

In the Matter of an ORS 656.260 Managed Care Dispute of
Cozad, Lewis , Claimant

Contested Case No: HH00-115

PROPOSED & FINAL ORDER

May 8, 2002

SAIF CORPORATION , Petitioner
PROVIDENCE MCO, Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

This dispute involved a decision by SAIF Corporation (insurer) that certain medical care was not reimbursable. On October 23, 2000, MRU issued administrative order MTX 00-523 finding the disputed services reimbursable. Insurer appealed the decision to contested case. On April 3, 2002, Hearing Officer Paul Vincent conducted a telephone hearing in the matter. Petitioner, SAIF Corporation, appeared through its attorney, Jeff Gerner. Respondent, Providence MCO (MCO), appeared and was represented by its attorney, Dean Lederer. The Workers' Compensation Division (WCD) waived appearance. The claimant, Lewis Cozad, did not appear.

The record of this proceeding, consisting of a tape recording of the hearing, all evidence received, and all hearing papers filed, has been considered. The findings of fact and conclusions of law are based upon the entire record.

ISSUE

The issue presented is whether substantial evidence supports the agency's administrative order, MTX 00-523, issued on October 23, 2000.

EVIDENTIARY RULING

WCD Exhibits 1-93 were received without objection and admitted into evidence. Insurer submitted an unmarked group of exhibits on November 24, 2000. These exhibits were received into the record without objection.

FINDINGS OF FACT

The parties did not challenge the following findings of fact contained in MRU's Administrative Order. Having reviewed the administrative record, I adopt the following findings of fact set forth in the Administrative Order which I find to be supported by the preponderance of evidence in the record:

Lewis Cozad injured his back on May 10, 1999 when, while unloading 80-pound bags of sand, he experienced a sudden onset of intense back pain that radiated into both legs. Claimant had previously experienced episodes of back pain beginning in the 1970s. After each episode the pain would resolve and he would continue to work. The 1999 episode, however, was described by the worker as more severe and disabling than prior episodes.

On July 6, 1999, a lumbosacral MRI revealed a moderate broad-based posterior disc bulge at L4-5 with mild facet arthrosis, and a moderate facet arthrosis at L5-S1. No central canal or foraminal stenosis or focal neural impingement was seen at any level. There was mild, diffuse lumbar disc desiccation. An epidural steroid injection, an L5-S1 radio frequency facet denervation, and a nerve root block failed to alleviate his symptoms, and Mr. Cozad continued to experience back and leg pain.

On September 15, 1999, SAIF denied claimant's Workers' Compensation claim. The claimant appealed the denial.

Claimant's attending physician, Clifford Hites, MD (Family Practice), referred claimant to Glenn O'Sullivan, MD (Orthopedic Surgery), who examined claimant on January 6, 2000. On examination, claimant displayed decreased range of motion of the back, no abnormal neurological signs, and negative straight leg raising. On the basis of patient history, diagnostic studies, and examination, Dr. O'Sullivan suspected the claimant had an annular tear, painful disc syndrome and a herniated disc at L4. He ordered a lumbar discogram.

A January 20, 2000 discogram, interpreted by Dr. O'Sullivan, proved the existence of an annular tear at L4-5, but did not classically reproduce the worker's symptoms, although it did produce "heavy back pain." The discography did not show a neural compressive lesion. Claimant and Dr. O'Sullivan decided to proceed with an IDET procedure.

Intradiscal electrothermal therapy (IDET) is a minimally invasive procedure performed by a surgeon through a needle in order to repair tears to discs in the lumbar spine. The needle is placed into the disc and a catheter is threaded through the needle until it is positioned properly inside the disc. A controlled heating process is then followed in which the catheter is heated to approximately 190° for about 15 minutes. The administration of heat breaks down the collagen bonds and partially ablates the nerves by coagulating the nerve endings.

On January 27, 2000, prior to claim acceptance, SAIF enrolled claimant in Providence MCO, providing him with required notification. SAIF copied Dr. Hites, but not Dr. O'Sullivan.

On February 11, 2000, claimant and SAIF settled the denial with SAIF accepting the condition of lower back strain.

On February 15, 2000, Dr. O'Sullivan requested pre-certification of the IDET procedure from Providence MCO. Pre-certification was denied on March 8, 2000 on the basis that the efficacy of the procedure had not been established to improve net health outcomes as much as or more than established alternatives and was experimental. The denial provided notice that the worker or physician could appeal the Providence MCO decision within 30 days.

On March 16, 2000, Dr. O'Sullivan performed the IDET procedure.

On March 31, 2000, claimant appealed the March 8, 2000 MCO decision. However, the Providence MCO process only allows the physician to request review through the internal

dispute resolution process. Providence MCO took no action after concluding that because the provider had not appealed the denial, the provider was not pursuing the request to provide treatment. The claimant appealed the decision to the Workers' Compensation Division, Medical Review Unit (MRU).

On May 3, 2000, SAIF modified its acceptance to include annular disruption of L4-5. SAIF did not pay for the IDET procedure and, on May 18, 2000, claimant requested that MRU perform and administrative review.

MRU requested that Michael Karasek, MD (Neurology), review claimant's records. Dr. Karasek found that the treatment was not experimental and noted that the procedure had been performed for over three years and is widely used by spine surgeons, pain management specialists and other physicians (by referral to physicians who perform the procedure). He also noted that the surgical devices used to perform the surgery are FDA approved, credentialed by Oregon hospitals and in broad clinical use.

Dr. Karasek listed the indications for IDET as follows:

1. Unremitting, persistent low back pain of at least six months duration.
2. Lack of satisfactory improvement with non-operative care program, including physical therapy, epidural steroid injections, facet injections, oral medications.
3. Normal neurologic examination.
4. Absence of sciatic stretch signs (negative straight leg raise).
5. An MRI which does not demonstrate a neural compressive lesion.
6. Discography performed by IASP standards which is consistent with a painfully disrupted lumbar disc with at least 75% height maintenance.

Dr. Karasek found that claimant met the indications for IDET. He also noted that claimant showed postoperative improvement in his medical condition with decreased back pain, reduced use of medications, and worker-reported improvement in condition. Dr. Karasek found IDET an appropriate medical procedure for claimant.

CONCLUSIONS OF LAW

Absent an of error law, my standard of review is for substantial evidence. ORS 656.260(16). Substantial evidence exists to support a finding "when the record, viewed as a whole, would permit a reasonable person to make that finding." ORS 183.482. To determine whether substantial evidence exists, a Hearings Officer is required to:

"look at the whole record with respect to the issue being decided, rather than one piece of evidence in isolation. If an agency's finding is reasonable, keeping in mind the evidence against the finding as well as the evidence supporting it, there is substantial evidence. * * * For instance, and in the context which is likely frequently to occur in workers' compensation cases, if there are doctors on both sides of a medical issue, whichever way the [director] finds the facts will probably have substantial

evidentiary support. [The Hearings Officer] would not need to choose sides. The difference between the 'any evidence' rule and the substantial evidence test * * * will be decisive only when the credible evidence apparently weighs overwhelmingly in favor of the finding and the [director] finds the other without giving a persuasive explanation." *Armstrong v. Asten-Hill Co.*, 90 Or App 200, 206 (1988).

In assessing whether findings are supported by substantial evidence, my task is not to substitute my judgment for that of MRU, but rather to decide whether the findings are reasonable in the light of countervailing as well as supporting evidence. *Reguero v. Teacher Standards and Practices*, 312 Or 402, 417-18 (1991). SAIF argues that MRU erred in finding that the IDET procedure was reimbursable, in light of OAR 436-009-0015(6)(b), effective April 1, 2002. That rule states:

(6) Pursuant to ORS 656.245 (3), the director has excluded from compensability the following medical treatment. While these services may be provided, medical providers shall not be paid for the services or for treatment of side effects.

(b) Intradiscal electrothermal therapy (IDET).

SAIF, joined by Providence MCO, acknowledges that OAR 436-009-0015(6) is not retroactive and therefore does not control this dispute by its own terms. Nevertheless, both argue that because IDET has now been determined to be experimental, it cannot previously have properly been determined non-experimental. I disagree. The director, through the MRU administrative review process, has previously determined that the IDET procedure is compensable. See, e.g., *Dixie L. Davis*, 5 WCSR ____ (2002)(Reversing MRU decision on other grounds). The director's previous administrative determination that IDET is compensable is based on the evidence presented in that case and therefore has no general applicability. Since the determinations in *Davis* and in this case, the director has held rulemaking hearings and determined that the evidence presented at that hearing justified the new rule. There is nothing inconsistent in the director having reached a conclusion here that IDET is non-experimental, based on the evidence presented to MRU at this hearing, and reaching a different decision at a rulemaking hearing for a rule of future general applicability.

Here, as in *Armstrong*, the director was presented with medical opinions on both sides of a medical issue, each of which is supported by substantial evidence in the record. SAIF and Providence MCO presented substantial evidence to the director showing that a significant portion of the medical community believes IDET is as yet unproven and experimental in nature. Dr. Karasek clearly announced why others feel that the treatment has been sufficiently proven non-experimental. In such a case, *Armstrong* indicates that the Hearings Officer need choose sides "only when the credible evidence apparently weighs overwhelmingly in favor of the finding and the [director] finds the other without giving a persuasive explanation." This is not such a case. MRU clearly explained that there was evidence present both for and against a finding that the disputed treatment was non-experimental and appropriate for the worker's compensable

condition and explained its reasoning based on the record presented. Accordingly, I find that substantial evidence exists to support MRU's decision in this matter and deny SAIF's request to reverse it.

ORDER

IT IS HEREBY ORDERED that MRU's Administrative Order, MTX 00-523, is affirmed.

DATED this ____ day of May, 2002.

By: _____

Paul Vincent, Hearing Officer
Hearing Officer Panel