
In the ORS 656.260 Managed Care Dispute of

Andrew E. Shipman Jr., Claimant

Contested Case No: 07-117H

PROPOSED & FINAL ORDER

April 18, 2008

ANDREW E. SHIPMAN JR., Petitioner
PRECISION CASTPARTS CORPORATION, Respondent
Before Keith Kekauoha, Administrative Law Judge

Hearing convened in Portland on March 19, 2008 before Administrative Law Judge Keith Kekauoha. Claimant, who was not personally present, was represented by his attorney, Steven Schoenfeld. The employer, PCC Structurals, and the claims administrator, ESIS, were represented by their attorney, Judy Johnson. The employer representative was Marsha Gross. Providence MCO was represented by its attorney, Jerald Keene. The hearing was recorded by the Administrative Law Judge. Exhibits 1-119 were admitted into evidence. No testimony was offered. After recorded closing arguments, the record closed on March 19, 2008.

ISSUE

Medical Services. Claimant appealed the Workers' Compensation Division's (WCD's) Administrative Order dated September 7, 2007, which upheld Providence MCO's refusal to approve a proposed total disc arthroplasty (artificial disc) at L5-S1.

SUMMARY OF FACTS

The following summary of facts is taken from WCD's order (Ex. 116):

Claimant injured his low back on January 25, 2002. The employer accepted a herniated disc at L5-S1.

In November 2002, claimant underwent an L5-S1 microdiscectomy and foraminotomy. His symptoms improved, and he was found medically stationary in August 2003.

In early 2004, claimant sought treatment for increasing low back pain that radiated into the left leg. An aggravation claim was filed.

In June 2004, a lumbar MRI showed a recurrent herniated disc at L5-S1. Claimant received three epidural steroid injections in August and September 2004.

In January 2005, claimant saw Dr. Kuether with increased pain in his low back, hips and right side. A repeat lumbar MRI showed an unchanged disc fragment at L5-S1 that was noted to be possibly contacting the right S1 nerve root.

In April 2005, claimant underwent a single level discography, which revealed a non-

concordant pain reaction to provocative discography at L4-5.

In June 2005, Dr. Kuether requested that Providence MCO approve an anterior lumbar fusion. The MCO issued a notice disapproving the surgery request for lack of medical necessity. The MCO later issued an opinion upholding its original decision to disapprove the surgery request. Claimant requested administrative review by the Director.

In late June 2005, Dr. Kuether stated that the best procedure for claimant's condition was a total disc arthroplasty.

In September 2005, Dr. Rohrer, neurosurgeon, examined claimant and recommended a repeat multilevel lumbar provocative discography.

In December 2005, Dr. Hill, neurosurgeon, reviewed the record and performed an examination at the Director's request. He agreed that the proposed surgery was indicated.

In January 2006, WCD, acting as the Director's designate, issued an administrative order holding that the L5-S1 fusion and/or disc arthroplasty proposed by Dr. Kuether was appropriate and that the employer would be liable for the surgery.

Claimant did not undergo the proposed surgery due to several different issues.

In August 2006, claimant underwent a lumbar MRI, which was compared to the February 2005 MRI and was reported to have unchanged findings. Mild disc bulging was reported at L3-4, which resulted in mild spinal stenosis.

In September 2007, claimant saw Dr. Bergquist and was seeking to have the surgery he had missed several months earlier. Dr. Bergquist opined that placing an artificial disc outside of a controlled study was irresponsible and that a fusion would have a material impact on claimant's situation.

Dr. Gillander, family physician, agreed with Dr. Bergquist's opinion.

In January 2007, Dr. Kuether evaluated claimant for a total disc arthroplasty. A repeat lumbar MRI showed no new abnormalities. Claimant elected to proceed with disc replacement surgery, and authorization for the surgery was requested.

In February 2007, the MCO issued a notice disapproving the proposed total disc arthroplasty for lack of medical necessity. In March 2007, the MCO issued a second notice upholding its disapproval of the proposed surgery. The MCO explained that the artificial discs were considered investigational as there was limited evidence on the safety and efficacy of the procedure with no available long-term outcome studies. The MCO stated that, alternatively, a decompression and possible fusion surgery might be indicated.

In April 2007, Dr. Kuether reasoned that the disc arthroplasty was needed because claimant had abnormalities in the disc above L5-S1 and a fusion could add to degeneration at that level. He stated that a disc arthroplasty would maintain normal motion at L5-S1 and prevent

any acceleration of wear-and-tear changes at other levels. He felt that the procedure was medically appropriate.

In April 2007, the MCO issued a final decision upholding its original decision to disallow the disc arthroplasty. Claimant requested administrative review by the Director.

In August 2007, Dr. Keenen, orthopedic surgeon, performed a Physician Review Examination at the Director's request. He diagnosed L5-S1 disc herniation and L4-5 degenerative disc disease and attributed claimant's symptoms to at least the L5-S1 disc changes and probably L4-5. He stated that the discogram in April 2005 did not include L3-4 as a normal control and did not include manometric pressure measurements and therefore was not a complete discogram and did not fully assess claimant's condition. He stated that indications for the proposed surgery included identifying whether the L3-4 disc is normal and obtaining a more accurate assessment of the L4-5 disc. He recommended discography with volume and pressure measurements at L3-4, L4-5 and L5-S1. He stated that if the L3-4 is found to be normal, then surgical treatment at L4-5 and L5-S1 could be anticipated. He opined that surgical treatment could include L5-S1 anterior arthrodesis and L4-5 disc arthroplasty, or possibly L4-5 and L5-S1 interbody fusion with an anterior or posterior instrumented approach.

On September 7, 2007, WCD, acting as the Director's designate, issued an Administrative Order upholding the MCO's disapproval of the proposed total disc arthroplasty. WCD found that the proposed surgery was not appropriate treatment for claimant's condition, relying on Dr. Keenen's opinion that a discogram using volume and pressure measurements on L3-4, L4-5 and L5-S1 was needed before determining whether surgical intervention was indicated.

CONCLUSIONS OF LAW AND OPINION

Claimant contends that WCD erred in find that the proposed surgery was not appropriate treatment for the accepted L5-S1 disc herniation. The employer and the MCO respond that WCD's order is supported by substantial evidence in the record and should be affirmed. Based on the following opinion, I agree with the employer and the MCO.

This is a managed care dispute arising under ORS 656.260. The Director's rule, OAR 436-001-0225, prescribes the applicable standard of review. Subsection (2) of the rule provides that in managed care disputes:

“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.”

Claimant has not alleged any error of law. I therefore review WCD's order for substantial evidence. Substantial evidence supports a finding of fact “when the record, viewed as a whole, would permit a reasonable person to make that finding.” ORS 183.482(8)(c). In reviewing a finding to determine whether it is supported by substantial evidence, the reviewing

entity must “evaluate 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). The Court of Appeals has explained that “substantial evidence” review is not *de novo* review. *Liberty Northwest Ins. Corp. v. Kraft*, 205 Or App 59, 62 (2006) (quoting *Armstrong v. Asten-Hill Co.*, 90 Or App 200, 206 (1988)).

Therefore, in reviewing WCD’s order for substantial evidence, I am limited to evaluating the evidence in the record to determine whether, based on that evidence, a reasonable fact finder in WCD’s position could have made the findings that WCD actually made. *Liberty Northwest Ins. Corp. v. Mundell*, __ Or App __ (April 16, 2008) (slip op. at p. 3). I do not have authority to determine whether the record could support findings different from those reached by WCD, nor do I have authority to reweigh the evidence and substitute my view of the evidence for that of WCD. *Id.*

In *Mundell*, the court explained:

“In situations where medical opinions are divided, whichever way the finder of fact ultimately finds will likely have substantial evidentiary support. [Citation omitted.] In that situation, the entity reviewing the findings for substantial evidence ‘would not need to choose sides. * * * [T]he substantial evidence test * * * will be decisive only when the credible evidence apparently weighs overwhelmingly in favor of one finding and the [finder of fact] finds the other without giving a persuasive explanation.’” (slip op. at 5) (quoting *Dillon v. Whirlpool Corp.*, 172 Or App 484, 489 (2001), and *Armstrong*, 90 Or App at 206).

In this case, the medical opinions are divided. Dr. Kuether, who proposed the L5-S1 total disc arthroplasty, stated that this procedure is the most appropriate treatment for the discogenic pain coming from the L5-S1 disc level, explaining that it would maintain normal motion at L5-S1 and prevent any accelerated wear-and-tear changes at adjacent levels. (Ex. 95).

Dr. Keenen, on the other hand, opined that the proposed surgery was not indicated because claimant’s lumbar condition had not yet been fully assessed. He stated that the April 2005 discogram did not include the L3-4 disc as a normal control and did not include manometric pressure measurements. He recommended discography with volume and pressure measurements at L3-4, L4-5 and L5-S1 to accurately determine the condition of those discs. He did not feel that claimant would do well with treatment of L5-S1 alone. (Ex. 114).

WCD considered both doctors’ opinions and was persuaded by Dr. Keenen’s opinion that a complete discogram at L3-4, L4-5 and L5-S1 was needed before determining the appropriate surgical treatment for claimant’s condition. WCD reasoned that the multilevel discogram was needed to accurately identify which lumbar disc was the pain generator. (Ex. 116-6).

Claimant argues that the April 2005 discogram was at the same disc level (L5-S1) for

which surgery is proposed and that Dr. Keenen did not explain why the April 2005 discogram is insufficient. I disagree. Dr. Keenen explained why the April 2005 discogram was inadequate and why a more thorough assessment of claimant's lumbar condition was needed before proceeding with the proposed surgery at L5-S1. WCD was persuaded by his opinion, and I find that its decision is reasonable and supported by substantial evidence.

Claimant also argues that this disputed procedure was previously approved by the MCO, although it was not performed because he had apparently overslept. To the extent that he is raising an estoppel issue, *i.e.*, that the MCO's prior approval of the total disc arthroplasty precludes the MCO from now disapproving the same procedure, I conclude that this is a new issue that was not raised before WCD and therefore may not be considered in this hearing. OAR 436-001-0225(2).

Because WCD's order is supported by substantial evidence and does not reflect an error of law, it must be affirmed.

ORDER

Claimant's request for relief is denied, and WCD's Administrative Order dated September 7, 2007 is affirmed.