

In the Matter of the ORS 656.260 Medical Services Dispute of

Boling, Stephen C, Claimant

Contested Case No: HH02-004

PROPOSED & FINAL ORDER

May 21, 2002

TRANSPORTATION INSURANCE CORPORATION, Petitioner

STEPHEN C. BOLING, Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

HISTORY OF THE CASE

Insurer appeals an administrative order issued on December 18, 2001 by the Medical Review Unit (MRU) of the Workers' Compensation Division (WCD), Department of Consumer and Business Services (department or director). On March 19, 2002, Administrative Law Judge Paul Vincent conducted a hearing in this matter. Petitioner Transportation Insurance Corporation (insurer) was represented by attorney Gene Platt. Respondent Stephen C. Boling (claimant) was represented by attorney Jean M. Fisher. WCD waived appearance. Oregon Health Systems, a managed care organization (OHS or MCO) also waived appearance. Claimant testified on his own behalf; no other witnesses testified. The record closed on April 15, 2002 following submission of supplementary exhibits.

The record of this proceeding, consisting of all evidence received, and all hearing papers filed, has been considered. The findings of fact set out below are based upon the entire record.

ISSUES

1. Whether James Lisle DPM (Doctor of Podiatry) may treat claimant as an MCO specialist.
2. Whether the August 29, 2001 right foot surgery was reasonable and appropriate.

EVIDENTIARY RULINGS

WCD Exhibits 1 through 163 as well as claimant's Supplementary Exhibits 65A, 120A, 144A, 146A and 146B were received into the record without objection.

FINDINGS OF FACT

On May 31, 1994, claimant suffered a right foot injury while manufacturing mobile homes. (Ex. 5). By letter dated December 22, 1994, claimant became enrolled in the MCO. (Ex. 13). Insurer initially accepted a metatarsal contusion and later accepted a Morton's neuroma right foot. (Ex. 76-2). Following litigation, insurer accepted scar

tissue, right third intermetatarsal space, persistent right foot pain with metatarsalgia. (Exs. 53, 61, 62, 99 and 115).

Claimant treated with Dr. Lisle intermittently from December 1994 through April 1995. (Ex. 10-1, 10-2, 10-3).

On December 4, 1998, David L. Noall, MD performed surgical neurectomy, 2-3 web space, right foot. (Ex. 25). On January 28, 2000, Dr. Noall performed surgical neurectomy, right 3-4 web space. (Ex. 32).

On April 27, 2000, insurer issued a Notice of Closure. (Ex. 36). By Order on Reconsideration dated July 21, 2000, the department affirmed the closure. (Ex. 47).

By letter dated January 15, 2001, OHS requested claimant to designate an MCO panel member as his attending physician. (Ex. 64). In February 2001, insurer provided claimant with a list of MCO providers. (Ex. 67).

On March 12, 2001, Dr. Noall, MD referred claimant to Dr. Lisle for treatment. (Ex. 69). Dr. Noall did not accept the role of attending physician. (Ex. 77). On March 22, 2001, claimant returned to Dr. Lisle for treatment. (Ex. 10-4). On April 10, 2001, Dr. Lisle requested OHS to precertify surgical excision of two right foot neuromas. (Ex. 73). The MCO list of panel medical providers includes Dr. Lisle as a specialist. (Ex. 65A-7).

On April 12, 2001, Patrick Spensley, MD requested authorization as a temporary OHS provider for claimant. (Ex. 75). On April 20, 2001, Dr. Spensley became claimant's attending physician. (Exs. 78 and 84).

On April 12, 2001, Dr. Noall did not concur with Dr. Lisle's surgical recommendation. (Ex. 74). On May 18, 2001, Douglas N. Beaman, MD examined claimant and recommended additional diagnostic testing before considering the proposed surgery. (Ex. 87-3).

By letter dated June 19, 2001, Dr. Spensley declined to provide any opinion regarding the proposed surgery. (Ex. 89-5).

On June 24, 2001, John DiPaola, MD and OHS Medical Director, reviewed claimant's medical records and recommended against an additional foot surgery. (Exs. 91 and 118-9). By letter dated June 29, 2001, OHS declined the surgical request. (Exs. 93 and 118).

On July 17, 2001, Dr. Lisle reiterated his surgery recommendation. (Ex. 98).

On July 22, 2001, claimant appealed OHS's denial of the surgical request. (Ex. 100).

On July 27, 2001, Dr. Lisle agreed that further diagnostic tests prior to surgery were appropriate. (Ex. 103). On July 30, Dr. Lisle stated that diagnostic modalities and untried conservative methods of care should not exclude an option for surgical treatment. (Ex. 104-2).

On August 3, 2001, John M. Coletti Jr., MD and Robert W. Geister, DPM conducted an insurer's medical examination. (Ex. 105). On August 17, 2001, the panel indicated that it did not recommend the proposed surgery. (Ex. 109-3).

On August 21, 2001, the OHS Medical Review Committee met and considered the case. (Ex. 118-3). Based on the opinions of several orthopedic surgeons against further surgery, the committee recommended a change of attending physician to an orthopedic foot specialist. (Ex. 118-7).

On August 27, 2001, Dr. Spensley stated, "It is my opinion that the recommendations of Dr. Lisle for surgery would be beneficial to this patient***." (Ex. 110).

On August 29, 2001, Dr. Lisle performed surgical excision of two right foot neuromas at the second and third web spaces. (Ex. 111). On October 11, 2001, Dr. Lisle conducted a post-operative examination and found that claimant had no pain in the second web space and some residual pain in the third web space. (Exs. 10-8 and 129.).

On November 12, 2001, John D. Mozena, DPM examined claimant at MRU's request. (Ex. 140) Dr. Mozena endorsed the disputed surgery. (Ex. 140-4).

CONCLUSIONS OF LAW

1. As an MCO specialist, Dr. Lisle may treat claimant.
2. The August 29, 2001 surgery was reasonable and appropriate.

OPINION

The director exercises jurisdiction over MCO disputes. ORS 656.260(6). I review for substantial evidence and error of law. ORS 656.260(16). The burden of proving a fact or position rests with the proponent. ORS 183.450(2).; *Harris v. SAIF*, 292 Or 683 (1982). In the absence of contrary legislation, the standard of proof in administrative hearings is preponderance of evidence. *Cook v. Employment Div.*, 47 Or 437 (1982) (In the absence of legislation adopting a different standard, the standard of proof in an administrative hearing is preponderance of evidence).

MRU determined that claimant is entitled to treat with Dr. Lisle as an MCO specialist and that the August 2001 surgery was reasonable and appropriate. Insurer contends that Dr. Lisle is not qualified to treat claimant as an MCO specialist and that the administrative order reflects an error of law. Insurer further contends that the August

2001 was not reasonable and appropriate and that the administrative order is not supported by substantial evidence. Claimant contends that the administrative order is correct and should be affirmed.

MCO Specialist

Pursuant to ORS 656.245(4)(a)¹ and OAR 436-015-0035(4)(d)², injured workers who are subject to an MCO shall receive medical services in the manner prescribed by the contract. As petitioner, insurer bears the burden of proving that the administrative order determining that Dr. Lisle was qualified to treat claimant as an MCO specialist, was incorrect. Here, the MCO contract is not in evidence.

The record establishes that Dr. Noall referred claimant to Dr. Lisle. Subsequently, Dr. Spensley, as a temporary MCO provider, assumed the role of claimant's attending physician. Although Dr. Spensley initially declined to render any opinion regarding the disputed surgery, he later agreed with Dr. Lisle's surgical recommendation. The MCO list of panel medical providers includes Dr. Lisle as a specialist. Inasmuch as the MCO contract is not in evidence, insurer failed to carry its burden of proving that the administrative order in claimant's favor is incorrect. Therefore, I conclude that the administrative order reflects no error of law and affirm.

¹ ORS 656.245(4)(a) provides in part:

“(4) Notwithstanding subsection (2)(a) of this section, when a self-insured employer or the insurer of an employer contracts with a managed care organization certified pursuant to ORS 656.260 for medical services required by this chapter to be provided to injured workers:

(a) Those workers who are subject to the contract shall receive medical services in the manner prescribed in the contract.***”

² OAR 436-015-0035(4)(d) provides:

“(4) An MCO may contract only with an insurer as defined in OAR 436-010-0005. When an MCO contracts with an insurer to provide services, the contract shall specify those employers governed by the contract.

(d) Workers enrolled in an MCO shall receive medical services in the manner prescribed by the terms and conditions of the contract;”

August 2001 Surgery

Pursuant to ORS 656.245(1), an insurer is obligated to provide medical services that are materially related to a compensable condition for so long as the nature of the injury or the process of recovery requires. This obligation continues over the injured worker's lifetime. ORS 656.245(1)(b). However, pursuant to ORS 656.327(1), an insurer is not responsible to provide medical treatment that is excessive, inappropriate, ineffectual or violates administrative rules.

A finding is supported by substantial evidence if it is reasonable in light of countervailing as well as supporting evidence. *Garcia v. Boise Cascade Corp.*, 309 Or 292 (1990). To determine whether substantial evidence exists, a Hearings Judge is

required to:

“look at the whole record with respect to the issue being decided, rather than one piece of evidence in isolation. If an agency’s finding is reasonable, keeping in mind the evidence against the finding as well as the evidence supporting it, there is substantial evidence. ***For instance, and in the context which is likely to occur in workers’ compensation cases, if there are doctors on both sides of a medical issue, whichever way the [director] finds the facts will probably have substantial evidentiary support. [The hearing Judge] would not need to choose sides. The difference between the ‘any evidence’ rule and the substantial evidence test***will be decisive only when the credible evidence apparently weighs overwhelmingly in favor of the finding and the [director] finds the other without giving a persuasive explanation.” *Armstrong v. Asten-Hill Co.*, 90 Or App 200 (1988).

It is not for an ALJ to decide which medical opinions are more persuasive. I am authorized only to determine whether the record contains substantial evidence to support MRU’s order. See *John J. Rice*, 4 WCSR 173, 176 (1999). The medical evidence here is divided. In determining that the disputed surgery was appropriate, MRU relied upon and found the opinions of Drs. Lisle, Spensley and Mozena persuasive. To use the language of *Armstrong*, I cannot say that the medical evidence opposing the disputed surgery “weighs overwhelmingly” against MRU’s determination. Accordingly, I find that the administrative order is supported by substantial evidence and affirm.

Attorney Fees

Claimant has finally prevailed in a contested case, and therefore, is entitled to a reasonable attorney fee. ORS 656.385(1). Claimant’s attorney submitted a statement of services requesting an attorney fee of \$4,000. Considering the factors listed in OAR 436-001-0265, \$4,000 is a reasonable fee for claimant’s attorney’s services in this matter.

ORDER

IT IS HEREBY ORDERED that:

The Administrative Order dated December 18, 2001 is affirmed.

DATED this _____ day of May 2002.

Paul Vincent, Administrative Law Judge
Hearing Officer Panel