

In the Compensation of
Patrick Wagner, Claimant
Contested Case No: 07-046zH
PROPOSED & FINAL ORDER

August 30, 2007

HARTFORD ACCIDENT & INDEMNITY CO., Petitioner
PATRICK WAGNER, Respondent

Before Darren L. Otto, Administrative Law Judge

A hearing was convened and concluded in the above entitled matter on August 14, 2007, in Portland, Oregon, before Administrative Law Judge Darren L. Otto of the Workers' Compensation Board. Claimant was present and was represented by his attorney, David Hollander. The employer, Orcanus Enterprises, and its insurer, Hartford Ins. Co., were represented by their attorney, John E. Snarskis. Jamie Fitzpatrick was also present on behalf of the employer. Exhibits 1-33, 14A, 18A, and 24A were received into evidence.

ISSUES

The insurer appeals the March 13, 2007 Administrative Order which awarded claimant's attorney a \$1,420.00 assessed fee. The issue is whether the Director's decision that claimant's attorney was instrumental in obtaining a settlement of the medical dispute prior to a decision by the Director was supported by substantial evidence in the record.

FINDINGS OF FACT

On November 7, 2005, claimant was a passenger in a vehicle that overturned, causing neck pain, while working for the employer (Ex. 1). He initially sought medical treatment from Dana Mirkin, M.D., who diagnosed bilateral lateral hip strains, right shoulder sprain, particularly of the right acromioclavicular ligament, and a right wrist sprain (Ex. 6). On December 12, 2005, claimant began treating with Thomas McWeeney, M.D., who diagnosed right shoulder rotator cuff impingement with subscapularis tendonitis (Ex. 9-1). Dr. McWeeney provided conservative care, including physical therapy and injections into the shoulder (Ex. 9-2).

On February 24, 2006, the insurer accepted claimant's right rotator cuff strain, bilateral hip strains, and left ankle sprain as a non-disabling industrial injury (Ex. 10).

By May 3, 2006, it was apparent that claimant's right shoulder condition had not improved with conservative treatment (Ex. 9-3). Therefore, Physicians' Assistant, Karen Lutt, PA-C, recommended surgery (Ex. 9-3). On May 15, 2006, her request was followed up with Dr. McWeeney's formal written request to authorize right shoulder arthroscopic surgery (Ex. 11).

On June 8, 2006, Dr. McWeeney diagnosed right shoulder tendonitis and a possible SLAP tear (Ex. 14A). He recommended an MRI scan of claimant's right shoulder which, on June 12, 2006, was interpreted as showing small effusion in the acromio-clavicular joint but was otherwise normal (Ex. 15).

On June 14, 2006, claimant was examined by the insurer-arranged medical examiner, George Zakaib, M.D., who believed that the recommended right shoulder arthroscopy was a reasonable and necessary surgical procedure for claimant's impingement syndrome, but Dr. Zakaib was not sure if that diagnosis was correct and recommended one month of physical therapy before proceeding with surgery (Ex. 16-6).

On July 5, 2006, claimant saw Dr. McWeeney again who stated, "Before I consider arthroscopic evaluation, I am going to try and get to the numbness and understand the etiology of that. We are going to refer him to neurology as he still has persistent complaints of numbness from the shoulder down to his hands when he lies on that right side to sleep at night." (Ex. 18A-1). Dr. McWeeney, however, never followed through with that neurological consultation.

On August 18, 2006, the insurer modified its Notice of Acceptance to include claimant's right shoulder rotator cuff strain with impingement and acromio-clavicular strain with subscapularis tendonitis as a disabling industrial injury (Ex. 19).

On October 13, 2006, and again on November 7, 2006, claimant's attorney asked the insurer to authorize the surgery previously requested by Dr. McWeeney (Exs. 20, 21). On November 17, 2006, the insurer stated that a review of its file found no request for surgery (Ex. 23). Therefore, on January 22, 2007, claimant's attorney requested Director review of the medical service dispute regarding surgical authorization (Ex. 24).

On January 22, 2007, claimant returned to Dr. McWeeney, who stated, "My recommendation at this point is, since we have given it more than a tincture of time, to go in there and evaluate it arthroscopically.***" (Ex. 24A-1). Dr. McWeeney went on to describe a number of possible procedures that could be performed depending upon what was found during surgery. *Id.* On January 29, 2007, Dr. McWeeney filed a second formal request for surgery authorization to the insurer (Ex. 25). On January 30, 2007, the insurer orally approved that request for surgery (Exs. 25, 29).

On March 13, 2007, an Administrative Order awarded claimant's attorney a \$1,420.00 assessed fee, finding that claimant's attorney was instrumental in obtaining a settlement of the dispute prior to a decision by the Director (Ex. 32). The insurer subsequently requested a hearing challenging that Order (Ex. 33).

FINDINGS OF ULTIMATE FACT

Dr. McWeeney did not withdraw his May 15, 2006, request for surgery authorization from the insurer.

CONCLUSIONS OF LAW AND OPINIONS

The insurer contends that Dr. McWeeney withdrew his initial request for surgery authorization and there was no new request for surgery to be approved until January 29, 2007, when a second formal request was filed with the insurer. Since the insurer authorized that

surgery on January 30, 2007, it argues that claimant's attorney was not instrumental in obtaining a settlement of the dispute prior to a decision by the Director and no fee is warranted. Claimant asserts that Dr. McWeeney never withdrew the initial request for surgery and the Administrative Order should be approved.

The scope of review of the Director's Order is limited by OAR 436-001-0225(2), which provides,

In medical service and medical treatment disputes under ORS 656.245, 656.247(3)(a), and 656.327, and managed care disputes under ORS 656.260(16), the Administrative Law Judge may modify the Director's Order only if it is not supported by substantial evidence in the record or if it reflects an error of law. New medical evidence or issues may not be admitted or considered.

ORS 656.385(1) further provides that, in all cases involving a dispute over compensation of benefits pursuant to ORS 656.245, 656.260, 656.327, or 656.340, where a claimant finally prevails after a proceeding has commenced before the Director of Consumer and Business Services, the Director shall require the insurer or self-insured employer to pay a reasonable attorney fee to the claimant's attorney. In such cases, where an attorney is instrumental in obtaining a settlement of the dispute prior to a decision by the Director, the Director shall require the insurer or self-insured employer to pay a reasonable attorney fee to the claimant's attorney. *Id.*

On May 15, 2006, Dr. McWeeney's office filed a "Request for Surgery Authorization" form with the insurer (Ex. 11-1). The surgical procedure included a right shoulder arthroscopy subacromial decompression. *Id.* On July 5, 2006, Dr. McWeeney examined claimant and stated, "Before I consider arthroscopic evaluation, I am going to try and get to the numbness and understand the etiology of that. We are going to refer him to neurology as he still has persistent complaints of numbness from the shoulder down to his hands when he lies on that right side to sleep at night." (Ex. 18A-1). Claimant was not referred to the neurologist and, when he returned to Dr. McWeeney on January 22, 2007, Dr. McWeeney again recommended surgery (Ex. 24A). On January 29, 2007, a second formal "Request for Surgery Authorization" form was filed with the insurer (Ex. 25).

There is substantial evidence in the record to support the Director's conclusion that claimant's attorney was instrumental in obtaining a settlement of the medical service dispute before a decision by the Director. Moreover, even if this matter were subject to *de novo* review, I would find that Dr. McWeeney did not withdraw the May 15, 2006, Request for Surgery Authorization. Dr. McWeeney's statement on July 5, 2006, that he wished to refer claimant to a neurologist before he considered arthroscopic evaluation did not constitute a withdrawal of the request for surgery authorization. Dr. McWeeney did not state that he was withdrawing the request for surgery. Whereas he had filed a formal

"Request for Surgery Authorization" form on May 15, 2006, and again filed a formal "Request for Surgery Authorization" form on January 29, 2007, Dr. McWeeney did not file a formal

request to withdraw the surgery authorization with the insurer. Also, the language that Dr. McWeeney used in the July 5, 2006, chart note was more reasonably interpreted to mean that the neurological consultation would be obtained before surgery and would at most delay the procedure. The evidence in this record did not establish that Dr. McWeeney withdrew the request for surgery in favor of a neurological evaluation. Obtaining a neurological consultation before surgery is not the same as withdrawing the request for surgery authorization. Dr. McWeeney's decision to proceed with surgery in January 2007 without the neurological consultation confirmed that he did not withdraw the request for surgery authorization. The Director's interpretation of the July 5, 2006 chart note was supported by substantial evidence in the record. Therefore, claimant's attorney was instrumental in obtaining a settlement of the medical dispute before a decision by the Director. That conclusion followed from the insurer's failure to act on Dr. McWeeney's May 15, 2006, surgery request and claimant's attorney's January 22, 2007 request for Director review of a medical service dispute.

The insurer's contention that the requests for surgery on May 15, 2006, and January 29, 2007, constituted different and distinct surgery requests because they outlined different potential surgical procedures was also not persuasive. Dr. McWeeney intended to do a right shoulder arthroscopy. It was exploratory in nature because the diagnostic studies had not shown a tremendous amount of pathology. On a number of occasions, Dr. McWeeney outlined several possible procedures that he could perform, depending upon what was discovered during surgery. Dr. McWeeney requested authorization to perform a right shoulder arthroscopy on May 15, 2006, and again on January 29, 2007. Even Dr. McWeeney did not know the extent of the surgical procedures he would perform until he was actually inside claimant's shoulder. The Director's finding in that regard was also supported by substantial evidence in the record.

For all of the above reasons, the Director correctly concluded that claimant's attorney was instrumental in obtaining a settlement of a medical service dispute prior to a decision by the Director. Therefore, the attorney fee award was appropriate and the Order will be approved.

ORS 656.385(3) provides that the insurer or self-insured employer shall be required to pay to the claimant or the attorney of the claimant a reasonable attorney fee if a request for a contested case hearing is initiated by an insurer or self-insured employer and the Director or court finds that the compensation awarded to a claimant should not be disallowed or reduced. Although claimant has prevailed in this matter, the only issue decided was entitlement to attorney fees. An attorney fee is not compensation. Therefore, the provisions of ORS 656.385(3) do not allow claimant's attorney an additional assessed fee for prevailing at this hearing.

ORDER

IT IS HEREBY ORDERED that the March 13, 2007, Administrative Order is approved in its entirety.