

In the the ORS 656.260 Treatment Dispute of

Senn, David M., Claimant

Contested Case No: H03-047

PROPOSED & FINAL ORDER

January 14, 2004

DAVID M. SENN AND KIRK WELLER, MD, Petitioner
SAIF CORPORATION AND MANAGED HEALTHCARE NORTHWEST,
Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

HISTORY OF THE CASE

Kirk Weller, MD and David M. Senn (claimant), appeal from an Administrative Order issued by the Medical Review Unit (MRU) of the Workers' Compensation Division (WCD), Department of Consumer and Business Services (the director or the department) on April 18, 2003, which found that SAIF Corporation (SAIF) is not liable for a lumbar epidural steroid injection. On May 15, 2003, the matter was referred to the Office of Administrative Hearings (OAH) for hearing

On September 23, 2003, Administrative Law Judge (ALJ) Paul Vincent conducted a telephone hearing in this matter in Salem, Oregon. Attorney Scott Supperstein represented claimant. Dr. Weller did not appear. Attorney Michael Fetrow represented SAIF. Attorney Jerald Keene represented Managed Healthcare Northwest (the MCO). No witnesses testified. The record closed following the hearing.

After the hearing, the OAH assigned the matter to ALJ Ray Myers to review the record and to write this order. The record of this proceeding, consisting of tape recording of the hearing, all evidence received and all hearing papers filed, has been considered. The findings of fact and conclusions of law are based upon the entire record.

ISSUES

Is SAIF liable for a proposed lumbar epidural steroid injection?

EVIDENTIARY RULING

The record consists of Exhibits 1 through 90, which were admitted into the record without objection.

FINDINGS OF FACT

I adopt MRU's Findings of Fact with the following supplementation:

1. Claimant was injured while working for SAIF's insured on September 25, 1996. The

claim has been accepted for “right pelvic contusion, lumbar strain and sacroiliac strain.” (Ex. 63.) On March 6, 2001, SAIF denied claimant’s current lumbar condition as no longer related to the accepted lumbar strain. (Ex. 50.) That denial is final as a matter of law. (Ex. 73.)

2. On May 2, 2002, the MCO refused to consider a request from Dr. Weller for authorization for an Epidural Steroid Injection on the grounds that it was proposed for a condition that is not an accepted condition. (Ex. 70.) The MCO based its decision on a review of the medical record. In that review, it noted that none of the accepted conditions are appropriately treated by Epidural Steroid Injections. (Ex. 75.) Claimant requested medical review of the MCO’s decision. (Ex. 76.)

3. MRU sent claimant to Dr. Wynn for an evaluation. Dr. Wynn stated that the indication for steroid injections is nerve root irritation. Dr. Wynn noted that claimant has evidence of a nerve root irritation, but noted that he also has other pathological processes that would not be helped by an epidural steroid injection. (Ex. 86.)

CONCLUSIONS OF LAW

SAIF is not liable for an epidural steroid injection.

OPINION

This managed care dispute arises under ORS 656.260; therefore, jurisdiction lies with the director. 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); *Salem Decorating v. National Council on Comp. Ins.*, 116 Or App 170 (1992), *rev den* 315 Or 643 (1993). As the proponent of his position, claimant bears the burden of proving by a preponderance of evidence that the administrative order is incorrect. *Harris v. SAIF*, 292 Or 683 (1982) (General rule regarding allocation of burden of proof is that burden is on the proponent of the fact or position.); *Cook v. Employment Div.*, 47 Or 437 (1982) (In the absence of legislation adopting a different standard of proof, the standard 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).

Substantial evidence review involves determining whether, when viewed as a whole, the record contains evidence that would make MRU’s decision reasonable. *Armstrong v. Asten-Hill Co.*, 90 Or App 200, 206 (1988). The party seeking to overturn the agency’s order bears the burden of proving that there was not substantial evidence to support the agency’s order. ORS 183.450(2). As the Court of Appeals recently said, the party seeking to reverse an agency’s decision on substantial evidence grounds “faces a daunting standard of review.” *Webb v. Glennbrook Nickel Co.*, ___ Or App ___ (August 13, 2003).

Claimant argues that Dr. Weller's opinion supports the position that the injection is beneficial for the accepted conditions. Unfortunately for claimant, Dr. Wynn and the MCO reviewer do not agree. As the Court of Appeals noted:

[I]n 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.

Armstrong v. Asten-Hill Co., 90 Or App 200, 206, 752 P2d 312 (1988).

In this case there are doctors on both sides, so MRU's order is supported by substantial evidence.

ORDER

IT HEREBY ORDERED that MRU's Administrative Order dated April 18, 2003, 2003 is affirmed

Dated this 14th day of January, 2004

Ray Myers, Administrative Law Judge
Office of Administrative Hearings