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In the ORS 656.327 Medical Treatment Dispute of

**Juan M. Villanueva, Claimant**

Contested Case No: 09-202H

**PROPOSED & FINAL ORDER**

October 28, 2010

JUAN M. VILLANUEVA, Petitioner

LIBERTY NORTHWEST INSURANCE CORPORATION, Respondent

Before Gregory J. Naugle, Administrative Law Judge

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Pursuant to notice, a hearing convened on the record in this matter on September 28, 2010, in Coos Bay, Oregon, before Administrative Law Judge Naugle. Claimant appeared and was represented by attorney Scott M. McNutt, Sr. The employer, South Coast Lumber Company, and its insurer, Liberty NW Insurance Company, were represented by attorney David O. Wilson. Ivan Guirado was appointed as the interpreter for the proceedings.

Exhibits 1-128, 130 and 131 were submitted. Exhibits 1-128 were admitted into evidence without objection. The employer objected to admission of Exhibits 130 and 131, and I deferred my ruling. In September 29, 2010 correspondence, counsel for the employer, citing OAR 436-001-0225(2), contended that in medical service disputes, new medical evidence or issues may not be considered. Claimant's attorney did not submit argument otherwise. I find the employer's argument persuasive and exclude Exhibits 130 and 131 from evidence.

The record closed at the conclusion of the hearing.

**ISSUES**

1. Propriety of WCD's December 14, 2009 Administrative Order TX 09-1537 which concluded that the proposed L4-5, L5-S1 anterior fusion was not appropriate; and
2. Claimant's entitlement to an attorney fee.

**FINDINGS OF FACT**

With the following amendments, I adopt the Findings of Fact in the Administrative Order.<sup>1</sup>

In the 6th full paragraph on page 1, March 7, 2006 is changed to March 6, 2006. (Ex. 44-13.)

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<sup>1</sup> See *Liberty Northwest Ins. Corp v. Kraft*, 205 Or App 59, 62-63 (2006)(a substantial evidence review does not contemplate an ALJ making supplemental findings of fact); *Liberty Northwest Ins. Corp v. Mundell*, 219 Or App 358, 363 (2008)( in reviewing the MRU's order for substantial evidence, an ALJ is limited to evaluating the evidence in the record to determine whether, based on that evidence, a reasonable factfinder in the MRU's position could have made the findings that the MRU actually made.)

In the 2nd full paragraph on page 2, February 13, 2007 is changed to February 12, 2007. (Ex. 44-27.)

In the 3rd full paragraph on page 2, July 24, 2007 is changed to July 23, 2007. (Ex. 44-31.)

In the last paragraph on page 2, right greater than left is changed to left greater than right. (Ex. 82-3.)

In the 2nd full paragraph on page 3, July 16, 2008 is changed to July 17, 2008. (Exs. 86-5, 97-1.)

In the 4th full paragraph on page 3, October 8, 2008 is changed to October 1, 2008. (Ex. 87-1.)

In the 7th full paragraph on page 3, Scott is changed to Steven. (Ex. 95-1.)

In the 3rd full paragraph on page 4, April is changed to July. (Ex. 6-29.)

In the 8th full paragraph on page 4, September 29, 2009 is changed to October 13, 2009. (Ex. 113.)

In the 9th full paragraph on page 4, interdiscal is changed to intradiscal. (Ex 123-11.)

### CONCLUSIONS OF LAW AND OPINION

The WCD, acting as the Director's designate, upheld the insurer's refusal to authorize the L4-5, L5-S1 anterior fusion proposed by Dr. Kitchel, concluding that the proposed surgery was not appropriate. Claimant contends that WCD erred in its determination. As follows, I affirm the WCD's order.

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); *Mundell*, 219 Or App at 362. I therefore review the record to determine if the order is supported by substantial evidence or reflects an error of law.

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). To determine whether substantial evidence exists, I am required to:

“Look 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 findings as well as the evidence supporting it, there is substantial evidence.” *Armstrong v. Asten-Hill Co.*, 90 Or App 200, 206 (1988).

Here, the WCD indicated that Dr. Kitchel believed there was not a solid anterior fusion at L4-5 and L5-S1 and that claimant was experiencing pain from cantilever motion and that surgery was appropriate. The WCD also indicated that Dr. Silver, Dr. Coelho and Dr. Berselli believed that additional surgery would not benefit claimant. The WCD further indicated that Dr. Golden did not find the indications for surgery present, that claimant's symptoms did not correlate with exam findings and diagnostic studies, and that he was unable to find support in medical literature for the cantilever theory treatment of chronic lumbar spine pain.

The WCD found Dr. Golden's reasoning persuasive and concluded that absent clinical correlation of claimant's symptoms with his exam findings and diagnostic studies, that based on record submitted for review, including Dr. Golden's opinion, the surgery proposed by Dr. Kitchel was not appropriate for claimant.

Claimant argues that as a result of litigation, his pseudoarthrosis at L4-5 and L5-S1 was determined to exist and to be a compensable condition. Claimant is correct. ALJ Brown's May 8, 2009 Opinion and Order set aside the insurer's denial of this condition and because the insurer withdrew its request for Board review, the Order became final. Accordingly, as a matter of law, claimant has a compensable condition of pseudoarthrosis at L4-5 and L5-S1.

Claimant further argues that because Dr. Golden did not agree that claimant had a failed fusion (pseudoarthrosis), his opinion was inconsistent with the legal posture of this case and should not be found persuasive. In *Kuhn v. SAIF*, 73 Or App 768, 772 (1985), the Court of Appeals indicated that where a physician's conclusion conflicted with the law of the case, the physician's conclusion must be discounted.

Even when discounting Dr. Golden's conclusion, when I consider the record as a whole, I conclude that the WCD's determination that the proposed surgery was not appropriate was reasonable. Accordingly, the order was supported by substantial evidence and must be affirmed.

In sum, claimant has not met his burden to establish that the order was not supported by substantial evidence or contained an error of law. Consequently, as claimant has not prevailed, he is not entitled to an attorney fee under ORS 656.385(1) or OAR 436-010-0008(12).

### **ORDER**

IT IS THEREFORE ORDERED that

1. The December 14, 2009 Administrative Order TX 09-1537 is affirmed; and
2. Claimant's request for an attorney fee is denied.