

In the ORS 656.245 Medical Services Dispute of

LINDEN W. MARSH, Claimant

Contested Case No: H04-158

PROPOSED AND FINAL ORDER

December 8, 2004

LINDEN W. MARSH, Petitioner

SAIF CORP., Respondent

Before Catherine P. Coburn, Administrative Law Judge, Administrative Hearings

HISTORY OF THE CASE

Claimant appeals the Administrative Order issued on September 8, 2004 by the Medical Review Unit (MRU) of the Workers' Compensation Division (WCD), Department of Consumer and Business Services (department or director). On October 27, 2004, the department referred the matter to the Office of Administrative Hearings (OAH). On November 30, 2004, Administrative Law Judge Catherine P. Coburn conducted a telephone hearing in Beaverton, Oregon. Attorney Christopher D. Moore represented Linden W. Marsh (claimant). Attorney David L. Runner represented SAIF Corporation (insurer). Oregon Health Systems Managed Care Organization (OHS or MCO) waived appearance. Claimant testified on his own behalf and the record closed on the date of hearing.

ISSUE

Whether MRU incorrectly determined that a lumbar discogram proposed by Peter Kosek, MD is not reimbursable as a diagnostic medical service.

EVIDENTIARY RULINGS

WCD Exhibits 1 through 58 were admitted into the record without objection. Claimant offered proposed Supplementary Exhibit 59, a November 8, 2004 report authored by Stephen Amos, MD. I sustained insurer's objection pursuant to ORS 656.245(6) and ORS 656.260(16), which provide that no new medical evidence is admissible at hearing.¹

FINDINGS OF FACT

I adopt and incorporate the findings of fact contained in the Administrative Order dated September 8, 2004 with the following supplementation:

(1) On October 29, 2002, claimant suffered a compensable injury in a work-related motor vehicle accident. (Exs. 8-2 and 17.) Insurer initially accepted cervical and thoracic strains and later expanded the scope of acceptance to include C4-5 disc herniation. (Exs. 18-2 and 40.)

¹ Former OAR 436-001-0195 which provided that medical experts' clarification reports did not constitute "new medical evidence" was repealed, effective April 1, 2004.

(2) On March 19, 2004, attending physician Stephan A. Ames, MD declared claimant's conditions medically stationary. (Ex. 41.)

(3) On May 14, 2004, Michael A. Karasek, MD recommended a discogram as work up for painful internal disc disruption in the low back. (Ex. 45.) On June 9, 2004, Peter Kosek, MD requested pre-authorization of a four-level lumbar discogram, listing ICD-9 diagnosis 722.52. (Ex. 46.)

(4) On June 17, 2004, insurer enrolled claimant in OHS MCO. (Ex. 47.) On July 12, 2004, OHS denied preauthorization of the lumbar discogram because the lumbar spine was not an accepted condition. (Ex. 48.)

(5) On August 6, 2004, Dr. Kosek agreed that the purpose of the proposed lumbar discogram was to identify disc disruption as the cause of claimant's lumbar spine complaints or to diagnose a specific condition that caused low back pain. (Ex. 54.)

CONCLUSION OF LAW

MRU correctly determined that a lumbar discogram proposed by Peter Kosek, MD is not reimbursable as a diagnostic medical service.

OPINION

Jurisdiction

Claimant contends that the department lacks jurisdiction and that the dispute should be transferred to the Workers' Compensation Board. Relying on ORS 656.704(3)(b)(C), claimant contends that the dispute requires a determination whether a sufficient causal relationship exists between the disputed discogram and the accepted claim, and therefore, jurisdiction lies with the Workers' Compensation Board, rather than the Workers' Compensation Division. In contrast, insurer takes the position that WCD exercises authority over this medical service dispute under ORS 656.704(3)(b) because claimant was enrolled in a managed care organization. I agree with insurer's position, and furthermore, I find that WCD has jurisdiction under ORS 656.704(3)(a).

ORS 656.245(6) provides:

Subject to the provisions of ORS 656.704, if a claim for medical services is disapproved, the injured worker, insurer or self-insured employer may request administrative review by the director pursuant to ORS 656.260² or 656.327.³

² ORS 656.260(16) provides in pertinent part:

At the contested case hearing, the administrative order may be modified only if it is not supported by substantial evidence or reflects an error of law.

³ ORS 656.327(2) provides in pertinent part:

ORS 656.704 provides in pertinent part:

(3)(a) For the purpose of determining the respective authority of the director and the board to conduct hearings investigations and other proceedings under this chapter, and for determining the procedure for the conduct and review thereof, matters concerning a claim under this chapter are those matters in which a worker's right to receive compensation, or the amount thereof, are directly in issue. However, subject to paragraph (b) of this subsection, such matters do not include **any disputes arising under ORS 656.245** ***.

(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.

(Emphasis added.)

In interpreting a statute, the court's, and thus my charge is to determine the legislative intent. ORS 174.020⁴ *PGE v. Bureau of Labor and Industries*, 317 Or 606 (1993). In order to discern the legislative intent, the first level of analysis is to examine both the text and context of the statute. 317 Or at 610-611. The test of the statute is the best evidence of the legislature's intent. If the legislature's intent is unclear, I consider legislative history, and if still unclear, I apply the general maxims of statutory construction. *Id.*

In applying the foregoing method of analysis to ORS 656.704(3), I find I need proceed no further than the plain meaning of the statute. The legislature assigned to the director authority to address medical service disputes arising under ORS 656.245. Here, claimant's condition is medically stationary and the claim for diagnostic medical service arises under ORS 656.245(1)(c)(H). Furthermore, the legislature assigned to the director authority to address managed care issues arising under ORS 656.260. Here, claimant was enrolled in an MCO. For these reasons, I conclude that jurisdiction lies with the director.

Standard of Review

At the contested case hearing, the administrative order may be modified only if it is not supported by substantial evidence or reflects an error of law.

⁴ ORS 174.020(1)(a) provides:

In the construction of a statute, a court shall pursue the intention of the legislature if possible.

I review for substantial evidence or error of law. ORS 656.245(6) and ORS 656.260(16). The burden of producing evidence to support a fact or position rests with the proponent. ORS 184.450(2). As petitioner, insurer bears the burden of proving by a preponderance of the evidence that the administrative order is incorrect. *See Cook v. Employment Div.*, 47 Or App 437 (1980) (In the absence of contrary legislation, the standard of proof in an administrative hearing is preponderance of evidence). Proof by a preponderance of evidence means that the fact finder is persuaded that the facts asserted are more likely true than false. *Riley Hill General Contractors v. Tandy Corp.*, 303 Or 390 (1989).

Substantial evidence exists to support a finding “when the record, viewed as a whole, would permit a reasonable person to make that finding.” ORS 183.482(8)(c). To determine whether substantial evidence exists, an ALJ is required to:

“look 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 findings 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 ALJ would not need to choose sides. 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 the finding and the (director) finds the other without giving a persuasive explanation.” *Armstrong v. Asten-Hill Co.*, 90 Or App 200, 206 (1998).

Compensability

MRU determined that insurer is not liable for the proposed lumbar discogram. Claimant contends that the administrative order reflects an error of law because MRU applied an incorrect legal standard for compensability of diagnostic medical services. In contrast, insurer contends that MRU correctly applied the case law and that the proposed lumbar discogram is not reimbursable. I agree with insurer’s position.

Following a work injury, an insurer is obligated to provide 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. ORS 656.245(1)(a). This obligation continues over the injured worker’s lifetime. ORS 656.245(1)(b). After the medically stationary date, medical services are not compensable with certain exceptions, such as diagnostic services. ORS 656.245(1)(c)(H). To establish compensability, the injured worker must show that the compensable injury made the diagnostic service necessary. *Counts v. International Paper Co.*, 146 Or App 768, 770 (1997). Diagnostic services for the purpose of determining a causal relationship, if any, between an

accepted condition and the worker's condition are compensable. *Roseburg Forest Products v. Langley*, 156 Or App 454, 462 (1998). The service is compensable if it is necessary to determine the cause or extent of the compensable injury, even if a noncompensable condition is discovered as a result. *Counts* at 771. Tests to determine the extent of a compensable injury are reimbursable; tests to establish the existence of a new or consequential condition are not. *Langley*, at 463.

Here, the record establishes that the proposed lumbar discogram is not necessary to determine the extent of the compensable injury. To begin, the accepted conditions are cervical and thoracic while the proposed lumbar discogram is directed to a different body part. Next, Dr. Karasek recommended the discogram to identify the cause of claimant's low back pain. Dr. Kosek listed ICD-9-CM 722.52 (Degeneration of lumbar or lumbosacral intervertebral disc). Additionally, Dr. Kosek opined that the purpose of the lumbar discogram was to diagnose a specific condition that caused claimant's low back pain. Finally, MRU properly relied on Dr. Kosek's opinion in determining that the proposed discogram is not compensable under *Counts* and *Langley*. Accordingly, finding no basis to modify the administrative order, I affirm.

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:

The Administrative Order dated September 8, 2004 is affirmed.