

In the Medical Treatment of

**Paul E. Booth, Claimant**

Contested Case No: 08-206H

**PROPOSED & FINAL ORDER**

June 5, 2009

SEDGWICK CLAIMS MGMT SERVICES, Petitioner

PAUL E. BOOTH, Respondent

Before Nicholas M. Sencer, Administrative Law Judge

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Pursuant to notice, the hearing was scheduled to convene on February 10, 2009 in Ontario, Oregon before the undersigned Administrative Law Judge. By agreement of the parties, the matter was submitted for decision based on the admitted exhibits and written closing arguments. Michael A. Gilbertson represents claimant. Ronald C. Holloway represents the employer, Home Depot USA Inc., and its processing agent, Sedgwick Claims Management Services. Exhibits 1 through 90 are admitted into the record. For the following reasons, proposed exhibit 91 is excluded from the record but will remain in the file as an offer of proof.

Pursuant to ORS 656.327(2), if a party is dissatisfied with a medical review order, “No new medical evidence or issues shall be admitted.” The challenged order issued on August 29, 2008. The employer offered proposed exhibit 91 to the Workers’ Compensation Division (“WCD”) on September 22, 2008. Since exhibit 91 was generated subsequent to the issuance of the administrative order, it constitutes new medical evidence and is inadmissible in this proceeding.

The record closed on May 7, 2009 upon my receipt of the employer’s reply argument.

**ISSUES**

The employer challenges the August 29, 2008 Administrative Order, which concluded that a proposed L4-5 lumbar interbody fusion was an appropriate medical service. The issue is whether substantial evidence supports the Administrative Order.

**FINDINGS OF FACT**

Claimant is 44 years of age. He sustained a compensable injury on August 31, 2005. On November 7, 2005 the processing agent issued an Initial Notice of Acceptance of a disabling lumbar strain.

On November 11, 2005, Christian Zimmerman, M.D. performed a left sided laminotomy L5, and microdiscectomy L5-S1. (Ex 24). On August 8, 2007, the processing agent issued a Modified Notice of Acceptance which added the conditions of “L4-5 and L5-S1 disc protrusion/herniation” to the accepted disabling lumbar strain. (Ex 62).

On April 7, 2008, Samuel S. Jorgenson, M.D. performed a spine surgery evaluation. (Ex 70). Dr. Jorgenson diagnosed a recurrent L4-5 disc herniation, severe L4-5 disc degeneration and left lumbar radiculopathy. (Ex 70, p 3). Dr. Jorgenson recommended an L4-5 posterior

lumbar interbody fusion to treat claimant's condition.

On April 18, 2008, Richard Lutz, D.O. wrote to Dr. Jorgenson on behalf of the processing agent and advised that the proposed surgical treatment did not meet medical necessity guidelines. (Ex 74). Dr. Lutz asserted that Dr. Jorgenson had failed to demonstrate lumbar instability or acute or progressive neurologic dysfunction. (Ex 74). Claimant requested medical review.

The WCD scheduled a medical examination of claimant with Todd Kuether, M.D., a neurosurgeon. Dr. Kuether examined claimant on July 28, 2008. (Ex 87). Dr. Kuether recommended that claimant undergo lumbar diskography to "verify concordant pain at this level or to verify normal disks above here such as a control level." (Ex 87, p 2).

Dr. Kuether also recommended a formal "neuropsychic" evaluation, "to make sure there is [*sic*] no significant issues with malingering, depression, etc., that could affect his outcome. Assuming his diskography points to concordant pain at L4-5 and his neuropsychological testing is normal, then he would be an appropriate candidate for additional surgery at the L4-5 level. What type of surgery is debatable. This would either require an L4-5 fusion or L4-5 total disk arthroplasty. . . . Certainly, the L4-5 interbody fusion, as proposed, would be a reasonable option." (Ex 87, p 2).

Dr. Kuether then summarized his opinion as follows:

"Is the disputed treatment appropriate? I have given my opinion above as to what I would recommend. I think there is certainly an argument to say that one could go ahead without diskography based on the fact that his other remaining disk levels look so normal at this time. For this reason, I think it would be more appropriate than not to proceed with an L4-5 interbody fusion, although based on my recommendations above, I think there may be some better options for him including diskography and I think also consideration of a total disk arthroplasty should be considered since this would potentially get him back to work quicker." (Ex 87, p 2).

On August 29, 2008, the Workers' Compensation Division issued its administrative order which concluded, "The director is persuaded by Drs. Rogers, Verska, Jorgenson, and Kuether's more reasonable and complete opinions that the proposed L4-5 fusion is appropriate for Mr. Booth." (Ex 90, p 4).

### CONCLUSIONS OF LAW AND OPINION

I may modify the administrative order only if it is not supported by substantial evidence in the record or if it reflects an error of law. ORS 656.327(2); OAR 436-001-0225(2). Substantial evidence supports a finding when the record, viewed as a whole and keeping in mind the evidence against the finding as well as the evidence supporting it, permits a reasonable person to make the finding. ORS 656.183.482(8)(c); *Armstrong v. Asten-Hill Co.*, 90 Or App

200, 206 (1988). See also, *Liberty Northwest Insurance Corporation v. Kraft*, 205 Or App 59, 62 (2006).

Dr. Jorgenson believes the proposed fusion is an appropriate procedure for claimant. Dr. Kuether believes it would “more appropriate than not” to proceed with the L4-5 fusion. While Dr. Kuether explained what he would do prior to proceeding with surgery, and promoted an alternative procedure, he still concluded that the proposed surgery would be appropriate even without following his suggestions.

The only contrary opinion comes from Dr. Lutz. Although Dr. Lutz provided an explanation to support his opinion, his opinion is not so persuasive as to render the opinions of Drs. Jorgenson and Kuether unreasonable. Accordingly, I conclude that the record, viewed as a whole and keeping in mind the evidence against the finding as well as the evidence supporting it, permits a reasonable person to make the finding that the proposed surgery is appropriate. Consequently, substantial evidence supports the WCD’s findings and its administrative order will be affirmed.

### **ORDER**

IT IS HEREBY ORDERED that the August 29, 2008 Administrative Order is affirmed.

IT IS FURTHER ORDERED that pursuant to ORS 656.385(1) and OAR 436-001-0265, based on the value of the proposed surgery (greater than \$6,000) and the apparent time devoted to this issue (between 2.1 and 4 hours), the employer and its processing agent are assessed an attorney fee in the amount of \$1,000, to be paid directly to claimant’s attorney.