Dr. Andrews' response is an unexplained change from his previous opinion that the injection was related to unaccepted conditions. Finally, SAIF argues that Dr. Andrews never indicated that the facet injections were necessary to determine the cause or extent of claimant's compensable injury and that therefore, the medical services are not a compensable diagnostic service.

Under [ORS 656.245\(1\)\(a\)](#), "[f]or every compensable injury, the[carrier] shall cause to be provided medical services for conditions caused in material part by the injury for such period as the nature of the injury or the process of the recovery requires * * *." The phrase "in material part" means a "fact of consequence." [Mize v. Comcast Corp.--AT & T Broadband, 208 Or App 563, 569-70 \(2006\)](#).

Diagnostic medical services are compensable if the services "are necessary to determine the cause or extent of a compensable injury." [Counts v. Int'l Paper Co., 146 Or App 768, 771 \(1997\)](#). This is true even if the condition discovered during the diagnostic service is itself not compensable. [SAIF v. Martinez, 219 Or App 182, 191 \(2008\)](#); [Counts, 146 Or App at 771](#).

In *John D. Swartz*, 62 Van Natta 570, 573 (2010), cited by claimant, the claimant's doctor, Dr. Koon, stated that the July 2007 compensable injury was the major contributing cause of the claimant's current back condition, and that there were a number of potential diagnoses that would explain that condition. Among those diagnoses were both lumbar facet syndrome and a chronic lumbar contusion. According to Dr. Koon, based on the limited diagnostics currently undertaken, either diagnosis was equally probable, and the proposed lumbar facet injections would assist in arriving at a more definitive diagnosis; *i.e.*, the injections were necessary to determine the extent of the claimant's compensable injury. Dr. Koon further explained that the proposed lumbar facet injections were a necessary medical service to determine the claimant's pain generator.

Based on Dr. Koon's opinion, the Board held that the extent of the claimant's injury was

unknown in the absence of the proposed lumbar facet injection, and he could not conclusively determine the extent of the compensable injury without the proposed diagnostic service. Based on Dr. Koon's well-explained opinion, the Board found that the proposed lumbar facet injections were "necessary to determine the * * * extent of [claimant's] compensable injury."

Here, in contrast to *Swartz*, Dr. Andrews never made any statement to the effect that the injection was necessary to diagnose or determine the extent of claimant's compensable injury. Based on this evidence, claimant has not established that the injection is compensable as a diagnostic medical service.

In addition, as noted by SAIF, Dr. Andrews's opinion is unpersuasive because the doctor rendered apparently conflicting opinions and did not provide an explanation for his change of opinion. See [*Kenneth L. Edwards*, 58 Van Natta 487, 488 \(2006\)](#) (unexplained change of opinion renders physician's opinion unpersuasive); cf. [*Kelso v. City of Salem*, 87 Or App 630, 633 \(1987\)](#) (where there was a reasonable explanation in the record for a physician's change of opinion, that opinion was persuasive). In this regard, Dr. Andrews previously indicated that the lumbar strain portion of the accepted claim had resolved and the medical treatment including the May 26, 2009 injection was related to the underlying pars defect and mild spondylolisthesis or lumbar facet osteoarthritis. (Ex. 15). Without further explanation or clarification, he later stated that the injection of May 26, 2009 was directed to the accepted conditions or conditions that are a direct result of claimant's injury. (Ex. 17B). Because Dr. Andrews did not explain his change of opinion, his opinion is not persuasive.

The November 10, 2009 Director's order dismissed claimant's hearing request on the ground that claimant had not made a new or omitted condition claim. However, as claimant argues, diagnostic medical services are compensable if the services are necessary to determine the cause or extent of a compensable injury, even if the condition discovered during the diagnostic service is itself not compensable (*i.e.*, not an accepted condition). Thus, dismissal of claimant's hearing request because a new or omitted condition claim had not been made was incorrect. Accordingly, claimant's hearing request is reinstated. However, for the reasons set forth above, claimant has not established compensability of the diagnostic services in this particular case.

ORDER

Claimant's hearing request is reinstated. However, the medical services are not compensable as a diagnostic service.