

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

GARY G. SHIELL Claimant

Contested Case No: H04-121

PROPOSED AND FINAL ORDER

November 10, 2004

SAIF CORP., Petitioner

GARY G. SHIELL, Respondent

Before Catherine P. Coburn, Administrative Law Judge, Administrative Hearings

HISTORY OF THE CASE

Insurer appeals the Administrative Order issued on June 21, 2004 by the Medical Review Unit (MRU) of the Workers' Compensation Division (WCD), Department of Consumer and Business Services (department or director). On August 31, 2004, the department referred the matter to the Office of Administrative Hearings (OAH). On October 13, 2004, Administrative Law Judge Catherine P. Coburn conducted a contested case hearing. Attorney Jerome P. Larkin represented petitioner SAIF Corporation (insurer). Attorney Christopher D. Moore represented respondent Gary G. Shiell (claimant). No witnesses testified and the record closed on the date of hearing.

ISSUE

Whether MRU incorrectly determined that a cervical MRI proposed by Victor K. Lin, MD (Neurosurgery) is compensable as a diagnostic medical service pursuant to ORS 656.245(1)(c)(H).

EVIDENTIARY RULINGS

WCD Exhibits 1 through 97 were admitted into the record without objection.

FINDINGS OF FACT

I adopt the findings of fact contained in the administrative order on appeal with the following supplementation.

(1) In July 1998, claimant suffered cervical and right arm pain following a motor vehicle accident. (Ex. 1-1.)

(2) On October 16, 2000, claimant was injured while working as a logger and wearing a hard hat. A treetop approximately 8 inches in diameter fell on claimant's head with a glancing blow, then on the right shoulder and slid down the rib cage. (Exs. 2-4, 12-1, 19, 44-1, 66-1, 70-1 and 74-2.) He reported right shoulder pain, right chest pain and difficulty breathing. (Ex. 3-1.) Claimant was initially diagnosed with right clavicle fracture, right rib fractures, #2-9 and a right 5 percent pneumothorax.¹ He was hospitalized in Coos Bay from the date of injury until October

¹ Pneumothorax is defined as the presence of air or gas in the pleural cavity. *Stedman's Medical Dictionary*, 1394 (26th ed 1995).

26, 2000 when he was released to the care of his local physician and orthopedic surgeon in Roseburg where he lived. (Exs. 19 and 42.)

(3) On October 27, 2000 claimant sought treatment from his attending physician, Steven F. Kagle, MD reporting continued pain and difficulty breathing. (Ex. 44-1.) Dr. Kagle hospitalized claimant and noted multiple injuries. In addition to other treatment, Dr. Kagle ordered cervical x-rays. (Ex. 44-2.) On October 28, 2000, cervical x-rays revealed possible right neural foraminal narrowing at C3-4, disk degeneration at C5-6 and C6-7 and no acute fracture or subluxation. (Ex. 50-1.) On November 2, 2000, claimant was discharged from the hospital in Roseburg. (Ex. 53.)

(4) On November 17, 2000, insurer accepted the following conditions: comminuted right scapular fracture with nondisplaced fracture of the distal acromion, right clavicular fracture, fracture of right ribs #2, #3, #4, #5, #6, #7, #8, and #9 and right mild pulmonary contusion. (Exs. 55, 79, 90.) Insurer enrolled claimant in an MCO. (Ex. 55.)

(5) On December 10, 2001, Allen A. Goodwin, MD examined claimant for neck and low back pain, on referral from Tom Tryon, D.C. (Exs. 58 and 66.) Dr. Goodwin stated, "At this point as far as the on the job injury, it does appear that he may possibly have a right upper extremity radiculopathy/plexopathy in the region of C5-6. *** [W]e may consider MRI of the cervical spine and/or the right shoulder." (Ex. 66-2.)

(6) On February 18, 2002, Joel R. Daven, MD examined claimant and found no indication of cervical radiculopathy. (Ex. 70-1.)

(7) On May 15, 2002, Lynne Bell, MD (Neurologist) and Joseph S. Sacamano, MD (Orthopedic Surgeon) examined claimant at insurer's request. (Ex. 74.) Among other conditions, they diagnosed pre-existing cervical degenerative disc disease. (Ex. 74-10.)

(8) On May 15, 2002, the accepted conditions became medically stationary. (Ex. 78.)

(9) On July 14, 2003, claimant sought treatment from Victor K. Lin, MD. (Ex. 83.) Dr. Lin stated, "I would like to review all his old records to determine what imaging has or has not been done. If an MRI of his neck has not been done it should be considered, but would like more future visits to assess consistency of examination." (Ex. 83-3.) On September 23, 2003, after reviewing claimant's medical records, Dr. Lin recommended a cervical MRI. (Ex. 84-1.) On September 26, 2003, Dr. Lin requested MCO authorization of a cervical MRI. (Ex. 85.) On December 9, 2003, Dr. Lin noted "MRI was denied by Workers Comp" and that he would continue to advocate for the procedue. Dr. Lin stated, "He has symptoms consistent with radiculopathy related logging accident in question." (Ex. 84-2.) On February 5, 2004, Dr. Lin stated, "I maintain that the patient would benefit form an MRI of the C-spine to rule out radiculopathy, given his symptoms." (Ex. 84-3.)

(10) On February 17, 2004, claimant requested administrative review. (Ex. 86.)

CONCLUSION OF LAW

MRU correctly determined that a cervical MRI proposed by Victor K. Lin, MD (Neurosurgery) is compensable as a diagnostic medical service pursuant to ORS 656.245(1)(c)(H).

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, insurer bears the burden of proving by a preponderance of the evidence that the administrative order is incorrect. *See Cook v. Employment Div.*, 47 Or App 437 (1980) (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 no 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.

MRU relied on Dr. Lin's opinion and determined that the proposed cervical MRI is reimbursable as a diagnostic medical service. Insurer contends that the disputed medical procedure is not reimbursable because it has not accepted a cervical condition. In contrast, claimant contends that the disputed MRI is reimbursable because the work injury necessitated it. I agree with claimant's position.

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. *See also Roseburg Forest Products v. Langley*, 156 Or App 454 462 (1998). Here, the record establishes that a tree fell on claimant's head before hitting the shoulder and rib cage. Following the medically stationary date, Dr. Lin proposed a cervical MRI to identify a cervical condition that may have been caused by the work injury. In recommending the diagnostic test, Dr. Lin stated, "[Claimant] has symptoms consistent with radiculopathy related to the logging accident in question." Based on the record, I find that Dr. Lin's opinion satisfies the *Counts* standard, and therefore, the diagnostic MRI is reimbursable.

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). Based on the record including Dr. Lin’s opinion, I find that a reasonable person could conclude, as MRU did, that the disputed diagnostic MRI is reimbursable. Finally, inasmuch as the administrative order is supported by substantial evidence, I affirm.

ATTORNEY FEES

Claimant has prevailed in a contested case hearing and is entitled to a reasonable attorney fee. ORS 656.385(1). On October 13, 2004, claimant’s attorney submitted a statement of services requesting a fee in the amount of \$1,000. Considering the factors listed in OAR 436-001-0265, and particularly the parties’ written argument, I find that \$1,000 is a reasonable fee for claimant’s attorney’s services in this administrative hearing.

ORDER

IT IS HEREBY ORDERED that:

1. The Administrative Order dated June 21, 2004 is affirmed.
2. Insurer shall pay claimant’s attorney a fee of \$1,000.