

In the ORS 656.245 Medical Service Dispute of

MANUEL O. RIVERA, Claimant

Contested Case No: H04-165

PROPOSED AND FINAL ORDER

APRIL 21, 2005

MANUEL O. RIVERA, Petitioner

TREE SOURCE INDUSTRIES, INC., Respondent

Before Lawrence S. Smith, Administrative Law Judge, Administrative Hearings

HISTORY OF THE CASE

Treesource Industries, Inc., (Employer) appealed an October 4, 2004 Administrative Order issued by the Medical Review Unit (MRU) of the Workers' Compensation Division (WCD), Department of Consumer and Business Services. In that Order (MS 04-847), MRU concluded that Employer was liable for epidural steroid injection and related medical services provided by Dr. Karasek to Manuel Rivera (Claimant). Employer's appeal was referred to the Office of Administrative Hearings (OAH) on November 5, 2004.

Claimant appealed a December 2, 2004 Administrative Order issued by the MRU. In that Order (MS 04-1048), MRU concluded that Employer was not liable for another magnetic resonance imaging (MRI) study for Claimant. Claimant's appeal was referred to OAH on January 21, 2005.

Both appeals were consolidated for hearing. On March 23, 2005, Administrative Law Judge (ALJ) Lawrence S. Smith of OAH conducted a telephone hearing. Attorney Gordon Clark represented Employer. Attorney Brian Pocock represented Claimant, who did not appear. Dr. Karasek did not participate because the ALJ ruled that no new medical evidence would be allowed. The record was closed that day.

ISSUES

(1) Whether substantial evidence supports MRU's conclusion in its October 4, 2004 Administrative Order that Employer was liable for epidural steroid injection and related medical services provided by Dr. Karasek to Claimant. (Case No. MS 04-847 and Contested Case No. H04-165.)

(2) Whether substantial evidence supports MRU's Conclusion in its December 2, 2004 Administrative Order that that Employer was not liable for another magnetic resonance imaging (MRI) study for Claimant. (Case No. MS 04-1048 and Contested Case No. H04-202.)

EVIDENTIARY RULING

The record for Case No. MS 04-847 and Contested Case No. H04-165 consists of Exhibits 1 through 89, which were admitted without objection.

The record for Case No. MS 04-1048 and Contested Case No. H04-202 consists of Exhibits 1 through 92, which were admitted without objection.

At hearing, Claimant offered Exhibit 93, a medical report from Claimant's treating doctor, Dr. Karasek, which he submitted after issuance of the Administrative Orders. No issues or medical evidence not considered by WCD may be considered. OAR 436-001-0225(1).¹ Exhibit 93 therefore was not received.

FINDINGS OF FACT

For the respective Administrative Orders issued on October 4, 2004, and December 2, 2004, the Findings of Fact in each of them are adopted and incorporated in this Final and Proposed Order, with the following supplementation:

(1) The Administrative Order issued October 4, 2004, contains the following conclusions:

The medications [for the epidural transforaminal steroid injection] are prescription medications. The Omnipaque is injectable media that is opaque on radiographic (x-ray) studies and available only to licensed medical professionals. The medications for an epidural injection require administration by a licensed medical provider and the results need monitoring by a medical provider. The director finds [Claimant] is entitled to prescription medications and services required to administer and monitor the medications for his compensable conditions. [Ex. 84 at 5.]

* * * * *

While [Employer] contends the epidural steroid injection was palliative care that had been denied and upheld or for relief of chronic pain, the director finds the epidural steroid injection to be prescription medication and the services necessary to administer and monitor, or even in the instant circumstance, diagnostic services. [Ex. 84 at 5.]

* * * * *

This [Dr. Karasek's treatment] does not match the definition of palliative care. These are diagnostic services with a goal of alleviation or elimination of the medical condition causing the symptoms. The director is persuaded that the services provided by Dr. Karasek more appropriately fit under the entitlement to diagnostic services than palliative care. As such, the director finds the services in dispute reimbursable. [Ex. 84 at 6.]

(2) During his new patient consultation with Claimant on October 7, 2002, Dr. Karasek

¹ OAR 436-001-0225(1) states:

Scope of Review/Limitations on the Record

(1) Review of medical service (ORS 656.245 and 656.247(3)(a)) and treatment (ORS 656.327 and 656.260) disputes is for substantial evidence or error of law. New medical evidence or issues may not be considered at the contested-case hearing.

reported:

Plan: Epidural steroid injection, S1, left. This could be viewed as palliative or curative; it all depends on the longitudinal results of this intervention. His treating physician, Dr. Sam Russo, has requested this intervention.

(Ex. 48 at 3.)

(3) On October 10, 2002, Dr. Karasek filed a Prior-Authorization Request with Employer for the lumbar spinal injection procedure. (Ex. 49.)

(4) In response to the independent medical evaluation set up by Employer, Dr. Karasek reported on January 8, 2003:

I must respectfully disagree with Dr. Marble's suggestion that further interventional management is fruitless. This patient has never had epidural steroid injections, which may offer him some reduction in his chronic neuropathic pain syndrome.

I do not disagree with most of Dr. Marble's comments and am not arguing against a psychological assessment. I just believe that spinal injection may offer this patient some pain relief.

(Ex. 51.)

(5) On April 18, 2003, Dr. Karasek reported in part:

I do believe that his [Claimant's] increasingly painful condition suggests the need for treatment in the form of transforminal epidural steroid injections. I believe that Dr. Russo and I agree in this regard. This treatment is potentially effective in reducing symptoms and allowing him to return to more strenuous work activities.

Therefore, I believe his claim should be opened on the basis of potentially effective treatment being available that has not been tried. * * *

(Ex. 54.)

(6) Dr. Karasek wrote the following in Claimant's chart (Ex. 56):

On June 6, 2003: "His [Claimant's] claim should be reopened for treatment with potential for improving the patient's pain and disability. He should have had epidural steroid injections before this time and certainly should have them now."

On August 20, 2003: "Long discussion with patient today. Will proceed with an S1 selective because of the midline bulge at L5-S1."

On January 7, 2004: "Lumbar MRI and plan epidural steroid injection. Hopefully his Workmen's Compensation claim will be settled soon and we can help this patient."

(7) On January 15, 2004, MRU issued an Administrative Order, denying Claimant's request for approval of epidural steroid injections as palliative care, but suggesting that the request may be approved for diagnostic purposes or for prescription medications necessary for the treatment or diagnosis of the compensable injury. (Ex. 63.)

(8) On July 8, 2004, Dr. Karasek stated two other reasons for the epidural steroid injections: 1) Administration of medications for the patient's care, as stated in the Administrative Order of January 15, 2004; 2) Diagnosis for the source of Claimant's lower back pain. (Ex. 81.)

CONCLUSIONS OF LAW

(1) Case No. MS 04-847 and Contested Case No. H04-165. Substantial evidence supports MRU's conclusion that Employer was liable for epidural steroid injection and related medical services provided by Dr. Karasek to Claimant.

(2) Case No. MS 04-1048 and Contested Case No. H04-202. Substantial evidence supports MRU's conclusion that Employer is not liable to pay for another magnetic resonance imaging (MRI) study for Claimant.

OPINION

(1) Case No. MS 04-847 and Contested Case No. H04-165.

ORS 656.245(1)(a) and (b)² provide that an insurer is required to provide medical services for any condition caused in material part by a compensable injury. WCD has jurisdiction over medical disputes arising under ORS 656.245(1) when compensability is not at issue. OAR 436-010-0008.³ Employer has the burden of showing that the Administrative Order

² ORS 656.245(1) states in relevant part:

(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.

(b) Compensable medical services shall include medical, surgical, hospital, nursing, ambulances and other related services, and drugs, medicine, crutches and prosthetic appliances, braces and supports and where necessary, physical restorative services. A pharmacist or dispensing physician shall dispense generic drugs to the worker in accordance with ORS 689.515. The duty to provide such medical services continues for the life of the worker.

³ OAR 436-010-0008 states in relevant part:

Administrative Review and Contested Cases
(1) Administrative review before the director:

is not supported by substantial evidence or that it reflects an error of law. OAR 436-001-0225(1);⁴ ORS 183.450(2) (“The burden of presenting evidence to support a fact or position in a contested case rests on the proponent of the fact or position.”)

“Substantial evidence exists to support a finding of fact when the record viewed as a whole, would permit a reasonable person to make that finding.” ORS 183.482(8)(c). A finding is supported by substantial evidence if it is reasonable in light of countervailing as well as supporting evidence. *Garcia v. Boise Cascade Corp.*, 309 Or 292 (1990). To determine whether substantial evidence exists, an administrative law judge is 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 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 administrative law judge] 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 (1988).

The question is not what medical opinions are more persuasive, but only whether the record contains substantial evidence to support MRU’s order. See *John J. Rice*, 4 WCSR 173,

(a) Except as otherwise provided in ORS 656.704, the director has exclusive jurisdiction to resolve all matters concerning medical services arising under ORS 656.245, 656.247, 656.260, and 656.327.

* * *

(3) Except for disputes regarding interim medical benefits, when there is a formal denial of the compensability of the underlying claim, the parties must first apply to the Hearings Division of the Workers' Compensation Board to resolve the compensability issues. After the compensability of the underlying claim is finally decided, any party may request director's review of appropriate medical issues within 30 days after the date the decision becomes final by operation of law.

(4) 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 Hearings Division of the Workers' Compensation Board.

⁴ OAR 436-001-0225(1) states:

Scope of Review/Limitations on the Record

(1) Review of medical service (ORS 656.245 and 656.247(3)(a)) and treatment (ORS 656.327 and 656.260) disputes is for substantial evidence or error of law. New medical evidence or issues may not be considered at the contested-case hearing.

176 (1999). In reviewing for substantial evidence, an ALJ is not obligated to defer to the opinion of the attending physician. *Dillon v. Whirlpool Corp.*, 172 Or App 484 (2001).

Under ORS 656.245 and ORS 656.327, the insurer is required to provide medical services for a compensable injury unless the treatment is excessive, inappropriate, ineffectual or in violation of the administrative rules. The court generally defers to the opinion of the attending physician unless the record reflects persuasive reasons to do otherwise. *Weiland v. SAIF Corp.*, 64 Or App 810 (1983); *Timothy Krushweitz*, 45 Van Natta 158 (1993). Where the medical dispute involves expert analysis, rather than expert external observation, the court does not give special deference to the attending physician's opinion as opposed to other doctors. *Hammons v. Perini*, 43 Or App 299 (1979).

Employer alleges that there is no substantial evidence to support MRU's conclusion that Employer is liable to pay for Dr. Karasek's epidural steroid injection of February 19, 2004, and related medical services because they are a prescribed medication and a diagnostic procedure.

Claimant's medical conditions accepted by Employer are acute thoracic strain, disabling lumbar sprain, and L4-5 disc herniation. He was found medically stationary as of August 28, 1999. Employer does not allege that the treatment proposed by Dr. Karasek was unrelated to the compensable injuries, but only that the treatment did not satisfy any of the criteria for continuing compensability of medical services in ORS 656.245(1)(c). That section states in relevant part:

Notwithstanding any other provision of this chapter, medical services after the worker's condition is medically stationary are not compensable except for the following:

* * * * *

(B) Prescription medications.

(C) Services necessary to administer prescription medication or monitor the administration of prescription medication.

* * * * *

(H) Services that are necessary to diagnose the worker's condition.

* * * * *

(J) With the approval of the insurer or self-insured employer, palliative care that the worker's attending physician referred to in ORS 656.005 (12)(b)(A) prescribes and that is necessary to enable the worker to continue current employment or a vocational training program. If the insurer or self-insured employer does not approve, the attending physician or the worker may request approval from the Director of the Department of Consumer and Business Services for such treatment. The director may order a medical review by a physician or panel of physicians pursuant to ORS 656.327 (3) to aid in the review of such treatment. The decision of the director is subject to the contested case and review provisions of ORS chapter 183.

(K) With the approval of the director, curative care arising from a generally recognized, nonexperimental advance in medical science since the worker's claim was closed that is highly likely to improve the worker's condition and that is otherwise justified by the circumstances of the claim. The decision of

the director is subject to the contested case and review provisions of ORS chapter 183.

(L) Curative care provided to a worker to stabilize a temporary and acute waxing and waning of symptoms of the worker's condition.

Claimant first requested payment for an epidural steroid injection and related medical services by Dr. Karasek as palliative care. This request was denied in an Administrative Order issued January 15, 2004, but this Order suggested that the request may be approved for diagnostic purposes or for prescription medications necessary for the treatment or diagnosis of the compensable injury. (Ex. 63.) Employer argues that this suggestion was in effect *dicta*, which prompted Claimant's request for payment on these other grounds. Employer provided specific references in reports by Dr. Karasek that the purpose of the epidural steroid injection of February 19, 2004, and related medical services was palliative or treatment, rather than prescription-related services or for diagnostic purposes. Indeed, the record contains no evidence that the treatment was for these later reasons until Dr. Karasek submitted a report on July 8, 2004, in which he stated two other reasons for Employer to pay for the epidural steroid injections: 1) As the administration of medications for the patient's care, as stated in the Administrative Order of January 15, 2004; 2) As diagnosis for the source of Claimant's lower back pain. (Ex. 81.) These reasons are considered separately below.

Diagnostic

Employer argues that little or no weight should be given to this report because these reasons were not stated earlier by Dr. Karasek and they seem to be prompted by the *dicta* in the prior Administrative Order. On October 7, 2002, Dr. Karasek reported after first seeing Claimant that the epidural steroid injections "could be viewed as palliative or curative; it all depends on the longitudinal results of this intervention." (Ex. 48 at 3.) He reported on January 8, 2003: "This patient has never had epidural steroid injections, which may offer him some reduction in his chronic neuropathic pain syndrome." (Ex. 51.) He later reported that such injections may be curative, but did not specifically state that the injections were for diagnostic purposes until his report on July 8, 2004.

The Administrative Order relies on Dr. Karasek's opinion of July 8, 2004. It provides substantial evidence unless it is given little or no weight. Dr. Karasek has treated Claimant regularly for over a year and is most familiar with his back pain. A proposed treatment course can have more than one objective. The later reasons given by Dr. Karasek were not rebutted by evidence from Employer. The only expert medical review after Dr. Karasek's report was by Dr. Purtzer, who found no medical need for the MRI on January 29, 2004, but did not address the reasons for the injections. For these reasons, there is substantial evidence in the record for the conclusion that Dr. Karasek's proposed treatment was for diagnostic purposes to determine whether discogenic pain was the source of Claimant's symptoms.

ORS 656.245(1)(c)(H) states that services necessary to diagnose Claimant's condition are compensable. Dr. Karasek's report, which is unrebutted by other medical evidence, provides substantial evidence that the epidural steroid injection of February 19, 2004, and related medical services Claimant received from Dr. Karasek, are also for diagnostic purposes, so Employer is

liable to pay for them.

Prescription

Dr. Karasek also stated that the epidural steroid injection of February 19, 2004, and related medical services were for a prescription medication, a steroid, and for administration of the medication, which are payable services pursuant to ORS 656.245(1)(c)(B) and (C). Employer argued that the medication was not prescribed with a prescription form, but the law gives no definition for “prescription medication” and the common understanding of those words does include steroids for injection. Nothing in the law requires that a medication be self-administered. There is substantial evidence in the record that the epidural steroid injection of February 19, 2004, and related medical services Claimant received from Dr. Karasek are for a prescription medication and the administration of the medication, so Employer is liable to pay for them.

(2) Case No. MS 04-1048 and Contested Case No. H04-202.

Dr. Karasek opined that the MRI of Claimant’s low back on January 29, 2004, was medically necessary for diagnosis of his continuing symptoms, but unlike his recommendation regarding the epidural steroid injection of February 19, 2004, and related medical services, his opinion regarding the MRI is countered by the opinion of WCD’s medical arbiter, Dr. Purtzer. (Ex. 86.) Dr. Purtzer’s opinion is an independent evaluation and provides substantial evidence for MRU’s conclusion that the MRI was not necessary for diagnosis of Claimant’s continuing symptoms. Therefore, Employer is not liable to pay for it.

ATTORNEY FEES

Claimant prevailed in Case No. MS 04-847 and Contested Case No. H04-165 in defending MRU’s decision and is entitled to attorney fees. ORS 656.385(1). His attorney submitted a statement of his fees, claiming two and one-half hours per each case, but giving no hourly rate. His hourly rate is set at \$175 per hour. Claimant prevailed in only one case and is entitled to attorney fees of \$437.50 for that case (2.5 hours x \$175 per hour).

ORDER

MRU’s October 4, 2004 and December 2, 2004 Administrative Orders are affirmed. Claimant is entitled to attorney fees of \$437.50 in Case No. MS 04-847 and Contested Case No. H04-165.