

In the Medical Services of
Willie D. Brown, Claimant
Contested Case No: 09-113H
PROPOSED & FINAL ORDER
May 21, 2010

WILLIE D. BROWN, Petitioner
SAIF CORPORATION, Respondent
Before Darren Otto, Administrative Law Judge

A hearing was convened in the above-entitled matter on December 9, 2009 in Portland, Oregon, before Administrative Law Judge Darren L. Otto of the Workers' Compensation Board. Claimant was present and represented by his attorney, Leslie Bush. The employer, Tarr, Inc., and its insurer, SAIF Corporation, were represented by their attorney, Carrol Smith. The hearing was continued to allow the parties to take the deposition of Dr. Button.¹ Exhibits 1 through 17 were received into evidence. On April 6, 2010, claimant filed his initial written closing argument. On April 21, 2010, SAIF filed its response. The hearing concluded on April 23, 2010 with claimant's reply.

Claimant's Request for Hearing in WCB case number 09-02950 is hereby bifurcated from this Proposed and Final Order concerning WCB case number 09-00113H and will be the subject of a separate Opinion and Order with different appeal rights.

ISSUES

Claimant appeals SAIF's refusal to pay for an MRI scan of his cervical spine proposed by his attending physician. The issue is whether claimant's need for that diagnostic MRI scan was necessary to determine the cause or extent of his compensable left shoulder injury.

FINDINGS OF FACT

On November 13, 2000, claimant began working for the employer (Ex. 1). On February 14, 2006, he injured his left shoulder while pulling on a trailer release (Ex. 2-1).

On May 4, 2006, SAIF accepted claimant's left shoulder strain as a disabling industrial injury (Ex. 3-2). On July 24, 2006, SAIF modified its acceptance to include claimant's left shoulder strain, left shoulder bursitis, and left shoulder inflammatory tendonitis (Ex. 4).

On April 3, 2009, claimant returned to his attending physician, Edgar Ragsdale, M.D., regarding increased left shoulder and neck pain radiating down the left arm (Ex. 7-1). He was also having more pain in his trapezius with cramping as well as some numbness and tingling in the left fingers. *Id.* Dr. Ragsdale believed that claimant's symptoms appeared to be from a C6 radiculopathy directly related to the neck and suggested he obtain MRI scans of the cervical spine and the left shoulder (Ex. 7-4). Dr. Ragsdale felt that it was important to have an MRI scan of claimant's neck to deal with his recurrent pain (Ex. 9-1). SAIF refused to approve the

¹ Dr. Button's deposition was not submitted into evidence in WCB Case No. 09-00113H.

MRI scan of claimant's cervical spine, but SAIF approved his request for the left shoulder MRI scan. *Id.*

On June 12, 2009, claimant asked the WCD to order SAIF to authorize a cervical MRI scan (Ex. 11). On June 16, 2009, SAIF informed the WCD that the MRI scan was disapproved because the service was for a new/omitted condition which claimant had not asked to be accepted (Ex. 13).

On July 2, 2009, the WCD issued an Administrative Order of Dismissal of claimant's request for administrative review to resolve a medical service dispute (Ex. 15). The Director concluded that the matter could be most expeditiously resolved simply by claimant requesting formal written acceptance of the specific new or omitted condition in writing pursuant to ORS 656.267(1) (Ex. 15-2).

On July 7, 2009, claimant requested a hearing appealing the WCD's July 2, 2009 Administrative Order of Dismissal (Ex. 16).

On December 4, 2009, Gavin Button, M.D., who evaluated claimant on two occasions, felt that "it was quite reasonable to request an MRI of the cervical spine, as Dr. Ragsdale did earlier this year, to help elucidate if the problem was in the shoulder joint or the neck.***" (Ex. 47-2).

FINDINGS OF ULTIMATE FACT

The MRI scan of claimant's cervical spine proposed by Dr. Ragsdale on April 3, 2009 was necessary to determine the nature and extent of claimant's compensable left shoulder injury and whether claimant's persistent symptoms were caused by the compensable injury.

CONCLUSIONS OF LAW AND OPINIONS

Claimant contends that the cervical MRI scan requested by Dr. Ragsdale was necessary to determine the cause or extent of his compensable injury and SAIF should be ordered to pay for that diagnostic study. SAIF asserts that there is no evidence that it is necessary to determine the cause of claimant's denied cervical condition to treat the left shoulder and the cervical MRI is therefore not compensable.

For diagnostic services to be compensable, claimant must show that his compensable injury made those tests necessary. *Counts v. Int'l Paper Co.*, 146 Or App 768, 770 (1997). In *SAIF v. Sprague*, 346 Or 661, 666-67 (2009), the Court held that two requirements must be met for claimant's medical services to be compensable: claimant must demonstrate that (1) the condition was caused by the compensable injury, and (2) the medical service was "directed to" the compensable condition. *Id.* at 673. Acceptance of the "compensable condition" is not required to satisfy the *Sprague* standard for determining compensability of a medical service claim. *Id.* at 674. See also *Dina A. Ganieany*, 62 Van Natta 17 (2010).

Generally, when the diagnostic services are related to non compensable conditions, the worker can not show that the condition was caused by the compensable injury or that the medical service was “directed to” the compensable condition. The exception to that proposition is when diagnostic services are necessary to determine the cause or extent of a compensable injury. *Sprague*, 346 Or at 770-771. In that circumstance, the tests are compensable whether or not the condition that is discovered as a result of those tests is compensable. *Id.* For example, in *Brooks v. D & R Timber*, 55 Or App 688, 692 (1982), the claimant suffered a compensable left knee injury while at work. *Id.* at 691. The doctor believed that the injury might have produced a meniscus tear. *Id.* at 692. Therefore, the doctor ordered exploratory surgery of the knee. *Id.* During the exploratory surgery, the doctor discovered that claimant's knee condition was not a torn meniscus but a non work-related condition. *Id.* The Court held that, although the exploratory surgery ultimately served only to discover the existence of a non compensable condition, it was still compensable because the surgery was initially performed as a result of the work-related compensable injury. *Id.* at 692.

In *John D. Swartz*, 62 Van Natta 570 (2010), claimant injured his low back when he fell five feet, landing on his tailbone and buttocks. SAIF accepted a lumbar contusion but denied a subsequent new/omitted medical condition claim for lumbar facet syndrome. *Id.* The evidence established that the compensable injury was the major contributing cause of claimant's current back condition, but there were two equally probable diagnoses, chronic lumbar contusion or lumbar facet syndrome. *Id.* at 573. Lumbar fact injections were proposed to assist in arriving at a more definitive diagnosis. *Id.* The Board found that the lumbar facet injections were necessary as a diagnostic tool to explore whether claimant's current symptoms were caused by the compensable injury and to determine the extent of his compensable injury. *Id.* at 575.

In this case, SAIF accepted claimant's left shoulder strain, left shoulder bursitis, and left shoulder inflammatory tendonitis. Claimant continued having symptoms and his attending physician, Dr. Ragsdale, suspected involvement from the neck (Ex. 17-3). Dr. Ragsdale thought that claimant should have MRI scans of both the cervical spine and the left shoulder (Ex. 7). Specifically, Dr. Ragsdale felt that he needed to get the MRI scan of the neck to deal with this recurrent pain (Ex. 9-1).

Dr. Button also felt it was necessary to obtain the MRI scan of claimant's cervical spine, stating, “I do feel that it was quite reasonable to request an MRI of the cervical spine, as Dr. Ragsdale did earlier this year, to help elucidate if the problem was in the shoulder joint or in the neck***”(Ex. 47-2). The MRI scan did not show any evidence of a C6 radiculopathy and, even if it had, Dr. Button did not believe it was related to claimant's work. Nevertheless, Dr. Button felt that the MRI scan was “necessary to reach this conclusion and should have been covered by Workers' Compensation.” *Id.*

The MRI scan was a diagnostic service which was necessary to determine the extent of claimant's compensable injury. It clarified whether the problem was in claimant's shoulder joint or the neck. By performing the MRI scan, claimant's cervical spine was ruled out as a source of his ongoing left shoulder symptoms. Thus, the diagnostic service was directed at determining the nature and extent of claimant's compensable left shoulder injury and it confirmed that

claimant's compensable left shoulder injury remained the source of his persistent symptoms. Therefore, SAIF will be ordered to pay for claimant's MRI scan as a diagnostic service.

ORS 656.385(1) provides that claimant is entitled to a reasonable attorney fee in this medical service dispute because he finally prevailed after a proceeding had commenced pursuant to ORS 656.245. ORS 656.385(1) further provides, "***An attorney fee awarded pursuant to this subsection may not exceed \$2000 absent a showing of extraordinary circumstances." After considering the factors set forth in OAR 438-015-0010(4) and applying them to this case, I find that a reasonable fee for claimant's attorney's services at hearing regarding the medical services issue is \$2000 (Two thousand dollars) payable by the insurer. In reaching this conclusion, I have particularly considered the time devoted to the issues, the complexity of the issues, the value of the interest involved, the risk that counsel may go uncompensated, the lack of a showing of extraordinary circumstances, and the statutory limitation on assessed attorney fees in medical service disputes under ORS 656.385(1).

ORDER

IT IS HEREBY ORDERED that Tarr Inc., and SAIF Corporation shall pay for the MRI scan of claimant's cervical spine proposed by Dr. Ragsdale on April 3, 2009. The claim is remanded to SAIF for processing according to Oregon Workers' Compensation laws.

IT IS FURTHER ORDERED that Tarr Inc., and SAIF Corporation are assessed reasonable attorney fee pursuant to ORS 656.385(1) in the amount of \$2000.00 to be paid directly to claimant's attorney.