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In the Matter of the Compensation of  
**DEBORAH R. SMITH, Claimant**  
WCB Case No. 01-05135  
ORDER ON REVIEW  
Hollander & Lebenbaum, Claimant Attorneys  
Steven T Maher, Defense Attorneys

Reviewing Panel: Members Lowell, Biehl, and Bock. Member Biehl dissents.

The self-insured employer requests review of Administrative Law Judge (ALJ) Kekauoha's order that set aside its denial of claimant's aggravation claim for a coccyx condition. On review, the issue is aggravation. We reverse.

FINDINGS OF FACT

We adopt the ALJ's findings of fact.

CONCLUSIONS OF LAW AND OPINION

Claimant injured her coccyx in 1992. She eventually filed a claim which was accepted for coccydynia. In 1998, claimant had coccygectomy surgery. She had no lasting improvement and was left with significant chronic low back pain that radiated into the legs. The claim was closed in March 1999 with a 5 percent unscheduled permanent disability. A June 1999 Order on Reconsideration affirmed the Notice of Closure.

Claimant was diagnosed with rib fractures in 1999. In July 2000, claimant was installing roof racks for the employer. She began standing on her tiptoes to install the racks. She developed progressively worsening pain in the left thoracic area due to the rib fractures.

In January 2001, Dr. Kahn recommended that a spinal cord stimulator be placed in the thoracic area to relieve the pain from the thoracic pain. He also recommended that a second lead be placed to address claimant's pain due to her compensable coccyx condition. In late February 2001, Dr. Kahn performed a temporary implantation of spinal cord stimulator electrodes in claimant's thoracic and lumbar areas which significantly relieved her pain. A permanent implantation was performed by Dr. Kahn in May 2001. A claim for aggravation was filed and was denied on June 14, 2001. Claimant requested a hearing.

The ALJ relied on the medical opinion of Dr. Kahn to conclude that claimant had established a compensable worsening of her coccyx condition. The employer argues that Dr. Kahn's change of opinion regarding whether claimant's coccyx condition had worsened is not persuasive in light of the contemporaneous medical record and is not adequately explained. The employer argues that the record establishes that claimant had persistent, but not worsening, pain following claim closure. We agree.

Dr. Kahn initially agreed that the accepted coccyx condition did not necessarily worsen resulting in the implant surgery, but that claimant was having persisting pain. (Ex. 67). On April 30, 2002, Dr. Kahn changed his opinion in a letter to claimant's attorney. Dr. Kahn indicated that claimant's persistent pain increased over time following her claim closure in 1999 and eventually led to the implantation of the spinal cord stimulator. Dr. Kahn further agreed that the increase in claimant's symptoms following claim closure constituted a pathological, material worsening of her accepted coccyx condition. (Ex. 72).

On June 17, 2002, Dr. Kahn was deposed. Dr. Kahn testified that he had an independent recollection that claimant's condition worsened. (Ex. 74-19; 25). Thus, the only basis for Dr. Kahn's changed opinion was his subsequent "independent recollection" of a worsening.

Dr. Kahn's "independent recollection" of a worsening many months after agreeing that there was no worsening of the coccyx condition is not persuasive based on this record. The contemporaneous chart notes do not reflect or document that the coccyx condition was worsening. From November 9, 2000 to February 26, 2001, claimant reported pain that varied from a 6 on a scale of 1 to 10 to an 8. (Ex. aA). In addition, it is difficult to determine whether the pain claimant reported was due to the coccyx condition or to the noncompensable thoracic/rib condition. Our review of the record supports Dr. Kahn's August 31, 2001 opinion that claimant was having persisting, but not worsening symptoms following her claim closure in March 1999. Because Dr. Kahn's explanation for his change of opinion is not supported by the record, we conclude that claimant has not established a compensable aggravation of her coccyx condition.<sup>1</sup> Accordingly, based on this record, we conclude that the employer's denial should be upheld.

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<sup>1</sup> After claimant underwent surgery, Dr. Davis reported, in a chart noted dated September 24, 2001, that claimant stated that her back pain had been worsening prior to her implant surgery. (Ex. 67A). We are not persuaded by claimant's statement to Dr. Davis because the contemporaneous chart notes do not support a conclusion that claimant had worsening pain prior to her surgery.

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ORDER

The ALJ's order dated September 6, 2002 is reversed. The employer's denial is reinstated and upheld. The ALJ's attorney fee award is also reversed.

Entered at Salem, Oregon on May 13, 2003

Board Member Biehl dissenting.

I disagree with the majority's decision and would affirm the ALJ's order that finds a compensable worsening of claimant's coccyx condition based on Dr. Kahn's persuasive opinion. Although I agree, based on this record, that claimant had persistent pain from her coccyx condition, the fact that claimant's symptoms were persistent or unrelenting, does not necessarily mean that they did not also worsen symptomatically.

According to Dr. Kahn's subsequent recollection, the symptoms did, in fact, worsen. Dr. Kahn stated that the basis for his change of opinion was that he looked back on claimant's clinical course and in retrospect concluded that claimant's condition really had worsened. (Ex. 74-19). As the ALJ noted, Dr. Kahn testified at his deposition that he might have rendered his earlier opinion in Exhibit 67 prior to recalling that claimant had complained of worsening coccyx pain. Dr. Kahn's clinical impression was that claimant's persistent coccyx pain increased over time following her claim closure in 1999 and eventually led to the implantation of the spinal cord stimulator. Dr. Kahn also indicated that the increase in claimant's symptoms constituted a pathological, material worsening of the accepted coccyx condition. (Ex. 72).

Moreover, prior to claimant's surgery, Dr. Davis reported that claimant reported worsened back pain (Ex. 67A) and increasing sacrococcyx pain into the balls of her feet. (Ex. 57). Dr. Davis' opinion is supportive of Dr. Kahn's opinion that claimant's condition compensably worsened. (Ex. 68). I would rely on the persuasive opinion of Dr. Kahn as supported by Dr. Davis to conclude that claimant has established an actual worsening of her accepted coccyx condition. Because the majority reaches the opposite conclusion, I respectfully dissent.