

In the Medical Services Dispute of

Hazel M. Hand, Claimant

Contested Case No: 05-174H

FINAL ORDER

December 22, 2006

HAZEL M. HAND, Petitioner

SAIF CORPORATION, Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

On June 5, 2006, Administrative Law Judge (ALJ) Kathryn A. Poland, of the Hearings Division of the Workers' Compensation Board, issued a Proposed and Final Order (Order) in this matter. Respondent (insurer) through its attorney, Dennis Ulsted, submitted exceptions to the Order on June 8, 2006. Petitioner (claimant) filed a response to insurer's exceptions on June 15, 2006. Respondent insurer filed a reply on June 30, 2006.¹ The issues are jurisdiction, and if I have jurisdiction whether the diagnostic services are reimbursable. Under the facts of this case, I find I do not have jurisdiction which ends the inquiry.

I adopt the ALJ's Findings of Fact as supplemented below:

(1) An "Explanation of Benefits" form disallowed payment for the MRI because the "service appears unrelated to a compensable condition."

Ex. 8.

(2) On August 29, 2005, insurer filed a "Specification of Disputed Medical Issues" that indicated that the insurer disapproved the medical services because the service was not "causally related to the accepted condition." Exs. 8, 10 & 11.

The underlying issue is whether insurer is liable for a lumbar MRI provided by Michael Pylman, M.D. on November 29, 2004. The Administrative Order issued on October 24, 2005 by the Medical Review Unit (MRU) held: 1) diagnostic disputes are solely within the director's jurisdiction, and 2) SAIF was not liable for the cost of the MRI because its purpose was not to determine the cause and extent of the compensable condition nor was it to determine the relationship, if any, to the current condition. The ALJ vacated the Administrative Order because she determined that the director lacked jurisdiction. She based her decision on her conclusion that the medical services dispute required a determination of the compensability of the medical condition for which the medical service is proposed or a determination of whether a sufficient causal relationship exists between the medical services and an accepted claim.

Insurer's argument is as follows. Claimant raised the issue before MRU as a diagnostic services issue, and that MRU correctly determined that the lumbar MRI was not a "payable

¹ OAR 436-001-0246(2)(c) provides that a reply must be filed within 10 days of the date the response was filed. Insurer's reply was filed 15 days after claimant's response was filed. The reply was therefore not timely and has not been considered.

diagnostic service” for the accepted claim. Insurer further argued that the ALJ erred because she added the issue of compensability. Claimant states that insurer’s exceptions are “specious” because insurer raised the issue of compensability in completing the “Specification of Disputed Medical Issues” by checking “Yes” to the question of whether the reason for disapproving the medical services was because the “service is not causally related to the accepted condition.” Ex. 11.

There is a long line of cases addressing the issue of diagnostic services. It is settled law that diagnostic services for the purpose of determining a causal relationship to an accepted claim are compensable. *Roger A. Longbotham*, 1 WCSR 398 (1996). *See also, Brooks v. D & R Timber*, 55 Or App 688 (1982). For many years, the director generally had jurisdiction over almost all disputes regarding medical services, including diagnostic, pursuant to ORS 656.245(6), which stated, in relevant part:

“If a claim for medical services is disapproved for any reason other than the formal denial of the compensability of the underlying claim and this disapproval is disputed, the injured worker, the insurer or self-insured employer shall request administrative review by the director pursuant to this section, ORS 656.260, or 656.327.”

Therefore, the default position was that a medical service dispute was under the director’s jurisdiction. The exception to that jurisdiction was when there was a formal denial of the compensability of the underlying claim. Such a denial would remove the medical service issue from the director’s jurisdiction. However, in 1999 the legislature narrowed, slightly, the director’s jurisdiction by amending subsection (6) to state:

“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 656.260 or 656.327.”

That provision has not been changed subsequently, except it was renumbered as subsection (7). During the same session, the legislature amended ORS 656.704(3). Prior to the amendment it stated:

“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, such matters do not include any disputes arising under ORS 656.245, 656.248, 656.260, 656.327, any other provisions directly relating to the provision of medical services to workers or any disputes arising under ORS 656.340 except as those provisions may otherwise provide.”

Thus, it clearly provided for the director to have jurisdiction over all disputes arising from ORS 656.245 (medical services), ORS 656.248 (medical fee schedules), ORS 656.260 (managed care organizations), and ORS 656.327 (medical treatment). The only exception to that jurisdiction was pursuant to ORS 656.245, when a denial issued regarding the compensability of the underlying claim. In 1999, when the legislature amended ORS 656.704(3), that subsection was divided into two parts. In subsection (3)(a), a phrase was added in the second paragraph so that that sentence began: “However, subject to paragraph (b) of this subsection, such matters do not include ***.” Therefore, the director continued to have jurisdiction over medical disputes however, subsection (b) becomes the controlling provision. Subsection (3)(b) expressly delineates the respective jurisdiction of the director and the board, and states:

“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.

”(B) Any dispute that requires a determination of whether medical services are excessive, inappropriate, ineffectual or in violation of the rules regarding the performance of medical services, or a determination of whether medical services for an accepted condition qualify as compensable medical services among those listed in ORS 656.245(1)(c), is not 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.”

Under this provision, the board has jurisdiction if the issue is whether a medical condition is compensable or whether there is sufficient causal relationship to the accepted claim. The director has held that she has jurisdiction when the issue is whether the compensable injury made those tests necessary or that the tests were produced to determine the extent of the injury.

In the administrative order, MRU concludes jurisdiction lies with the director because it is a diagnostic service dispute and it therefore falls under the ORS 656.704(3)(a) and is “not a matter concerning a claim.” In *Jerome S. Hawkins*, 11 CCHR 162 (2006), the ALJ found that the director had jurisdiction over a medical services dispute despite the fact that the insurer raised the issue of the causal relationship of the proposed surgery and the compensable condition. The ALJ relied on *Roseburg Forest Products v. Langley*, 156 Or App 454 (1998), and its analysis of ORS 656.245 and 656.704. *Roseburg* stands for two principles of law. The first principle is that diagnostic services are compensable if they are necessary to determine the cause or extent of a compensable injury even if the condition that is discovered is not compensable. The first principle is still good law. The second is that the director has jurisdiction over medical services disputes related to a compensable claim. However, the *Roseburg* case was decided and published in 1998, prior to the amendments to

ORS 656.245(6) and 656.704(3). Therefore, the second principle established by *Roseburg* is no longer good law.

More recently, a distinction has been drawn between types of diagnostic services disputes. *In the Matter of Todd E. Cole*, 56 Van Natta 3165 (2004). MRU determined that because the insurer challenged the causal relationship of the medical services to the compensable conditions, the board and not the director had jurisdiction over that issue. As a result, MRU deferred its decision pending the outcome of the hearing before the board. In the Opinion and Order dated November 25, 2003, ALJ Jill Riechers determined that because AIG had taken the position that the diagnostic medical service was not related to the compensable condition under ORS 656.704(3)(b)(C), the Hearings Division of the board had jurisdiction to determine whether the discography services are compensable medical services. The board affirmed ALJ Riechers' determination regarding jurisdiction. The case was appealed to the Court of Appeals. In *AIG v. Cole*, 205 Or App 170 (2006), the insurer contended it was not liable for the cost of a lumbar discography because it was not causally related to the compensable condition and it was not effective as a diagnostic tool. *Id.* at 174. The court agreed with the ALJ and board that the ALJ had jurisdiction to determine whether the medical services were casually related to the compensable injury pursuant to ORS 656.704(3)(b)(C). *Id.* at 174. The court held that the issue regarding the causal relationship of the diagnostic services fell under ORS 656.704(3)(b)(C), and therefore, the board had jurisdiction.

Here, as in *Cole*, the insurer contended that the medical services were not related to the compensable condition. (Exs. 8 - 11). Additionally, in stating the issue on the "Specification of Disputed Medical Issues" form, the insurer checked "No" to the questions of whether the "service is excessive, inappropriate, ineffectual, or in violation of the medical service rules[.]", and whether the "service is not a compensable medical service under ORS 656.245(1)(c)." These are the two questions that would give the jurisdiction to the director. Instead, the insurer checked "Yes" to the question of whether the "service is not causally related to the accepted condition." Ex. 11.

Because the dispute does not pertain to whether the proposed medical services are excessive, inappropriate, ineffectual, or in violation of the rules regarding the performance of medical services, or whether medical services for an "accepted condition" qualify as compensable medical services, ORS 656.704(3)(b)(B) does not apply. This claim involves the third type of dispute discussed by the court in *AIG v. Cole*. This dispute requires a determination of whether a sufficient causal relationship exists between medical services and an accepted claim. Therefore, under ORS 656.704(3)(b)(C), I do not have jurisdiction to resolve this dispute.² The Administrative Order, therefore, is reversed and the Proposed and Final Order issued by the ALJ is affirmed.

² In *Teresa L. Hicks*, 10 CCHR 462 (2005), the director reasoned that a determination of whether diagnostic services are compensable requires a determination of whether the compensable injury made the services necessary, but does not require a determination of the causal relationship between the services and an accepted claim. To the extent that reasoning is inconsistent with ORS 656.704(3)(b)(C), it is disavowed.

ATTORNEY FEES

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

ORDER

IT IS HEREBY ORDERED that the Proposed and Final Order is affirmed as supplemented above.