

In the ORS 656.327 Medical Treatment Dispute of

John K. Flewellin, Claimant

Contested Case No: 09-110H

ORDER ON REMAND

November 4, 2009

INTERMOUNTAIN CLAIMS, Petitioner

JOHN FLEWELLIN, Respondent

Before David D. Lipton , Administrative Law Judge

Pursuant to notice, this matter went to hearing on October 19, 2009 in Portland, Oregon before David D. Lipton, Administrative Law Judge. The hearing was requested by counsel for Intermountain Claims who appeared through its attorney Robert Radler. The injured worker, John Flewellin, appeared by telephone.

ISSUE

This is the employer/claims processor's Request for Hearing protesting the Workers' Compensation Division's June 23, 2009 Administrative Order finding that the employer/claims processor did not timely challenge the medical procedure proposed by Claimant's physician.

FINDINGS OF FACT

Claimant was compensably injured on October 22, 2003. On December 19, 2003 Intermountain Claims accepted a claim for a disabling lumbar strain and sacroilitis. The Notice of Acceptance was later amended to add the conditions of L5-S1 disc protrusion and post-operative epidural fibrosis.

On February 25, 2009 C. William Murphy, M.D. requested authorization for a trial dorsal column stimulator. This followed previous requests in April, August and December 2008.

On February 25, 2009 Intermountain Claims completed a Form 3228, informed Dr. Murphy that it would not approve palliative care and scheduled examinations by Thomas Rosenbaum, M.D., Eric Goranson, M.D. and Gray Olbrich, M.D.

On May 12, 2009 the attorney for Intermountain Claims advised the Workers' Compensation Division that his client considers Dr. Murphy's proposed procedure to be excessive, inappropriate or ineffectual, requested an administrative review and filed Form 2842.

The Workers' Compensation Division issued its Administrative Order on June 23, 2009. It recognized the issue as whether the proposed spinal cord stimulator implantation was appropriate. The Workers' Compensation Division found, *inter alia* that Dr. Murphy had proposed a spinal cord stimulator trial on April 3, 2008, August 4, 2008, December 2, 2008 and February 25, 2009 and that Intermountain Claims was aware of that request at least by December 2, 2008. The request was formalized by Dr. Murphy on January 8, 2009 in response to Intermountain Claims' December 2, 2008 inquiry. The Workers' Compensation Division held

that Intermountain Claims was barred from disputing the proposed procedure because it had not submitted a Form 440-3228 by January 15, 2009 or within seven days of Dr. Murphy's January 8, 2009 request in response to Intermountain Claims' December 2, 2008 inquiry. The Workers' Compensation Division found this holding dispositive and did not address the issues raised by the attorney for Intermountain Claims. Intermountain Claims' request for hearing followed.

Barring Intermountain Claims from disputing the proposed procedure for the reason that it did not timely submit a Form 440-3228 is an issue that arises from the June 23, 2009 Administrative Order. In response thereto, at the October 19, 2009 hearing, counsel for Intermountain Claims offered additional exhibits and testimony bearing on Dr. Murphy's request to perform the dorsal column stimulator procedure and Intermountain Claims' processing in response to that request.

In a dispute such as this, I 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." OAR 436-001-0225(2). Consequently, I cannot consider the additional exhibits offered at hearing nor the testimony obtained addressing the processing of Dr. Murphy's request. Although Intermountain Claims did not have an opportunity to respond to the Form 3228 issue before Workers' Compensation Division issued its Administrative Order, I cannot address that issue because that would require me to consider evidence which was not before the Director. However, I may remand to the Director to decide whether to admit the additional evidence and then determine whether to proceed with a review of Intermountain Claims' objection to the procedure or return the matter to me for a decision which may or may not include the additional evidence offered at hearing addressing the Form 3228 issue. OAR 436-001-0170(5).

IT IS HEREBY ORDERED that this matter is remanded to the Workers' Compensation Division for further proceedings consistent with this Order.