
In the Matter of the ORS 656.245(1)(c)(H) Medical Services Dispute of

Bottoms III, William H., Claimant

Contested Case No: H03-104

PROPOSED AND FINAL ORDER

October 22, 2003

WILLIAM H. BOTTOMS III, Petitioner

SAIF CORPORATION, Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

HISTORY OF THE CASE

Claimant appeals the administrative order issued on July 29, 2003 by the Medical Review Unit (MRU) of the Workers' Compensation Division (WCD), Department of Consumer and Business Services (department or Director). On October 6, 2003, Administrative Law Judge Catherine P. Coburn conducted a telephone hearing in Beaverton, Oregon. Attorney Glen J. Lasken represented petitioner William H. Bottoms III (claimant). Attorney Mary Goebel Adams represented respondent SAIF Corporation (insurer). No witnesses testified and the record closed on the date of hearing.

ISSUE

Whether MRU incorrectly determined that insurer is not liable for a C7-8 SPECT scan as a diagnostic medical service.

EVIDENTIARY RULINGS

WCD Exhibits 1 through 44 were received without objection.

FINDINGS OF FACT

- (1) On November 11, 1999, claimant suffered a cervical injury while working as a logger and attempting to start a chain saw. (Exs. 3 and 6-2.) Insurer initially accepted a cervical strain and later accepted "left lateral disc herniation at C5-6." (Exs. 7, 14, 19 and 24.) Claimant was treated with physical therapy and trigger point injections. (Exs. 2-3, 6.)
- (2) A December 1999 MRI revealed a disk protrusion at the C5-6 level, left, mild desiccation of the C4-5 and C5-6 disks. Brian D. Denekas, MD and James C. Dineen, MD interpreted the MRI as suggesting the presence of pre-existing early degenerative disease. (Ex. 6-7.)
- (3) In February 2000, claimant was released to medium work and enrolled in an MCO.

(Exs. 2-7 and 8).

- (4) The accepted condition became medically stationary on December 15, 2000. (Ex. 13-1.) Attending physician Mark G. Belza, MD attributed 60 percent of claimant's impairment to the cervical strain and 40 percent to degenerative disc disease. (Ex. 12-1.) On February 5, 2001, the claim was closed with a 5 percent permanent partial disability award. (Exs. 15 and 25.)
- (5) Dr. Belza continued conservative treatment and on February 27, 2003, diagnosed cervical spondylosis, cervical disc disease and left cervical radiculopathy with bilateral C7 versus C8 distribution. He recommended a SPECT scan. (Ex. 2-15.)
- (6) In a letter dated April 4, 2003, Dr. Belza requested authorization for a SPECHT scan for diagnostic purposes to investigate the C7 and C8 distribution. He stated that it was possible that there were disc problems at the C7 or C8 level which could be directly or indirectly related to the accepted condition. Dr. Belza requested the SPECHT scan to further diagnose the accepted condition and determine whether or not a new or consequential condition developed as a result of the accepted on-the-job injury. (Ex. 32.)

CONCLUSIONS OF LAW

MRU incorrectly determined that insurer is not liable for a C7-8 SPECT scan as a diagnostic medical service.

OPINION

Jurisdiction over this medical service dispute lies with the director. ORS 656.245(6); OAR 436-010-0008(1). Since claimant was enrolled in an MCO, I review for substantial evidence or error of law. ORS 656.245(6) and ORS 656.260(16). The burden of proving a fact or position rests with the proponent. ORS 184.450(2). As petitioner, claimant bears the burden of proving by a preponderance of the evidence that the administrative order is incorrect. *See Cook v. Employment Div.*, 47 Or 437 (1982) (In the absence of contrary legislation, the standard of proof in an administrative hearing is preponderance of evidence). Proof by a preponderance of evidence means that the fact finder is persuaded that the facts asserted are more likely true than false. *Riley Hill General Contractors v. Tandy Corp.*, 303 Or 390 (1989).

Following a work injury, an insurer is obligated to provide medical services for conditions caused in material part by the injury for such period as the nature of the injury or the process of the recovery requires. This obligation continues over the injured worker's lifetime. ORS 656.245(1)(b). However, after the compensable condition becomes medically stationary, medical services are longer compensable with certain exceptions. Listed among the exceptions is diagnostic medical services.

ORS 656.245(1)(c)(H) provides:

(c) Notwithstanding any other provision of this chapter, medical services after the worker's condition is medically stationary are not compensable except for the following:

(H) Services that are necessary to diagnose the worker's condition.

In *Counts v. International Paper Company*, 146 Or App 768 (1997), the court addressed the compensability of diagnostic medical services. The court held that, in order for diagnostic services to be compensable, claimant must show that the compensable injury made the tests necessary. The court further stated that diagnostic medical services are compensable if they are necessary to determine the cause and extent of a compensable injury.

MRU relied on Dr. Belza's chart notes and determined that the proposed diagnostic test was not compensable. Claimant contends that the administrative order is not supported by substantial evidence. I agree.

Substantial evidence exists to support an administrative order "when the record, viewed as a whole, would permit a reasonable person to make that finding." ORS 183.482(8)(c). The "substantial evidence" standard of review can be overcome only when "credible evidence apparently weighs overwhelmingly in favor of one finding and the [director] finds the other without giving a persuasive explanation. *Armstrong v. Asten-Hill Co.*, 90 Or App 292, 295 (1998).

Relying on Dr. Belza's chart notes, MRU found insufficient evidence that the proposed diagnostic test was directed to the accepted condition and concluded that the test was not compensable. However, in addition to the chart notes, the evidence includes Dr. Belza's April 4, 2003 letter clarifying the causal relationship. Dr. Belza requested authorization of the SPECHT test "to further diagnose the accepted condition." I find that this statement from the attending physician meets the *Counts* standard. Moreover, I find that a reasonable person, reading the record as a whole, would conclude that the proposed SPECHT test is compensable as a diagnostic medical service. Inasmuch as the administrative order is not supported by substantial evidence, I reverse.

ATTORNEY FEES

Claimant has prevailed in a contested case hearing and is entitled to a reasonable attorney fee. ORS 656.385(1). On October 9, 2003, claimant's attorney submitted a statement of services requesting a fee in the amount of \$1,500. Considering the factors listed in OAR 436-001-0265, I find that \$1,500 is a reasonable fee for claimant's attorney's services in this case.

ORDER

IT IS HEREBY ORDERED that:

1. The Directors Review and Order dated July 29, 2003 is reversed.
2. Insurer shall pay claimant's attorney a fee of \$1,500.

DATED this 22nd day of October 2003.

Catherine P. Coburn
Administrative Law Judge
Office of Administrative Hearings