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In the Medical Services of  
**Henry Roberson, Claimant**  
Contested Case No: 11-027H

**PROPOSED & FINAL ORDER**

October 5, 2011

HENRY ROBERSON, Petitioner  
LABOR READY NORTHWEST INC. C/O ESIS, INC., Respondent  
Before Darren L. Otto, Administrative Law Judge

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A hearing was convened and concluded in the above entitled matter on September 8, 2011 in Portland, Oregon before Administrative Law Judge Darren L. Otto of the Workers' Compensation Board. The parties appeared by telephone. Claimant was represented by his attorney, Jodie Phillips Polich. The employer, Labor Ready, and its processing agent, ESIS, were represented by their attorney, Gordon T. Clark. Exhibits 1 through 66 were received into evidence.

**ISSUES**

Claimant appeals the Director's February 3, 2011 Administrative Order which found that ESIS was not liable for prescription medications incurred by claimant on May 27, 2010 and June 27, 2010. The issue is whether the Director's Order was not supported by substantial evidence in the record or reflected an error of law.

**FINDINGS OF FACT**

On August 2, 2008, claimant injured his right shoulder at work while using a chainsaw (Ex. 4). On December 2, 2008, the employer accepted claimant's right shoulder strain as a disabling industrial injury (Ex. 20). On April 27, 2009, the employer modified its Notice of Acceptance to include claimant's right shoulder sprain, superior labrum anterior and posterior tear, labral tear, and rotator cuff tear as a disabling industrial injury (Ex. 27).

Claimant's right shoulder symptoms did not respond to conservative care and, on March 10, 2009, his attending physician, Karl R. Knudsen, M.D., performed right shoulder surgery consisting of an extensive debridement of the right shoulder, subacromial decompression, and manipulation under anesthesia (Ex. 23-3). The post-operative diagnosis was right shoulder chondrolysis with severe bone loss of the central portion of the glenoid, severe impaction injury of the superior aspect of the humeral head with unsupported cartilage, biceps rupture, adhesive capsulitis, subacromial impingement, and rotator cuff tendinopathy. *Id.* In fact, Dr. Knudsen was astonished by what was essentially a complete destruction of claimant's glenoid, severe cavitory bone loss and large impaction fracture of the humeral head (Ex. 28). Dr. Knudsen felt that claimant's right shoulder condition was more consistent with a traumatic dislocation of the shoulder as opposed to exposure to vibration or injury or heavy lifting (Ex. 49).

On October 26, 2009, claimant asked the employer to accept his right shoulder post-traumatic arthritis, impaction fracture of the humeral head, and glenohumeral joint destruction (Ex. 35).

On December 21, 2009, claimant was examined by the insurer-arranged medical examiner, W. C. Kaesche, M.D., who did not believe that the industrial injury was even a material contributing cause of claimant's need for treatment of the advanced arthritic condition of the right shoulder joint (Ex. 40-17). Dr. Kaesche further believed that the accepted conditions were never the major contributing cause of claimant's need for treatment of his right shoulder condition. *Id.*

On December 22, 2009, the employer denied compensability of claimant's right shoulder post-traumatic arthritis, impaction fracture of the humeral head, and glenohumeral joint destruction (Ex. 42).

On January 21, 2010, a Notice of Closure awarded no permanent disability for claimant's accepted right shoulder sprain, superior labrum anterior and posterior tear, labral tear, and rotator cuff tear conditions (Ex. 45). Claimant requested reconsideration of that closure order and the appointment of a medical arbiter. On March 19, 2010, claimant was examined by the medical arbiter, Anthony Smith, M.D., who concluded that 70 percent of claimant's permanent impairment was due to the non-compensable destruction of the glenoid and impaction fracture of the humeral head (Ex. 48-7). Dr. Smith, however, felt that 30 percent of claimant's impairment was due to other parts of the shoulder. *Id.*

On April 27, 2010, the parties entered into a Disputed Claim Settlement in which the employer's December 22, 2009 denial of compensability of claimant's right shoulder post-traumatic arthritis, impaction fracture of the humeral head, and glenohumeral joint destruction was approved (Ex. 51). In that Disputed Claim Settlement, claimant also agreed that his accepted right shoulder conditions had fully resolved and his need for medical treatment was due solely to the denied conditions outlined in the Disputed Claim Settlement (Ex. 51-2). Claimant agreed to hold the employer harmless from any and all other medical expenses incurred after April 27, 2010 and stipulated that the employer's contentions constituted "the law of the case" regarding his need for medical treatment (Ex. 51, pgs. 4-5). As a result of that agreement, claimant's right to seek workers' compensation benefits concerning the claim was extinguished. *Id.*

On April 27, 2010, claimant also entered into a Claim Disposition Agreement in which he released all rights to his accepted industrial injury claim with the exception of ongoing medical services (Ex. 52).

On May 27 and June 27, 2010, claimant incurred medical services for prescription medications related to his ongoing right shoulder pain (Exs. 53, 54, 57, & 61). Claimant asked the employer to reimburse him for those medical expenses which he felt were related to the accepted right shoulder claim (Ex. 54). The employer refused to pay those expenses, citing the Disputed Claim Settlement in which claimant agreed to hold the employer harmless from any and all other medical expenses incurred after April 27, 2010 (Ex. 10). Claimant asked the Director to review the employer's refusal to pay those benefits.

On April 22, 2010, an Order on Reconsideration affirmed the January 21, 2010 Notice of Closure (Ex. 62).

On February 3, 2011, the Director issued an Administrative Order finding the employer not liable for claimant's out-of-pocket expenses incurred on May 27, 2010 and June 27, 2010 (Ex. 64-6). Claimant requested a hearing regarding that Administrative Order.

#### CONCLUSIONS OF LAW AND OPINIONS

Claimant contends that the medical prescriptions he incurred after April 27, 2010 were still related to the accepted right shoulder condition and, regardless of the language contained in the Disputed Claim Settlement, he is entitled to reimbursement for those costs from the employer. The employer asserts that the Director's Administrative Order was supported by substantial evidence in the record and did not reflect any errors of law and therefore should be approved.

OAR 436-001-0225, promulgated by the Workers' Compensation Division, prescribes the standard of review governing an ALJ's review on appeal of an MRU order in a proceeding under ORS 656.245:

- (1) Except for the matters listed in sections (2) and (3), the administrative law judge reviews all matters within the director's jurisdiction *de novo*, unless otherwise provided by statute or administrative rule.
- (2) In medical service and medical treatment disputes under ORS 656.245 \*\*\* 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.

Under "substantial evidence" review, the reviewing tribunal "look[s] 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." *Armstrong v. Asten-Hill Co.*, 90 Or App 200, 206 (1988). Thus, "substantial evidence" review "is not what has been referred to as the 'any evidence' rule \*\*\* but it is also not *de nova* review." *Id.* (citation omitted); *see also United Sates Bakery v. Shaw*, 199 Or App 286, 288-89 (2005). Under a substantial evidence review, the administrative law judge may not supplement the evidentiary record developed below. *Liberty Northwest Ins. Corp. v. Kraft*, 205 Or App 59, 62-63 (2006).

The "substantial evidence" *review* does not mean that a factual finding must be affirmed if it is supported by *any* evidence, no matter how meager. The law requires more than that. It requires such evidence that "a reasonable mind would employ to support a conclusion." *Ruiz v. Employment Division*, 83 Or App 609 (1987) *citing Cook v. Employment Division*, 47 Or App 437, 441, *rev den* 290 Or 157 (1980); *see also de St. German v. Employment Division*, 74 Or App 484, 488 (1985). Substantial evidence "means more than 'any evidence,' a scintilla of evidence, or speculation." *Cantrell v. Employment Division*, 24 Or App 215, 217 (1976).

In its February 3, 2011 Administrative Order, the Director concluded that the employer was not liable for any medical expenses incurred after the date of the Disputed Claim Settlement based on the following reason,

After review of the record, the director finds that the settlement date of the DCS is April 27, 2010. The DCS clearly specified that ESIS had paid for all medical bills received on or before April 27, 2010, and that [claimant] released ESIS and his employer from any claim or legal action of whatever kind arising out of the claimed injury or disease. [Claimant] agreed that there were no unpaid medical billings subject to reimbursement from the proceeds of the DCS. [Claimant] accepted payment in full settlement of all issues raised or raisable arising out of the denied conditions, and agreed to the terms and conditions of the DCS. The DCS extinguished all rights for the denied conditions of Parsonage-Turner syndrome, post-traumatic arthritis, right shoulder, impaction fracture, humeral head, right shoulder, and glenohumeral joint destruction. Although, Dr. Miller noted that he prescribed medication to reduce the pain [claimant] experienced from his accepted conditions of right shoulder superior labrum anterior and posterior tear, right shoulder labral tear, and right shoulder rotator cuff tear, the director is more persuaded by the medical records that [claimant's] pain was from conditions that were extinguished pursuant to the terms of the DCS. Therefore, the director concludes that ESIS is not liable for the out of pocket expenses [claimant] incurred on May 27, 2010, and June 27, 2010.

(Ex. 64-5).

The Director's finding that claimant's pain was from conditions that were extinguished pursuant to the terms of the DCS was supported by substantial evidence in the record. On December 21, 2009, Dr. Kaesche found that claimant had no permanent impairment related to the accepted right shoulder sprain or labral or rotator cuff pathology (Ex. 40-16). He did not believe that the accepted conditions were even a material contributing cause of claimant's need for treatment, and claimant's right shoulder pathology at that time was noncompensable arthritis (Ex. 40-17). Dr. Knudsen concurred with those findings and conclusions (Ex. 43). The medical arbiter, Dr. Smith, agreed that most of claimant's right shoulder impairment was due to his non-compensable arthritis condition (Ex. 48-7). Although Dr. Smith felt that 30 percent of claimant's impairment was due to other parts of the shoulder than those affected by arthritis, he did not specify which conditions he was referring to. *Id.*

Dr. Miller was the only physician in this record to attribute claimant's recent right shoulder symptoms to the accepted conditions (Ex. 53). That opinion, however, was conclusory, did not refer to the extensive non-compensable conditions from which claimant suffers, and was not persuasive. The Director's finding that claimant's need for medical services was related to his noncompensable conditions was supported by substantial evidence in the record.

Even if the Director's Order had not been supported by substantial evidence in the record, the Disputed Claim Settlement approved on April 27, 2010 extinguished all of claimant's rights to seek workers' compensation benefits concerning the claim (Ex. 51-5). Although claimant theoretically retained his right to medical services for the accepted right shoulder conditions, pursuant to the DCS, the parties agreed that claimant's accepted right shoulder conditions had "fully resolved and claimant's need for treatment is due solely to the denied conditions enumerated in this Disputed Claim Settlement." (Ex. 51-2). Thus, in order for claimant to have any chance to establish compensability of further medical services, he would need to produce medical evidence that his resolved accepted right shoulder conditions had somehow become symptomatic again after April 27, 2010. There is no such medical evidence in this record and the "law of the case" is that claimant's need for medical treatment is unrelated to the August 2, 2008 industrial injury. Therefore, the Director's Administrative Order, which relied on the language of the DCS, did not reflect an error of law.

For all of these reasons, claimant has not carried his burden of proof under the substantial evidence and errors of law standard in OAR 436-001-0225 and the Director's February 3, 2011 Administrative Order will be approved.

### **ORDER**

IT IS HEREBY ORDERED that the February 3, 2011 Administrative Order is approved in its entirety.