

In the Matter of the ORS 656.245 Treatment Dispute of

Vinton, Timothy, Claimant

Contested Case No: H03-044

PROPOSED & FINAL ORDER

November 14, 2003

TIMOTHY VINTON, Petitioner

OBERTO SAUSAGE CO. AND SEDGWICK CMS, Respondent

Before Ray Myers, Administrative Law Judge, Office of Administrative Hearings

HISTORY OF THE CASE

Timothy Vinton (claimant) appeals an April 17, 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 the self-insured employer, Oberto Sausage Co., and its processing agent, Sedgewick CMS (Oberto or respondent) are not liable for services of Dr. Yamada on August 1, 2000 and September 25, 2000 because they were for a condition not related to the accepted compensable injury or disease and were not diagnostic in nature. On May 9, 2003, the matter was referred to the Office of Administrative Hearings (OAH) for hearing

On June 20 2003, Administrative Law Judge (ALJ) Paul Vincent conducted a telephone hearing in this matter in Salem, Oregon. Attorney Max Rae represented Mr. Vinton. Attorney Thad Hettle represented . 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), are respondents liable to reimburse for Mr. Vinton's August 1, 2000 and September 25, 2001 office visits to Dr. Yamada?

EVIDENTIARY RULING

The record consists of Exhibits 1 through 50, which were admitted into the record without objection.

FINDINGS OF FACT

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

1. Mr. Vinton compensably injured his right shoulder while working for respondent, Oberto. On[,] January 25, 2000, Johnson and Culberson (JCI), Sedgewick's predecessor, accepted the claim as a nondisabling right shoulder tendonitis with an assigned dated of injury of October 25, 1999. (Ex. 6.)

2. Mr. Vinton first saw Dr. Yamada for his shoulder on July 18, 2000; Dr. Yamada referred him for an MRI. (Ex. 11-2.) On July 19, 2000, an MRI was performed on Mr. Vinton. It revealed a full-thickness tear of the distal rotator cuff with associated tendonitis. (Ex. 12.) Dr. Yamada then saw Mr. Vinton for follow-up on August 1, 2000. He reported that the MRI was consistent with a torn rotator cuff. Dr. Yamada diagnosed torn right rotator cuff. (Ex. 11-2.)

3. Mr. Vinton next saw Dr. Yamada on September 25, 2000. Dr. Yamada reviewed an IME report from Dr. Farris and expressed his disagreement with it. He contended that the torn rotator cuff was work related. (Ex. 11-3.) Dr. Yamada billed this as an office visit. (Ex.13-7.)

4. On November 13, 2000, Mr. Vinton requested that respondents accept right shoulder rotator cuff tear and right shoulder impingement. (Ex. 23.) On November 14, 2000, Mr. Vinton requested administrative review of a treatment dispute involving the July 18, 2000 and September 25, 2000 visits to Dr. Yamada as well as two other office visits. (Ex. 24.) Respondents requested that the medical services dispute be deferred pending resolution of the compensability dispute. (Ex. 28.)

5. Respondents denied compensability of the right rotator cuff tear by Denial Letter dated February 5, 2001. (Ex. 35.) On August 24, 2001, Administrative Law Judge Catherine Coburn deferred the Medical Dispute and transferred jurisdiction to the Workers' Compensation Board to determine compensability. (Ex. 42.) Administrative Law Judge Monte Marshall of the Workers' Compensation Board presided over a hearing on the compensability issue. By Opinion and Order dated June 24, 2002, ALJ Marshall found the right shoulder rotator cuff tear to be non-compensable. He also found that the impingement syndrome was a mechanism of injury and not a compensable condition. (Ex. 44.) On February 24, 2003, The Workers' Compensation Board affirmed. (Ex. 46.)

CONCLUSIONS OF LAW

Under ORS 656.245(1)(c)(H), respondents are not liable to reimburse for Mr. Vinton's August 1, 2000 and September 25, 2001 office visits to Dr. Yamada.

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.)

Mr. Vinton 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 Mr. Vinton 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 the July 18, 2000 visit was diagnostic in nature because to that point the only diagnosis was tendonitis and because Dr. Yamada requested an MRI to determine other causes of the shoulder pain. Respondents do not challenge that finding. MRU reasoned, however, that the two disputed visits to Dr. Yamada involved treatment of the rotator cuff tear and impingement syndrome, which are not compensable conditions. By the August 1, 2000 visit, the MRI had been performed and had demonstrated to a radiologist that a right rotator cuff tear existed. Thus, there is evidence in this record that supports the finding that at the time of the disputed visits, Dr. Yamada was treating Mr. Vinton for rotator cuff tear and impingement syndrome, not for the accepted condition. Those conditions are not compensable, therefore,

there is substantial evidence in this record that supports MRU's decision. Mr. Vinton has failed to sustain his burden of proving that the disputed visits were made necessary by the compensable injury.

Mr. Vinton also argues that the August 1, 2000 visit was diagnostic because until Dr. Yamada had read the MRI, there was insufficient evidence that Mr. Vinton had a right rotator cuff tear. I disagree. The radiology report, Exhibit, 12, is dated July 19, 2000 and contains the radiologist's impression of a "full thickness tear of the distal rotator cuff." Substantial evidence supports MRU's decision on this issue.

Finally, Mr. Vinton argues that the September 25, 2001 office visit should be reimbursable because respondents had sent Dr. Yamada a copy of Dr. Farris's IME evaluation to comment upon. He argues that respondents had essentially contracted with Dr. Yamada to review the report and, therefore, they should be ordered to reimburse for this report, which he alleges is a consequence of the respondent's request. I disagree. Substantial evidence supports the conclusion that this was an examination, not a billing for reading the IME report. Dr. Yamada billed this as an office visit, not to read the IME report. Accordingly, I conclude that Mr. Vinton has failed to sustain his burden of proof on this issue.

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 April 17, 2003 is affirmed.