

In the ORS 656.260 Managed Care Dispute of

Ronald C. Weise Jr., Claimant

Contested Case No: 06-033H

PROPOSED & FINAL ORDER

June 16, 2006

SAIF CORPORATION, Petitioner
RONALD C. WEISE JR., Respondent

Before Kirk Spangler, Administrative Law Judge, Workers' Compensation Board

Pursuant to notice, a hearing was convened and closed on May 23, 2006, in Salem, Oregon, before Administrative Law Judge Kirk Spangler. Claimant was represented by his attorney, Evohl Malagon. The employer, Pride Disposal Company, insured by SAIF Corporation, was represented by John Motley, SAIF Trial Counsel. Exhibits 1 through 73 (the certified record from the Director) were received in evidence. The hearing was recorded by the Workers' Compensation Board.

ISSUE

Whether substantial evidence supports the Medical Review Unit's (MRU's) decision that the proposed discogram is an appropriate medical service.

SUMMARY OF FACTS

Claimant, 43 year-old garbage truck driver, compensably injured his low back on June 30, 2003. SAIF accepted his claim as a disabling L4-5 disc herniation and coccyx contusion. Claimant's medical services were provided by a Managed Care Organization, CareMark Comp. Claimant variously treated with Dr. Cruz, a physician, Dr. Kallgren, a physician, and Dr. Cottrill, a physician.

In May 2004, claimant underwent a lumbar decompression laminectomy with bilateral decompression foraminotomies at L4-5. The procedure was performed by Dr. O'Neill, an orthopedic surgeon.

Unfortunately, claimant's low back pain did not resolve. As a result, Dr. Cruz eventually recommended a lumbar discogram as a reasonable diagnostic tool to help delineate the source of claimant's pain. Dr. Kallgren, Dr. Cottrill, and Dr. O'Neill concurred with Dr. Cruz.

However, CareMark Comp denied the procedure after review by one of its "physician advisors." Ex. 39. Thus, claimant appealed the decision and the matter was reconsidered by CareMark Comp after claimant had undergone a pain center evaluation, as well as an examination by Dr. Rosenbaum, a neurosurgeon. Yet, CareMark Comp affirmed its earlier decision to deny the recommended lumbar discogram.

As a result, claimant requested administrative review by the Director. Thereafter, CareMark Comp set forth its position in a report to the Director, which was authored by Dr.

Wong, a physician.

By way of a February 1, 2006 Administrative Order, the Director, through the MRU, reversed the decision of CareMark Comp and approved the recommended lumbar discogram. Thereafter, SAIF requested the instant hearing to contest the decision of the Director.

CONCLUSIONS OF LAW AND OPINION

SAIF argues that the weight of the medical evidence does not support the MRU's decision that discography is an appropriate diagnostic service for claimant to undergo. Claimant, however, argues that my review is not de novo and, therefore, I am precluded from weighing the medical opinions other than to determine whether substantial evidence supports the MRU's decision. I agree with claimant.

This is a case of divided medical opinion. Claimant's MCO rejected the proposed discogram procedure that was recommended by claimant's treating physician, Dr. Cruz, and that was supported by Dr. Cottrill, Dr. Kallgren, and Dr. O'Neill. After receiving the notice of disapproval, claimant requested reconsideration by the MCO. Consequently, SAIF sent claimant to Dr. Rosenbaum, a neurologist, who did not support further surgical intervention, but who also did not directly address the issue of whether a discogram was appropriate. Thereafter, the MCO declined to reverse its finding of disapproval and claimant requested administrative review by the Director. Subsequently, SAIF sent claimant to Dr. Wong, for an additional evaluation. Dr. Wong opined that the proposed discogram procedure was not appropriate.

This is a classic case of divided medical opinion wherein the petitioner (SAIF) is dissatisfied with the result reached by the Director. In *Armstrong v. Asten-Hill Co.*, 90 Or App 206 (1988), the court announced: "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." See also *Kraft v. DCBS*, ___ Or App ___ (April 5, 2006).

Here, the record clearly contains "substantial evidence" to support the MRU's finding that the proposed discogram procedure is appropriate for claimant. To that end, I decline SAIF's invitation to reweigh the evidence and to second guess the persuasiveness of the expert opinions that it disagrees with. To do otherwise, would result in the same sort of error that the *Kraft* court had to remedy by remanding the case to the Hearings Division.

Accordingly, I affirm and adopt the order of the MRU as supplemented herein.

Claimant's attorney is entitled to a reasonable assessed fee for successfully defending against SAIF's appeal of the Director's order approving a disputed medical service. Such a fee is based on the factors set forth in OAR 438-015-0010(4). Here, the length of the case was average. Moreover, the record was already established as the certified record before the Director. However, claimant's attorney was required to defend against SAIF's attempt to deprive his client of a Director approved medical service. To that end, he did so artfully and skillfully, while facing an equally skilled defense attorney. After considering all of the factors, especially those noted above, I conclude that \$3,000 is a reasonable and deserved fee.

ORDER

IT IS THEREFORE ORDERED that the Director's Administrative Order, dated February 1, 2006, is approved in its entirety.

IT IS FURTHER ORDERED that SAIF Corporation shall pay claimant's attorney an assessed fee of \$3,000 for successfully defending against its attempt to reduce claimant's compensation.