

In the Medical Services Dispute of
GEORGE S. STINSON, Claimant

Contested Case No: H05-081

FINAL ORDER

February 28, 2006

SAIF CORP., Petitioner

GEORGE S. STINSON, Respondent

Before John Shilts , Administrator, Workers' Compensation Division

Respondent claimant, through his attorney Keith D. Semple, timely filed exceptions to Office of Administrative Hearings Administrative Law Judge (ALJ) Catherine P. Coburn's August 18, 2005 Proposed and Final Order. Petitioner insurer, through its attorney David L. Runner, responded. This matter comes before the director for a final order. The issue is diagnostic medical services. I affirm in part and reverse in part.

The proposed order recites that exhibits 1 through 42 were admitted into the record, and supplementary exhibits 43 and 44, offered by claimant prior to hearing, were not admitted. The order does not recite that the ALJ withdrew, on her own motion, exhibits 33 and 38 because they were not related to this matter. Exhibits 33 and 38 are therefore not part of the record.

I adopt the ALJ's findings of fact.

The issue is whether insurer is liable for diagnostic medical services provided by K. Annette Weller, MD, on May 17, 2004 and November 3, 2004. The Medical Review Unit (MRU), by Administrative Order dated May 18, 2005, found insurer liable for the services. MRU reasoned that Dr. Weller was trying to determine whether claimant's right shoulder symptoms were due to his compensable right shoulder injury or a pre-existing cervical injury.

The ALJ reversed, finding that MRU's order was not supported by substantial evidence in the record. The ALJ reasoned that the medical reports in the record attribute the need for the disputed services to claimant's previous neck injury or to his recent work activities, but not to his compensable shoulder injury.

Motion for remand

The proposed order makes the following evidentiary ruling,

“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).”

Claimant's letter was dated July 1, 2005, prior to the hearing of July 22, 2005.¹ In his motion, claimant submitted a June 1, 2005 Report of Operation and a June 8, 2005 letter from Dr. Lamoreaux, and asked that the documents be included or that the matter be remanded to MRU for inclusion of the documents in the record.² At hearing, claimant again made a motion for remand to MRU for additional fact-finding on the same basis as his July 1, 2005 motion; namely, the June 1, 2005 shoulder surgery. Following a discussion between the parties on the record, claimant agreed to go forward with the hearing based on the information in the record on the theory that the services at issue are compensable as diagnostic services; any argument that the services are compensable as related to a new or omitted medical condition could be raised at a subsequent proceeding. In effect, claimant withdrew his motion for remand at hearing, and it was not necessary for the ALJ to rule on it in the proposed order.

In his exceptions, however, claimant responds to the ALJ's ruling and provides further argument in support of his motion for remand. He argues the evidence was not obtainable at the time of hearing and is reasonably likely to affect the outcome of this case. Claimant argues the evidence clarifies Dr. Weller's intent in performing the services at issue. Insurer responds that the new evidence is irrelevant because it relates to non-accepted new shoulder conditions, not to Dr. Weller's intent in providing the disputed services.

To the extent that claimant withdrew his motion at hearing, I am not inclined to consider it now. Moreover, I do not find that the evidence is likely to affect the outcome of this case. As discussed below, there is sufficient evidence in the record on which to determine Dr. Weller's intent in providing the services at issue.

Compensability of the services

As an alternative to remand, claimant argues that the disputed services are compensable as diagnostic services. Claimant's accepted condition is right shoulder contusion with tendonitis. At issue are exams performed by Dr. Weller on May 17, 2004 and November 3, 2004. At hearing, insurer indicated that it was not contesting the entire May 17, 2004 exam, and had already paid 60% of the bill for that exam. Insurer continues to contest the remainder of the May 17, 2004 exam and the November 3, 2004 exam as related to claimant's neck condition, not the accepted shoulder condition.

Claimant argues Dr. Weller was trying to determine the source of claimant's shoulder symptoms and whether they were caused by the accepted condition. Claimant argues there is substantial evidence supporting MRU's conclusion that the services are compensable. I find substantial evidence supporting MRU's conclusion that the May 17, 2004 exam is compensable as a diagnostic service, but not supporting the conclusion that the November 3, 2004 exam is a compensable diagnostic service.

¹ It does not appear as though the ALJ received claimant's letter until after the hearing. The letter is stamped as received by the Workers' Compensation Division on July 5, 2005, and is stamped as received by the Office of Administrative Hearings on July 25, 2005, three days after the hearing. Further, the letter was not specifically mentioned at hearing.

² The documents submitted with claimant's July 1, 2005 letter are not the same documents as claimant's proposed supplementary exhibits 43 and 44.

Medical services for conditions caused in material part by the compensable injury are compensable. ORS 656.245(1)(a). Services that are necessary to diagnose the worker's condition after the worker's condition is medically stationary are compensable. ORS 656.245(1)(c)(H). Diagnostic services are compensable if the compensable injury made the services necessary. *Counts v. Int'l Paper Co.*, 146 Or App 768, 770 (1997). If the services are necessary to determine the cause or extent of the compensable injury, they are compensable even if a non-compensable condition is discovered as a result. *Id.* at 771. Services to determine the 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).

To determine the reason for the services at issue, I look to Dr. Weller's chart notes on the dates in question. Her May 17, 2004 chart notes state:

"The patient is here referred by Dr. Guild for evaluation of chief complaint of right shoulder pain, which patient reports is a flare-up of previous on the job injury. * * * The patient * * * had been doing fairly well, although he continued to have some persistent right anterior shoulder pain. He reports that over the past year his pain has become progressively worse. He notes increased pain * * *."

(Ex. 12-1.) Under "Impression," Dr. Weller states,

"One year history of progressive increase in right shoulder pain, neck pain and right arm paresthesias. 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. * * * Will proceed x-rays of the cervical spine and right shoulder for now, and contact patient after I have reviewed the results * * *."

(Ex. 12-4.) Dr. Weller's chart notes indicate that claimant came in because of right shoulder pain. While Dr. Weller suspected the cause of claimant's symptoms was his prior neck injury, not his work injury, she ordered x-rays to confirm. The x-rays would rule out a cause stemming from the right shoulder injury. The medical evidence at the time of the services supports the conclusion that the May 17, 2004 services were provided to determine the causal relationship, if any, between the accepted shoulder condition and claimant's symptoms. The services are therefore compensable under *Langley* and ORS 656.245(1)(c)(H). Even though Dr. Weller suspected that the cause of claimant's symptoms was his cervical condition, she had not yet ruled out claimant's work injury as a source of his symptoms.

Subsequent medical evidence in the record indicates that claimant's symptoms were caused by the cervical condition. The ALJ relied on that evidence in determining that Dr. Weller's services were not compensable. However, at the time Dr. Weller examined claimant on

May 17, 2004, she was still trying to determine whether his accepted condition may be causing his symptoms. Accordingly, I reverse the ALJ's conclusion that the May 17, 2004 exam was not compensable.

I affirm the ALJ's conclusion that the November 3, 2004 exam is not compensable. Dr. Weller's chart notes of that date state:

“The patient is seen today for a follow up visit. He continues to have complaints of right shoulder, neck, and arm pain. * * * I am concerned about spinal pathology contributing to * * * much of his neck and shoulder pain. * * * Strongly recommend further evaluation of the cervical spine. * * * Although I recognize that there is some significant shoulder pathology, I would advise against pursuing any surgery for the shoulder until the cervical condition can be further assessed * * *.”

(Ex. 20-1.) Unlike Dr. Weller's May 17, 2004 chart notes, her November 3, 2004 notes do not contain references to differentiating between claimant's work injury and other conditions. Rather, she was further investigating claimant's neck condition. Moreover, prior to the November 3, 2004 visit, Dr. Weller had reviewed the right shoulder and neck x-rays and attributed claimant's symptoms to his cervical condition. In her May 28, 2004 chart notes, she states, “I reviewed the x-rays of both his shoulder and neck. The right shoulder x-ray looks good * * *. As a result of his current symptoms, which are supported by abnormalities on the x-ray for the cervical spine with cervical source for increasing right shoulder pain and neck pain * * *.” (Ex. 13.) On October 27, 2004, she also concurred with Dr. Brenneke's September 15, 2004 Independent Medical Examination report in which he stated: “There appears to be no clear correlation between this claimant's present problem now and an injury which took place over a decade ago. * * * In my opinion, the etiology and the major contributing cause of the conditions * * * come about by the lifestyle and activities and not from a particular injury.” (Ex. 16-9, 16-10, 18.) The evidence shows that, by the time of the November 3, 2004 visit, Dr. Weller was no longer trying to determine the cause and extent of claimant's work-related shoulder condition. Accordingly, that exam is not a compensable diagnostic service for claimant's accepted condition.

Claimant has partially prevailed, and his attorney is therefore entitled to a partial fee. ORS 656.385(1). At administrative review, claimant's attorney devoted 2.5 hours. (Ex. 37.) I do not find a statement of services in the file for the time devoted to the hearing process. Based on the pre- and post-hearing correspondence in the file, I estimate that claimant's attorney spent 3.5-4 hours on the hearing and exceptions processes. The value to claimant is the outstanding bills for the services in dispute [(\$289 x 40%) + \$113 = \$228.60]. Applying the director's matrix, I award claimant's attorney \$325 for services at all levels. OAR 436-001-0265(1).

IT IS HEREBY ORDERED the August 18, 2005 Proposed and Final Order is affirmed in part and reversed in part. Insurer is liable for the May 17, 2004 exam performed by Dr. Weller. Insurer is not liable for the November 3, 2004 exam performed by Dr. Weller. Insurer shall pay to claimant's attorney a total fee in the amount of \$325.