

In the ORS 656.260 Managed Care Dispute of

RAMONA N. LEFFLER, Claimant

Contested Case No: H04-149

PROPOSED AN FINAL ORDER

MARCH 23, 2005

SAIF CORP, Petitioner

RAMONA N. LEFFLER, Respondent

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

HISTORY OF THE CASE

Insurer appeals the Administrative Order issued on September 8, 2004 by the Medical Review Unit (MRU) of the Workers' Compensation Division (WCD), Department of Consumer and Business Services (department or director). On October 14, 2004, the department referred the matter to the Office of Administrative Hearings (OAH). On February 23, 2005, Administrative Law Judge Catherine P. Coburn conducted a hearing in Beaverton, Oregon. Attorney Jerome P. Larkin represented petitioner SAIF Corporation (insurer). Attorney George J. Wall represented respondent, Ramona N. Leffler (claimant). No witnesses testified and the record closed on the date of hearing.

ISSUE

Whether the June 7, 2004 diagnostic cervical MRI is compensable as a diagnostic medical service pursuant to ORS 656.245(1)(c)(H).¹

EVIDENTIARY RULINGS

WCD Exhibits 1 through 41, as well as insurer's Supplementary Exhibits 23 and 36A were admitted without objection.

FINDINGS OF FACT

(1) On May 10, 2000, claimant suffered a right shoulder injury while working as a school custodian. (Ex. 2.) On August 9, 2000, insurer accepted right shoulder tendonitis and enrolled claimant in Caremark Comp Managed Care Organization (MCO). (Exs. 5, 6 and 16.) Claimant's condition became medically stationary on November 25, 2002, and on January 17, 2003, insurer closed the claim. (Exs. 15 and 18.)

(2) On April 29, 2004, claimant sought treatment from Dr. Gambee on referral from Edgar K. Ragsdale, M.D. Claimant complained of neck and right shoulder pain. (Ex. 21.) Dr. Gambee noted, "We will follow through with work-up of her neck and neurological status." (Ex. 21-3.) On May 10, 2004, Dr. Ragsdale indicated that claimant exhibited symptoms in both the

¹ The parties settled an issue concerning a cervical EMG.

right shoulder and the neck. (Ex. 22.) On June 7, 2004, claimant underwent a cervical MRI. (Ex. 26.)

(3) On July 1, 2004, Dr. Gambie wrote, “Neck problems and shoulder problems are oftentimes very confusing and difficult to sort out. *** So, in summary, it would appear that her current complaints, which have been persistent since the time of her worker’s comp claim filing, are directly associated with this old work injury.” (Ex. 33.)

(4) On July 20, 2004, Medical Arbiter Nels L. Carlson, M.D., examined claimant and opined, “In my opinion, the differential diagnosis for shoulder pain would include shoulder joint pathology such as an impingement syndrome or rotator cuff tear versus a C5 or C6 cervical radiculitis or radiculopathy. Often times there may be overlap, and at times it is difficult to differentiate shoulder pain caused by shoulder joint pathology versus shoulder pain caused by cervical radiculitis.” (Ex. 37-3.)

CONCLUSION OF LAW

The June 7, 2004 diagnostic cervical MRI is compensable as a diagnostic medical service pursuant to ORS 656.245(1)(c)(H).

OPINION

This managed care dispute arises under ORS 656.260, and 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 petitioner, insurer 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).

MRU determined that insurer is liable for the disputed cervical MRI. Insurer contends that the administrative order reflects legal error. In support of its position, insurer argues that the cervical MRI is not compensable because it was not necessitated by the accepted shoulder tendonitis. In contrast, claimant contends that the administrative order is correct and should be affirmed.

Pursuant to ORS 656.245(1), an insurer is obligated to provide medical services for compensable conditions for such period as the nature of the injury or the process of recovery requires. This obligation continues over the injured worker’s lifetime. ORS 656.245(1)(b). Pursuant to ORS 656.245(1)(c), medical services after the medically stationary² date are not

² ORS 656.005(17) provides:

compensable with certain exceptions. Pursuant to ORS 656.245(1)(c)(H), medical services that are necessary to diagnose the worker's condition are compensable. 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 order 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.

Here, the accepted condition is right shoulder tendonitis, and claimant seeks compensability of a diagnostic cervical MRI. Dr. Gambee noted that shoulder and neck problems are often difficult to differentiate and opined that claimant's current cervical complaints were related to the work injury. Additionally, medical arbiter Carlson opined that the differential diagnosis was shoulder joint pathology versus cervical radiculopathy. Dr. Carlson further noted that the two diagnoses often overlap. Based on the record, I find that claimant has met her burden of proving that the cervical MRI is compensable as a diagnostic medical service. Finally, finding no legal error, 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 March 15, 2005 claimant's attorney submitted a statement of services requesting a fee in the amount of \$1,462.50 for 6.5 hours of work. On March 16, 2005, counsel for the insurer filed an Objection to Attorney Fee Request. Considering the factors listed in OAR 436-001-0265, including the ranges set forth in the matrix, I find that \$1,000 is a reasonable fee for claimant's attorney's services in this case.

ORDER

IT IS HEREBY ORDERED that:

"Medically stationary" means that no further material improvement would reasonably be expected from medical treatment, or the passage of time.

1. The Administrative Order dated September 8, 2004 is affirmed.
2. Insurer shall pay claimant's attorney a fee of \$1,000.