Skinner, Ladonia

TREATMENT

Proper and necessary medical and surgical services (RCW 51.36.010)

The Department is precluded from authorizing spinal cord stimulator treatment based on the court's decision in *Joy v. Department of Labor and Indus.*, 170 Wn. App. 614 (2012). The Board's decision in *In re Susan Pleas*, BIIA Dec., 96 7931 (1998) is no longer an accurate statement of the law regarding the Department's authority to authorize spinal cord stimulator treatment. **….*In re Ladonia Skinner,* BIIA Dec., 14 10594 (2015)** [*Editor's Note:* The Board's decision was appealed to superior court under King County Cause No. 15-2-15630-6-SEA.]

Spinal column stimulator

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: LADONIA M. SKINNER	**)**	**DOCKET NO. 14 10594**
	)	
CLAIM NO. SE-96996	**)**	**DECISION AND ORDER**

APPEARANCES:

Claimant, Ladonia M. Skinner, by
Walthew Law Firm, per
Robert Heller

Self-Insured Employer, Seattle School District #1, by
Eims Graham, P.S., per
Jonathan James

Department of Labor and Industries, by
The Office of the Attorney General, per
Penny L. Allen

The claimant, Ladonia M. Skinner, filed a protest with the Department of Labor and Industries on December 30, 2013. The Department forwarded the protest to the Board of Industrial Insurance Appeals as a direct appeal. The claimant appeals an October 30, 2013 Department order in which the Department affirmed an April 18, 2013 order. In the April 18, 2013 order the Department closed the claim with time-loss compensation benefits as paid through January 23, 2013, and directed the self-insured employer to pay a permanent partial disability award equal to Category 2 of WAC 296-20-280 for dorso-lumbar and lumbosacral impairments, less an overpayment in the amount of $7,630.61 for time-loss compensation benefits paid for March 22, 2012, through January 23, 2013. The Department order is **AFFIRMED.**

PROCEDURAL/EVIDENTIARY MATTERS AND OVERVIEW

As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision. The self-insured employer and the Department filed timely Petitions for Review (PFR) of a January 26, 2015 Proposed Decision and Order in which the industrial appeals judge (IAJ) reversed the October 30, 2013 Department order and remanded for further treatment in the form of a spinal cord stimulator (SCS). The claimant filed a Response on April 9, 2015.

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed. The rulings are affirmed.

We have granted review primarily to address whether an SCS is a covered benefit under RCW 51.36.010. However, there is a preliminary matter that must be addressed first. In its PFR,

the Seattle School District challenged the IAJ's finding that the industrial injury aggravated Ms. Skinner's degenerative disc disease. We agree that the medical evidence does not support that finding. However, the evidence establishes that Ms. Skinner suffers from post-laminectomy syndrome (or lumbar failed-back-surgery syndrome) and chronic back pain because of the injury. We have modified the Findings of Fact to reflect that.

Regarding the issue of whether an SCS is a covered benefit, the IAJ relied on *In re Susan Pleas*[1] to find that the Board has the authority to direct the Department to authorize such treatment. He reversed the order in which the Department closed Ms. Skinner's claim and remanded the matter to the Department "to order the self-insured employer to provide proper and necessary treatment of a spinal cord stimulator."

The Department did not participate in the hearing process but has now filed a PFR contending that *Joy v. Department of Labor & Indus.*, 170 Wn. App. 614 (2012) precludes the Department from authorizing such treatment. The Department has attached a copy of the October 22, 2010 Health Technology Assessment (HTA) adopted by the Health Technology Clinical Committee (HTCC) under the process in RCW 70.14. Under ER 201, we take judicial notice of the HTA published on the Health Care Authority (HCA) website as required by WAC 185-55-040. The Seattle School District echoed the Department's argument in its PFR.

The IAJ's reliance on *Pleas* is misplaced. *Pleas* is no longer an accurate statement of the law regarding the Department's authority to authorize the use of an SCS. Those devices have been excluded from coverage since October 22, 2010, when the HTA on spinal cord stimulators was adopted under the process in RCW 70.14. Because the treatment Ms. Skinner is seeking is not a covered benefit, the October 30, 2013 order closing her claim is affirmed.

DECISION

What conditions are covered under this claim? Ms. Skinner injured her back on January 19, 2011, during the course of her employment with the Seattle School District when she and a co-worker were attempting to move a large C-shaped table top using a hand truck. Ms. Skinner bore the weight of the table and they could not move it with the hand truck. They positioned the table top on its side and pushed it down the hall. Because of this activity, Ms. Skinner suffered a lumbosacral strain. A February 26, 2011 MRI revealed multi-level degenerative disc disease, primarily at the L4/5 and L5/S1 levels. After conservative treatment was

[1] *In re Susan Pleas*, BIIA Dec., 96 7931 (1998).

unsuccessful, Rod Oskouian, M.D., recommended surgery and on August 9, 2012, Ms. Skinner underwent a laminectomy and foraminotomy at L5-S1. The IAJ determined that: "The Department examined these facts and accepted that Ms. Skinner's industrial injury aggravated her degenerative spine condition. Further, it authorized the low back surgery to reduce her pain."[2] In proposed Finding of Fact No. 2, the IAJ found that the industrial injury caused a lumbosacral strain and aggravated the degenerative disc disease. The employer challenges the latter in its PFR.

The stipulated Jurisdictional History reveals no Department orders determining what conditions were caused or aggravated by the industrial injury, nor does there appear to have been an order directing the self-insured employer to authorize the August 9, 2012 surgery. Ms. Skinner presented the testimony of two medical experts, Thomas S. Yang, M.D., and Sarah B. Hufbauer, M.D. Neither doctor offered an opinion regarding how the industrial injury affected the underlying degenerative disc disease, but both diagnosed post-laminectomy syndrome (or lumbar failed-back-surgery syndrome) and related that condition to the industrial injury. Dr. Yang also said the injury had caused chronic pain.

The employer presented the testimony of Lee Robertson, M.D., and James Champoux, M.D. Dr. Robertson's diagnoses were lumbar strain; chronic radicular symptoms; and status post L5/S1 laminectomy. He apparently determined that Ms. Skinner's permanent impairment was equal to Category 2 of WAC 296-20-280. The claim was closed with a permanent partial disability (PPD) award equal to that impairment rating. Dr. Robertson offered no opinion regarding causation or whether the industrial injury had affected the underlying degenerative disc disease.

The employer's other witness, Dr. Champoux, said the only condition related to the industrial injury was a lumbar strain that had resolved long ago. He was the only doctor who directly addressed whether the injury affected the degenerative disc disease and he said it had not. Dr. Champoux testified that the August 9, 2012 surgery was not proper and necessary treatment for the industrial injury.

However, "[i]t is well-established that when . . . the worker reasonably relies on the advice of her doctors, the consequences of treatment are compensable, even if the treatment later turns out to be ill-advised or not necessitated by a condition covered under the claim."[3] There is an exception: When the worker has been placed on notice that the treatment she wishes to pursue has

[2] Proposed Decision and Order, at 11.
[3] *In re Alejandra Silva*, Dckt. No. 08 13990 (August 4, 2009), citing *In re Arvid Anderson*, BIIA Dec., 65,170 (1986).

been denied, she proceeds at her own risk and is not entitled to any resulting benefits.[4] But the exception does not apply here because there is no evidence that the self-insured employer or the Department denied authorization for the surgery or that Ms. Skinner proceeded against the recommendations of her doctors. Even though the employer's experts did not believe the surgery was warranted, the evidence shows it was recommended by Dr. Oskouian.

In addition, both Ms. Skinner's medical experts related post-laminectomy syndrome or lumbar failed-back-surgery syndrome to the industrial injury, and the Department closed the claim with a Category 2 PPD award presumably based on more than a completely resolved lumbar strain. The employer did not appeal the PPD award, so it has conceded that Ms. Skinner has a permanent low back disability because of the industrial injury. While the record supports no specific finding that the industrial injury aggravated the underlying degenerative disc disease in the low back, we accept the opinions of Dr. Yang and Dr. Hufbauer that Ms. Skinner's post-laminectomy syndrome or lumbar failed-back-surgery syndrome was related to the injury. Under *Anderson* and *Silva*, the Seattle School District is responsible for the consequences of the recommended surgery. We have modified the findings of fact to reflect that.

Are spinal cord stimulators a covered benefit? In 2006, the Legislature established the Health Care Authority (HCA) to "study all state purchased health care . . . and make recommendations aimed at minimizing the financial burden which health care poses on the state, its employees, and its charges, while at the same time allowing the state to provide the most comprehensive health care options possible."[5] As part of that process, a health technology clinical committee (HTCC) was established under the aegis of the HCA.[6] The committee reviews selected health technologies and issues health technology assessments (HTAs) that are published on the HCA website.[7]

For each health technology selected for review, the committee must determine "[t]he conditions, if any, under which the health technology will be included as a covered benefit in health care programs of participating agencies."[8] "Based on the evidence regarding safety, efficacy, and cost-effectiveness of the health technology, the committee shall" determine whether a technology is a covered benefit and may decide that "[c]overage is not allowed because either the evidence is

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[4] *In re Iva Labella*, BIIA Dec., 89 3586 (1991).
[5] RCW 41.05.006(2)(b).
[6] RCW 70.14.090.
[7] RCW 70.14.100; RCW 70.14.110; WAC 182-55-050; WAC 182-55-055; WAC 182-55-040.
[8] RCW 70.14.110(1)(a).

insufficient to conclude that the health technology is safe, efficacious, and cost-effective or the evidence is sufficient to conclude that the health technology is unsafe, ineffectual, or not cost-effective."[9]

Under RCW 70.14.080(6), the Department of Labor and Industries is one of the participating agencies governed by the committee's coverage determinations that decide "the circumstances, if any, under which a health technology will be included as a covered benefit in a state purchased health care program."[10] Under RCW 70.14.120:

> (1) A participating agency shall comply with a determination of the committee under RCW 70.14.110 unless:
>
> (a) The determination conflicts with an applicable federal statute or regulation, or applicable state statute; or
>
> (b) Reimbursement is provided under an agency policy regarding experimental or investigational treatment, services under a clinical investigation approved by an institutional review board, or health technologies that have a humanitarian device exemption from the federal food and drug administration.

On October 22, 2010, the HTCC adopted an HTA precluding the coverage of spinal cord stimulators by any participating agency. On September 11, 2012, the Court of Appeals addressed the applicability of this HTA to an industrial insurance claim and whether an injured worker could appeal the Department's denial of medical treatment that the HTCC has determined is not a covered benefit. RCW 70.14.120(3) provides:

> A health technology not included as a covered benefit under a state purchased health care program pursuant to a determination of the health technology clinical committee under RCW 70.14.110, or for which a condition of coverage established by the committee is not met, shall not be subject to a determination in the case of an individual patient as to whether it is medically necessary, or proper and necessary treatment.

But Ms. Joy argued that she retained the right to challenge the Department's decision not to provide a spinal cord stimulator under RCW 70.14.120(4), which provides: "Nothing in chapter 307, Laws of 2006 diminishes an individual's right under existing law to appeal an action or decision of a participating agency regarding a state purchased health care program. Appeals shall be governed by state and federal law applicable to participating agency decisions." The court disagreed with Ms. Joy's argument she could challenge the Department's denial of an SCS, holding "that RCW 70.14.120(3) controls over RCW 70.14.120(4), and Joy may not obtain relief on appeal from

[9] WAC 182-55-035(1)(c).
[10] RCW 70.14.080(4).

L&I's denial of coverage for treatment, when L&I's denial is based on the HTCC's determination of noncoverage for such treatment under all state health care plans."[11]

In her Response, Ms. Skinner argues that *Joy* did not address the question of "whether such a non-appealable process is constitutional. It is not."[12] The court did not reach Ms. Joy's due process argument because it was raised too late. This Board has no authority to resolve constitutional issues.[13] Ms. Skinner's constitutional arguments must await resolution by a tribunal authorized to address them. Based on the October 22, 2010 HTA and *Joy*, we have no alternative but to affirm the October 30, 2013 Department order.

FINDINGS OF FACT

1. On March 25, 2014, an industrial appeals judge certified that the parties agreed to include the amended Jurisdictional History in the Board record solely for jurisdictional purposes.

2. Ladonia Skinner injured her back on January 19, 2011, during the course of her employment with the Seattle School District #1 when she and a co-worker were attempting to move a large C-shaped table top using a hand truck. Ms. Skinner bore the weight of the table and they could not move it with the hand truck. They positionned the table top on its side and pushed it down the hall.

3. As a proximate result of the industrial injury, Ms. Skinner suffered a lumbosacral strain. A February 26, 2011 MRI revealed multi-level degenerative disc disease, primarily at the L4/5 and L5/S1 levels. After conservative treatment was unsuccessful, Rod Oskouian, M.D., recommended surgery. On August 9, 2012, Ms. Skinner underwent a laminectomy and foraminotomy at L5-S1.

4. As of October 30, 2013, Ms. Skinner suffered from post-laminectomy syndrome or lumbar failed-back-surgery syndrome and chronic pain as a proximate result of the January 19, 2011 industrial injury.

5. On October 22, 2010, the Washington Health Care Authority adopted a Health Technology Assessment Finding (HTA) on spinal cord stimulators that prohibits the Department of Labor and Industries from authorizing the use of a spinal cord stimulator as treatment for an industrial injury.

6. Because the Department is not permitted to authorize a spinal cord stimulator as treatment for the January 19, 2011 industrial injury, Ms. Skinner's conditions proximately caused by the injury were fixed and stable as of October 30, 2013, and she was not entitled to further proper and necessary treatment.

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[11] *Joy*, 170 Wn. App. at 627.
[12] Response, at 8.
[13] *In re James Gersema*, BIIA Dec., 01 20636 (2003).

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and subject matter in this appeal.

2. The October 22, 2010 Health Technology Assessment Finding (HTA) on spinal cord stimulators adopted under RCW 70.14 and WAC 182-55 precludes the Department from authorizing a spinal cord stimulator as treatment for the January 19, 2011 industrial injury.

3. Ms. Skinner's conditions proximately caused by the industrial injury were fixed and stable as of October 30, 2013, and she was not entitled to further proper and necessary treatment under RCW 51.36.010, RCW 70.14, and WAC 182-55.

4. The October 30, 2013 Department order is correct and is affirmed.

Dated: June 12, 2015.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/
DAVID E. THREEDY Chairperson

/s/
FRANK E. FENNERTY, JR. Member

/s/
JACK S. ENG Member