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In the ORS 656.260 Managed Care Dispute of

**Stephen R. Sheets, Claimant**

Contested Case No: 07-025H

**ORDER ON REMAND**

June 6, 2007

STEPHEN R. SHEETS, Petitioner

SAIF CORPORATION, Respondent

Before Keith Kekauoha, Administrative Law Judge

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Hearing convened in Portland on May 7, 2007 before Keith Kekauoha, Administrative Law Judge. Claimant was present and represented by his attorney, Ernest Jenks. Employer, Aloha Auto Appearance, and its insurer, SAIF Corporation, were represented by their attorney, Mary Goebel Adams. The insurer representative was Brad Anderson. The hearing was recorded by the Administrative Law Judge. Exhibits 1-55 and 54A were admitted into evidence. Claimant's Proposed Exhibits 51A and 56 were excluded.<sup>1</sup> Testimony was taken and, following recorded closing arguments, the record closed on May 7, 2007.

**ISSUE**

Medical Services. Claimant appealed the Director's Administrative Order dated January 18, 2007, which upheld a managed care organization's (MCO's) disapproval of proposed left biceps tenodesis surgery.

**FACTS**

The following facts are taken from the Director's order.

On June 24, 2004, claimant sustained a compensable injury while working for an auto detailing business. SAIF initially accepted a cervical strain, thoracic strain and lumbar strain, and enrolled claimant in an MCO.

In November 2004, Dr. Rask, orthopedic surgeon, performed left shoulder arthroscopic acromioplasty, distal clavicle resection, bursectomy, and debridement of partial rotator cuff on the articular side.

In December 2005, Dr. Rask performed left shoulder arthroscopic superior labrum anterior and posterior (SLAP) repair and open complete synovectomy, rotator cuff repair, and excision of the distal clavicle.

In June 2006, SAIF issued an updated notice of acceptance at closure, which listed the following accepted conditions: cervical strain; thoracic strain; lumbar strain; left shoulder strain; left acromioclavicular joint sprain; partial tear of left shoulder supraspinatus, 1.5 cm length, 4

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<sup>1</sup> Proposed Exhibits 51A and 56 were excluded because "new medical evidence," *i.e.*, medical evidence that was not part of the record at the Director's administrative review, may not be admitted or considered at hearing in a managed care dispute arising under ORS 656.260(16). *See* OAR 436-001-0225(2).

mm width and 3 mm depth; left shoulder subacromial impingement syndrome; and left shoulder adhesive capsulitis secondary to the November 2004 left shoulder arthroscopic acromioplasty.

Claimant continued to experience pain and, in June 2006, Dr. Rask requested approval to perform left biceps tenodesis surgery.

In July 2006, Dr. Vessely, orthopedic surgeon, performed an independent medical examination (IME). He opined that the proposed surgery would not be beneficial, though he recommended that the area be injected under fluoroscopy before proceeding with surgery. He stated that claimant would have to have complete relief of symptoms for a period of time, longer than just the analgesic effect, to establish the diagnosis.

On September 7, 2006, Dr. Rask performed a left biceps tendon injection under fluoroscopy.

Four days later, Dr. Colorito, orthopedic surgeon, examined claimant at the MCO's request. Dr. Colorito advised that the proposed surgery would not address current symptoms, as claimant indicated the injection had only provided 20 percent relief of pain.

On September 20, 2006, Dr. Rask wrote that claimant reported 80 percent relief from pain.

On September 28, 2006, the MCO disapproved the proposed surgery. Claimant appealed the decision. On October 18, 2006, the MCO issued a final decision upholding the disapproval.

Claimant requested administrative review by the Director.

In December 2006, Dr. Ballard, orthopedic surgeon, reviewed medical records and examined claimant at the Director's request. He opined that the proposed surgery is not appropriate because the indications for the procedure had not been established and the clinical examination was not consistent with straightforward biceps pathology.

### **CONCLUSIONS OF LAW AND OPINION**

The Director concluded that the left biceps tenodesis surgery proposed by Dr. Rask is not appropriate for the compensable conditions. The Director relied on the opinions of Dr. Vessely, Dr. Colorito and Dr. Ballard.

Claimant argues that the Director addressed the compensability of his left biceps condition and that the Board, rather than the Director, has exclusive authority to address the compensability issue. For the following reasons, I conclude that this matter should be remanded to the Director further administrative action.

ORS 656.704(3)(b) provides that

“[t]he respective authority of the board and the director to resolve medical service disputes shall be determined according to the following principles:

- (A) Any dispute that requires a determination of the compensability of the medical condition for which medical services are proposed is a matter concerning a claim.
- (B) Any dispute that requires a determination of whether medical services are excessive, inappropriate, ineffectual or in violation of the rules regarding the performance of medical services, or a determination of whether medical services for an accepted condition qualify as compensable medical services among those listed in ORS 656.245(1)(c), is not a matter concerning a claim.
- (C) Any dispute that requires a determination of whether a sufficient causal relationship exists between medical services and an accepted claim to establish compensability is a matter concerning a claim.”

ORS 656.704(3)(b)(A) and (C) reserve to the Board authority essentially over disputes concerning the compensability of medical conditions for which medical services are proposed and disputes concerning whether those medical services are sufficiently, causally related to the accepted claim. *Weyerhaeuser Co. v. Rich*, 208 Or App 302, 306, *rev den*, 342 Or 117 (2006).

Dr. Rask proposed the left biceps tenodesis surgery to treat what he diagnosed as left shoulder proximal biceps tendinitis resulting from the compensable shoulder surgery. (Ex. 25).

Dr. Vessely, Dr. Colorito and Dr. Ballard concluded that the proposed surgery is not appropriate largely because they did not believe that claimant has the diagnosed condition for which surgery is proposed. Dr. Vessely stated that he found no indication of bicipital tendinitis and did not believe that the diagnosis had been objectively established. (Exs. 26, 43). Dr. Colorito did not diagnose bicipital tendinitis and opined that claimant’s left shoulder pain was of “unclear etiology.” (Ex. 31). Dr. Ballard felt that claimant’s clinical examination was “not consistent with straightforward biceps pathology.” (Ex. 56-7).

I conclude that the existence or non-existence of the diagnosed condition for which treatment is proposed is essentially an issue concerning the compensability of the condition. Thus, in relying on the opinions of doctors who do not believe that claimant has the diagnosed left bicipital tendinitis condition, it appears that the Director determined, at least implicitly, the compensability of the condition.

Claimant, through his attorney, formally requested acceptance of left biceps/bicipital tendinitis as a new medical condition relating to the accepted injury. (Ex. 41). SAIF issued a denial of compensability of that condition. (Ex. 48). Claimant requested a hearing on the denial.

A hearing was convened before the undersigned Administrative Law Judge on May 7, 2007, and has been continued for receipt of additional evidence. (WCB Case No. 06-07536).<sup>2</sup>

Because the issue of compensability of the condition for which the surgery is proposed is pending at the Hearings Division, I conclude that this matter should be remanded to the Director to defer administrative review until the compensability of the condition has been determined in WCB Case No. 06-07536. Thereafter, the Director may review the appropriateness of the proposed surgery for the compensable conditions.

### **ORDER**

The Administrative Order dated January 18, 2007 is vacated, and this matter is remanded to the Director for further administrative action consistent with this order.

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<sup>2</sup> WCB Case No. 06-07536 was dismissed by an Order Approving Settlement (Stipulation) on May 31, 2007. However, during a conference call on June 6, 2007, claimant's and SAIF's attorneys agreed that the case should not have been dismissed and that the stipulation can later be approved in the same Opinion and Order that resolves the compensability issue. Accordingly, the Order Approving Settlement will soon be withdrawn before it becomes final, and the case will be reinstated.