

In the ORS 656.245 Medical Services Dispute of

TERESA L. HICKS, Claimant

Contested Case No: H04-155

FINAL ORDER

November 22, 2005

JELD-WEN INC. c/o CRAWFORD & CO., Petitioner

TERESA L. HICKS, Respondent

Before John Shilts, Administrator, Workers' Compensation Division

Petitioner employer filed exceptions to Office of Administrative Hearings Administrative Law Judge (ALJ) Lawrence S. Smith's April 22, 2005 Proposed and Final Order. Respondent claimant did not respond; nor did the provider, Dr. Koller. The issues are jurisdiction and compensability of diagnostic medical services. I find I have jurisdiction over this matter, and substantial evidence supports the conclusion that the services are compensable.

I adopt the ALJ's findings of fact.

The underlying issue is whether employer is liable for nerve conduction studies provided by Richard Koller, MD on June 13, 2003. The Medical Review Unit (MRU), by Administrative Order dated August 18, 2004, held diagnostic service disputes are solely within the director's jurisdiction and the services at issue here are compensable because they were provided to determine the cause and extent of the compensable injury. The ALJ affirmed, finding that ORS 656.704(3)(b)(A) and (C) do not apply and substantial evidence exists to support MRU's conclusion that the services are compensable.

Employer's argument is as follows. The services were specifically performed to determine whether claimant has carpal tunnel syndrome, a condition which was specifically claimed and denied. That denial is now final. That matter requires a determination of compensability in order to determine whether benefits are due for that condition, which is within the jurisdiction of the Workers' Compensation Board. The studies were not performed to determine the cause or extent of the compensable injury or accepted condition, which is upper back strain.

Jurisdiction

ORS 656.704 delineates the jurisdiction between the director and the Workers' Compensation Board. Generally, "matters concerning a claim" are within the jurisdiction of the board, while matters other than those concerning a claim are within the director's jurisdiction.¹ As to medical service disputes specifically, ORS 656.704(3) further provides:

"(3)(a) [S]ubject to paragraph (b) of this subsection, [matters concerning a claim] do not include any disputes arising under ORS 656.245, 656.248, 656.260, 656.327, any other provisions directly

¹ A "matter concerning a claim" is one "in which a worker's right to receive compensation, or the amount thereof, are directly in issue." ORS 656.704(3)(a).

relating to the provision of medical services to workers or any disputes arising under ORS 656.340 except as those provisions may otherwise provide.

“(b) The respective authority of the board and the director to resolve medical service disputes * * * shall be determined according to the following principles:

“(A) Any dispute that requires a determination of the compensability of the medical condition for which medical services are proposed is a matter concerning a claim.

“* * * * *

“(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.”

While the language in (3)(a) provides that matters concerning a claim do not include medical service disputes arising under ORS 656.245, that language is made subject to the provisions of (3)(b).

Under ORS 656.704(3)(b)(C), the board has jurisdiction over disputes requiring a determination of whether a sufficient causal relationship exists between medical services and an accepted claim. ORS 656.704(3)(b)(C) does not apply here because this dispute does not require a determination of causation between the services and an accepted *claim*.² Rather, under *Counts v. Int'l Paper Co.*, 146 Or App 768 (1997) (“[F]or the diagnostic services at issue to be compensable, claimant had to show that his compensable injury made those tests necessary.”), a determination of whether diagnostics are compensable requires a determination of whether the compensable *injury* made those tests necessary.³ The issue is whether the services were necessary to determine the cause or extent of a compensable injury. 146 Or App at 771. Such an inquiry does not require a determination of the causal relationship between the services and an accepted claim. Thus, ORS 656.704(3)(b)(C) does not apply.

ORS 656.704(3)(b)(A) likewise does not apply. Under ORS 656.704(3)(b)(A), the board has jurisdiction over disputes requiring a determination of the compensability of the medical condition for which medical services are proposed. This matter does not require such a determination. The services have already been performed. They were ordered to determine whether claimant might have carpal tunnel syndrome. Employer eventually denied claimant’s claim for carpal tunnel syndrome and that denial is now final. However, the fact that the condition has been denied does not end the inquiry when the services at issue are diagnostic in

² A “claim” is “a written request for compensation from a subject worker or someone on the worker’s behalf, or any compensable injury of which a subject employer has notice or knowledge.” ORS 656.005(6).

³ “A ‘compensable injury’ is an accidental injury * * * arising out of and in the course of employment requiring medical services or resulting in disability or death * * *”. ORS 656.005(7)(a).

nature. “[I]f diagnostic services are necessary to determine the cause or extent of a compensable injury, the tests are compensable whether or not the condition that is discovered as a result of them is compensable.” *Counts*, 146 Or App at 771. This matter does not require a determination of compensability of the condition. The issue is whether the diagnostic services were necessary to determine the cause or extent of a compensable injury

This matter is not a matter concerning a claim under ORS 656.704(3)(b). This is a medical service dispute arising under ORS 656.245, and I therefore have jurisdiction under ORS 656.704(3)(a).⁴

Compensability

The services are compensable if they were necessary to determine the cause or extent of a compensable injury. *Counts*, 146 Or App at 771. MRU concluded that at the time the services were performed, the medical providers were trying to determine the cause and extent of the compensable injury. The ALJ found that substantial evidence supports MRU’s conclusion, and I agree.

Evidence in the record shows the following. Claimant was injured at work on May 2, 2003. On May 14, 2003, she went to Dr. Ponte with a chief complaint of “painful swollen hands.” The “history of present illness” begins with the May 2 incident. Other symptoms were right elbow pain and “swelling and numbness in the median nerve distention, bilateral hands, right greater than left.” Dr. Ponte notes, “no prior history of similar symptoms.” The initial assessment is “bilateral carpal tunnel syndrome, right greater than left, with right medial epicondylitis.” (Ex. 1.) On or about May 15, 2003, claimant made a claim for workers’ compensation benefits. On May 15, 2003, claimant went to the chiropractor who noted a chief complaint of “upper back pain, right elbow pain and numbness in her hands. This started about two weeks ago while lifting boxes at her place of employment. * * * Later during the workday her hands began to tingle. * * * She denies having any numbness or tingling in her hands prior to this episode.” The assessment is “thoracocervical strain. Right elbow strains/sprain. Acute carpal tunnel syndrome.” (Ex. 5-1.) Dr. Kenny assessed carpal tunnel syndrome, among other things, on June 3, 2003, and ordered diagnostic tests by Dr. Koller. The chart note provides, “EMG both wrist _ Koller- numbness in hands and elbow pain.” (Ex. 8-3.) The EMG was performed on June 13, 2003. On August 7, 2003, employer accepted upper back strain. On May 24, 2004, employer denied carpal tunnel syndrome on the basis that it was not compensably related to the May 2, 2003 injury.

The record shows that the EMG was ordered to determine whether claimant might have carpal tunnel syndrome, based on claimant’s reported symptoms following the May 2, 2003 work injury. Carpal tunnel syndrome was eventually denied. However, substantial evidence in the record supports the conclusion that at the time the EMG was ordered and performed, the medical providers were trying to determine the cause and extent of claimant’s May 2, 2003 injury. The

⁴ Although not raised by employer, OAR 436-010-0008(4) provides, “When there is a denial of the causal relationship between the medical service and the accepted condition or the underlying condition, the issue must first be decided by the board.” To the extent this rule can be interpreted to divest the director of jurisdiction over *diagnostic* service disputes, I find that it is not valid.

tests are therefore compensable, even though the specific condition is not compensable.

IT IS HEREBY ORDERED the April 22, 2005 Proposed and Final Order is affirmed.