In the ORS 656.260 Managed Care Dispute of

CYNTHIA A. HOLTMAN Claimant

Contested Case No: H05-058

PROPOSED AND FINAL ORDER

August 15, 2005

SAIF CORP., Petitioner

CYNTHIA A. HOLTMAN, Respondent

Before Lawrence S. Smith , Administrative Law Judge, Administrative Hearings

HISTORY OF THE CASE

SAIF Corporation (SAIF) appeals a March 28, 2005 Administrative Order issued by the Medical Review Unit (MRU) of the Workers' Compensation Division (WCD), Department of Consumer and Business Services. In the Order, MRU concluded that Employer was liable for medical services provided to Cynthia A. Holtman (Claimant) by Ronald L. Teed, MD. Employer's appeal was referred to the Office of Administrative Hearings (OAH) for hearing on April 7, 2005.

On July 13, 2005, Administrative Law Judge (ALJ) Lawrence S. Smith conducted a telephone hearing in this matter. Assistant Attorney General Jerry Larkin represented SAIF. Attorney Chuck Mundorff represented Claimant. No one appeared on behalf of MRU/WCD. No testimony was offered, and the record was closed that day.

ISSUE

Whether substantial evidence supports MRU's Administrative Order that the diagnostic services provided by Dr. Teed were necessary to treat Claimant's compensable injury or MRU made an error of law in its Administrative Order.

EVIDENTIARY RULINGS

WCD's Exhibits 1 through 32 were received without objection.

FINDINGS OF FACT

(1) Claimant fell at work on December 2, 2003, but continued working. She later reported injuries to her shoulder, elbow, ribs, hip, and lower leg from the fall. (Ex. 1 at 2 and Ex. 4.) X-rays of the affected areas were normal (Ex. 3), and she was diagnosed with multiple contusions. (Ex. 4 at 2.)

(2) On December 23, 2003, the insurer for Claimant's employer, SAIF, accepted a non-disabling claim for left hip and left shoulder contusion. (Ex. 5 at 2.)

(3) On January 29, 2004, Claimant sought treatment from Dr. Alan Scott because she continued to have left shoulder pain. Dr. Scott opined that her shoulder pain was mainly

muscular in nature and that there was no evidence of bursitis or rotator cuff. He referred her to an orthopedic surgeon. (Ex. 6.)

(4) On June 17, 2004, Claimant sought treatment from Dr. Teed, complaining of continuing left shoulder pain after the injury, with no history of pain before. Dr. Teed diagnosed a left shoulder strain due to the injury and prescribed physical therapy for a month. He planned that if her condition did not significantly improve in a month, "I would have a low threshold to get an MRI of the shoulder to rule out a rotator cuff tear." (Ex. 10 at 1 and 2.)

(5) On June 30, 2004, SAIF enrolled Claimant in CareMark Comp, a managed care organization (MCO) and advised her that Dr. Teed was a member of the MCO panel. (Ex. 11.)

(6) On July 2, 2004, Claimant was again examined by Dr. Teed and reported no improvement. Dr. Teed recommended an MRI with arthrogram of her left shoulder. (Ex. 10 at 3.)

(7) An MRI of Claimant's left shoulder on July 26, 2004, revealed mild hypertrophic changes of the left AC joint and a "mild increased signal at musculotendinous junction of the rotator cuff, consistent with mild tendonitis and/or partial tear." (Ex. 12.)

(8) Dr. Teed recommended a left shoulder arthroscopic evaluation with debridement, acromioplasty, and subacormial decompression. On October 21, 2004, MCO denied review of the surgery, stating the procedure was not for the claimed condition. (Ex. 13.)

(9) On November 11, 2004, Dr. Teed opined that Claimant's symptoms were most consistent with impingement syndrome of the left shoulder because her symptoms resolved completely after an injection of local subacromial anesthetic. Dr. Teed noted that conservative treatment of Claimant's shoulder failed to relieve her symptoms and, that combined with the MRI findings, a left shoulder arthroscopic evaluation with debridement, acromioplasty and a subacromial decompression was recommended. (Ex. 14.)

(10) Based on Dr. Teed's opinion, Claimant asked SAIF to add left shoulder impingement to the accepted conditions. SAIF denied the request. Claimant's appeal is pending.

(11) On January 26, 2005, Claimant's MCO declined review of Dr. Teed's recommendation because the proposed treatment was not for an accepted condition. (Ex. 22.)

CONCLUSIONS OF LAW

MRU's Administrative Order is supported by substantial evidence and does not reflect an error of law.

OPINION

Jurisdiction lies with the director. ORS 656.245(6) and 656.704(3)(a). The review is for substantial evidence or error of law. ORS 656.245(6) and OAR 436-001-0225(1). The burden of producing evidence to support a fact or position rests on the proponent. ORS 184.450(2). SAIF 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. 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.

Error of Law

SAIF alleges that MRU misapplied *Counts v. Int'l Paper Co.*, 146 Or App 768 (1997) in its Administrative Order, as interpreted in *William H. Bottoms,* Final Order*,* 9 CCHR 37 (2004). In *Bottoms*, WCD concluded that there was substantial evidence to support the conclusion that the services were not for a compensable condition. WCD is given some leeway in deciding compensability for subsequent medical services. Dr. Teed's reports establish sufficient connection to the original accepted injury to establish compensability of Dr. Teed's services as diagnostic.

Substantial Evidence

Substantial evidence exists to support a finding "when the record, viewed as a whole, would permit a reasonable person to make that finding." ORS 183.482(8)(c). To determine whether substantial evidence exists, an ALJ 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 findings as well as the evidence supporting it, there is substantial evidence. *** For instance, and in the context which is likely frequently 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 ALJ 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, 206 (1998).

SAIF argues that diagnostic testing must be related to the accepted condition. Testing to "rule in" possible additional conditions is not compensable. For the same reasons as stated above, Dr. Teed has established that the proposed services were necessary to establish the extent of Claimant's compensable injury. SAIF provided no rebuttal evidence. MRU had substantial evidence to conclude that the services proposed by Dr. Teed were compensable.

ATTORNEY FEES

Claimant has prevailed in a contested case hearing and is entitled to a reasonable attorney fee. ORS 656.385(1). Claimant's attorney submitted no statement of services. The hearing was nearly 40 minutes. Considering the factors listed in OAR 436-001-0265 and because the issue was the same as before, a reasonable attorney fee was two hours x $200 per hour, or $400.

ORDER

IT IS HEREBY ORDERED:

MRU's March 28, 2005 Administrative Order is affirmed. Claimant is entitled to a reasonable attorney fee of $400.rsed.