

In the ORS 656.245 Medical Service Dispute of

SHANDA M. DALHAUG Claimant

Contested Case No: H05-051

PROPOSED AND FINAL ORDER

August 02, 2005

SHANDA M. DALHAUG, Petitioner

SAIF CORP., Respondent

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

HISTORY OF THE CASE

Claimant appeals the Administrative Order issued on March 9, 2005 by the Medical Review Unit (MRU) of the Workers' Compensation Division (WCD), Department of Consumer and Business Services (department or director). On March 31, 2005, the department referred the matter to the Office of Administrative Hearings (OAH). On July 26, 2005, Administrative Law Judge Catherine P. Coburn conducted a hearing in Beaverton, Oregon. Attorney Thomas M. Cary represented petitioner Shanda M. Dalhaug (claimant). Attorney David L. Runner represented respondent SAIF Corporation (insurer). Attorney Jerald P. Keene represented Providence Managed Care Organization (MCO). No witnesses testified and the record closed on the date of hearing.

ISSUE

Whether MRU correctly determined that insurer is not liable for a lumbar discogram recommended by Scott Kitchel, MD,

EVIDENTIARY RULINGS

WCD Exhibits 1 through 38 and 40 through 43 were admitted into the record without objection. WCD Exhibit 39 was admitted over claimant's lack of notice objection.

FINDINGS OF FACT

I adopt and incorporate the findings of facts contained in the administrative order dated March 9, 2005 with the following supplementation:

1. On July 30, 2002, claimant suffered a compensable injury while working as a medical records clerk. (Ex. 3-2.) On December 11, 2002, insurer accepted an L5-S1 disc herniation and on June 4, 2003, enrolled claimant in an MCO. (Exs. 10 and 16.)
2. On October 18, 2003, Dr. Kitchel performed a right L5-S1 laminectomy and discectomy. (Ex. 18.)
3. On July 8, 2004, a lumbar MRI showed no evidence of persisting or recurrent disc herniation. It revealed an annular tear at L4-5 and degenerative changes at L4-5 and L5-S1.

(Exs. 24, 26 and 39-4.)

4. On August 27, 2004, the MCO denied Dr. Kitchel's request for a lumbar discectomy for lack of medical necessity. (Exs. 25, 26 and 28.)

5. In an independent medical examination dated October 1, 2004, William A. Carr, MD indicated that claimant suffered pre-existing degenerative disc disease at L4-5 and L5-S1 which was not work-related. (Ex. 30-8.)

6. In a medical arbiter's report dated December 15, 2004, Dr. Ballard opined,

In evaluating her lower back and if we assume that she is valid in her presentation and does have persistent back pain with some radiation to the right buttocks and right posterior thigh, then it would not be unreasonable to proceed with a diskogram in helping to differentiate the etiology of her continued back symptoms. However, the reason for the diskogram more likely than not would be due to her degenerative changes in her back and not due to the L5/S1 disk herniation. (Ex. 39-5.)

CONCLUSION OF LAW

MRU correctly determined that insurer is not liable for a lumbar discogram recommended by Scott Kitchel, MD.

OPINION

Jurisdiction lies with the director. ORS 656.704(3)(a), 656.245(6) and ORS 656.260(14). I review for substantial evidence or error of law. ORS 656.245(6), ORS 656.260(16) and OAR 436-001-0225(1). The burden of producing evidence to support 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 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). Having reviewed the record, I conclude that claimant has met his burden.

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. ORS 656.245(1)(a). This obligation continues over the injured worker's lifetime. ORS 656.245(1)(b). After the medically stationary date, medical services are not compensable with certain exceptions, such as diagnostic services. ORS 656.245(1)(c)(H). To establish compensability, the injured worker must show that the compensable injury made the diagnostic service necessary. *Counts v. International Paper Co.*, 146 Or App 768, 770 (1997). Diagnostic services for the purpose of determining a causal relationship, if any, between an

accepted condition and the worker's condition are compensable. *Roseburg Forest Products v. Langley*, 156 Or App 454, 462 (1998). The service is compensable if it is necessary to determine the cause or extent of the compensable injury, even if a noncompensable condition is discovered as a result. *Counts*, at 771. Tests to determine the extent of a compensable injury are reimbursable; tests to establish the existence of a new or consequential condition are not. *Langley*, at 463. See *William H. Bottoms*, Final Order, 9 CCHR 37 (2004).

MRU determined that insurer is not liable for the proposed lumbar discogram as a diagnostic medical procedure. Claimant first contends that she was deprived of adequate notice of the medical causation issue. Claimant next contends that MRU erred by applying either a sole or major contributing cause standard to a medical service dispute. Finally, claimant requests remand to MRU for further consideration. Insurer and the MCO contend that the administrative order is correct and should be affirmed.

I find claimant's arguments unpersuasive. To begin, claimant was not surprised by the medical causation issue. The medical record contains several references to preexisting lumbar degenerative disc disease and MRU acted well within its purview to consider the question whether the proposed diagnostic treatment was related to the accepted L4-5 disc herniation or to an unrelated, preexisting medical condition. Next, MRU correctly enunciated the legal standard defined by *Counts and Langley*. For example, MRU relied on the opinion of medical arbiter Ballard who stated that "more likely than not" the discogram was caused by degenerative disc disease and not the compensable injury. Thus, MRU correctly applied a "medical probability" standard for establishing compensability of a medical service. Finally, a reasonable person could read the opinions of Drs. Kitchel, Carr and Ballard, and conclude that the compensable work injury did not make the proposed discogram necessary. Inasmuch as the administrative order reflects no legal error and MRU's determination is supported by substantial evidence, I affirm.

ATTORNEY FEES

Claimant has not prevailed in a contested case hearing and is not entitled to a reasonable attorney fee. ORS 656.385(1).

ORDER

IT IS HEREBY ORDERED that:

The Administrative Order dated March 9, 2005 is affirmed.