
In the ORS 656.245 Medical Services of

Antonio L. Martinez, Claimant

Contested Case No: 08-321H

PROPOSED & FINAL ORDER

April 15, 2009

ANTONIO L. MARTINEZ, Petitioner

SAIF CORPORATION, Respondent

Before John P. McCullough, Administrative Law Judge

The above-captioned case involves claimant's January 10, 2004 left knee injury claim with ACW, Inc., and its insurer, SAIF Corporation. Representing claimant in this matter is his attorney, Phillip Garrow. Representing the employer and SAIF is their attorney, James Booth.

On October 20, 2008, claimant's attorney filed a request for hearing with the Workers' Compensation Division (WCD) of the Department of Consumer and Business Services, appealing an Administrative Order of Dismissal (DMMS 08-1194) issued by WCD on September 23, 2008. On November 14, 2008, WCD referred the matter to the Workers' Compensation Board, Hearings Division, pursuant to ORS 656.704(2)(a) and OAR 436-001-0019. Thereafter, a hearing was scheduled on February 25, 2009 in Bend, Oregon. Subsequently, the parties' attorneys advised the Hearings Division that the case could be submitted for a decision based on the documentary record and written arguments. Accordingly, the February 25, 2009 hearing was cancelled.

On December 8, 2008 WCD submitted the documentary record (Exhibits 1-63) on which the September 23, 2008 Administrative Order was based. Also submitted were Exhibits 64 (the September 23, 2008 Administrative Order) and Exhibit 65 (claimant's attorney's October 20, 2008 request for hearing). Those exhibits are hereby admitted in evidence in this proceeding.

On March 11, 2009, claimant's attorney submitted his initial written argument. Also submitted was proposed Exhibit 52A. No objection has been made to the admission of that exhibit. Accordingly, it is admitted in evidence.

On March 23, 2009, SAIF submitted its written response argument. SAIF also submitted proposed Exhibit 60A, Dr. Bollom's May 1, 2008 chart note. On March 26, 2009, claimant's attorney submitted his written reply argument. Therein, claimant's attorney objected to the admission of Dr. Bollom's May 1, 2008 chart note. The objection is overruled. Said chart note was part of the record before WCD at the time of issuance of the September 23, 2008 Administrative Order, and was considered by WCD in issuing its Order (see Ex. 36, pg. 2, Ex. 64, pg. 2, and the December 8, 2008 Exhibit List submitted by WCD). Therefore, the chart note does not constitute "new medical evidence" prohibited by ORS 656.327(2), and it is admitted in this proceeding. It will remain numbered as Exhibit 36, page 2, consistent with the December 8, 2008 Exhibit List submitted by WCD, rather than 60A, as proposed by SAIF.

All of the exhibits that are admitted in this proceeding are identified in the December 8, 2008 Exhibit List submitted by WCD, which has been marked as the "ALJ's Master Exhibit List."

The record was closed on March 26, 2009.

FINDINGS OF FACT

On January 10, 2004, claimant injured his left knee as a result of his employment with ACW, Inc., dba Andy's Custom Work. He filed a workers' compensation claim for his injury, and on March 3, 2004 the employer's insurer, SAIF Corporation, accepted the claim for "mild sprain left medial collateral ligament and recurrent tear horizontal cleavage left medial meniscus."

On January 7, 2005, Dr. Bollom, an orthopedic surgeon, examined claimant and proposed arthroscopic surgery. Dr. Bollom advised that depending on the condition of the cartilage in claimant's knee at the time of arthroscopy, the surgery would involve either 1) anterograde drilling from an outside end technique, or 2) debridement with microfracture/OATS procedure.

On January 17, 2005, claimant was scheduled for surgery with Dr. Jacobson, another orthopedic surgeon in Dr. Bollom's clinic. The proposed procedure was: "left knee scope, debridement, possible drilling of LFC osteonecrosis." Notification of the scheduled surgery was sent to SAIF.

On July 5, 2005, claimant's attorney requested that SAIF advise whether it would authorize the surgery proposed by Dr. Bollom.

On July 19, 2005, SAIF advised claimant's attorney that it would not authorize the surgery proposed in the January 17, 2005 notification from Dr. Bollom's/Jacobson's office.

On July 21, 2005, the Workers' Compensation Division (WCD) of the Department of Consumer and Business Services acknowledged receipt of a request for administrative review of the medical treatment dispute between claimant and SAIF concerning the arthroscopy proposed by Dr. Bollom.

On August 5, 2005, SAIF advised WCD that the reason for its disapproval of the surgery was that the surgery was not "causally related to the accepted condition." SAIF also specifically indicated that the surgery was not being disapproved on any other ground.

On August 18, 2005, WCD transferred the medical treatment dispute to the Hearings Division of the Workers' Compensation Board to resolve the causation issue and then send the matter back to WCD.

On December 9, 2005, an Administrative Law Judge in the Hearings Division issued an Opinion and Order that determined the causation issue in claimant's favor. Claimant's attorney was awarded a \$4,000 assessed fee for his efforts in establishing the causation/compensability issue.

In a July 27, 2006 Order on Review, the Workers' Compensation Board affirmed the

ALJ's decision regarding causation. The Board affirmed the ALJ's award of a \$4,000 assessed fee at the Hearings Division level and also ordered a \$2,000 assessed fee for claimant's attorney's efforts at the Board level concerning the causation issue, both fees contingent on claimant ultimately prevailing in the proceeding before WCD concerning "the appropriateness of the proposed medical treatment."

On April 9, 2008, the Court of Appeals affirmed the Board's July 27, 2006 Order on Review. The Court's Appellate Judgment was issued on August 5, 2008.

On May 1, 2008, claimant was examined by Dr. Bollom for a follow up assessment concerning his left knee condition. Dr. Bollom reported that claimant was still having difficulties with his left knee: specifically, a fair amount of pain with prolonged walking. Dr. Bollom stated that he would not recommend elective arthroscopic surgery on claimant's knee within six months to a year of his recent heart attack and stent placement.

WCD received Dr. Bollom's May 1, 2008 chart note on August 29, 2008. On September 4, 2008, WCD's medical reviewer contacted Dr. Bollom by telephone and was advised that due to claimant's health, Dr. Bollom was no longer proposing surgery.

On September 23, 2008, WCD issued an Administrative Order of Dismissal, concluding that because Dr. Bollom was no longer proposing surgery, the medical treatment dispute that had been brought before WCD was not currently ripe for review.

The left knee arthroscopic surgery procedure proposed by Dr. Bollom is appropriate medical treatment for claimant's January 10, 2004 left knee injury. In May 2008, Dr. Bollom temporarily postponed the proposed surgery for approximately 6-12 months because of claimant's recent heart attack and stent placement.

OPINION AND CONCLUSIONS

As noted in WCD's September 23, 2008 Administrative Order, the issue in this case is whether SAIF is liable, in connection with claimant's January 10, 2004 injury claim, for the left knee arthroscopic surgical procedure proposed by Dr. Bollom (Ex. 64, pg. 1). The record shows that SAIF denied/disapproved the proposed surgery on the ground that it was "not causally related to the accepted condition" (Ex. 50). That causation issue was litigated before the Hearings Division, the Workers' Compensation Board, and the Court of Appeals, and the issue has been resolved in claimant's favor. Following the completion of the litigation on the causation issue, the dispute concerning the proposed surgery was referred back to WCD for final resolution. WCD's September 23, 2008 Administrative Order dismissed the matter, based on its conclusion that the surgery issue was not "ripe for review" because Dr. Bollom was no longer proposing the surgery (Ex. 64, pgs. 2 and 3).

In his May 1, 2008 chart note, Dr. Bollom reported that claimant was still having problems with his left knee. He indicated that in light of claimant's recent heart attack and stent placement, he felt that claimant should not have the proposed knee surgery for about 6-12 months after the heart attack and stent placement (Ex. 36, pg. 2). The summary of WCD's phone

call to Dr. Bollom on September 4, 2005 (Ex. 63) does not indicate that Dr. Bollom's view was any different from that expressed in his May 1, 2008 chart note. I find that said chart note clearly shows that Dr. Bollom has not changed his mind since 2005 about the appropriateness and necessity of the proposed surgery for claimant's left knee condition; rather, he simply feels that surgery should wait for a period of time. Accordingly, I conclude that the issue of SAIF's liability for the surgery is "ripe for review", and WCD's contrary conclusion is an error of law.

As noted earlier, SAIF has not contested the need/appropriateness of the proposed surgery. It only contested causation (Ex. 50). Because the causation issue has been established in claimant's favor, and the appropriateness/necessity of the proposed surgery has not been contested by SAIF¹, I conclude that SAIF is liable for the cost of the surgery when Dr. Bollom determines that the need to postpone it no longer exists. I conclude that claimant has finally prevailed regarding the surgery dispute. Accordingly, claimant's attorney is entitled to be paid the \$6,000 fee awarded by the Board for his services at the Hearings Division and Board levels concerning the causation issue. Claimant's attorney also is entitled to an assessed fee for his services concerning the appeal of the September 23, 2008 Administrative Order issued by WCD. Considering the factors set forth in ORS 656.385(1) and OAR 436-001-0265, I find that a reasonable fee for claimant's attorney's services in the current proceeding before the Hearings Division is \$750.

ORDER

IT IS THEREFORE ORDERED that WCD's September 23, 2008 Administrative Order is set aside.

IT IS FURTHER ORDERED that SAIF is liable for the cost of the left knee arthroscopic surgery proposed by Dr. Bollom at such time as Dr. Bollom determines that the need to postpone the surgery no longer exists.

IT IS FURTHER ORDERED that SAIF pay claimant's attorney a total assessed fee of \$6,750.

¹ Even if a dispute on that point had been raised, Dr. Bollom's reports support the appropriateness of the proposed surgical procedure.