

In the Matter of the ORS 656.245 Treatment Dispute of

Large, Debora, Claimant

Contested Case No: H03-082

PROPOSED AND FINAL ORDER

November 7, 2003

DEBORA LARGE, Petitioner

CAMBRIDGE INTEGRATED SERVICE GROUP, Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

HISTORY OF THE CASE

Debora Large (claimant) appeals a June 11, 2003 Administrative Order issued by the Medical Review Unit (MRU) of the Workers' Compensation Division (WCD), Department of Consumer and Business Services (the director or the department) which determined that Cambridge Integrated Service Group (Cambridge or the insurer) is not liable for a discogram, office visits and related services because they were for a condition not related to the accepted compensable injury or disease. On June 24, 2003, the matter was referred to the Office of Administrative Hearings (OAH) for hearing

On August 6 2003, Administrative Law Judge (ALJ) Paul Vincent conducted a telephone hearing in this matter in Salem, Oregon. Attorney Chris Moore represented Ms. Large. Attorney Karen Varney represented Cambridge. WCD waived appearance. No witnesses testified. The record closed following the hearing.

After the hearing, the OAH assigned the matter to Administrative Law Judge Ray Myers to review the record and to write this order. The record of this proceeding, consisting of tape recordings of the hearing, all evidence received and all hearing papers filed, has been considered. The findings of fact and conclusions of law are based upon the entire record.

ISSUES

Under ORS 656.245(1)(c)(H)¹, is the insurer liable for a March 21, 2002 discogram, a post-discogram CT scan, a follow up visit with Dr. Karasek on April 1, 2001 and a follow up visit with Dr. Kosek on July 23, 2001?

EVIDENTIARY RULING

The record consists of Exhibits 1 through 146, plus petitioner's Exhibit 1, which were admitted into the record without objection.

¹ The insurer originally challenged these procedures on the basis that the claim is closed and no palliative care request had been filed and because the treatments were excessive and inappropriate. MRU concluded that the disputed services were not treatment, but diagnostic. Therefore, it only reviewed the services to determine whether they were compensable diagnostic services. At hearing, Ms. Large contended only that the services were compensable diagnostic services. Therefore, on review I consider only the diagnostic services issue.

FINDINGS OF FACT

I adopt MRU's Findings of Fact with the following supplementation:

1. Ms. Large injured her low back working as a dental assistant on April 23, 1996 while lifting a patient from a wheelchair to a dental chair. (Ex. 1.) The accepted condition is a disabling lumbar strain with L5-S1 fissure. (Ex. 75.)

2. Dr. Peter Kosek is Ms. Large's attending physician. On January 28, 2000, he requested that Dr. Paul Wilson perform a discogram on her lumbar spine from L3 through S1. Dr. Wilson noted fissuring at all three levels. The L5-S1 level was positive for pain. (Ex. 67.) Following the first discogram, Dr. Kosek performed intradiscal electrothermal therapy (IDET). (Ex. 88-2.) Following the IDET, Dr. Kosek ordered a second discogram. This one showed no pain at L5-S1, with pain at L4-5. He reported that the findings are consistent with disc degeneration, unrelated to the compensable injury. (Ex. 58-31 and 58-32.)

3. Dr. Michael Karasek began treating Ms. Large's low back pain on December 20, 2001. He considered the pain to have begun with the 1996 strain injury. (Ex. 94.) On January 25, 2002, Dr. Karasek noted that he had reviewed the discograms performed by or at the behest of Dr. Kosek. He noted that Dr. Kosek's latest discogram had revealed no pain at the L5-S1 level despite the fact that the previous one had revealed pain only at that level. He stated that it was difficult to sort out the findings. He suggested another discogram because it "might reveal whether she has low-pressure-sensitive discal pain at any of the 3 levels." (Ex. 96.) Dr. Karasek performed a lumbar discogram at L3-4, L4-5 and L5-S1 on March 21, 2001. (Ex. 96.) Richard Marsa, CRNA, performed anesthesia for the discogram. (Ex. 129.) Dr. Karasek interpreted the discogram as showing pain sensitive discs at L3-4, L4-5 and L5-S1 with annular disruptions at all three levels. (Ex. 96.) Dr. Karasek performed a follow-up examination on April 1, 2002. (Ex. 138.)

4. Dr. Kosek performed an examination of Ms. Large on July 23, 2002. The purpose of the examination was to treat Ms. Large's low back pain. (Ex. 58-34.) Dr. Kosek believes the low back pain is not due to the compensable injury. (Ex. 58-32.)

CONCLUSIONS OF LAW

Under ORS 656.245(1)(c)(H), the insurer is not liable for a March 21, 2002 discogram, a post-discogram CT scan, a follow up visit with Dr. Karasek on April 1, 2001 and a follow up visit with Dr. Kosek on July 23, 2001.

OPINION

The Director has jurisdiction over medical disputes arising under ORS 656.245(1) in cases where compensability of the condition to which medical services are directed is

not at issue. OAR 436-010-0008(3), (4). Diagnostic medical service disputes are not matters concerning a claim under ORS 656.704(3) and are within the director's jurisdiction. *See James P. Fisher*, 5 WCSR 332 (2000). (Determination of causation is not necessary to resolve dispute.)

Ms. Large contends that the disputed treatment is compensable as diagnostic treatment under ORS 656.245(1)(c)(H), which states:

(1)(a) For every compensable injury, the insurer or the self-insured employer shall cause to be provided 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, subject to the limitations in ORS 656.225, including such medical services as may be required after a determination of permanent disability. In addition, for consequential and combined conditions described in ORS 656.005 (7), the insurer or the self-insured employer shall cause to be provided only those medical services directed to medical conditions caused in major part by the injury.

* * * * *

(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.

To be compensable under this statute, the injured worker must establish that the compensable injury made the tests necessary. *Counts v. International Paper Co.*, 146 Or App 768 (1997). MRU concluded that Ms. Large had not sustained that burden of proof. Pursuant to ORS 656.327(2) and ORS 656.245(6), I review MRU's decision for substantial evidence and errors of law.

Substantial evidence review involves determining whether, when viewed as a whole, the record contains evidence that would make MRU's decision reasonable. *Armstrong v. Asten-Hill Co.*, 90 Or App 200, 206 (1988). The party seeking to overturn the agency's order bears the burden of proving that there was not substantial evidence to support the agency's order. ORS 183.450(2). As the Court of Appeals recently said, the party seeking to reverse an agency's decision on substantial evidence grounds "faces a daunting standard of review." *Webb v. Glennbrook Nickel Co.*, ___ Or App ___ (August 13, 2003).

MRU found that disputed services were not necessary to determine the cause or extent of the accepted injury, but rather were ordered to further evaluate low back pain due to non-compensable degenerative disc disease at multiple levels. I affirm the order because substantial evidence supports the director's determination that the services in dispute were not sought to determine the cause or extent of claimant's accepted condition. In particular, Dr. Kosek had opined that Ms. Large's ongoing low back pain (the reason for Dr. Karasek's discogram and the other disputed services) was due to non-compensable conditions. Therefore, substantial

evidence exists in the record to support the conclusion that the discogram and related services at issue were not necessitated by the compensable injury.

ATTORNEY FEES

Claimant has not prevailed in this contested case hearing, and therefore, is entitled to no assessed attorney fee.

ORDER

IT HEREBY ORDERED that MRU's Administrative Order dated June 11, 2003 is affirmed.

Dated this 7th day of November 2003 at Salem, Oregon.

Ray Myers, Administrative Law Judge
Office of Administrative Hearings