
In the Matter of the ORS 656.245 Medical Services Dispute of

Bermudez, Jose A., Claimant

Contested Case No: H01-070

AMMENDED PROPOSED & FINAL ORDER

February 27, 2002

JOSE A. BERMUDEZ, Petitioner

SIMS CORPORATION, Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

Claimant and insurer appeal an administrative order issued on June 20, 2001 by the Medical Review Unit (MRU) of the Workers' Compensation Division (WCD), Department of Consumer and Business Services (director or department). On June 26, 2001, claimant requested a contested case hearing to challenge the administrative orders' determination concerning palliative care. On July 5, 2001, insurer cross-appealed to challenge the administrative order's determinations concerning medical services, medical treatment and palliative care.

On September 6, 2001, Administrative Law Judge Catherine P. Coburn conducted a hearing in this matter. Self-insured employer RSC Products and its claims administrator, Self-Insured Management Services (SIMS) were represented by attorney Scott Monfils. Jose A. Bermudez (claimant) was represented by attorney Todd Hammond. The Workers' Compensation Division (WCD) waived appearance. No witnesses testified.

The record of this proceeding, consisting of a tape recording of the hearing, all evidence received, and all hearing papers filed, has been considered. The findings of fact set out below are based upon the entire record.

ISSUE

Pursuant to ORS 656.704, does the director have jurisdiction over a diagnostic medical service dispute during the pendency of a compensability dispute?

EVIDENTIARY RULINGS

WCD Exhibits 1 through 40, claimant's Supplementary Exhibits N, 1b, 5a, 35a and 41a as well as insurer's Supplementary Exhibits A and 1B were received without objection. Insurer's Supplementary Exhibits 31A through 43 were received over claimant's relevance objection.

FINDINGS OF FACT

In October 1999, claimant suffered a low back injury while working as a sawmill chain puller. (Ex.A). In January 2000, insurer accepted a nondisabling lumbosacral strain. (Ex. D). In April and May 2000, insurer expanded the scope of acceptance to include a 3 mm central disc protrusion at L4-5 and reclassified the claim as disabling. (Exs. H and I).

In August 2000, insurer issued a Notice of Closure listing the medically stationary date as July 25, 2000 and awarding zero permanent partial disability. (Ex. M). A November 2000 Order on Reconsideration changed the medically stationary date to July 31, 2000, modified the temporary disability dates and otherwise affirmed the Notice of Closure. (Ex. 1B).

On November 27, 2000, insurer issued a partial denial alleging that the work-related injury was no longer the major contributing cause of claimant's current disability or need for treatment. (Ex. 4). In an Opinion and Order dated April 5, 2001, Workers' Compensation Board Administrative Law Judge Menashe set aside the compensability denial. (Ex. 12). On June 20, 2001, the Workers' Compensation Board affirmed the Opinion and Order. (Ex. 37A). On July 5, 2001, insurer filed a Petition for Judicial Review. (Ex. 41).

CONCLUSIONS OF LAW AND REASONING

The question presented is whether the director has jurisdiction over a diagnostic medical service issue when compensability of the current condition is pending before the Court of Appeals on appeal from the Workers' Compensation Board (board). Claimant contends that the director has jurisdiction and insurer disagrees. The underlying diagnostic services issue arises under ORS 656.245(1)(c)(H).¹ ORS 656.704 defines the parameters of the director's jurisdiction. ORS 656.704(3)(b)(C) and (D) provide:

“(b) The respective authority of the board and the director to resolve medical service disputes, other than disputes arising under ORS 656.260, shall be determined according to the following principles:

“(C) Any dispute that requires a determination of whether a sufficient causal relationship exists between medical services and an accepted claim to establish compensability is a matter concerning a claim.

“(D) The board and the director shall adopt rules to facilitate the fair and orderly determination of disputes that involve matters concerning a claim and additional issues. Such rules shall **first** require the determination of those issues that are matters concerning a claim.” (Emphasis added).

Claimant seeks to establish reimbursability of EMG studies, MRI and a lumbar mylogram as diagnostic medical services under ORS 656.245(1)(c)(H). Claimant cites *Counts v. International Paper Co.*, 146 Or App 768 (1997). In *Counts*, the court held that in order to establish reimbursability of diagnostic medical services, claimant must show that his

¹ ORS 656.245(1)(c)(H) provides:

“(c) Notwithstanding any other provision of this chapter, medical services after the worker's condition is medically stationary are not compensable except for the following:

“(H) Services that are necessary to diagnose the worker's condition.”

compensable injury made those tests necessary. Here, compensability of claimant's current condition is pending before the Court of Appeals on appeal from the board. ORS 656.704(3)(b)(D) requires compensability disputes before the board to be finally resolved prior to reimbursability disputes before the director. Therefore, the director lacks jurisdiction over the diagnostic services issue until such time as the compensability dispute is finally resolved. Accordingly, I dismiss without prejudice.

Attorney Fees

Claimant has not prevailed in a contested case hearing, and therefore, is entitled to no attorney fee. ORS 656.385(1).

ORDER

IT IS HEREBY ORDERED that:
Contested Case Number H01-070 is dismissed without prejudice.

Dated this 27th February, 2002

Catherine P. Coburn
Administrative Law Judge
Hearing Officer Panel