File # 09-HIA-0271 and 10-HIA-0349

HEALTH SERVICES APPEAL AND REVIEW BOARD

PRESENT:

Taivi Lobu, Vice-Chair, Presiding
Michael Bossin, Board Member
Marc D'Amours, Board Member

Heard June 27, 2012 at Ottawa, Ontario

IN THE MATTER OF AN APPEAL UNDER SECTION 20(1) of the *Health Insurance Act,* Revised Statutes of Ontario, 1990, Chapter H.6, as amended

B E T W E E N:

JOSEPH PILON

Appellant

and

THE GENERAL MANAGER,
THE ONTARIO HEALTH INSURANCE PLAN

Respondent

Appearances:

The Appellant: Mr. Joseph Pilon

For the Respondent: General Manager, OHIP Mr. John Johnston, Counsel

DECISION AND REASONS

I. DECISION

1. This decision concerns appeals by Mr. Joseph Pilon, the Appellant, of decisions by the General Manager, Ontario Health Insurance Plan (OHIP) to deny payment for out-of-country elbow replacement surgery, shoulder surgery and nerve stimulator(s); and, in-province scar revision surgery.

2. The Health Services Appeal and Review Board (the Appeal Board) refuses the appeal

with respect to the applications for elbow replacement surgery, the nerve stimulator(s), and scar revision. The Appeal Board finds that these services are not prescribed as insured services under the Health Insurance Act and are not eligible for payment.

3. The Appeal Board finds that out-of-country medical service for orthopaedic treatment of the Appellant's shoulder is an insured service under the *Health Insurance Act* and eligible for payment. This would include an assessment of the shoulder and ancillary orthopaedic conditions, and orthopaedic treatment indicated by such an assessment that may be expected to be successful and relieve the Appellant's symptomology.

4. The Appeal Board therefore allows the appeal for out-of-country orthopedic services related to the Appellant's shoulder, to be carried by Dr. Mark P. Brodersen at the Mayo Clinic in Jacksonville, Florida, as requested by the Appellant in the 2009 application; by Dr. Luis Villanueva at the CMO Hospital in Puerto Vallarta Mexico, as requested by the Appellant in the 2010 application; or by another physician/facility that may be agreed upon between the Appellant and the Respondent.

5. The appeal is therefore allowed in part.

II. BACKGROUND

6. The Appellant, who had worked as a licensed practical nurse, severely injured his left shoulder, arm, and hand in a motor vehicle accident in March 2006.

7. The Appellant has undergone multiple consultations, procedures, and surgeries in relation to the trauma to his left upper arm and shoulder. On May 3, 2007, an orthopaedic surgeon in Ottawa, Dr. Steven Papp fused the Appellant's elbow. The Appellant subsequently filed a complaint with the hospital, and then a civil law suit against Dr. Papp concerning this surgery.

8. The Appellant's condition is complicated by limited mobility and pain – including a

severed ulnar nerve; issues with his fingers, wrist, elbow; and a mal-aligned fracture of his shoulder. He has consulted orthopaedic specialists in Ontario, British Columbia, the United States, and Mexico.

Elbow Procedures (Elbow Replacement & Excision of excess tissue/scar revision)

9. In 2008, the Appellant became a patient of Dr. Peter Lapner, an orthopaedic surgeon at the Ottawa Hospital. Dr. Lapner first examined the Appellant on February 29, 2008. During that examination, Dr. Lapner identified numerous concerns, including: pain in and about the elbow; shoulder discomfort; lack of mobility in the Appellant's left upper extremity; and limitations with the Appellant's left hand and fingers caused by an ulnar nerve deficit. At the time, Dr. Lapner indicated that he would arrange for consultations with other specialists.

10. In addition to the investigations in Ontario, at the end of 2008 the Appellant obtained an assessment from the Mayo Clinic in Jacksonville, Florida for a reversal of the elbow fusion, which Dr. Papp had carried out, and a total elbow replacement. The estimated cost of this procedure was $41,725.36 (US).

11. In 2009, Dr. Lapner referred the Appellant to Dr. Graham King of the Hand & Upper Limb Centre at St. Joseph's Health Care at the University of Western Ontario in London, Ontario.

12. Dr. King saw the Appellant on July 13, 2009. He proposed addressing the Appellant's elbow and ulnar nerve issues before dealing with the shoulder. According to the July 2009 consultation note, Dr. King was of the opinion that the Appellant's shoulder appeared more amenable to reconstruction than his elbow.

13. In his July 2009 consultation report, Dr. King observed that the Appellant had a complicated problem without a definitive solution. He stated, "I do not think it is as simple as doing a total elbow replacement and peripheral nerve stimulator as I do not

think this will definitively relieve much of his problems. In fact, I think he does have some pain from his hardware around the elbow and significantly the ulnar nerve proximal stump seems to be quite symptomatic on physical examination …”

14. Dr. King noted a number of risks related to the option of a total elbow replacement, taking into account the Appellant’s infection with surgeries in 2007. Such risks included the complexity of taking down the elbow fusion; a higher failure rate of an elbow replacement where there had been a fusion; a risk of soft tissue problems; concerns of further nerve injury; and the risk of risk of premature loosening. Dr. King observed that, typically, a solid elbow fusion did not cause as much pain as the Appellant was experiencing. In his view, much of the Appellant’s pain could be related to soft tissue and the severance of the ulnar nerve. He recommended leaving the elbow fusion alone but as a first step, removing the hardware that had been installed as part of the elbow fusion and dealing with the severed ulnar nerve.

15. On April 20, 2010, Dr. King performed surgery to remove the hardware from the Appellant’s elbow and to address the severed ulnar nerve. In addition, during this procedure, Dr. Ross, a plastic surgeon, debulked a soft tissue flap by the elbow area and removed a skin graft from the free muscle flap, which had resulted, at least in part, when the elbow fusion surgery was carried out in 2007.

16. Dr. King followed up with the Appellant two months later. In his follow-up note of June 28, 2010, Dr. King observed that the wound from the April 20, 2010 surgery had healed. While there was some improvement resulting from the surgery, a number of issues remained. In his note, Dr. King expressed the opinion, “anything that would be done to try and improve [the Appellant’s] forearm rotation would be fraught with risk. Given that he does not have a functioning triceps and, of course, suboptimal hand function, and with a history of previous infection, taking down his elbow to perform an elbow arthroplasty would be a risky procedure and I am not sure to what level it would improve his function. Right now he has a painless elbow albeit fused and we could certainly change that into a worse situation.”

17. The Appellant was not satisfied with Dr. King's opinion not to take down the elbow fusion. He continued to pursue medical options to ease his situation – including elbow replacement surgery outside of Canada.

18. By letter to the Appellant, dated October 6, 2010, Dr. Lapner noted that while he had arranged the original referral to Dr. King, and while Dr. King did not recommend elbow surgery, the Appellant was planning to go forward with further surgical work on his elbow despite Dr. King's advice. Dr. Lapner advised the Appellant that he would no longer be able to provide care to the Appellant, including follow-up care for the elbow surgery that the Appellant planned to have (namely, surgery to reverse the elbow fusion and have an elbow replacement, which the Appellant had planned to have done out-of-country.) Dr. Lapner advised the Appellant that owing to the complex nature of the case, it would be best if the Appellant sought shoulder surgery with another physician - commenting that the relationship between him and the Appellant was no longer therapeutic.

19. By a further letter to the Appellant, dated November 2, 2010, Dr. Lapner wrote that he considered Dr. King in London to be the country's foremost elbow expert and that Dr. King had advised against a take-down of the elbow fusion and an elbow replacement. Dr. Lapner noted that he did not consider it advisable for the Appellant to undergo this surgery. He indicated that if the Appellant were to proceed with such surgery, he would not be able to provide follow-up care as he was not an elbow expert and would not have the expertise to deal with any potential complications arising from a complex operation of this nature.

20. In February 2011, the Applicant went to Puerto Vallarta, Mexico for a medical consultation with Dr. Luis Villanueva, an orthopaedic specialist who had trained at the Mayo Clinic in the United States. In March 2011, Dr. Villanueva took down the Appellant's elbow fusion and performed surgery for a total elbow replacement and nerve repair. The elbow replacement surgery was successful. The Appellant was billed $15,000 U.S. for this procedure, in addition to the cost of his accommodations.

21. As of May 11, 2011, the Appellant had personally expended some $40,000 for consultations, surgeries, and related costs.

Shoulder Surgery

22. In his initial consultation with the Appellant in February 2008, Dr. Lapner also considered the condition of the Appellant's shoulder fracture. Based on the information available to him at that time, Dr. Lapner advised against a shoulder replacement, as the Appellant did not have significant pain in his shoulder and as there was a significant inferior subluxation that appeared difficult to correct with an arthroplasty. Dr. Lapner planned to consult with another orthopaedic surgeon in Ottawa; but he ultimately referred the patient to Dr. King in London, Ontario. The priority focus at that time became orthopaedic work related to the Appellant's elbow.

23. The Appellant subsequently sought an assessment from Dr. Mark P. Brodersen, an orthopaedic surgeon at the Mayo Clinic in Jacksonville, Florida regarding his shoulder. Dr. Brodersen had reviewed the x-rays and MRI scan of the Appellant's shoulder, and provided his opinion in a letter dated May 21, 2009. Dr. Brodersen noted the fracture of the proximal humerous, commented on issues related to alignment, and observed other physical issues that would "make reconstructive surgery difficult but not impossible." In addition, he noted that the Appellant might need a special prostheses designed if the rotator cuff tendon was not repairable and that recovery from such surgery would take six to nine months.

24. In an apparent follow-up to further communications with the Appellant, Dr. Brodersen wrote a letter on May 26, 2010, referencing his report of May 21, 2009. He opined that a fusion of the shoulder would not work very well with an arm that has a previously fused elbow. He explained: "I would not be in favor of trying to fuse both joints in the same arm. I would rather consider reconstruction of the ball using a prosthesis and then trying to realign the fracture fragments and do what we can with the rotator cuff tendon. As stated, this would still require some immobilization and take six to nine months to heal. I

suggested that you might want to be seen at the Mayo Clinic Rochester, which is closer to where you live."

25. By letter, dated September 30, 2010, Dr. Lapner advised Dr. H.G. Langley, Senior Medical Advisor with the Respondent that he had been following the Appellant with respect to his elbow, and secondarily with respect to his shoulder pathology. He noted that the Appellant may require a total shoulder arthroplasty and stated, "Regrettably, I strongly believe that no surgeon in Ontario will feel comfortable treating this patient for his shoulder/elbow conditions."

Applications Made to the Respondent on Behalf of the Appellant

26. The Appellant's family physician, Dr. Imane Bidari, made two applications for the out-of-country services in 2009 and in 2010 (with the subsequent application covering essentially the same concerns but with proposed procedures to be carried out in Mexico rather than at the Mayo Clinic in the United States, owing to cost considerations.) These applications for out-of-country services concerned elbow replacement, shoulder surgery and nerve stimulators. A third application was made by Dr. Ross for the in-province excision of excess tissue/scar revision performed by Dr. Ross and carried out in conjunction with Dr. King's surgery in April 2010.

27. The Respondent refused the applications and the Appellant appealed these decisions to the Appeal Board.

III. THE APPEAL HEARING

28. At the hearing held on June 27, 2012, the Appellant was self-represented and testified on his own behalf. Mr. John Johnston, legal counsel, represented the Respondent. Dr. Robert Thomson was called as a witness for the Respondent. Dr. Thomson is a physician working in the Health Service Branch of the Ministry of Health and Long-Term Care, adjudicating out-of-country applications.

29. The Appeal Board received documents from both parties, including a recent report of Dr. Bidari, submitted by the Appellant on the day of the hearing. The Respondent consented to the introduction of this letter into evidence. Other relevant documentary evidence included:

(a) Correspondence and submissions from both the Appellant and Respondent;
(b) The Statement of Claim filed by the Appellant with respect to Dr. Papp, and the Appellant's letter to Ottawa Civic Hospital, dated October 31, 2007;
(c) A report of an electromyogram from December 17, 2007;
(d) A consultation/clinical note of Dr. P. Lapner, dated February 29, 2008;
(e) An estimate from the Mayo Clinic for Total Arthroplasty, Elbow, for $41,725.36, dated December 16, 2008;
(f) A radiologist's report to Dr. Peter Lapner, dated 18 April 2009, from a series of images regarding the Appellant's left shoulder;
(g) A letter, dated May 21, 2009, from Dr. Mark P. Brodersen of the Mayo Clinic in Florida to the Appellant regarding his review of the Appellant's left shoulder and treatment options;
(h) A letter, dated May 26, 2010, from Dr. Brodersen of the Mayo Clinic to the Appellant, responding to further questions regarding treatment for the left shoulder;
(i) Dr. Graham King's clinical note from his July 13, 2009 consultation with the Appellant and a related diagnostic imaging report and electrodiagnostic laboratory preliminary summary on the question of ulnar nerve palsy;
(j) A report, dated 15 October 2009, from Electrodiagnostic Laboratories, St. Mary's Campus;
(k) The application form to the Respondent, date-stamped December 10, 2009, requesting approval of payment for proposed surgery for "scar revision/excision of excess tissue with Dr. Douglas C. Ross;
(l) Photographs of the Appellant's elbow prior to the removal of hardware;
(m) An invoice from Dr. Ross to the Appellant, dated February 5, 2010, for "Debulking free flap left elbow", in the amount of $750.00;

(n) The operative reports of Dr. King and Dr. Ross for April 20, 2010, St. Joseph's Campus, London;

(o) The discharge summary and a related form from St. Joseph's Health Centre regarding the Appellant's discharge on April 23, 2010;

(p) A report of Dr. King's follow-up visit with the Appellant, dated June 28, 2010;

(q) The application form for prior approval for out-of-country health services for the Mayo Clinic, in Jacksonville, Florida, May 2009;

(r) The application form for prior approval for out-of-country health services at the CMO Hospital in Puerto Vallarta, Mexico; and

(s) Correspondence, dated Mary 30, 2011 and June 22, 2011 from Richard R. Marks, acting as counsel for the Appellant enclosing medical reports - including laboratory and electromyography report related to the evaluation and surgery conducted by Dr. Villanueva in Mexico in 2011. Mr. Marks also enclosed various accounts for the medical, accommodation and prescription costs.

IV. LAW – GENERAL

30. Health insurance in Ontario is governed by the provisions of the *Health Insurance Act,* R.S.O. 1990, c. H.6 (the *Act*), and Regulations made pursuant to the *Act*. The *Act* and the Regulations made under the *Act* constitute a comprehensive legislative and regulatory scheme setting out the circumstances in which health care is to be paid for under the Ontario Health Insurance Plan (OHIP).

31. Section 10 of the *Act* states that the purpose of OHIP is to provide "insurance against the costs of insured services on a non-profit basis on uniform terms and conditions available to all residents of Ontario."

32. Section 12 of the *Act* provides that every insured person is entitled to payment for insured services. Section 12 of the *Act* provides that every insured person is entitled to payment for insured services in the amounts and subject to any conditions and co-payments that

are prescribed in the Regulations. The term “insured services” is defined in section 11.2 of the *Act*.

33. The jurisdiction of the Appeal Board is set out in section 21 of the *Act*. The Appeal Board conducts a hearing *de novo*. The Appeal Board determines whether, in light of the evidence presented to it, proposed treatment is prescribed as an insured service and eligible for payment under the *Act*. The Appeal Board is limited to ordering the General Manager to do that which the General Manager is authorized to do under the *Act* or the regulations. The Appeal Board has no jurisdiction to order OHIP, for any reason, to do something that is not permitted under the *Act* or the regulations.

34. In this decision, the Appeal Board will first address the applications for funding of the out-of-country services (being the elbow, shoulder and nerve stimulator), following which we will address the application for funding of the in-province scar revision.

V. OUT-OF-COUNTRY SERVICES

a) The Law

35. For the most part, insured services under the *Act* are health services rendered in Ontario. However, payment for out-of-country health services is allowed under Regulation 552 in two general circumstances:

(i) when a subscriber is outside Canada and an emergency arises that requires immediate medical treatment; or

(ii) when the services are rendered outside Canada with the prior approval of OHIP.

36. In each of these situations, the Regulation establishes separate criteria and conditions for determining if a service that is part of a treatment is an insured service under the *Act* and is thus eligible for payment.

37. The appeal relating to out-of-country services involves the application of section 28.4 of the Regulation, which specifies the criteria that must be met for out-of-

country services that are part of a treatment to be considered as insured services under the *Act*.

38. Section 28.4(2) of the Regulation provides that out-of-country services that are part of a treatment are prescribed as insured services if:

> (a) the treatment is generally accepted by the medical profession in Ontario as appropriate for a person in the same medical circumstances as the insured person; and
>
> (b) either,
>
> > (i) that kind of treatment is not performed in Ontario by an identical or equivalent procedure, or
> >
> > (ii) that kind of treatment is performed in Ontario but it is necessary that the insured person travel out of Canada to avoid a delay that would result in death or medically significant irreversible tissue damage.

39. In addition to meeting these conditions, the Respondent must grant written approval of payment of the amount of the services before the services are rendered.

b) The Applications for Out-of-Country Services

40. In May 2009, the Appellant's family physician, Dr. Bidari, sought prior approval of funding for the Appellant to have a "total elbow replacement +3 with peripheral nerve stimulator" and shoulder surgery performed out-of-country, with Dr. Brodersen, an orthopaedic surgeon at the Mayo Clinic in Florida. Dr. Bidari noted in the application that "no physician [was] available [in Ontario] due to [the] malpractice lawsuit against Dr. Steven Papp." Dr. Lapner was identified as the physician consulted about this condition. Dr. Bidari also checked the box on the prior approval form indicating that such treatment was not generally accepted in Ontario as appropriate for a person in the Appellant's medical circumstances. She clarified this by noting, "No physician in Canada available to perform this surgery (complicated surgery)."

41. By letter dated August 7, 2009, the Respondent denied the application on the basis that the Appellant appeared to be receiving appropriate treatment and investigation of his orthopaedic and neurological problems by Ontario physicians.

42. By letter received September 4, 2009, the Appellant filed an appeal of this decision to the Appeal Board - indicating that if Dr. King would not reverse the elbow fusion, he needed to obtain the services of specialists in this type of surgery so that he could have functionality restored in his arms and fingers. He stated that the initial operation performed by Dr. Papp to fuse the elbow was not required and should not have occurred given the misalignment of his shoulder. He added that there was now burning pain in the left elbow; that the bones in his wrist had been twisted in the course of the elbow fusion; that his wrist needed to be reset, the fusion reversed, the hardware from the fusion removed, the nerve damage addressed, and functionality restored to his arm and fingers.

43. On October 29, 2010, Dr. Bidari completed a second application for prior approval for out-of-country shoulder and elbow surgery/shoulder arthroplasty. She indicated that the reason for reapplying was that the initial application was for medical services at the Mayo Clinic at a cost of $46,000, whereas the current application was for surgery in Mexico with Dr. Luis Villanueva at the CMO Hospital at a cost of $18,000. In the section of the application requesting names of Ontario physicians consulted concerning the condition, the family physician indicated that no doctor was available due to the lawsuit that the Appellant had launched against the surgeon for fusing his elbow and for nerve damage.

44. In the 2010 application, Dr. Bidari checked the box indicating that the treatment proposed was generally accepted in Ontario as appropriate for a person in the Appellant's medical circumstances and that it was performed in Ontario. She commented on the form that the services were "not available due to law suit" - in reference to the civil action with Dr. Papp for the surgery resulting in the elbow fusion. In the section requesting names of physicians and/or health facilities contacted in Ontario to determine whether the treatment was performed, Dr. Bidari wrote, "not available due to law suit – no physician will touch him for care."

45. By letter dated December 6, 2010, the Respondent refused the 2010 application on the basis that the proposed elbow and shoulder surgery was not generally accepted in Ontario as appropriate for a person in the Appellant's medical circumstances. By letter dated December 17, 2010, the Appellant appealed this decision to the Appeal Board.

c) Issues – Out-of-Country Applications

46. Prior to the hearing, there was some question as to whether the Appellant was proceeding with the refusal of the application as it related to the shoulder surgery. However, in correspondence to the Appeal Board, dated May 11, 2011, the Appellant confirmed that he was continuing to seek out-of-country funding for shoulder surgery. The Respondent addressed the appeal as it related to shoulder surgery in its "Grounds of Response – Provisional" dated January 11, 2011, and subsequently confirmed these submissions by letter dated May 18, 2011.

47. The issue before the Appeal Board regarding the prior approval applications for the out-of-country elbow replacement surgery (which the Appellant had completed in February 2011), shoulder surgery, and nerve stimulator is whether these are prescribed as insured services under section 28.4(2) of the Regulation. Under that section, the questions are:

a. whether the treatment is generally accepted by the medical profession in Ontario as appropriate for a person in the same medical circumstances as the insured person? and if it is,
b. whether the treatment is not performed in Ontario by an identical or equivalent procedure, or if the treatment is performed in Ontario, whether it is necessary that the insured person travel out of Canada to avoid a delay that would result in death or medically significant irreversible tissue damage?

Out-of-Country Elbow Replacement Surgery; Shoulder Surgery; Nerve Stimulator

Analysis/Elbow Replacement

48. The Appellant took the position that the Respondent ought to have granted his application for funding out-of-country elbow replacement surgery. He stated that a reversal of the elbow fusion was essential to restore function in his arm and that the surgery that he underwent proved successful.

49. The Respondent took the position that the Appellant had not shown that the requested surgery was generally accepted treatment by Ontario standards for a person in the Appellant's medical circumstances and that generally accepted methods of treatment, namely, conservative management, had been available to the Appellant in Ontario with Dr. King.

50. The Respondent relied on the clinical consultation note of Dr. King of July 13, 2009 wherein Dr. King set out his views on the question as follows:

> It might actually be wiser to leave his elbow fusion alone and remove his hardware and deal with his ulnar nerve as a first step and then perhaps address his shoulder, which I think is more amenable to reconstruction than I believe his elbow is. Given that he had an infection after the arthrodesis was done, converting this to a total elbow arthroplasty would currently be at high risk. Clearly converting him to a total elbow arthroplasty would be risky procedure not only with respect to the risk of infection and the complexity of trying to take down his fusion to perform an elbow arthroplasty, but a risk of soft tissue problems, further nerve injury, risk of premature loosening, particularly since he has a forearm synostosis, and clearly the failure rate of a total elbow arthroplasty in the setting of a forearm synostosis is much higher than in the absence of a synostosis.

51. The Respondent also referred to the following portion of Dr. King's clinical note from his last appointment with the Appellant on June 28, 2010:

> Given that his distal radioulnar joint looks subluxed on his wrist film and on his CT, I think that restoration to forearm motion would be quite a challenging problem. He has a proximal radioulnar synostosis and a distal radioulnar joint subluxation. I think anything that would be done to try and improve his forearm rotation would be fraught with risk. Given that he does not have a function triceps and, of course, suboptimal hand function, and with a history of previous infection, taking down his elbow to perform an elbow arthroplasty would be a risky procedure and I am not sure to what level it would improve his function. Right now he has a painless elbow albeit fused and we could certainly change that into a worse situation.

52. In determining whether the medical profession in Ontario generally accepts the elbow replacement surgery as appropriate for a person in the same medical circumstances as the insured person, the Appeal Board finds Dr. King's opinion to be persuasive. The evidence from Dr. Lapner is that Dr. King is recognized as a leading orthopaedic specialist in elbow procedures in Canada. The Respondent advanced evidence that Dr. King was a full professor at the University of Western, Ontario; that his specialized training included fellowship at the Mayo Clinic in Rochester to gain further clinical experience in wrist and elbow surgery and additional research experience in upper extremity bio-engineering; and that he was a leader of clinical practice at that the Centre of Excellence, Hand and Upper Limb Centre at St. Joseph's Health Care in London Ontario. There is no evidence before the Appeal Board from other Ontario specialists to question Dr. King's opinion as to whether elbow replacement surgery ought to proceed in this case.

53. While the Appellant has clearly demonstrated that the elbow replacement surgery proved successful when he had the procedure performed outside of Canada, the evidence of this outcome after the fact does not alter the validity of Dr. King's opinion – which, as set out above, was the elbow replacement was not recommended because of the risk, the complexity of the Appellant's medical condition and the complexity of the procedure.

54. The Appeal Board finds that the application for elbow replacement surgery does not meet the requirements for insured services under section 28.4(2)(a) of the Regulation.

Specifically, the Appellant has not demonstrated that the elbow arthroplasty was generally accepted in Ontario for a person in his medical circumstances.

Analysis/ Shoulder Arthroplasty

55. The Respondent's position was that the requested treatment had not been shown to be generally accepted treatment by Ontario standards for a person in the Appellant's medical circumstances and that generally accepted methods of treatment were available in Ontario.

56. The Respondent relied on the following excerpt from a report of Dr. Lapner, dated February 29, 2008, in which he stated:

> With respect to the shoulder, the head is centered on the glenoid on all of the previous x-rays. The fracture of the proximal humeral shaft appears to be united. There is a significant inferior subluxation of the humeral head and I do not believe that there is a good surgical solution for this. My concern would be that conversion to a hemiarthroplasty would not be advisable at this time given that he has very little pain in the shoulder and, secondly, that he has significant inferior subluxation that is difficult to correct with an arthroplasty.

57. In determining whether the application for out-of province funding for treatment of the Appellant's shoulder is prescribed as an insured service, the first question under section 28.4 of the Regulation is whether the treatment is generally accepted by the medical profession in Ontario as appropriate for a person in the Appellant's medical circumstances.

58. The evidence is clear that there are orthopaedic issues with the Appellant's shoulder. Dr. King's reports and Dr. Lapner's letters, referred to below, shows that orthopaedic treatment of the Appellant's shoulder has been contemplated in Ontario. In terms of the appropriateness of the treatment, the only real issue appears to have been whether a successful outcome could be anticipated from surgical intervention.

59. As indicated above, the Respondent has relied on Dr. Lapner's initial February 2008 consultation wherein he observed that a surgical solution might not be a good course, given the condition of the Appellant's shoulder. However, the Appeal Board notes that Dr. Lapner's February 2008 initial consultation was an early part of the picture. In that same consultation note, Dr. Lapner indicated that he planned to arrange a consultation with another orthopaedic surgeon. Eventually he referred the Appellant to Dr. King in London, Ontario, and the priority for treatment was the Appellant's elbow condition.

60. In his consultation with the Appellant in July 2009, Dr. King considered the prospect of a surgical solution to the Appellant's shoulder condition and expressed the view that the Appellant's shoulder appeared to be more amenable to reconstruction than his elbow. There is no evidence or other medical opinion to the contrary, and at the hearing, there was no issue that the Appellant's elbow reconstruction had proven successful.

61. In addition, since his first visit with Dr. Lapner in 2008, it appears that further medical consideration of the Appellant's shoulder has taken place and orthopaedic treatment of the shoulder appears to have been accepted treatment under consideration by Ontario specialists. In a report of June 28, 2010, Dr. King indicated that he understood the Appellant would be following up with Dr. Lapner regarding his shoulder. In a letter of September 30, 2010 addressed to Dr. Langley – a medical advisor with the Respondent - Dr. Lapner indicated that the Appellant may require a total shoulder arthroplasty.

62. Having considered all of the oral and documentary evidence, the Appeal Board is satisfied that the balance of the evidence demonstrates that consideration for shoulder surgery is generally accepted by the medical profession in Ontario as appropriate in the Appellant's medical circumstances.

Whether identical or equivalent treatment is performed in Ontario

63. Having determined that further assessment of the Appellant's shoulder and, if indicated, shoulder surgery, meets the criteria of section 28.4(2)(a) of Regulation 552, the question

under section 28.4(2)(b) then becomes whether such treatment is performed in Ontario by an identical or equivalent procedure.

64. The Appeal Board is of the opinion that the question under section 28.4(2)(b) as to whether treatment is performed in Ontario (the availability issue), must be interpreted and applied within the context of an applicant requiring such treatment. In other words, if a treatment was indicated for an individual in accordance with Ontario standards, but that treatment was not available to him or her in this province – then, from the standpoint of that patient's treatment, such treatment is not performed in Ontario. Such a contextual interpretation – based on the performance of service for the individual requiring the service – is necessary to avoid a result inconsistent with the purpose of the out-of-country provisions of Regulation 552. As recently affirmed by the Ontario Court of Appeal in *Blue Mountain Resorts Limited v. Bok*, 2013 ONCA 75, the wording of a statute must be applied in a purposive manner – particularly if a literal interpretation is to lead to an absurd result.

65. The Appeal Board finds that the letters of Dr. Lapner to the Appellant and to the Respondent in September, October and November of 2010, referred to earlier in the decision, demonstrate that he was no longer prepared to be involved with orthopaedic services to the Appellant.

66. At the hearing, the Appeal Board also received documentation of Dr. Bidari's referral to Dr. King, dated July 25, 2011, indicating that the Appellant had been seen by an orthopaedic surgeon at the Montfort Hospital and asking for an assessment by Dr. King. The response from Dr. King's office corroborated the Appellant's testimony. The referral had not been prioritized at any level by Dr. King's office for a consultation nor was the referral passed on to another specialist. Rather, a referral acknowledgement was returned to Dr. Bidari stating, "Unable to accept. Recommend referral to local specialist."

67. The evidence from Dr. Brodersen, and consistent with the evidence from Drs. Lapner and King, and the testimony of the Appellant, indicates that the nature of orthopaedic services

respecting the Appellant's shoulder is complex and requires specialized skill. While there are orthopaedic specialists in Ontario who perform the shoulder surgery being considered for the Appellant, the evidence before the Appeal Board demonstrated on a balance of probabilities that at this time the Appellant does not have effective access to treatment from such surgeons.

68. The documents before the Appeal Board from Dr. Lapner and from Dr. King's office demonstrate that these two orthopaedic surgeons who had been involved in the Appellant's care were no longer willing to provide medical care to the Appellant. As indicated earlier, Dr. Lapner has been the orthopaedic surgeon in Ottawa assisting the Appellant in managing care in this area, including referrals between February 2008 to the fall of 2010. In his letter of September 30, 2010 to Dr. Langley, Dr. Lapner expressly stated that surgeons in Ontario would not be comfortable treating the Appellant at this point for elbow or shoulder issues.

69. The Respondent, in submitting that there was evidence of orthopaedic care for the Appellant, relied on the fact that Dr. Lapner offered, in a letter of October 6, 2010, to refer the Appellant to another surgeon. However, the Appeal Board notes that this comment was in the context of Dr. Lapner's letter to the Appellant, advising him to seek care elsewhere – written just one week after he had advised Dr. Langley the previous week that he believed that no surgeon in Ontario would feel comfortable treating the Appellant for his shoulder/elbow conditions. The Appeal Board does not take the statement in the letter as indicating any change in Dr. Lapner's belief that no surgeon in Ontario would be comfortable treating the Appellant for elbow or shoulder issues.

70. Dr. Lapner's concern about the availability of medical care for the Appellant's complex orthopaedic condition is borne out by evidence from the Appellant's family physician, Dr. Bidari, who has not met with success in her efforts to make referrals for her patient in Ontario. As previously indicated in this decision, Dr. Bidari stated in her applications for funding for out-of-country treatment that specialists would not see the Appellant because

of the law suit he had launched in relation to the orthopaedic surgery carried out by Dr. Papp with the elbow fusion and nerve issues.

71. In a letter written for the Appeal Board's June 27, 2012 hearing, Dr. Bidari stated in part:

> Mr. Pilon was supposed to have a follow up post surgery with an orthopaedic surgeon in Ottawa, many referrals have been done without success. A referral request for consultation with Dr. Lapner was sent on April 2011, the answer was to refer to Dr. Young at the Queensway hospital.

72. The appeal hearing was held well over a year after the referral was made, and it would appear to the Appeal Board, based on the testimony of the Appellant and the information from Dr. Bidari, that the referral to Dr. Young has not resulted in orthopaedic care for the Appellant.

73. Dr. Bidari, in her written report provided to the Appeal Board at the hearing noted, "The procedure of referral has been unusually complicated for Mr. Pilon as his condition is very complicated and many specialists weren't comfortable to deal with it." She further noted, "[t]he mental health of Mr. Pilon has progressively declined because of the pain and functional limitations and frustration from the complicated referral system and the multiple refused requests to follow-up with orthopedic surgeons."

74. The evidence also indicates that after the Appellant had elbow replacement surgery that performed outside of Canada by Dr. Villanueva, Dr. Lapner and Dr. King were no longer prepared to continue seeing the Appellant. As indicated earlier, Dr. King had been of the view that such surgery was not advisable in the Appellant's condition because of medical complexity and ensuing risk.

75. It is clear that although the Appellant's condition would likely benefit from orthopaedic treatment – the difficulties he has faced in having an assessment in Ontario in relation to the specialized orthopaedic-related treatment options amount to a practical inability to obtain such medical services from Ontario specialists. Such an inability to obtain medical services is not because the treatment is inappropriate to his medical circumstances as

such. Rather, it appears to be the result of a situation where physicians who might otherwise perform the specialized treatment are not prepared to do so: (1) because the Appellant has launched a law suit regarding orthopedic treatment carried out in 2007, resulting in the fusion; compounded by the fact (2) that the Appellant obtained an out-of-country elbow replacement, contrary to the opinion of a recognized specialist in Canada.

76. If a medical service is performed in Ontario and considered appropriate for an individual's medical condition, but qualified physicians are not prepared to make it available to a specific individual, it cannot be said that for that individual, the service is performed in Ontario under section 28.4(2)(c)(i). If a qualified Ontario physician is not available to an individual, it cannot be said that for that person, medical services are available. That provision of the Regulation must be read within the context of the individual requiring the service, otherwise it would be meaningless.

77. The Appeal Board finds Dr. Lapner's statement of his belief that "no surgeon in Ontario will feel comfortable treating this patient for his shoulder/elbow condition" as being in accord with the experience of the Appellant and his family physician. His family physician's efforts to make referrals in Ontario for the Appellant's orthopaedic condition have not met with success. At the hearing, the Appellant was clear that despite attempts, he has not been able to find an orthopaedic specialist available to address his shoulder condition in Ontario. This is consistent with the information from his family physician and the statements from Dr. Lapner. The Appeal Board is persuaded that the difficulties in achieving a successful referral for the Appellant's specialized orthopaedic concerns directly relate to reluctance on the part of appropriate Ontario specialists to provide treatment to the Appellant. The Appeal Board finds that the evidence persuasively demonstrates that orthopaedic services required to address the Appellant's shoulder have not proved available to him since having his elbow fusion reversed and elbow replacement surgery completed outside of Canada.

78. The onus of proof on the Appellant is the balance of probabilities – not beyond a reasonable doubt. The Appeal Board is satisfied that the weight of the evidence

demonstrates that for this Appellant, in his unique circumstances, the medical treatment related to shoulder reconstruction is not performed in Ontario under section 28.4(2)(c)(i) of the Regulation.

79. The evidence shows that orthopaedic treatment of shoulder injuries is a generally accepted modality in Ontario. The question under section 28.4 of the Regulation will be whether it is generally accepted as appropriate in the Appellant's medical circumstances. The evidence as to Ontario standards as it relates to the Appellant's shoulder condition – based on both from Dr. Lapner's and Dr. King's consultations - is that surgical intervention/shoulder arthroplasty would be indicated as a corrective measure if it appeared that the Appellant's symptomology would be aided by such treatment and if the surgical intervention could be expected to be successful given the complexity of the condition. These questions could only be suitably addressed with a current assessment of the Appellant.

80. If the out-of-country assessment indicates that surgical intervention/shoulder arthroplasty would aid the Appellant's symptomology and that such treatment could be expected to be successful given the complexity of the condition, the Appeal Board is satisfied that orthopaedic treatment of the shoulder and ancillary orthopaedic issues would be generally accepted by the medical profession in Ontario as appropriate for the Appellant's medical circumstances.

81. Accordingly, if an out-of-country orthopaedic assessment indicates that actual treatment is warranted within the parameters set out in the above paragraphs, the Appeal Board is satisfied that such treatment would also meet the conditions of section 28.4 of the Regulation.

82. In interpreting section 28.4 (2)(c) the Appeal Board has considered the application of section 28.4 (5) which states:

> 28.4(5) For the purposes of clause (2) (c), a service is performed in Ontario if the service can be legally obtained by an insured person in Ontario and includes,
>
> (a) services that are prescribed as insured services, other than under this section;
>
> (b) services that are publicly funded, in whole or in part;
>
> (c) services that are for sale anywhere in Ontario to a person in the same medical circumstances as the insured person; and
>
> (d) services that a person in the same medical circumstances as the insured person is eligible to receive in Ontario under or through any program or policy, including a program or policy permitting special or extraordinary access to the services. O. Reg. 135/09, s. 4.

83. The Appeal Board is satisfied that "insured person" in section 28.4(5) must be read as being specific to the circumstances of the insured person who is making the application for medical services. Accordingly, section 28.4(5) does not alter the Appeal Board's interpretation of the application of section 28.4(2)(c) in this matter.

Nerve Stimulator

84. The 2009 application submitted by the Applicant's family physician included out-of-province funding for a nerve stimulator(s). While the evidence shows that nerve stimulation may be treatment considered appropriate for the Appellant's condition, the evidence before the Appeal Board at this time does not demonstrate on a balance of probabilities that this treatment is not available in Ontario by an identical or equivalent procedure. In addition, it is unclear as to the appropriate timing for this treatment. At the current time, there is some indication that use of a nerve stimulator should await determination of the shoulder treatment.

85. Specifically, the Appeal Board notes Dr. Bidari's report which indicated that the question of treatment for the shoulder surgery was delaying the Appellant's candidacy for a spinal cord stimulator.

86. Regarding the Appellant's condition in relation to the nerve stimulator, Dr. Bidari stated that since she started seeing the Appellant:

> … his pain has greatly increased. His initial pain medication was oxycontin 10 mg 2 times a day and recently was increased to oxycontin 30 mg 4 times a day + oxcycocet 4 times a day. Many medications have been tried for his neuropathic pain including Gabapentin, Nortriptyline and Lyrica with no success.
>
> At his last assessment at the pain clinic on August 2011, Dr. Evans specified that we couldn't increase his actual dosage of oxycontin because of the possible risk of developing an opiate-induced hyperalgesia which may end up making his pain scales worse. Dr. Evans discussed the other options for pain management with Mr. Pilon. He mentioned on his last report on August 2011 that Mr. Pilon is awaiting 2 other surgeries which would delay his being a candidate for a spinal cord stimulator to relieve his pain and he would also need a psychologist's assessment before undergoing placement of a spinal cord stimulator.

87. Based on the above information from Dr. Bidari, the Appeal Board finds that the application for a placement of a nerve stimulator is premature. The evidence falls short of demonstrating that a nerve stimulator is generally accepted by the medical profession in Ontario as appropriate to the Appellant's current medical circumstances.

88. The Appeal Board therefore finds that the Appellant's application for a nerve stimulator does not currently meet the requirements of section 28.4 of the Regulation.

89. If medical assessments indicate that a nerve stimulator or stimulators should be placed as part of procedures related to shoulder surgery, the question of the nerve stimulator should be revisited to determine whether out-of-country shoulder surgery would appropriately be inclusive of insertion of a nerve stimulator as a related aspect of that overall treatment for the Appellant's orthopaedic condition or if the appropriate treatment for nerve stimulator would appropriately be addressed as a separate procedure in Ontario.

Accommodation, Legal and other Expenses

90. The Appellant also sought reimbursement for expenses directly associated with his efforts to obtain medical treatment – such as costs for accommodation, medication, legal help,

and incidental expenses. The *Act* and Regulations do not provide coverage for such expenses, even when incurred in relation to insured services.

VI. IN-PROVINCE SCAR REVISION

a) *Application for in-province scar revision/excision of excess tissue*

91. Dr. Douglas C. Ross worked in conjunction with Dr. King in London Ontario with regard to the 2010 surgery to remove the hardware in the Appellant's elbow. He submitted a request to the Respondent for approval of payment of $750.00 for "scar revision/excision excess tissue [left] elbow after complex trauma with free flap …" The Respondent denied the request. Dr. Ross performed the surgery on April 20, 2010, at the same time as the elbow revision surgery performed by Dr. King, as described above. The Appellant appealed the decision of the Respondent refusing payment for the scar revision/excision of the excess tissue.

b) The Law – In-Province Scar Revision

92. The issue before the Appeal Board is whether the scar revision/excision of excess tissue is an insured service or as part of an insured service in Appendix D of the Schedule of Benefits under Regulation 552.

93. Section 37.1 of Regulation 552 under the *Act* provides:

> 37.1 (1) A service rendered by a physician in Ontario is an insured service if it is referred to in the schedule of benefits and rendered in such circumstances or under such conditions as may be specified in the schedule of benefits.

94. Section 24(1) of Regulation 552 lists services that are not insured unless they are specifically listed as an insured service or as part of an insured service in the Schedule of Benefits. The list includes at paragraph 10, a service that is solely for the purpose of altering or restoring appearance.

i. Schedule of Benefits

95. The Schedule of Benefits is defined in section 1(1) of Regulation 552 as "the document published by the Ministry of Health and Long-Term Care titled 'Schedule of Benefits – Physician Services under the Health Insurance Act'' but does not include the "[Commentary…]" portions of the document, or its Appendices A, B, C and F'.

ii. Appendix D: Preamble

96. Appendix D of this Schedule describes, among other things, the conditions under which surgery for alteration of appearance may be a benefit. The pertinent sections of the Preamble to Appendix D state:

> 1. Surgery to alleviate significant physical symptoms, which have not responded to a minimum of six months active treatment, or to restore or improve function to any area altered by disease, trauma or congenital deformity is normally an insured service.
>
> 2. Services rendered by physicians that are **solely** for the purpose of … alteration or restoration of appearance are not an insured service except under circumstances as listed in the following policy:
>
> > (a) Emotional, psychological or psychiatric grounds are not considered sufficient reason for the coverage of surgery for alteration of appearance except under exceptional circumstances.
> >
> > (b) Surgery to alter a non-symptomatic significant defect in appearance caused by the disease, trauma, or congenital deformity may be allowed on an Independent Consideration basis, on request of the operating physician provided that it is
> >
> > > (i) Recommended by a Mental Health Facility (as designated by the Mental Hospitals Act) or equivalent, or
> > >
> > > (ii) Performed on a patient who is less than 18 years of age and the defect is in the area of the body which normally and usually would not be clothed.
>
> …

6. Within the context of this policy, the word “trauma” includes trauma due to treatment such as **surgery**, radiation etc.

…

97. Revision, because of undesirable results, of a surgery, which was originally performed for alteration of appearance, is an insured service only if the original surgery was an insured service and if the revision is either part of a pre-planned staged process or occurs within a reasonable period of convalescence. Prior authorization is required only when the original surgical procedure, if it had been carried out at the time of the proposed revision, would have required such authorization.

iii. Appendix D: Post-Traumatic Scar Repair

98. As noted above, paragraph 6 of the Appendix D Preamble included surgery within the definition of “trauma.”

99. Paragraph 1(b) of Appendix D describes the circumstances where revision of post-traumatic scars in areas of the body other than the face and neck may be insured under OHIP, as follows:

> 1. Trauma Scars
>
> …
>
> b. Scars in other Anatomical Areas
>
> (i) Repair of scars which interfere with **function** or which are **significantly symptomatic** (pain, ulceration, etc.) is an insured service.
>
> (ii) Scars with no significant symptoms or functional interference.
>
> – Repair is an insured service if such a repair is part of a pre-planned post-traumatic (including post-surgical) staged process. Notification to the Ministry of Health and Long-Term Care must be included as part of the planning process.
>
> – Other post-traumatic scar revision is not an insured service,

- Scar revision should not be claimed when excision of scar is the method of gaining access to the surgical site of the major procedure.

- Prior authorization from the Ministry of Health and Long-Term Care is required for all scar repair procedures in areas other than the face or neck. Scar revision codes should be used (e.g. R026-R029)

100. "Trauma" is defined in the Preamble of Appendix D to include surgery. The scar and excess tissue in question was the result of previous procedures related to the Appellant's elbow. Accordingly, the excess tissue that is the subject of this application is a "trauma scar." Repair of a scar in an anatomical area other than the neck or face is an insured service if the scar "interferes with function," if the scar is "significantly symptomatic," or if it is "part of a pre-planned post-traumatic (including post-surgical) staged process."

101. The Appellant testified that there was excess skin that would interfere with the movement of his arm. The Appellant provided photographs of his left elbow, prior to the removal of the hardware, which showed bulking around the elbow area.

102. The Respondent took the position that the post traumatic scar would not interfere with function; that it was not significantly symptomatic; that the surgery was not part of a pre-planned, post-traumatic staged process; and that the surgery was not a reconstructive procedure in the acute stage, within two years of his original surgery.

103. While the Appellant testified that the excess skin, which was removed by Dr. Ross, would have interfered with his use of the arm, the evidence fell short of demonstrating such interference would have had any practical effect on function within the ambit of paragraph 1(b)(i) of Appendix D. In addition, there was no indication that the tissue or scar removed by Dr. Ross had been symptomatic. Finally, while the tissue and scarring at the elbow site resulted from the operations that had been carried out by previous procedures, its removal had not been part of a pre-planned post-traumatic or post-surgical staged process.

104. It is clear that the removal of the tissue led to a desirable result. However, for scar revision on the Appellant's elbow to be an insured service, it must fall within one of the categories set out in paragraph (b) of Appendix D. For the reasons stated above, it does not do so. Accordingly, the Appeal Board finds that the surgery carried out by Dr. Ross was not an insured service.

105. The appeal with respect to the application for in-province services is refused and the Appeal Board confirms the Respondent's decision in this regard.

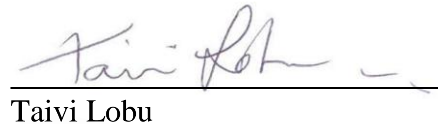
VII. DECISION

106. The Appeal Board refuses the appeal with respect to the applications for the elbow replacement, the nerve stimulator, and scar revision.

107. The Appeal Board allows the appeal with regard to orthopaedic treatment for the Appellant – and specifically an out-of-country assessment of the Appellant's shoulder and any ancillary orthopaedic issues, and any out-of-country orthopaedic treatment indicated by such an assessment that may be expected to be successful and helps relieve the Appellant's symptomology. Such out-of-country treatment is to be carried by Dr. Mark P. Brodersen at the Mayo Clinic in Jacksonville, Florida, as requested by the Appellant in the 2009 application; by Dr. Luis Villanueva at the CMO Hospital in Puerto Vallarta Mexico, as requested by the Appellant in the 2010 application; or by another physician/facility that may be agreed upon between the Appellant and the Respondent.

108. The appeal is allowed in part.

ISSUED April 10, 2013



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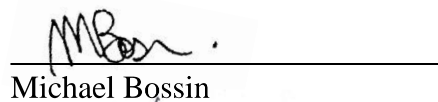

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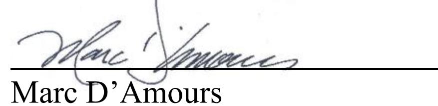

Marc D'Amours