
In the ORS 656.260 Managed Care Dispute of

Loren F. Kruesi, Claimant

Contested Case No: 08-096H

PROPOSED & FINAL ORDER

September 23, 2008

SAIF CORPORATION, Petitioner

LOREN F. KRUESI, Respondent

Before Jenny Ogawa, Administrative Law Judge

SAIF appealed the Director's Review and Order issued on May 7, 2008, by the Medical Review Unit (MRU) of the Workers Compensation Division (WCD), Department of Consumer and Business Services (director). Pursuant to notice, a hearing was scheduled for August 28, 2008, in Salem, Oregon, before Administrative Law Judge Ogawa. Claimant is represented by attorney Randy Elmer. The employer, DHS CAF Field Services, and its insurer, SAIF Corporation, are represented by SAAG Holly O'Dell. The WCD waived appearance. WCD exhibits 1 through 45 were received into evidence. The record closed at the conclusion of the hearing.

ISSUE

Whether SAIF is liable for a MRA of the brain proposed by Dr. Barish.

FINDINGS OF FACT

SAIF contends that the MRU's findings are not supported by substantial evidence. Specifically, SAIF disputes the MRU's findings involving Dr. Barish's records. The following findings of fact are not in dispute.

Claimant works as a Social Service Specialist. On August 24, 2006, claimant was involved in a motor vehicle accident (MVA) when he rear-ended a van. (Ex. 1). Dr. Thrall, claimant's initial attending physician, diagnosed cervical and upper back strain associated with headaches and left arm paresthesias; right wrist and elbow contusion/strain; right knee strain; and right ankle contusion. (Ex. 6). SAIF accepted the August 2006, injury claim for cervical strain, thoracic strain, right wrist strain, right elbow strain, right knee strain, right ankle contusion, and complex tear of the posterior horn of the right knee medial meniscus. (Exs. 12, 13). On October 11, 2006, SAIF enrolled claimant in the Oregon Health Systems MCO. (Ex. 12-6).

On December 21, 2006, claimant reported that his headaches had diminished in intensity and frequency, and that they were controlled with medications. (Ex. 6-7). On May 24, 2007, Dr. Thrall declared claimant medically stationary. Claimant still had 4-5 headaches a month. (Ex. 6-10). SAIF closed the claim on September 20, 2007. Dr. Valleroy performed a medical arbiter examination on November 15, 2007. Claimant's current symptoms included neck pain and headaches several times per week. Dr. Valleroy felt claimant's headaches fit the pattern of muscle tension headaches and could reasonably be linked to the accepted cervical strain. She opined that claimant had class I neurologic disorder due to his headache complaints. (Exs. 24,

25). The ARU found that claimant suffered muscle tension headaches as a direct medical sequela of the accepted cervical strain condition, and assigned a value of 10 percent whole person impairment. (Ex. 27).

On January 28, 2008, Dr. Barish began treating claimant for episodes, which lasted about two minutes and occurred about twice a month, and which consisted of weakness in the elbows and knees. Dr. Barish noted that the episodes began with a feeling of tightness in the throat, and then proceeded to the shoulders, arms, and legs. Dr. Barish felt claimant's spells were episodic anxiety and/or panic attacks, and did not represent any significant neurological impairment (either cranial or cervical). Claimant also indicated he had frontal headaches about twice a week. Dr. Barish related claimant's headaches to some type of concussion suffered in the 2006 MVA. He did not think claimant needed an MRI of the head "at this time." He recommended an SRI or mood stabilizer for claimant's headaches, to be prescribed by Dr. Elder. (Ex. 29).

On February 15, 2008, Dr. Barish referred claimant for a diagnostic Magnetic Resonance Angiogram (MRA) of the brain because of his "syncope w/ intense HA, possible neck stiffness." (Ex. 31). The MCO denied the request for the MRA, on the ground that the procedure was not directed toward the accepted conditions. (Ex. 33). Claimant requested director review. (Ex. 36). SAIF contended that the MRA was not a compensable medical service under ORS 656.245(1)(c).

CONCLUSIONS OF LAW AND OPINION

This is a managed care dispute arising under ORS 656.260. The MRU order "may be modified only if it is not supported by substantial evidence in the record or reflects an error of law. No new medical evidence or issues shall be admitted. *** Decisions by the director regarding medical disputes are subject to review under ORS 656.704." ORS 656.260(16); OAR 436-001-0225(2)¹.

Substantial evidence supports a finding when the record, viewed as a whole, permits a reasonable person to make the finding. ORS 656.183.482(8)(c); *Armstrong v. Asten-Hill Co.*, 90 Or App 200, 206 (1988). Conducting a substantial evidence review requires evaluating "evidence against the finding as well as evidence supporting it to determine whether substantial evidence exists to support that finding. If a finding is reasonable in light of countervailing as well as supporting evidence, the finding is supported by substantial evidence." *Garcia v. Boise Cascade Corp.*, 309 Or 292, 295 (1990).

Claimant sought further medical services after his claim had been closed. Dr. Barish recommended a brain MRA. The MCO denied the proposed MRA on the ground that the procedure was not directed toward the accepted conditions. Before the MRU, SAIF asserted the

¹ 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."

MRA was not “a compensable medical service under ORS 656.245(1)(c).” The MRU found SAIF liable for the MRA of the brain. The MRU found that the MRA was “a diagnostic service, requested to evaluate headaches [claimant] was experiencing, and Dr. Barish documented may be related to the accepted cervical strain.” (Ex. 44-2). The MRU concluded that the MRA was compensable on a diagnostic basis. (Ex. 44). SAIF requested a contested case hearing. (Ex. 45).²

SAIF argues that the MRU order is not supported by substantial evidence. SAIF disagrees with the MRU’s finding that “Dr. Barish made a referral for a second opinion of [claimant’s] headaches.” (Ex. 44-1). Dr. Barish first saw claimant on January 28, 2008, for complaints of episodes of weakness in the elbows and knees that lasted about two minutes and that occurred about twice a month, and for headaches that also occurred twice a month. Dr. Barish noted that the episodes began with a feeling of tightness in the throat, and then proceeded to the shoulders, arms, and legs. Dr. Barish felt claimant’s spells were episodic anxiety and/or panic attacks, and did not represent any significant neurological impairment (either cranial or cervical). He related claimant’s headaches to some type of concussion suffered in the 2006 MVA. He did not think claimant needed an MRI of the head “at this time.” Dr. Barish referred claimant to Dr. Elder for the spells/anxiety and for the headaches. Dr. Barish recommended an SRI or mood stabilizer for the headaches, to be determined and prescribed by Dr. Elder. (Ex. 29 pp. 3-4). Dr. Barish’s records as a whole support the MRU’s finding that Dr. Barish referred claimant to Dr. Elder, in part, for his headaches.

SAIF next contends the MRU’s conclusion, that Dr. Barish related the headaches to the work injury, is not supported by substantial evidence. Specifically, SAIF states that (1) Dr. Barish had an inaccurate history that claimant sustained a head injury and a concussion as a result of the MVA. (2) Dr. Barish never related the headaches to the accepted cervical strain. And, (3) Dr. Barish never said the MRA was to diagnose the extent of the headaches. In this regard, SAIF points out that the MRA was not proposed until Dr. Barish mentioned syncope, and that Dr. Barish did not indicate that the need for the MRA was connected to the work injury.

Dr. Barish thought that claimant’s headaches might be related to the head injury or to some type of concussion suffered in the MVA. (Exs. 29-4, 29-6). The record, however, does not indicate that claimant hit his head in the MVA or that he sustained a concussion. Although Dr. Barish had an inaccurate history regarding the mechanism of injury (hit to the head) that resulted in some type of concussion, he correctly related the headaches to the work injury. However, the MRU did not rely on Dr. Barish’s history in reaching its decision. Moreover, the causal relationship between the headaches and the accepted cervical strain is not a finding of fact necessary to the dispute. *SAIF v. Martinez*, 219 Or App 182 (2008). Rather, the issue is whether substantial evidence supports the MRU’s decision that the MRA was a compensable diagnostic service.

² At hearing, SAIF also raised the issue of whether a sufficient causal relationship existed between the disputed medical service and the accepted claim, based on its argument that Dr. Barish recommended the MRA to assess claimant’s syncope and spells. However, no new issue may be raised at this juncture. ORS 656.260. In addition, that issue is outside the MRU’s jurisdiction to decide. *AIG Claim Services v. Cole*, 205 Or App 170 (2006).

SAIF states that Dr. Barish failed to clearly indicate that the MRA was to assess the extent of the compensable injury. Claimant counters that Dr. Barish's chart notes can be read to reasonably find that Dr. Barish recommended the diagnostic MRA to determine the extent of claimant's disability and whether there was another condition that should be treated as part of the claim.

In *Counts v. International Paper Co.*, 146 Or App 768 (1997), the court cited its opinion in *Brooks v. D & R Timber*, 55 Or App 688, 692, (1982), for the rule that "if diagnostic services are necessary to determine the cause or extent of a compensable injury, the tests are compensable whether or not the condition that is discovered as a result of them is compensable." 146 Or App at 771. In *Martinez, supra*, the claimant landed on his left knee. SAIF accepted a sprain of the left medial collateral ligament and recurrent tear of the left medial meniscus. After the claim had been closed, the claimant's left knee pain increased. Testing revealed osteochondritis dissecans on the lateral femoral condyle, which indicated the presence of osteonecrosis. SAIF denied the request for arthroscopy. SAIF asserted that the requested services pertained to a condition [osteonecrosis] not encompassed within the accepted claim. The court stated that the dispute concerned whether the proposed surgery was compensable within the claimant's existing claim. Applying *Counts, supra*, the court concluded that the proposed surgery was necessary as a diagnostic tool to determine the extent of claimant's injury. *Martinez*, 219 Or App at 191.

Dr. Barish's records indicate his impression that claimant's headaches were related to the MVA. Dr. Barish did not recommend the MRA for a concussion, but rather for claimant's headaches. His reasons for the MRA were "syncope with intense headache, possible neck stiffness," (ex. 31-1) and "syncope, headache, neck pain," (ex. 31-2). Even though the MRA may have been proposed, in part, to establish the existence of another condition, (*e.g.* syncope), the record as a whole can be read to reasonably find that Dr. Barish recommended the diagnostic MRA to determine the extent of claimant's symptoms, disability, need for treatment for his headaches. When viewed as a whole, substantial evidence supports the MRU's conclusion that the MRA was necessary to diagnose claimant's condition as it related to the headaches.

Claimant's attorney is entitled to an attorney fee for prevailing over SAIF's request for hearing. ORS 656.385; OAR 436-001-0265. The factors that may be considered in determining an appropriate assessed attorney fee are: (a) the complexity of the issue(s) involved; (b) the quality of the legal representation; (c) the value of the interest involved; (d) the nature of the proceedings; (e) the risk in a particular case that an attorney's efforts may go uncompensated; (f) the assertion of frivolous issues or defenses; (g) a statement of services, if submitted before an order is issued; and (h) any other relevant consideration deemed appropriate by the administrative law judge or director. OAR 436-001-0265(2).

After considering these factors set forth and applying them to this case, in particular, the time devoted to the case, the quality of the legal representation (as evidenced by both parties well-reasoned arguments), and the value of the interest involved, I find that reasonable fee for claimant's attorney's services at hearing is four thousand dollars (\$4,000.00), payable by SAIF.

ORDER

IT IS HEREBY ORDERED that the MRU order dated May 7, 2008, is affirmed. For services at hearing, claimant's attorney is awarded an assessed fee in the amount of \$4,000.00, payable by SAIF.