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In the ORS 656.327 Medical Treatment Dispute of

**Bruce D. Rainwater, Claimant**

Contested Case No: 10-191H

**PROPOSED & FINAL ORDER**

August 22, 2011

BROADSPIRE SERVICES, INC., Petitioner

BRUCE D. RAINWATER, Respondent

Before Monte Marshall, Administrative Law Judge

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Pursuant to notice, a hearing was scheduled for March 30, 2011 before Administrative Law Judge Mundorff. Claimant is represented by his attorney, Christopher D. Moore. The employer, Hire Calling, Incorporated, and its claims processor, Broadspire, are represented by their attorney, Scott H. Terrall. Prior to the scheduled hearing, the parties agreed to submit this matter on the documentary record. Exhibits 1-63 were received from the Workers' Compensation Division and are admitted into evidence. The record initially closed on June 8, 2011 following receipt of the self-insured employer's written reply argument. The record was reopened following Administrative Law Judge Mundorff's passing and assigned to the undersigned Administrative Law Judge. The record re-closed on June 27, 2011.

**ISSUE**

Medical Services. The employer appeals a November 22, 2010 Administrative Order that found it liable for a proposed surgery.

**FINDINGS OF FACT**

I adopt and incorporate by reference herein, the Findings of Fact set forth in the November 22, 2010 Administrative Order, as summarized below.

On June 22, 2006, claimant sustained a work-related injury. The employer accepted left elbow and knee strain, cervical strain, left lateral epicondylitis secondary to contusion, post-traumatic rupture of the humeral attachment of the common extensor tendon, partial tear of the radial collateral ligament and left shoulder contusion. Claimant was treated for these injuries by Dr. Ackerman, D.O.

In March 2007, claimant experienced bilateral arm pain and hand numbness. Claimant underwent a cervical MRI scan which showed degenerative disc disease with spondylosis and foraminal stenosis. Claimant continued to experience left elbow pain. In April 2007, claimant underwent a cortisone injection to his left elbow. His left elbow symptoms improved temporarily, but had returned when he next saw Dr. Ackerman in June 2007. Conservative care was recommended.

On September 5, 2007, claimant returned to Dr. Ackerman with increased left elbow complaints. On September 26, 2007, claimant was examined by Dr. Abraham, M.D., for left elbow symptoms. Dr. Abraham recommended an MRI scan. The left elbow MRI scan

revealed a complete avulsion of the humeral attachment of the common extensor tendon and partial tear of the subjacent radial collateral ligament. Joint effusion and spurring were also noted. Claimant returned to Dr. Ackerman who recommended referral to an orthopedist.

On October 25, 2007, claimant was examined by Dr. Neumann, M.D, at the request of the employer. On November 7, 2007, claimant was examined by Dr. Fitzpatrick, M.D., on referral from Dr. Ackerman. Dr. Fitzpatrick recommended an examination under anesthesia and possible nerve conduction studies.. In April 2008, claimant underwent the examination recommended by Dr. Fitzpatrick. Thereafter, claimant's follow-up care was provided by Dr. Ackerman while awaiting approval of the nerve conduction studies. On July 10, 2008, Dr. Ackerman referred claimant to a physical medicine and rehabilitation specialist and asked them to assume claimant's care.

On December 15, 2008, claimant was again examined by Dr. Fitzpatrick. Dr. Fitzpatrick recommended possible surgery, but indicated that the nerve conduction studies should be performed prior to any surgical intervention. On February 9, 2009, claimant underwent nerve conduction studies. The studies showed evidence of mild ulnar nerve compromise at or near the elbow affecting the sensory components with a focal demyelination process. On February 20, 2009, Dr. Ackerman reported that the nerve conduction findings were consistent with claimant's clinical presentation.

On April 25, 2009, Dr. Englander, M.D., performed a file review at the request of the employer. Dr. Englander opined that there had been an error in the interpretation of the nerve conduction studies. On April 28, 2009, claimant returned to Dr. Fitzpatrick. Dr. Fitzpatrick reported that the nerve conduction studies showed ulnar neuritis at the elbow. Dr. Fitzpatrick recommended an open arthroscopic debridement.

On May 6, 2009, Dr. Fitzpatrick requested preauthorization from the employer's claims processor to perform a left elbow neuroplasty of the ulnar nerve and tendon lengthening with arthroscopic debridement. The request was made via facsimile.

On June 11, 2009, claimant was examined by Dr. DeBolt, M.D., and Dr. Matteri, M.D., at the request of the employer. The physicians agreed that the nerve conduction studies had been misinterpreted in that there was a finding in the left wrist and not the left elbow. The physicians concluded that claimant was medically stationary and that any further treatment would be palliative. Dr. Ackerman subsequently concurred with the reported of Drs. DeBolt and Matteri.

Claimant returned to Dr. Ackerman in September 2009 with left elbow tenderness and swelling. Medication was prescribed. Dr. Ackerman next saw claimant in November 2009 and noted that surgery had been recommended, but not yet approved. Thereafter, Dr. Ackerman continued to provide follow-up treatment pending the outcome of the surgery request.

On March 3, 2001, claimant was examined by Dr. Leadbetter, M.D., at the request of the employer. Dr. Leadbetter opined that the accepted conditions were medically stationary and that surgery was not indicated. Dr. Ackerman concurred with Dr. Leadbetter's report.

On June 14, 2010, claimant was again seen by Dr. Fitzpatrick. In his chart note, Dr. Fitzpatrick indicated that he continued to believe that claimant would benefit from ulnar surgery and would continue to await approval of the procedure. Dr. Fitzpatrick also indicated that he would continue to serve as claimant's consulting physician until the surgery was approved. The claims processor received Dr. Fitzpatrick's chart note on June 21, 2010,

On September 14, 2010, claimant requested administrative reviews of the proposed surgery. By Administrative Order dated November 22, 2010, the Director found that the self-insured employer liable for the proposed surgery. Thereafter, the employer requested a hearing.

### CONCLUSIONS OF LAW AND OPINION

The self-insured employer contends that the Administrative Order erred in finding that it was liable for claimant's proposed surgery. The employer bears the burden of showing that the Administrative Order is not supported by substantial evidence. See *Liberty Northwest v. Kraft*, 205 Or App 59 (2006).

The employer first contends that it was error to find that that Dr. Fitzpatrick was a consulting surgeon on referral. OAR 436-010-0250(2) provides in relevant part, that when an attending physician or surgeon on referral by the attending physician believes elective surgery is need to treat a compensable injury, the surgeon must give the carrier notice at least seven days prior to the proposed surgery.

On October 7, 2007, Dr. Ackerman indicated that claimant was being referred to an orthopedist. (Ex. 5-30). On December 10, 2007, Dr. Ackerman noted that claimant had been evaluated by Dr. Fitzpatrick, an orthopedist, who was recommending conservative care and then possible surgery. (Ex. 5-33). Thereafter, the record is replete with references from Dr. Ackerman indicating that they were waiting approval of pending procedures, including surgery, recommended by Dr. Fitzpatrick. (Exs. 5-35, 36, 40, 42, 48, 51, 52, 54, 61). Under these circumstances, claimant was referred to Dr. Fitzpatrick by Dr. Ackerman. Accordingly, Dr. Fitzpatrick is a surgeon on referral pursuant to OAR 436-010-0250(2).

The employer next contends that the surgery that the proposed surgery is not reasonable and necessary. As noted above, OAR 436-010-0250(2) requires the employer be given notice of the proposed surgery within seven days. Dr. Fitzpatrick notified the employer on June 14, 2010. (Ex. 5-69) The employer received this notice of June 21, 2010. (Id.). Once notification of a proposed procedure is received, the employer must notify the recommending physician within whether it desires an independent consultation. OAR 436-010-0250(3)(a). Here, the employer did not provide such notification. Thereafter, if the procedure is not approved, the employer must submit a Form 440-3228 (Elective Surgery Notification) to the recommending physician. The employer did not submit such a form.

Under OAR 435-010-0250(5), failure to timely respond to a proposed surgery, either by approval or submission of a Form 440-3228 shall bar an employer from later disputing that the proposed surgery is not reasonable and necessary. Because the self-insured employer failed to

comply with the applicable administrative rules, it is barred from disputing the proposed surgery on a reasonable and necessary basis. See *Roseburg Forest Products v. Castillo*, 212 Or App 709 (2007).<sup>1</sup>

Finally, the employer contends that the attorney fee awarded by the Administrative Order was excessive. Claimant's counsel was awarded \$1,355. Even assuming extraordinary circumstances were not involved, that is within the maximum amount allowed by OAR 436-001-4410(1)(c) and (d). That is, Dr. Fitzpatrick has provided the CPT codes associated with the proposed surgery. (Ex. 28). The lowest amount listed for those services in the Director's rules (which is a factor pursuant to OAR 436-001-0410(2)) is approximately \$4870. The maximum allowable fee for benefits between \$4001 and \$6000, where 1 to 4 hours has been spent by counsel, is approximately \$1575. Inasmuch as the amount awarded by the order is less than the maximum, I find it supported by the record and declined to reduce it.

Claimant's counsel is entitled to an assessed attorney fee for services at hearing. ORS 656.385. After considering to the time devoted to the case (as represented by the record) and applying the factors set forth in OAR 536-0010410(1) as discussed above, I find that \$1200 is a reasonable assessed fee, payable by the self-insured employer.

### **ORDER**

IT IS THEREFORE ORDERED that the Administrative Order, dated November 22, 2010 is affirmed.

IT IS FURTHER ORDERED that claimant's counsel is awarded \$1,200 as a reasonable assessed attorney fee for services at hearing, payable by the self-insured employer.

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<sup>1</sup>The employer also argues that claimant is not entitled to the surgery because his condition is medically stationary. Although there is medical evidence in the record to support this assertion, claimant has not been legally found to be medically stationary, which is a function of the employer's claims proceeding status. Because claimant's claim has not been closed, he is not medically stationary for purposes of ORS 656 245. Accordingly, ORS 656 245 is not applicable.