

In the ORS 656.260 Dispute of

**Daniel N. Hanson, Claimant**

Contested Case No: 10-046H

**FINAL ORDER**

December 6, 2010

DANIEL N. HANSON, Petitioner  
SAIF CORPORATION, Respondent

Before John Shilts, Workers' Compensation Division Administrator

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Daniel N. Hanson (claimant) seeks director review of a Proposed and Final Order issued by Administrative Law Judge (ALJ) Martha J. Brown. That order upheld an Administrative Order issued by the Workers' Compensation Division's Resolution Team (RT), which in turn upheld a decision by Oregon Health Systems, Inc. (OHS). OHS denied claimant's surgeon's request for artificial disc replacement at L4-5 and interbody fusion at L5-S1. I affirm the ALJ's and RT's orders.

**FACTUAL SUMMARY**

I adopt the facts as found in the Proposed and Final Order. Claimant suffered a compensable injury in July, 2003. The accepted claim was for an L4-5 herniated disc. SAIF Corporation then enrolled claimant in OHS. On November 17, 2003, claimant underwent an L4-5 hemilaminectomy on the left with discectomy and a left L5-S1 foraminotomy. Imaging studies of the affected area have been interpreted both to show that bone was, or was not, removed from the facets during this procedure.

Claimant participated in physical therapy from January 1, 2004, until July 28, 2004. That therapy was terminated when claimant and the physical therapist agreed claimant had "plateaued." The Administrative Order describes the outcome of the physical therapy as "... no change in pain rating, functional index improved to 58%, and improvement to 7 out of 10." (order at p. 2) During physical therapy, claimant suffered another injury, or a re-injury, when picking up a weight. He felt a popping sensation and burning pain when this occurred. Claimant was subsequently declared medically stationary, although that finding was later revoked. Claimant has never returned to work. He generally has reported worsening pain and additional loss of physical function since the time of the injury.

Many examinations and imaging studies have been performed. They show degenerative disc disease at L4-5 and L5-S1, as well as in the thoracic and lumbar areas generally. There is a grade I spondylolisthesis at L5-S1. There is foraminal stenosis at L5-S1 secondary to facet hypertrophy.

Claimant had a psychological evaluation by Dr. Jack Davies on November 21, 2005. The report is not in the record, but various evaluators refer to the report results. The evaluation apparently provided indications of psychological factors that weigh against surgery.

On February 4, 2009, orthopedic surgeon Dr. Timothy Keenan requested precertification from OHS for an artificial disc replacement at L4-5 and interbody fusion at L5-S1. OHS

disapproved that request on February 27, 2009. Claimant appealed that decision through OHS' internal appeals process. OHS' review committee upheld the denial on April 20, 2009.

Claimant then requested administrative review of OHS's decision. On review, RT upheld the denial by Administrative Order issued February 26, 2010. That order upheld the denial on several grounds: there had not been a six month period of physical therapy that was unsuccessful; claimant has a documented spondylolisthesis; the hemilaminotomy on the left at L4-5 removed bone from the facet structure; mild or modest facet arthropathy is present at L4-5; mild or moderate degenerative disc disease is present at L4-5 and L5-S1, and in the thoracic spine; there are indications of possible psychosocial disorders. OAR 436-009-0015(6)(g)(C); (6)(g)(E); OAR 436-010-0230(13), (14).<sup>1 2</sup>

Claimant then requested a hearing on the Administrative Order. ALJ Martha J. Brown found substantial evidence supported RT's order and affirmed it by a Proposed and Final Order issued on July 20, 2010. Claimant now seeks director review of that order.

### CONCLUSIONS OF LAW

I may only find error in the underlying decision if it is not supported by substantial evidence or if it is based on an error of law. OAR 436-001-0225(2). Substantial evidence

<sup>1</sup> OAR 436-009-0015 provides in part:

(6) [T]he director has excluded from compensability the following medical treatment . . .

(g) Lumbar artificial disc replacement . . . [except where]:

(C) The injured worker underwent a minimum of 6 months unsuccessful exercise based rehabilitation. . . .

(D) The procedure is not found inappropriate under OAR 436-010-0230(13) or (14) . . .

OAR 436-010-0230 provides in part:

(13) Lumbar artificial disc replacement that is not excluded from compensability under OAR 436-009-0015(6)(g) is always inappropriate for injured workers with the following conditions

(absolute contraindications):

\* \* \* \* \*

(h) Lumbar spondylolisthesis or lumbar spondylosis;

\* \* \* \* \*

(j) Prior . . . laminectomy that involves any part of the facet joint . . . at the same level as proposed surgery . . .

\* \* \* \* \*

(14) Lumbar artificial disc replacement that is not excluded from compensability under OAR 436-009-0015(6)(g) may be inappropriate for injured workers with the following conditions, depending on severity, location, etc. (relative contraindications):

\* \* \* \* \*

(d) Facet arthropathy – lumbar – moderate to severe, as shown radiographically;

\* \* \* \* \*

(f) Multilevel degenerative disc disease – lumbar – moderate to severe, as shown radiographically;

\* \* \* \* \*

(i) Psychosocial disorders – diagnosed as significant to severe . . .

<sup>2</sup> The Administrative Order refers to reports from the physical therapist. (order at p. 2). The order also refers to a psychological examination performed by a psychologist, Dr. Davies. (order at p. 15). Finally, the order also describes the surgery performed by Dr. Maurice Collada. (order at pp. 1, 14). None of the original reports from these sources are included in the hearing record, so that the hearing record contains only indirect evidence on these important issues. There is no indication any party objected to the absence of these documents or sought to have them admitted to the hearing record.

supports a finding where the record, viewed as a whole, would permit a reasonable person to make that finding. ORS 183.482(8)(c). The reviewing body looks at the record as a whole, rather than at any piece of evidence in isolation. Considering the evidence against the finding as well as for it, substantial evidence supports the finding if that finding is reasonable. *Liberty Northwest Insurance Co. v. Kraft*, 205 Or App 59, 62-63 (2006).

Claimant first argues substantial evidence does not support the finding that claimant's period of physical therapy was successful. OAR 436-009-0015(6)(g)(C). Claimant is correct.

It is only apparent from the record that claimant was able to engage in some physical activity during the physical therapy. The record also does indicate claimant suffered further injury while performing physical therapy. Physical therapy was discontinued not because claimant had improved significantly, but rather because claimant's progress had "plateaued." This suggests, at the least, there was no further benefit to be obtained. The termination of therapy because it plateaued does not, alone, establish whether or not therapy was "successful." Claimant did not discontinue pain medication, return to work, or enter vocational training, following the physical therapy. That claimant may have improved in some measures or gained some benefit from the therapy is not the same as the therapy having been successful in the context of the workers' compensation system. It does not appear the therapy helped to obviate the need for surgery, contributed towards enabling claimant to return to work, or even made a significant contribution to his quality of life by reducing his pain or improving his overall functioning. The therapy therefore was "unsuccessful" in the context of this rule.

Claimant next asserts the finding of psychosocial disorder is not supported by substantial evidence. This provision is a relative contraindication for artificial disc surgery only where the psychosocial disorder is diagnosed as significant to severe. OAR 436-010-0230(14)(i). The Administrative Order found the psychologist determined claimant had "significant" psychological issues. That finding is not supported by the hearing record. As explained above, the hearing record does not contain the psychologist's report. There are many references in the hearing record to the nature of the issues the psychologist described, but those indirect references do not state the level of severity which the psychologist diagnosed. There is no statement in the hearing record by any professional that claimant's psychological issues are at least "significant." There is, therefore, not substantial evidence in the record that claimant's psychological issues are in the range of significant to severe, as the rule requires.

Claimant also contends substantial evidence does not support the finding there had been surgery involving the facet joints at L4-5. OAR 436-010-0230(13)(i). Claimant's surgeon, Dr. Keenan, examined a CT scan performed February 10, 2009. Dr. Keenan interpreted that study to show that there was not evidence of surgery involving the facets at that location. However, Dr. David Silver, who reviewed the medical record, including the imagery, found evidence of surgery affecting the facets at this location in a May 17, 2004, MRI and a June 25, 2004, anterior to posterior and lateral lumbar spine x-ray. There is a conflict in the evidence on this point, but it was RT's function to weigh the evidence. Dr. Silver's evaluation constitutes substantial evidence supporting RT's finding on this issue.

It also appears that claimant does not dispute RT's findings that there is lumbar spondylolisthesis, facet arthropathy, and multilevel degenerative disc disease present. These are absolute and relative contraindications for the proposed artificial disc procedure. OAR 436-010-0230(13)(h), (14)(d), (f).

Although there is not substantial evidence supporting all of RT's findings, there is substantial evidence supporting enough of those findings to justify RT's ultimate conclusion. The evidence supports RT's findings that there was surgery affecting the facets, that there is lumbar spondylolisthesis, facet arthropathy, and multilevel degenerative disc disease. The combination of contraindicating factors that are supported by substantial evidence supports RT's ultimate conclusion to affirm the denial of the requested artificial disc procedure.

**IT IS HEREBY ORDERED** that the February 6, 2010, Administrative Order, and the July 20, 2010, Proposed and Final order are affirmed.