

In the ORS 656.260 Managed Care Dispute of

**Victor J Wassgren, Claimant**

Contested Case No: 08-039H

**PROPOSED & FINAL ORDER**

July 16, 2008

VICTOR J WASSGREN, Petitioner

SAIF CORPORATION, Respondent

Before Jill M. Reichers, Administrative Law Judge

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Pursuant to a request for contested case hearing filed by claimant on March 12, 2008, a hearing was scheduled and held June 16, 2008. Claimant is represented by Evohl F. Malagon. The employer, ODOT – Safety & Risk, and its insurer, SAIF Corporation, were represented by Carrol J. Smith. At hearing, Exhibits 1 through 155, submitted by Becky Miner of the Workers’ Compensation Division (“WCD”), Department of Consumer & Business Services, on April 4, 2008, were admitted into evidence. Claimant offered proposed Exhibit 156, a March 11, 2008 narrative report by Kent Grewe, M.D. Proposed Exhibit 156 was not admitted, however, it remains in the agency file.<sup>1</sup>

**ISSUE**

Claimant appeals from WCD’s February 12, 2008 Administrative Order, MTX 08-0121, which ordered, absent a change in claimant’s clinical condition, that surgery proposed by Kent Grewe, M.D., consisting of anterior interbody fusion at L5-S1 and a far lateral posterior fusion at L1-L2, L2-L3, and L3-L4, and hardware fixation from L1-S1, is not appropriate, and that if performed, SAIF Corporation will not be liable. (Ex 152).

**FACTS**

The Findings of Fact set forth in the February 12, 2008 Administrative Order on pages 1 through 4 are hereby adopted and incorporated by reference. See *Liberty Northwest Ins. Corp. v. Kraft*, 205 Or App 59, 62-63 (2006); see also *Liberty Northwest Ins. Corp. v. Mundell*, 219 Or App 358 (2008).

**CONCLUSIONS OF LAW AND OPINION**

This is a managed care dispute that arises under ORS 656.260 and ORS 656.327. I review for substantial evidence and errors of law. ORS 656.260(16); ORS 656.327(2); OAR 436-001-0225(2). The burden of proving a fact or position rests with the proponent. ORS 183.450(2); *Salem Decorating v. Nat’l Council on Comp. Ins.*, 116 Or App 166 (1992), rev den 315 Or 643 (1993). As the proponent of his position, claimant bears the burden of proving by a preponderance of evidence that the Administrative Order is incorrect. *Harris v. SAIF*, 292 Or 683 (1982) (General rule regarding allocation of burden of proof is that burden is on the

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<sup>1</sup> No new medical evidence may be admitted at contested case hearings involving review of a Director’s Order pertaining to whether treatment is appropriate or in violation of rules regarding performance of medical services. See ORS 656.327(2) and ORS 656.260(16); see also OAR 436-001-0225(2). Unless withdrawn, all exhibits will be part of the record in the case, whether or not admitted into evidence. OAR 436-001-0240(4). Consequently, proposed Exhibit 156 remains in the agency file, although it has not been admitted into evidence.

proponent of the fact or position.); *Cook v. Employment Div.*, 47 Or App 437, rev den 290 Or 157 (1980) (In the absence of legislation adopting a different standard of proof, the standard in an administrative hearing is preponderance of evidence.) Proof by a preponderance of evidence means that the fact finder is persuaded that the facts asserted are more likely true than false. *Riley Hill General Contractor v. Tandy Corp.*, 303 Or 390 (1987).

According to the director, Dr. Grewe's recommendation for surgery was made on June 12, 2007.<sup>2</sup> (Ex 152-2, -3). The director indicated that in the June 12, 2007 document, it is stated that Dr. Grewe and claimant discussed the difficulty of diagnosing a specific spinal level of pathology to explain all of claimant's symptoms. Claimant had severe pathology at several levels, and was interested in taking an aggressive approach in the hopes of gaining at least some improvement. No further justification for the surgical procedure is described in the director's finding of fact with regard to the contents of the June 12, 2007 document. (See Ex 152-2, -3). Previously, on May 8, 2007, Patrick Radecki, M.D. found evidence on nerve testing studies of changes most consistent with chronic or old nerve root injury bilaterally at L5-S1, with subtle mild peripheral neuropathy as well. (Exs 129, 130, 152-3).

The director has the authority pursuant to ORS 656.327(1) to review and determine whether proposed medical treatment is appropriate for the compensable injury. The director may request a physician of the appropriate specialty to examine the worker and provide a report of findings and recommendations to assist the director in review. OAR 436-010-0008(9). In this case, Daniel Rohrer, M.D., of Comprehensive Neurosurgical Consultants, performed the review. Dr. Rohrer reviewed medical records and imaging studies, examined claimant and wrote a report containing his opinion with respect to the surgery proposed by Dr. Grewe.

As found by the director in the Administrative Order, claimant has had seven previous lumbar surgeries. Claimant stated to Dr. Rohrer that there has been transient recovery after each surgery. After his review and examination, Dr. Rohrer concluded that he would be very hesitant to treat the upper aspect of claimant's lumbar spine surgically. As for the L5-S1 space, fusion could be considered if claimant were to have significant clinical improvement with selective L5 or S1 nerve root blocks. If there were no improvement with such nerve root blocks, Dr. Rohrer stated that he would not proceed with fusion at L5-S1, especially considering that claimant has undergone seven previous back surgeries and is 75 years of age. Dr. Rohrer noted moreover that claimant's distal aorta was partially calcified, making an anterior approach much more difficult to achieve safely. Dr. Rohrer concluded that proposed surgery was inappropriate. (Ex 151). There is no finding of fact or other indication in the record with respect to whether claimant underwent the selective L5 and S1 nerve root blocks Dr. Rohrer recommended

The director also noted that William Smith, M.D., a neurological surgeon, performed a record review at the request of Managed Healthcare Northwest. (Ex 133). Dr. Smith concluded that claimant did not meet the criteria for spinal fusion as outlined by the managed care organization. Dr. Smith noted that claimant did not have a recurrent disk protrusion, but did have severe lumbar spine degeneration, and no evidence of spinal instability (translation on flexion/extension). Dr. Smith also stated that claimant has a slowly progressive peripheral motor and sensory neuropathy, which explained the progressive symptoms. Dr. Smith opined that it

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<sup>2</sup> The June 12, 2007 surgical recommendation is not contained within the exhibits submitted by WCD.

would be highly unlikely that the proposed extensive fusion surgery would result in any significant long-term relief of claimant's pain.

Taking into consideration the opinion of these two neurosurgeons, Dr. Rohrer and Dr. Smith, the director concluded that the lumbar spine surgery proposed by Dr. Grewe was not appropriate for claimant.

Under substantial evidence review,

“[the reviewing tribunal] looks at the whole record with respect to the issue being decided, rather than at 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.” *Kraft*, 205 Or App at 62, citing *Armstrong v. Asten-Hill Co.*, 90 Or App 200, 206 (1988).

There is little evidence in the record, other than the statements of claimant and Dr. Grewe as found by the director in the June 12, 2007 treatment record, to support the appropriateness of the proposed procedure. Those statements referred to by the director suggest that there was some uncertainty in Dr. Grewe's recommendation. For example, Dr. Grewe explained the difficulty in isolating a specific level of pathology to explain all of claimant's symptoms. The surgical recommendation was made in the context of claimant's desire for an aggressive approach, with the hope that it might alleviate at least some of claimant's symptoms. Further, Dr. Radecki had found evidence of peripheral neuropathy in May 2007, a problem not amenable to correction by spinal surgery.

The opinions in favor of the director's finding come from Dr. Rohrer and Dr. Smith, discussed above. These opinions are based on evidence contained in past and current medical records, and an examination by Dr. Rohrer. Accordingly, considering all of the evidence in the record, I find that the finding of WCD that the proposed surgery is not appropriate is reasonable, and therefore supported by substantial evidence. See *Kraft*, 205 Or App at 62.

The Administrative Order is also reviewed for errors of law. See ORS 656.260(16); ORS 656.327(2); and OAR 436-001-0225(2). Pursuant to ORS 656.245(1)(a), the insurer shall cause to be provided for every compensable injury medical services for conditions caused in material part by the injury for such period as the nature of the injury or the process of the recovery requires. In the present case, it has not been demonstrated that the Administrative Order finding the proposed treatment inappropriate violates the standard for compensability set forth in ORS 656.245. Accordingly, no error of law has been demonstrated.

In conclusion, the director's decision set forth in Administrative Order is supported by substantial evidence, and does not reflect an error of law. There is no basis for modifying the Administrative Order. Consequently, the Administrative Order will be affirmed.

### **ORDER**

IT IS THEREFORE ORDERED that the February 12, 2008 Administrative Order, Case No. MTX 08-0121, is affirmed.