

In the ORS 656.245 Medical Services Dispute of

Wallace, William C., Claimant

Contested Case No: H03-031

PROPOSED AND FINAL ORDER

July 10, 2003

WILLIAM C. WALLACE, Petitioner

LIBERTY NW INSURANCE COPR., Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

PROCEDURAL HISTORY

On March 17, 2003, claimant's attorney requested contested case review of an order by the Medical Review Unit (MRU) of the Workers' Compensation Division (WCD) finding that a diagnostic nerve block provided by Roy Slack, MD, on December 9, 2002 was not a compensable diagnostic service and that an L3-4 right nerve block proposed by Francis Nash, MD on December 3, 2002 is not a compensable diagnostic service. On May 7, 2003, Administrative Law Judge Paul Vincent conducted a contested case hearing¹. Petitioner William Wallace (claimant) was represented by attorney Charles Mundorf. Respondent Liberty Northwest Insurance Corp. (insurer or Liberty) was represented by attorney Judy Johnson. The Workers' Compensation Division waived appearance. Testimony was taken from claimant William Wallace. The record closed on the date of hearing.

ISSUE

The issue is whether the insurer is liable for the diagnostic L4-5 right nerve root block provided by Roy Slack, MD, on December 19, 2002, and the diagnostic L3-4 right nerve root block proposed by Francis Nash, MD, on December 3, 2002.

EVIDENTIARY RULINGS

WCD Exhibits 1-26 were admitted without objection. Petitioner's Exhibits 27-28 were admitted without objection. Respondent's Exs. A, B, 1A-1D, 3A-3E, 8A, 10A, 27A were admitted without objection.

FINDINGS OF FACT

Claimant suffered a lumbar strain on May 11, 2000. (Ex. 1). Insurer accepted the claim as a disabling lumbar strain on July 17, 2000. (Exs. 2-3). Claimant's condition became medically stationary on November 24, 2000. A Notice of Closure issued on July 13, 2001. (Ex. 7).

¹ The Office of Administrative Hearings (OAH) was previously called the Hearing Officer Panel (the Panel). The Panel's name was changed to the Office of Administrative Hearings by House Bill 2526, which became effective upon the Governor's signature on May 22, 2003.

On August 1, 2002, claimant sought medical treatment from Dr. Nash. Claimant's symptoms included lumbar spine pain; bilateral gluteal pain, right side greater than left; right posterior and interior thigh pain; and bladder dysfunction. Claimant was prescribed muscle relaxant and pain medications and referred for a lumbar MRI and lumbar spine x-rays. (Ex. 9).

On August 16, 2002, a lumbar spine x-ray revealed degenerative disc disease, with narrowed disc spaces at L3-4 and L4-5. A lumbar spine MRI on the same date displayed scattered mild to moderate degenerative changes, with a mild to moderate broad-based protrusion of the L3-4 disc and a slight broad-based bulge of L4-5. (Ex. 10).

On October 3, 2002, claimant returned to Dr. Nash. After reviewing results from the August 16, 2002 lumbar spine x-ray and lumbar spine MRI, Dr. Nash recommended a nerve root block at L3/4 and L4/5, right side, to determine the level causing claimant's right leg symptoms. (Ex. 9)

On October 8, 2002, Dr. Nash referred claimant to Roy Slack, MD, for nerve root blocks at L3/4 and L4/5 for the diagnosed condition of disc prolapse with secondary degenerative disc disease at L3-4 and L4-5. Dr. Nash's goal was to define the level generating the greater right leg pain, with a secondary goal of therapeutic effect for claimant's symptoms. (Ex. 11).

On December 3, 2002, Dr. Nash submitted a palliative care request to insurer for diagnostic/therapeutic nerve root blocks at L3/4 and L4/5 right. Dr. Nash listed the claimant's diagnosis as lumbar segmental instability, post-traumatic lumbar degenerative disc disease, and lumbar disc prolapse. He stated that the procedure was necessary "to define the level of major pain generator." (Ex. 14)

On December 17, 2002, claimant's attorney requested an administrative review by WCD of the requested procedure. (Ex. 15)

On December 18, 2002, insurer disapproved the proposed nerve root blocks as not related to the accepted lumbar strain. (Ex. 16)

On March 11, 2003, MRU issued administrative order MS 03-210 finding that the disputed procedures were not compensable diagnostic services for the accepted condition. (Ex. 25).

CONCLUSIONS OF LAW AND REASONING

Jurisdiction

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). Liberty has denied treatment on the basis that the disputed treatment was not a compensable diagnostic medical service. 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). I may modify the director's administrative order in this matter only if it is not supported by substantial evidence in the record, or reflects an error of law. ORS 656.327(2).

In order to determine whether substantial evidence exists, I am required to:

"[L]ook at the whole record with respect to the issue being decided, rather than 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. For instance, and in the context which is likely frequently to occur in workers' compensation cases, if there are doctors on both sides of a medical issue, whichever way the [director] finds the facts will probably have substantial evidentiary support. *** The difference between the 'any evidence' rule and the substantial evidence test * * * will be decisive only when the credible evidence apparently weighs overwhelmingly in favor of one finding and the [director] finds the other without giving a persuasive explanation." *Armstrong v. Asten-Hill Co.*, 90 Or App 200, 206 (1988).

The burden of proving a fact or position rests with the proponent. ORS 183.450(2).

Diagnostic Medical Services

The administrative order found that requested procedure was not necessary to determine the cause or extent of the accepted injury, but rather were ordered to further evaluate degenerative disc disease. I affirm the order on the grounds that substantial evidence supports the director's determination that the service in dispute was not sought to determine the cause or extent of claimant's accepted condition.

The claimant argues that there are two basis for finding the disputed treatment compensable. First, he argues that there was a "curative nature" to this treatment . Second, he argues that the continuity of symptoms from date of injury to present indicate that the disputed treatment was directed to the compensable condition. The insurer argues that the only relevant issue is whether the treatment was directed to the accepted a strain, or was instead directed to the disc conditions that have not been accepted yet. I agree with the insurer that the record contains substantial evidence in support of MRU's determination that the treatment was directed to disc conditions not yet accepted.

While claimant argues that the disputed procedures were both diagnostic of the accepted injury and therapeutic for it as well, the record contains substantial evidence to support MRU's determination otherwise. The claim was closed without permanent disability in June 2001 after an IME had determined that the muscle strain was resolved and the on-going back pain was due to pre-existing degenerative disc disease. (Exs. R3D, 5). MRI's in 2000 and 2002 both diagnosed degenerative disc disease and bulging discs secondary to that as the cause of claimant's continuing pain. (Exs. 1D, 10). In a letter of October 3, 2002, Dr. Nash explicitly stated that he was going to offer nerve root blocks directed to disc changes at L3/4 and L4/5 in order to determine which level was most symptomatic:

At present there are options for treatment directed to the disc changes at L3/4 and L4/5 with secondary degenerative disc development. These would include the following:

4. Offer the patient both diagnostic and therapeutic blocks at L3/4 and L4/5 to determine which level is most symptomatic. (Ex. 10A-2).

This comment demonstrates that Dr. Nash had already determined that the proposed procedure was directed to the non-compensable condition. In the referral of October 8, 2002, Dr. Nash, again explicitly stated that his diagnosis is “disc prolapse secondary to degenerative disc disease L3/4 and L4/5” and commented to Dr. Slack that “our goal [is] to define the level generating the greater pain.” (Ex. 11). Even in the palliative care request form, Ex. 14, Dr. Nash stated that he was requesting “diagnostic/therapeutic nerve root blocks at L3/4 and L4/5 right to define level of major pain generator.” On these facts, MRU appropriately applied *Counts v. International Paper Co.*, 146 Or App 768 (1997) (claimant must show that the accepted injury made diagnostic tests necessary, tests meant to rule in or out non-compensable conditions are not reimbursable). Because the claimant has not shown that the compensable condition made the diagnostic tests necessary, the diagnostic procedure is not reimbursable.

ATTORNEY FEES

Claimant has not prevailed in a contested case hearing, and therefore, his attorney is not entitled to a fee. ORS 656.385(1).

ORDER

IT IS HEREBY ORDERED that:

The Director’s Review and Order, MS 03-210, dated March 11, 2003, is affirmed.

DATED this 10th day of July, 2003.

Paul Vincent
Administrative Law Judge
Office of Administrative Hearings