

In the Matter of the ORS 656.260 Managed Care Dispute of  
**Parnell, Gordon D., Claimant**

Contested Case No: H03-074

**PROPOSED AND FINAL ORDER**

October 8, 2003

GORDON D. PARNELL, Petitioner

SAIF CORPORATION & PROVIDENCE MCO, Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

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**HISTORY OF THE CASE**

Claimant appeals a May 16, 2003 Administrative Order issued by the Medical Review Unit (MRU) of the Workers' Compensation Division, Department of Consumer and Business Services, concerning claimant's entitlement a diagnostic service known as a discogram. On September 2, 2003, Administrative Law Judge Paul Vincent conducted a telephone hearing in this matter. Claimant appeared and was represented by his attorney, Chris Moore. Respondent SAIF Corporation was represented by its attorney, Mary Goebel-Adams, and Providence MCO was represented by attorney Dean Lederer. The record closed on the date of hearing.

After the record closed in this matter, ALJ Vincent began working for a different section of the Office of Administrative Hearings and this matter was transferred to the undersigned. I have listened to the tape of the September 2 hearing, including the arguments of the parties, and I have reviewed all of the exhibits in the record before making the decision that follows.

**ISSUE**

Whether substantial evidence supports MRU's decision that lumbar discography was not an appropriate medical service for claimant's compensable condition.

**EVIDENTIARY RULINGS**

Workers' Compensation Division (WCD) Exhibits 1 through 101 were received into evidence. Respondents objected to Exhibits 100 and 101, as well as to the testimony of claimant being allowed in the hearing, relying upon ORS 656.260(16). The objection was overruled.

During review of the file, it was noted that the Administrative Order was not one of the exhibits. ALJ Vincent had marked the document as Exhibit 97A, but the tape of the hearing does not reflect that it was ever identified and offered on the record. To remedy that situation, the Administrative Order of May 16, 2003 has been marked as Exhibit 97A and is hereby admitted into evidence. If any of the parties object to the inclusion of Exhibit 97A, they are directed to make their objections in writing to me within ten days of the mailing of this Order, with copies to the other parties.

### FINDINGS OF FACT

I adopt the Findings of Fact in the Administrative Order, with the following supplementation:

(1) Claimant injured his low back on February 1, 2001, while moving a gasoline pouring stem. He lifted the stem and pulled on it while twisting his body. Claimant sought treatment from Dr. Griffin, complaining of low back pain, right hip and leg numbness, and radiation into his toes. On February 26, 2001, Dr. Griffin referred claimant to Dr. Kitchel, an orthopedist. (Ex. 1).

(2) Dr. Kitchel diagnosed a lumbar strain and lumbar radiculitis, and referred claimant for an MRI scan. (Ex. 2). Dr. Kitchel noted claimant's past history of low back surgeries (two in 1982) and cervical surgery (in 1995), concluding that claimant's degenerative disk disease preexisted his February 2001 injury, but also concluding that the 2001 injury was the major contributing cause of the need for treatment of the low back. (Ex. 11). SAIF had denied compensability of the claim on May 4, 2001, (Ex. 9), but decided to seek an independent medical opinion from Dr. Dietrich of the Orthopaedic Consultants. Dr. Dietrich examined claimant on July 27, 2001 and concluded that claimant had a herniated L5-S1 disc as a result of the February 2001 injury. Surgery was recommended. (Ex. 12). On November 29, 2001, SAIF rescinded its denial as part of a stipulated settlement of the case. SAIF accepted a claim for lumbar strain, (Ex. 19) and, eventually, a herniated disk at L5-S1. (Ex. 33).

(3) Claimant was referred to Dr. Norelle, a neurosurgeon, who performed surgery on January 22, 2002. Claimant underwent a right-sided hemilaminectomy, foraminotomy and discectomy at L-5, and a right-sided L4-5 medial hemifacetectomy. (Ex. 25). Claimant had minor relief for a short period of time following the surgery. As of July 25, 2002, however, claimant's pain had returned. Dr. Norelle thought that claimant might need a fusion in his low back, if claimant could lose between 50 and 100 pounds of body weight. In the meantime, Dr. Norelle wanted claimant to undergo a discogram at levels L2-3, L3-4, L4-5 and L5-S1, and also flexion/extension x-rays to determine whether a fusion would help. (Ex. 10).

(4) On August 6, 2002, Providence MCO gave notice to Dr. Norelle that the discogram was not approved because it was not considered medically necessary. (Ex. 52). Although Dr. Norelle did not contest the decision of the MCO, claimant (through counsel) did contest the decision by requesting review and appealing the decision. (Ex. 56, 59). After claimant's appeal, a Notice of Required Action was sent to the parties. On October 11, 2002, after receiving all of the pertinent documents, the MCO concluded the denial was appropriate. (Ex. 71).

(5) Pursuant to the standards of the MCO, discography is only appropriate where there are significant objective findings with an identified disease process sufficient to warrant a spinal fusion, and when there is a need to identify the operative level for a spinal fusion. (Ex. 80).

(6) On January 28, 2003, Dr. Norelle made a second request for a discogram. The doctor again believed the test was necessary, along with flexion/extension x-rays, to fully evaluate claimant's need for surgery. (Ex. 77, 79). On January 30, the MCO again denied the discogram. (Ex. 80). On February 3, 2003, WCD set up an appointment to have Dr. Michael Liu review the file. (Ex. 81, 82). Claimant was seen by Dr. Liu on February 17, 2002,<sup>1</sup>XX and the doctor examined claimant after reading the medical records. Dr. Liu concluded that the MCO criteria were not met by claimant's current condition. The doctor felt that claimant's pain was not discogenic in origin and that claimant's radicular symptoms were more consistent with epidural fibrosis due to the previous surgeries at L4-5 and L5-S1. Dr. Liu recommended that the discogram not be authorized. (Ex. 78, 87).

(7) Dr. Liu was contacted again by MRU, and was provided with additional medical records to see if the doctor's opinion would change. (Ex. 94). Dr. Liu's opinion remained unchanged. (Ex. 95). On May 16, 2003, MRU issued its Administrative Order finding that discography was not appropriate in this case. (Ex. 97A). Claimant appealed the decision.

### CONCLUSIONS OF LAW

Substantial evidence supports MRU's decision that lumbar discography was not an appropriate medical service for claimant in this case.

### OPINION

The question of the appropriateness of the requested medical treatment lies with the Director of the Department of Consumer and Business Services (DCBS). ORS 656.260(6). The Administrative Order may be modified only if it is not supported by substantial evidence in the record or if it reflects an error of law. ORS 656.260(16). In this case, claimant has the burden of establishing either an error of law or a lack of substantial evidence to support the Administrative Order. ORS 183.450(2).

#### Nature of Substantial Evidence Review

Unlike a case involving *de novo* review, in which evidence is examined to determine which party's position is more probable, a case involving substantial evidence review looks only to see if the Administrative Order is reasonable, based upon the entire record. The ALJ is required to:

[L]ook at the whole record with respect to the issue being decided, rather than one

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<sup>1</sup> Dr. Liu's report was received as Exhibit 78, showing a date of January 28, 2003. However, the document was more probably written on February 17 and/or 18, since the appointment with claimant was on February 17 and the fax to MRU took place on February 18.

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...

*Armstrong v. Asten-Hill Co.*, 90 Or App 200, 206, 752 P2d 312 (1988).

In *Armstrong*, the Court of Appeals gave an example quite common to workers' compensation cases:

For instance, and in a 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 Board<sup>2</sup>XX finds the facts will probably have substantial evidentiary support. We 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 one finding and the Board finds the other without giving a persuasive explanation...

90 Or App at 206.

Thus, my review of the case will involve determining whether there was substantial evidence in the record which would enable the Director to make the decision that was made in this case. *John J. Rice*, 4 WCSR 173, 176 (1999).

### **Basis for the Director's Decision**

A review of the Administrative Order in this case indicates the nature of the decision reached and the basis for that decision. Recognizing that claimant had an ongoing, open claim, the reviewer correctly recognized that claimant had ongoing rights to diagnostic testing for his compensable conditions of lumbar strain and L5-S1 herniated disk. However, the MCO and the insurer do not believe that the requested diagnostic testing in this case—discography—is medically appropriate. Therefore, the question is one of medical necessity.

The file was reviewed on the Director's behalf by Judith Wells, RN. The reviewer noted that Dr. Norelle was requesting a *four level* discogram in a case for which only one disk had been found compensable. The reviewer stated:

After review of the record, including MRI's, flexion/extension xrays, and the opinions of Providence and Dr. Liu, the director is persuaded that the proposed L2-L3, L3-L4, L4-L5, L5-S1 discograms may be appropriate for Mr. Parnell's overall clinical presentation, but are not appropriate for his compensable condition...

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<sup>2</sup> *Armstrong, supra.*, was a matter coming to the Court from the Workers' Compensation Board, not DCBS, but the principle is the same.

(Ex. 97A p 5). In other words, the requested treatment sought to treat more than the compensable condition. In addition, the reviewer noted that the reasons the discogram was requested did not fit within the criteria set by the MCO for that specific diagnostic test. Under MCO rules, a discogram was only appropriate where the evidence established the need for a spinal fusion and it was necessary to determine the level where fusion was needed. (Ex. 80). While Dr. Norelle's first request for the discography was in contemplation of a fusion at some point, claimant was not ready for such treatment due to his obesity. Claimant lost weight over the ensuing months, but the doctor's second request for the discogram came at a point when she had not seen claimant for six months. Thus, the reviewer accepted the MCO's conclusion that the doctor's requests did not meet the criteria.

Finally, and certainly related to the MCO's decision under its criteria, the reviewer accepted the opinion of Dr. Liu over that of Dr. Norelle when it came to determining the appropriateness of the diagnostic treatment itself. While Dr. Norelle wanted discography because she believed claimant would need a spinal fusion, Dr. Liu attributed the radicular symptoms to epidural fibrosis and did not believe the pain was discogenic in origin.

Thus, the threefold basis of the director's decision was that: 1) the diagnostic test addressed conditions beyond the compensable conditions; 2) the specific test request did not meet MCO criteria; and 3) the discogram was not needed medically. (Ex. 97A).

### **Was There Substantial Evidence?**

Claimant has the burden of proof to show that there was not substantial evidence supporting the director's decision. As the Court of Appeals has recently stated, this is a "daunting standard of review." *Webb v. Glenbrook Nickel Co.*, \_\_\_ Or App \_\_\_ (slip opinion, August 13, 2003). Was there evidence in the record upon which the director could reasonably conclude that discography was inappropriate in this case?

In all three areas of the director's Administrative Order, there is evidence in the record to support the decision. The record is clear about what conditions are compensable; it is also clear about the MCO criteria for when a discogram will be authorized. Finally, while there is an apparent difference of opinion between Drs. Liu and Norelle,<sup>3</sup> Dr. Liu's opinion is sufficiently developed to be entitled to the reliance the director gave it. Thus, while in a *de novo* setting I might have considered Dr. Norelle's opinion more persuasive, I cannot fault the foundation of the director's reliance on Dr. Liu.

In conclusion, the director's Administrative Order is based upon substantial evidence and will not be disturbed.

### **ATTORNEY FEES**

Claimant's attorney is not entitled to an assessed fee in this matter.

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<sup>3</sup> The word apparent is used because Dr. Norelle did not contest either denial of the discogram; it was only claimant who contested the decision.

**ORDER**

IT IS HEREBY ORDERED that:

1. The Directors Review and Order dated May 16, 2003 is affirmed.

DATED this 8th day of October, 2003.

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Rick Barber, Administrative Law Judge  
Office of Administrative Hearings