

In the ORS 656.245 Medical Services Dispute of

GEORGE S. STINSON Claimant

Contested Case No: H05-081

PROPOSED AND FINAL ORDER

August 18, 2005

SAIF CORP., Petitioner

GEORGE S. STINSON, Respondent

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

HISTORY OF THE CASE

Insurer appeals the Administrative Order issued on June 6, 2005 by the Medical Review Unit (MRU) of the Workers' Compensation Division (WCD), Department of Consumer and Business Services (department or director). On June 10, 2005, the department referred the matter to the Office of Administrative Hearings (OAH). On July 22, 2005, Administrative Law Judge Catherine P. Coburn conducted a hearing in Beaverton, Oregon. Attorney David L. Runner represented petitioner SAIF Corporation (insurer). Attorney Keith Semple represented respondent George S. Stinson (claimant). Providence Managed Care Organization (MCO) waived appearance. Claimant testified on his own behalf and the record closed on the date of hearing.

ISSUE

Whether MRU correctly determined that insurer is liable for diagnostic medical services provided by K. Annette Weller, MD on May 17 and November 3, 2004.

EVIDENTIARY RULINGS

WCD Exhibits 1 through 42¹ were admitted into the record without objection. Pursuant to ORS 656.245(6), ORS 656.260(16) and OAR 436-001-0225(1),² I sustained insurer's objection to claimant's Supplementary Exhibits 43 and 44.

By letter dated July 1, 2005, post-hearing, claimant moved to reopen the record and offered additional exhibits. Pursuant to OAR 137-003-0610 and in the interest of efficiency and finality, I deny the motion. Moreover, the proposed exhibits, constitute new medical evidence and are inadmissible under OAR 436-001-0225(1).

FINDINGS OF FACT

(1) On December 1, 1993, claimant suffered a compensable injury while working as an asbestos remover. (Exs. 1 and 2.) On March 1, 1994, insurer accepted a right shoulder

¹ I corrected a typographical error in the Exhibit Index by deleting a duplicate of number 17 and renumbering 17 through 42 to correspond to the exhibit numbers listed on each page.

² No new medical evidence is admissible at the contested case hearing.

contusion with tendonitis and enrolled claimant in an MCO. (Ex. 1.) On October 27, 1994, claimant's condition became medically stationary. (Ex. 3.) In September 1995, the parties executed a claims disposition agreement (CDA). (Ex. 6.) Claimant returned to his regular work as a mechanic and later became self-employed. (Ex. 12-1.)

(2) On May 17, 2004, claimant sought treatment from his initial attending physician, K. Annette Weller, MD, on referral by Robert Guild, MD. (Ex. 12.) Claimant reported one year history of progressive increase in right shoulder and neck pain and right arm paraesthesia. Dr. Weller reviewed claimant's medical history including a non-work-related motor vehicle accident 20 years earlier resulting in a C-4 spinal cord fracture and the 1993 work-related right shoulder injury. Dr. Weller noted, "Would like to check an x-ray of the right shoulder to rule out any progressive arthritis or other process involving the right shoulder which may explain the more focal right shoulder pain and be attributable to his work injury. Discussed with the patient my concern that this is more likely related to his previous history of cervical fracture and injury." (Ex. 12-4.) On May 28, 2004, Dr. Weller viewed the shoulder and neck x-rays and noted, "The right shoulder looks good, without significant arthritis." (Ex. 13-1.) She observed significant degenerative changes at C5-6 and C6 and recommended a cervical MRI. (Ex. 13-2.)

(3) On September 15, 2004, Stephen L. Brenneke, MD examined claimant at insurer's request. In summarizing claimant's medical record, he noted, "5/28/04 Followup with Dr. Weller. It was her impression that the cervical problem was causing most of [claimant's] pain." (Ex. 16-6.) Dr. Brenneke noted that claimant's hands were well-calloused, due to heavy repetitive work as a mechanic. He opined that, in addition to a cervical condition, claimant suffered significant pathology in both shoulders caused by lifestyle and activities and not from a particular injury. (Ex. 16-10.)

(4) On November 1, 2004, Dr. Weller concurred with Dr. Brenneke's report. (Ex. 18.)

(5) On November 3, 2004, claimant sought treatment from Dr. Weller for bilateral shoulder and neck pain. Dr. Weller noted the history of spinal cord injury 20 years earlier with C4 fracture and expressed concern about spinal pathology contributing to the reduced sensation in the right forearm, much of his neck and shoulder pain, as well as other symptoms. Dr. Weller recommended a cervical MRI. (Ex. 20.)

(6) On November 19, 2004, Dr. Guild concurred with Dr. Brenneke's report. (Ex. 21.)

CONCLUSION OF LAW

MRU incorrectly determined that insurer is liable for diagnostic medical services provided by K. Annette Weller, MD on May 17 and November 3, 2004.

OPINION

Jurisdiction lies with the director. ORS 656.245(6) and 656.704(3)(a). I review 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 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).

MRU determined that the disputed diagnostic services were compensable because claimant complained of right shoulder pain, among other symptoms, when he sought treatment from Dr. Weller. Insurer contends that MRU ignored the medical opinions contained in the record and that the administrative order is not supported by substantial evidence. In contrast, claimant contends that the administrative order is correct and should be affirmed. Having reviewed the record, I find that insurer has carried its burden of proof.

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 also William H. Bottoms*, Final Order, 9 CCHR 37 (2004).

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).

It is not for an ALJ to decide which medical opinions are more persuasive. I am authorized only to determine whether the record contains substantial evidence to support MRU's order. See *John J. Rice*, 4 WCSR 173, 176 (1999).

Here, the accepted right shoulder contusion and tendonitis became medically stationary in 1994 and the disputed medical services were provided ten years later. On May 17, 2004, claimant sought treatment from Dr. Weller, who stated that it was medically probable that the symptoms were related to the non-industrial cervical fracture rather than the work injury. Subsequently, Dr. Brenneke examined claimant and opined that the current shoulder problems were caused by recent repetitive work and not the 1993 work injury. Moreover, Drs. Weller and Guild concurred with Dr. Brenneke's report. Consequently, the record establishes that the work injury did not make the disputed diagnostic medical services necessary. On the contrary, the medical opinions contained in the record attribute the need for diagnostic services to either a non-industrial cervical fracture or to recent repetitive work. Furthermore, no medical opinion attributes the diagnostic services to the 1993 work injury. Finally, inasmuch as the administrative order is not supported by substantial evidence, I reverse.

ATTORNEY FEES

Claimant has not prevailed in a contested case hearing and is entitled to no attorney fee. ORS 656.385(1).

ORDER

The Administrative Order dated June 6, 2005 is reversed.