

In the ORS 656.327 Medical Treatment Dispute of

Kevin D. Windows, Claimant

Contested Case No: 11-122H

PROPOSED & FINAL ORDER

December 15, 2011

KEVIN D. WINDOWS, Petitioner

CHARTIS CLAIMS, INC., Respondent

Before Bruce D. Smith, Administrative Law Judge

This matter is before the undersigned Administrative Law Judge (ALJ) pursuant to Workers' Compensation Division's Administrative Order on Reconsideration dated August 25, 2011. Hearing convened on November 23, 2011, and was completed. Claimant was present, and is represented by attorney Roger Ousey. Medical service provider Dr. Young was not present, and is not represented. Employer Cropper Medical Inc. and its claims administrator Chartis Claims Inc. are represented by attorney Thomas K. Dyke. The documentary record consists of Exhibits 1 through 32, as identified in the Division's September 26, 2011 exhibit list. The record closed on November 23, 2011, the date of hearing.

ISSUES

Issues are appropriateness of proposed medical services, and attorney fee.

FINDINGS OF FACT

Claimant suffered a hyperextension injury to his left thumb on November 10, 2010, when an 80-pound roll of material fell on his left hand while claimant was unloading a truck. (Exs. 1, 2). Dr. Delgado saw claimant six days later, and diagnosed left thumb sprain. (Ex. 1-2). X-rays were negative for fracture or focal alignment abnormality. (Ex. 5).

On January 4, 2011 claimant came under the care of Dr. Young, who found that claimant had 35 degrees laxity in the left thumb ulnar collateral ligament. (Ex. 6-2). Young offered claimant two surgical options, including reconstruction with tendon graft. He told claimant, however, that his left thumb metacarpophalangeal (MP or MPC) joint would likely wear out within four or five years unless he underwent a fusion. (*Id.*).

On January 5, 2011 the claim was accepted as nondisabling left thumb sprain. (Ex. 8).

On January 19, 2011 Dr. Young sought pre-authorization for surgical fusion of the left thumb MP joint. (Ex. 9). Employer promptly referred the case to Dr. Weinman for review of the proposed treatment (reconstruction with tendon graft or fused left thumb). (Ex. 10).

On February 8, 2011 Dr. Weinman examined claimant, and found no instability of the left thumb MCP joint. (Ex. 11-6). He felt that claimant was medically stationary, and did not need surgery. (Ex. 11-8).

On February 11, 2011 the claims administrator sent Dr. Young a copy of the IME report, asking whether he agreed with Dr. Weinman. (Ex. 12). On February 14 the adjuster notified Young that the surgery request had been denied. (Ex. 13).

On February 22, 2011 Dr. Young responded to the adjuster, indicating that he did not agree with Weinman, and would follow up with a detailed response. (Ex. 12). That same day Young saw claimant, and indicated in his chart note that he disagrees with the Weinman, explaining that claimant had a toothache on the day of the IME, so he was not focused on the injured thumb. (Ex. 6-5). Young reiterated that claimant's left thumb has 35 degrees of laxity at the ulnar collateral ligament; and predicted that it will worsen over time, necessitating fusion of the MP joint. (*Id.*).

On February 24, 2011 Young wrote to the adjuster, explaining in detail his reasons for disagreement with Dr. Weinman. (Ex. 6-6). Young reiterated his belief that claimant's injured thumb would worsen if he did not receive prompt surgical intervention.

On May 6, 2011 the carrier filed a request for medical review of the proposed treatment (reconstruction with tendon graft or fused left thumb). (Ex. 16).

On May 27, 2011 the carrier responded to a request for specification of disputed medical issues, indicating to the Workers' Compensation Division (WCD) that the left thumb MP joint fusion or reconstruction with a tendon graft proposed by Dr. Young is excessive, inappropriate, and/or ineffectual. (Ex. 19). That same day claimant's attorney wrote to WCD, asking the director to approve the proposed surgery. (Ex. 20).

On June 21, 2011 WCD's Resolution Team (RT) wrote to Dr. Morrison, asking him to examine claimant and report back regarding the appropriateness of the proposed/disputed treatment, which it described as "left thumb MP joint fusion or reconstruction with a tendon graft proposed by Scott C. Young, MD." (Ex. 24). Copies of claimant's medical records accompanied the letter.

On July 11, 2011 Morrison examined claimant, and sent the director a report. His diagnosis was ulnar collateral ligament tear, left thumb. (Ex. 25-1). On exam Morrison found that claimant had no obvious instability at the MCP joint; had very mild radial subluxation of the proximal phalanx on the left thumb metacarpal with stressing; and had 25 degrees of radial deviation of the thumbs bilaterally. (Ex. 25-2).

Addressing indications for surgery. Dr. Morrison offered the following observations:

"In reviewing the summary in Campbell's Operative Orthopaedics, 11th Edition, page 3935, the claimant did not demonstrate 30 [degrees] of instability, which would suggest a completely ruptured ulnar collateral ligament. That description suggested functional bracing for a period of four to six weeks for an incomplete rupture which would appear to be what this claimant has or he has healed his complete rupture quite well. The discussion in Campbell's Operative Orthopaedics suggested that arthrodesis is indicated

when there is degenerative disease within the joint or gross disruption of the joint. Neither of these conditions occur.

"It is my feeling, therefore, that the claimant at this time is not a candidate for arthrodesis of the joint. He may be a candidate for ligamentous reconstruction to try to stabilize the minimal joint translation that is noted."

(Ex. 25-2). Morrison recommended that claimant be reevaluated after another five or six months of conservative care. (*Id.*)

On July 14, 2011 claimant returned to Dr. Young, who wrote:

"Kevin is doing fine. He is still complaining, though, that his left thumb lateral pinch hurts, particularly with certain things he does at work. * * * Measuring him today, his left ulnar collateral ligament continues to be lax and it is getting worse. It is now measuring 35 degrees of laxity, which is back to what it was when I first saw him. So it is gradually loosening more and more and he will need this fixed, it is just a matter of time."

(Ex. 6-11).

On July 28, 2011 Dr. Young wrote to claimant's attorney. He had reviewed Dr. Morrison's report, and commented that he did not know whether Morrison had noted that claimant initially had 35 degrees of laxity of the ulnar collateral ligament of the left thumb MP joint. (Ex. 26-1). According to Young this meant that claimant had indeed suffered a complete rupture of the left thumb MP joint ulnar collateral ligament, which had partially healed by the time Young saw claimant in January 2011. (*Id.*)

Young again stated that claimant has two surgery options: (1) ligament reconstruction; or (2) MP joint fusion. (*Id.*). He reiterated that reconstruction would probably not be a permanent solution;" and indicated that claimant had agreed to a fusion. (*Id.*). Young felt that, in the face of worsening laxity and associated pain, claimant will be at risk for long term pain syndrome unless he is surgically treated. (Ex. 26-2).

On August 4, 2011 the director issued an Administrative Order, finding that the left thumb fusion surgery proposed by Dr. Young is not medically necessary or appropriate; and that the carrier is not liable for any costs associated with that procedure. (Ex. 28-7).

In an August 10, 2011 letter to WCD claimant's attorney asked the medical reviewer to abate and reconsider the order, asking that Dr. Young's July 28, 2011 report be included in the record. (Ex. 29).

On August 25, 2011 the director issued an Administrative Order on Reconsideration, again framing the issue as "whether a left thumb fusion or reconstruction with a tendon graft are medically necessary and appropriate for [claimant]." (Ex. 31 -5). Finding Dr. Morrison persuasive, the director again concluded that the proposed fusion not medically necessary or

appropriate. This time addressing both of the alternative surgical procedures, the director explained:

"Based on reviewing the record and evaluating the evidence, and the persuasive opinion of Dr. Morrison, the director is persuaded the left thumb fusion proposed by Dr. Young is not medically necessary or appropriate. Additionally, the director is persuaded that should [claimant] remain symptomatic status-post conservative treatment for another five or six months reconstruction with a tendon graft is an appropriate medical service for [him]."

(Ex. 31-7).

The director noted that in his July 28, 2011 letter Young had indicated that the relevant test of laxity was his own January 4, 2011 evaluation, and that Dr. Morrison's July 11, 2011 measurements were not valid because claimant had partially healed. (Ex. 31-7). The director found Dr. Young to be unpersuasive.

On September 1, 2011 claimant requested a hearing. (Ex. 32).

CONCLUSIONS OF LAW AND OPINION

This matter arises under ORS 656.327 for resolution of a dispute over appropriateness of proposed medical services. As the moving party claimant bears the burden of proof ORS 183.450(2); ORS 656.283(6).

The hearing is conducted under OAR 436-001.' The ALJ may modify the director's order only if it is not supported by substantial evidence in the record or reflects an error of law. OAR 436-001-0225(2). Claimant here contends that the director's August 25, 2011 order is not supported by substantial evidence.

To conduct substantial evidence review, I must be able to identify the director's findings of fact, and determine why the director believes that those findings lead to the conclusions the director reached. *Armstrong v. Aston-Hill Co.*, 90 Or App 200 (1988).

Citing *Armstrong*, claimant points out that the substantial evidence standard is stricter than the "any evidence" standard, and requires "substantial reason." Claimant argues that the director failed to explain why the treatment proposed by Dr. Young is inappropriate; and seeks a remand to the director for an explanation. In the alternative, claimant asks that I modify the order; and strike the director's comment about future treatment with tendon graft, because that issue was not before the director.

Employer contends that the director's order is supported by substantial evidence, including Dr. Morrison's findings and opinion; and argues that the director adequately explained the reasons for his order. Employer argues that the director's reference to future appropriate treatment with tendon graft is merely *dicta*, and asks me to affirm the director.

First, I find that the issue of treatment with tendon graft was before the director. As stated in the Administrative Order on Reconsideration, "[t]he issue before the director is whether a left thumb fusion *or reconstruction with a tendon graft* proposed by Scott C. Young, MD, is medically necessary or appropriate." (Ex. 31-1). (Emphasis added). The carrier had sought review concerning this proposed treatment. (Ex. 19). The director should have addressed this issue in the order portion of his Administrative Order on Reconsideration.

The main problem with the director's order is not that it is unsupported by substantial evidence. In *Armstrong v. Aston-Hill* the court explained that where there are doctors on both sides of a medical issue the board's findings of fact are likely to be supported by substantial evidence. *Armstrong v. Aston-Hill Co.*, *supra*, 90 Or App at 206. The court noted that the difference between the "any evidence" rule and the substantial evidence test would

"be decisive only when the credible evidence apparently weighs overwhelmingly in favor of one finding and the Board finds the other without giving a persuasive explanation."

Id

Dr. Young does not dispute the surgery indications set forth by Morrison (Ex. 25-2). Nor does he criticize Morrison's use of x-ray films to assess instability of the thumb MP joint; or challenge the validity of Morrison's exam findings. I therefore find that Dr. Morrison's opinion constitutes substantial evidence.

The problem here is that the director, while concluding that Morrison is persuasive and Young is not, does not tie these conclusions to any finding(s) of fact. Thus, the director's order is not sufficient for purposes of judicial review, as required by ORS 656.327(2). In *Armstrong v. Aston-Hill* the court stated that substantial evidence review "requires a reasoned opinion based on explicit findings of fact." *Armstrong v. Aston-Hill Co.*, *supra*, 90 Or App at 205. The court then quoted from an earlier case of its own [citation omitted], as follows:

"If there is to be any meaningful judicial scrutiny of the activities of an administrative agency * * * we must require that its orders clearly and precisely state what it found to be the facts and fully explain why those facts lead it to the decision [which] it makes."

(*Id.*).

The director failed to do that here. The director notes that Dr. Young had rejected Dr. Morrison's July 11, 2011 findings as invalid because claimant had partially healed, and that the relevant measurements were those obtained by Young himself back in January 2011. (Ex. 31-7). Without explanation, the director then writes, "[a]ccordingly, the director finds Dr. Young's opinion unpersuasive." (*Id.*). According to what? Although Young criticizes Morrison's findings as "not *valid*" (Ex. 26-1), what he really means (and thereafter says) is that the measurements obtained by Morrison on July 11, 2011 are not *relevant*, because claimant had partially healed. (Ex. 26-2). (Emphasis added). Does the director disagree?

Does the director find that Morrison's July 11, 2011 findings are more *reliable* than Young's July 14, 2011 findings? Or his January 4, 2011 findings? If so, why? Does the director reject Young's opinion that 35 degrees of laxity *at any time* justifies fusion? The director does not say.

The administrative order here does not meet the standard set forth in ORS 656.327(2). I reach the same conclusion that the court did in *Armstrong v. Aston-Hill*, and for the same reason:

"The order does not satisfy the standards we have described. It is for the most part merely a recitation of the evidence, followed by a bare conclusion. It lacks an ordered set of findings of fact and is devoid of any explanation of why facts supported by evidence lead to its conclusion. Therefore, it is inadequate for judicial review."

Armstrong v. Aston-Hill Co., *supra*, 90 Or App at 207.

For the foregoing reasons I find that the director erred in failing to explain the reasons for his conclusion that the fusion surgery recommended by Dr. Young is not appropriate for claimant. I also find that the director erred in failing to address in the order section of his Administrative Order on Reconsideration the alternative treatment of tendon reconstruction.

Finally, I find that since claimant has not finally prevailed in this matter, he is not entitled to an attorney fee under ORS 656.385 and OAR 436-001-0410.

ORDER

IT IS THEREFORE ORDERED that the director's Administrative Order on Reconsideration dated August 25, 2011 is reversed; and the case is remanded to the director for findings and conclusions consistent with this order.