

In the ORS 656.245 Medical Service Dispute of

David M. Durant, Claimant

Contested Case No: 07-123H

PROPOSED & FINAL ORDER

February 29, 2008

DAVID M. DURANT, Petitioner

CON-WAY INC., Respondent

Before Kirk Spangler, Administrative Law Judge

Pursuant to notice, a hearing was convened and closed on January 30, 2008, in Eugene, Oregon, before Administrative Law Judge Kirk Spangler. Claimant was represented by his attorney, Michael Warshafsky. The employer, Con Way Freight, Incorporated, administered by Sedgwick Claims Management Services, was represented by Dennis Reese. Exhibits A, B, and C were received in evidence.¹

ISSUES

1. The appropriate level of palliative care (*i.e.*, chiropractic care and massage) for claimant vis-à-vis his accepted 1988 injury.
2. The appropriate level of medical prescriptions for claimant vis-à-vis his accepted 1988 injury.
3. The appropriate level of palliative care (*i.e.*, chiropractic care and massage) for claimant vis-à-vis his accepted 1994 injury.
4. The assessment of attorney fees as follows: (a) the amount of claimant's attorney's fee for his services before the Workers' Compensation Division (WCD); (b) the entitlement and amount of claimant's attorney's fee for his services in the instant proceeding; and (c) the amount of claimant's attorney's fee for his services before ALJ Donnelly in April 2007.

FINDINGS OF FACT

Claimant, a 60 year-old salesman, compensably injured his left thumb, left shoulder, right hip, low back, and right hamstring on April 8, 1988, while unloading a hand truck. Claimant fell over backwards, reported his injury, and sought medical treatment two days later. He was examined at the Eugene Clinic and was treated with a thumb splint and prescription medication. Shortly thereafter, he was apparently examined by Dr. Matteri, a physician.

¹ The Exhibit packets provided by the Workers' Compensation Division were submitted in separate packets. Exhibit "A" was submitted as Exhibits 1 thru 70 under WCD Case No. I414835. Exhibit "B" was submitted as Exhibits 1 thru 130 under WCD Case No. E773222. Exhibit "C" is the transcript of an April 17, 2007 hearing before ALJ Kate Donnelly, which claimant submitted to WCD in compact disc form along with a request for transcription.

On April 15, 1988, claimant obtained chiropractic treatment from Dr. Siri Amir Sing Khals, and was taken off work for seven days.

In August 1988, claimant was examined by Dr. Becker, a physical medicine specialist, primarily for continued right hip, low back, and radiating pain into his right leg. Dr. Becker prescribed a course of anti-inflammatories, but wished to delay further treatment until claimant obtained some resolution of his upper left extremity complaints.

Thereafter, claimant continued to experience significant pain and symptoms in his left shoulder, low back, right hip, and right leg. He continued to treat with Dr. Becker, who prescribed deep tissue massage for claimant's right hip and leg.

In late August 1988, claimant underwent surgical correction by Dr. Teal, an orthopedist, for his unstable MCP joint.

In October 1988, claimant underwent a left shoulder arthrogram, which failed to reveal a rotator cuff tear.

In August 1989, claimant was taken off work due to his left upper extremity condition.

Over the next several years, claimant continued to experience significant flare-ups in his left upper extremity and lower back. He continued under the care of Dr. Becker, and obtained regular massage therapy, as well as chiropractic treatment. He also developed right carpal tunnel syndrome, which caused him to be taken off work June 1992. On August 4, 1992, Dr. Becker diagnosed degenerative lumbosacral disc disease. Ex. B4-17. An MRI performed on August 10, 1992, revealed mild changes in claimant's right hip joint and lumbosacral spine consistent with a mild degree of degenerative arthritis.

On November 14, 1994, claimant sustained a second compensable injury when a chain snapped off of a pallet and hit him in the jaw and teeth, knocking out a bunch of his teeth and cutting his lip. As a result, he was momentarily knocked out and stunned, fell backwards and hit his head and back on a hard floor. Immediately thereafter, he was taken to a hospital emergency room and was examined. He was treated with narcotic analgesic medication (i.e., Percocet and Fiorinal).

On November 18, 1994, claimant was examined by Dr. Herring, a physician, who diagnosed multiple entrapment neuropathies and a new post-concussive syndrome. As a result of his post-concussive syndrome, claimant was unable to drive a vehicle. Shortly thereafter, claimant underwent a brain MRI, which was unremarkable.

In December 1994, Dr. Herring prescribed six chiropractic visits every two weeks. He also changed claimant's medications due to irritability and headaches. Claimant also began to experience some depression associated with as a result of his head injury. Ex. B16-10.

Over the next decade, claimant regularly treated with Dr. Herring, who prescribed a regimen of massage therapy, chiropractic care, and prescription medications to deal with

claimant's plethora of compensable conditions. The palliative care regimen assisted claimant and enabled him to keep his pain and symptoms moderated.

In August 1997, claimant was evaluated at the Northwest Occupational Medicine Center by Dr. Kolbell, a neuropsychologist.

On December 1, 1998, the administrator issued an Updated Notice of Acceptance for claimant's 1994 injury, accepting: "Post-concussive syndrome, mouth, teeth." Ex. B25. Claimant's claim was closed that same day by way of a Notice of Closure, which awarded temporary disability from November 14, 1994 through February 27, 1998, and 10 percent unscheduled permanent disability for his brain injury. Claimant apparently requested reconsideration of the December 1st closure, however, as his 1994 claim was subsequently reclosed with a new medically stationary date. Exs. B26 & 45.

On December 4, 1998, the administrator issued an Updated Notice of Acceptance for claimant's 1988 injury, accepting: "Left thumb fracture with repair of the ulnar collateral ligament, right hip strain, left shoulder strain, [and] low back strain." Ex. B27. That same day, the administrator closed claimant's claim by way of a Notice of Closure, which awarded temporary disability from April 14, 1988 through January 25, 1988, and 28 percent unscheduled permanent disability for his low back, right hip, and left shoulder condition, as well as 9 percent scheduled permanent disability for his left thumb injury. B28. However, claimant requested reconsideration of the December 4th closure, which was set aside by the Appellate Review Unit (ARU), Workers' Compensation Division, on March 30, 1999.

On December 23, 1999, the administrator reclosed claimant's claim by way of a second Notice of Closure. Thus, claimant was awarded increased temporary disability, 9 percent unscheduled permanent disability for his low back, and 38 percent scheduled permanent disability for his left thumb. B35. Subsequently, claimant requested reconsideration.

On July 12, 2000, the parties entered into two Stipulation and Order of Dismissals, which expanded the scope of claimant's accepted claims. That is, his 1988 injury was broadened to include a "traumatic avulsion of the medial hamstring." Likewise, his 1994 injury was broadened to include a "cervical strain." Exs. B40 & B41.

On July 20, 2000 an Order on Reconsideration issued, which modified the December 23, 1999 closure. Specifically, the ARU increased claimant's unscheduled award to his low back to 15 percent, reduced his scheduled award for his left thumb to 2 percent, but also awarded 15 percent scheduled disability for his right leg.

On August 11, 2000, claimant's newly expanded 1988 claim was reclosed by another Notice of Closure, which was affirmed by the ARU in November 2000, by an Opinion and order in May 2001, and by the Board in November 2001. Exs. B49, 50, & 56.

On August 30, 2000, claimant's 1994 claim was reclosed by way of a Notice of Closure, which awarded temporary disability and 9 percent unscheduled permanent disability for his neck. Ex. B45.

On August 14, 2001, the administrator again expanded the acceptance of claimant's 1994 claim to include "cervical and thoracic sprain/strain, and cervical and thoracic segmental dysfunction." As a result, claimant's 1994 claim was reclosed on August 14, 2001, by another Notice of Closure.

Thereafter, claimant continued under the steady care of Dr. Herring and regularly received chiropractic and massage treatments.

On June 24, 2005, claimant was examined by Dr. Karasek, an orthopedist. Ex. B69.

On September 23, 2005, claimant was examined by Dr. Vessely, an orthopedist, for the purposes of an Independent Medical Examination (IME). Ex. B85.

On December 8, 2005, Dr. Herring set forth his authorization for palliative care in detail. Ex. B90.

On December 28, 2005, the administrator denied Dr. Herring's request for further authorization of palliative care for claimant. Ex. B92. Consequently, claimant requested review by WCD. A Defer Order then issued by WCD on January 13, 2006.

In February 2006, claimant developed increased low back pain with radiculopathy into his right leg.

In the Fall of 2005, claimant had apparently undergone right knee surgery. On April 3, 2007, Dr. Herring testified by way of a deposition. Ex. B108.

On April 17, 2007, the palliative care dispute resulted in a continued hearing before Administrative Law Judge Kate Donnelly. ALJ Donnelly decided the causation dispute in claimant's favor, by way of a June 28, 2007 Opinion and Order. Ex. B112. The case then proceeded to WCD for further resolution. WCD directed Dr. Takacs, an osteopathic physician, to examine claimant on its behalf. Dr. Takacs did so on September 4, 2007.

On October 15, 2007, WCD issued an Administrative Order, which reduced claimant's overall level of palliative care and prescription medications. Shortly thereafter, claimant filed a Request for Hearing to appeal the decision.

ULTIMATE FINDINGS OF FACT

Claimant's palliative care, specifically his chiropractic and massage treatments and his prescription medications, recommended and utilized by Dr. Herring, for the care of his compensable 1988 and 1994 injuries is appropriate and not excessive.

CONCLUSIONS OF LAW AND OPINION

Palliative Care and Prescription Medications

Claimant argues that the WCD reviewer's decision to significantly reduce claimant's longstanding level of palliative care and prescription medicine was based on legal error and a lack of substantial evidence. In essence, claimant asserts that the WCD reviewer blindly relied on the expert opinion of Dr. Takacs, whose opinion was solicited by WCD, and in doing so committed reversible error under OAR 436-001-0225(2). Specifically, he argues that Dr. Takacs medical opinion is in derogation of the "law of the case" concerning the scope of claimant's accepted conditions, and that the WCD reviewer's decision is not based on even a scintilla of evidence with regard to the accepted 1994 injury.

The administrator, however, argues that claimant is essentially unhappy with the expert opinion of Dr. Takacs, as well as with the WCD reviewer's reliance on her opinion. However, given the narrow standard of review, the administrator argued that it is not appropriate for the undersigned judge to weigh the persuasiveness of the medical opinions. Thus, the administrator argues that the WCD reviewer followed the expert opinion of one doctor over another, and that doing so constitutes neither legal error nor a lack of substantial evidence.

OAR 436-001-0225(2) states: "In medical service and medical treatment disputes under ORS 656.245, 656.247(3)(a), and 656.327, and managed care disputes under ORS 656.260(16), the administrative law judge may modify the director's order only if it is not supported by substantial evidence in the record or if it reflects an error of law. New medical evidence or issues may not be admitted or considered."

As can be seen, the scope of my review in this case is not *de novo* and quite limited. Therefore, it is not appropriate for me to weigh the relative weight of the expert opinions and to decide which expert is more persuasive. Rather, I can modify the WCD reviewer's order only for two reasons: legal error or lack of substantial evidence.

The difficulty in this case is that Dr. Vessely's opinion concerning the appropriate level of palliative care and prescription medication was largely based on his opinion that the care and medications were being directed at non-compensable preexisting conditions. In other words, Dr. Vessely did not merely opine that 8 treatments a month were more appropriate than 12 treatments a month, or that some of the medications were ineffective. Instead, Dr. Vessely's reasoning was based on causation and compensability, which has already been decided by ALJ Donnelly. Importantly, Dr. Takacs rendered the same sort of opinion. That is, one that was based on her view that claimant's palliative care was being directed at a non-compensable underlying condition. Then, the medical reviewer wholly adopted Dr. Vessely and Dr. Takacs' opinions, which was legal error. Further, Dr. Takacs wholly failed to address the appropriate level of palliative care and prescription medication vis-à-vis the accepted 1994 injury. Thus, for the medical reviewer to assume that such an "omission" constituted some sort of evidence in which to abolish all of claimant's care related to that accepted injury, was to reach a conclusion that lacked "substantial evidence."

For example, on page 5 of the medical reviewer's Administrative Order, she stated: "Dr. Vessely did not believe that the medication prescribed for [claimant] was for his accepted condition, but rather for a preexisting, evolving degenerative lumbar spondylosis." Similarly, the

medical reviewer stated: “Dr. Takacs did not believe that the lumbar strain was significant at this time and chiropractic care for low back pain would be for his documented arthritic condition.”

In her June 28, 2007 Opinion and Order, ALJ Donnelly set forth the accepted conditions under both the 1988 and the 1994 claims. In doing so, she stated: “The accepted conditions in the April 8, 1988 claim are left thumb fracture with repair of the ulnar collateral ligament, right hip strain, left shoulder strain, low back strain, and traumatic avulsion of the right medial hamstring also diagnosed as right hamstring muscle mass deformity.” ALJ Donnelly then concluded: “Because I have found Dr. Herring’s opinion persuasive, I further find that claimant has met his burden of establishing that *the accepted conditions* under the April 1988 injury and November 1994 injury are the material and major contributing cause of the palliative care plan. I further find that claimant’s medications are materially related to the April 1988 claim.” (Emphasis added).

In sum, the medical reviewer relied on expert medical opinions (*i.e.*, those of Dr. Takacs and Dr. Vessely) that effectively parceled out claimant’s various conditions and diagnoses. In doing so, they delved into whether his palliative care and medications were directed at accepted or non-accepted conditions. The medical reviewer then wholly adopted that line of reasoning, which was compound error. The causal connection between claimant’s accepted 1988 injury (and all of the accepted conditions) and his palliative care and medications has been finally decided by ALJ Donnelly. It was legal error for the medical reviewer to adopt expert opinions, which were contrary to the “law of the case.”

Regarding claimant’s 1994 claim, the medical reviewer abolished all palliative care in association therewith. That in itself, of course, could well be correct if such a conclusion was based on substantial evidence. However, the medical reviewer provided no reasoning whatsoever for her decision. Moreover, Dr. Takacs wholly failed to address the appropriateness of claimant’s palliative care related to her accepted 1994 claim. Thus, the medical reviewer’s decision to wholly abolish claimant’s palliative treatment in association with her 1994 claim, by way of finding Dr. Takacs “silence” on the matter as persuasive, was to reach a decision without substantial evidence.

For all of the above reasons, I conclude that the October 15, 2007 Administrative Order should be modified.² This case presents a very complicated issue concerning the appropriate level of claimant’s palliative care and prescription medications. I do not believe that I can make a better decision than can the medical experts. My role, as the factfinder, is to weigh their opinions.³ The medical experts are divided. Dr. Vessely and Dr. Takacs both opine that claimant’s level of care is excessive and inappropriate. Both Dr. Vessely and Dr. Takacs examined claimant on one occasion. Dr. Herring, on the other hand, has treated claimant for several years. Thus, absent persuasive reasons to do otherwise, I conclude that he is more

² Remand to WCD is not authorized by ORS Chapter 656.

³ Had I not concluded that the medical reviewer’s decision was based on legal error and that it laced substantial evidence, I would have affirmed the October 15, 2007 Administrative Order in its entirety. But, I did find that the medical reviewer had erred. Thus, inasmuch as remand to WCD is not authorized, I have no choice but to modify the medical reviewer’s decision.

persuasive than either Dr. Vessely or Dr. Takacs. In addition, Dr. Herring's opinion is well-reasoned and based on a correct history.

Accordingly, I adopt Dr. Herring's palliative care and prescription medication plan that he authored on December 8, 2005. Ex. B90.

Attorney Fees

ALJ Donnelly awarded claimant's attorney an assessed fee of \$8,000 for his services at hearing, contingent on a successful outcome before WCD. In this Proposed and Final Order, I have vacated and reversed the decision of the medical reviewer and have granted claimant all of his requested relief. Therefore, the \$8,000 assessed fee awarded by ALJ Donnelly should be reinstated.

Claimant's attorney also seeks an increased assessed fee over the \$1,000 that he was awarded by WCD, as well as a \$3,500 additional fee for his services in the instant proceeding. The administrator, however, argues that claimant's fee should be limited to \$2,000 insofar as there are no extraordinary circumstances to justify a fee above the statutory maximum.

ORS 656.385(1) provides that claimant's attorney's fee "must be based on all work the claimant's attorney has done relative to the proceeding at all levels before the department." The statute further states that the fee must be proportionate to the benefit to the injured worker and that it must give primary consideration to the results achieved and time devoted to the case.

Here, claimant's attorney has represented that he spent 13.2 hours before WCD and 13 hours in the instant proceeding. Thus, he has provided 26.2 hours of services. At a reasonable hourly rate of \$175, his fee would amount to \$4,585. Reviewing the relevant factors, claimant's attorney has obtained all of the relief that he sought for claimant. Claimant's longstanding palliative care and prescription medication plan will now continue, until and unless a change in circumstances occurs. Thus, claimant has obtained a significant benefit that is meaningful to his everyday life, by obtaining medical care that allows him to function with minimal pain and symptoms. Moreover, I conclude that the nature of this case was complex – factually, legally, and medically. The written record is voluminous. Thus, both of the experienced and skilled lawyers necessarily had to spend a significant amount of time devoted to this case, as claimant's 13 hours at this level demonstrates.

Accordingly, I conclude that extraordinary circumstances warrants an attorney fee above the \$2,000 statutory maximum for claimant's attorney's services before the WCD and before the undersigned judge. To that end, I conclude that \$4,585 is a reasonable and deserving attorney fee.

ORDER

IT IS THEREFORE ORDERED that the Administrative Order, dated October 15, 2007, is reversed and vacated. The administrator shall accept Dr. Herring's December 8, 2005

palliative care and prescription medicine proposal in its entirety and process claimant's benefits according to law.