

In the ORS 656.245 Medical Services Dispute of

Deborah J. Swingle, Claimant

Contested Case No: 06-025H

FINAL ORDER

December 20, 2006

DEBORAH J. SWINGLE, Petitioner

JELD-WEN, Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

Petitioner claimant, through her attorney Jodie Anne Phillips Polich, timely filed exceptions to Workers' Compensation Board Hearings Division Administrative Law Judge (ALJ) Kate Donnelly's October 12, 2006 Proposed and Final Order on Reconsideration. Respondent employer, through its attorney Lance M. Johnson, responded. This matter comes before the director for a final order. The issues are whether the director has jurisdiction to resolve this dispute and, if the director has jurisdiction, liability for a lumbar MRI. I adopt and affirm with the following supplementation.

I adopt the ALJ's findings of fact and summarize and supplement them as follows. On October 3, 2003, employer accepted lumbar strain combined with non-compensable lumbar degenerative arthritis. On that same date, employer issued a combined condition denial. On November 20, 2003, claimant underwent an MRI scan of the lumbar spine. On November 26, 2003, the MRI provider billed employer. On May 7, 2004, the parties entered into a disputed claim settlement (DCS) regarding the denied condition. The DCS did not list the bill from the MRI provider.

The underlying issue between the parties is liability for the MRI. The Medical Review Unit (MRU) issued two Administrative Orders of Dismissal¹ on January 5, 2006 concluding that the director lacks jurisdiction because under the terms of the DCS, the MRI was for a denied condition. ALJ Donnelly affirmed, issuing a Proposed and Final Order on July 24, 2006. The ALJ concluded that OAR 436-009-0030(9)² does not apply to this case because it was adopted after the date the MRI was performed. The ALJ further reasoned that the MRI is not payable under ORS 656.247(3)(c)³ because it was performed after the date of the denial. Lastly, the ALJ

¹ MRU issued one order for each claim number. The orders are otherwise identical.

² OAR 436-009-0010(9) provides:

"The insurer must pay a medical provider for any bill related to the claimed condition received by the insurer on or before the date the terms of a disputed claim settlement (DCS) were agreed on, but was either not listed in the approved DCS or was not paid to the medical provider as set forth in the approved DCS. Payment must be made by the insurer as prescribed by ORS 656.313(4)(d) and OAR 438-009-0010(2)(g) as if the bill had been listed in the approved settlement or as set forth in the approved DCS, except if the DCS payments have already been made, the payment must not be deducted from the settlement proceeds. Payment must be made within 45 days of the insurer's knowledge of the outstanding bill."

³ ORS 656.247(3)(c) provides:

"Except as provided in subsection (2) of this section [no payment due if claim denied within 14 days], when a claim is settled pursuant to ORS 656.289 (4), all medical services payable under subsection (1) of this section that are provided on or before the date of denial shall be paid in

declined to impose sanctions against claimant's attorney under ORS 656.390. On claimant's motion for reconsideration, ALJ Donnelly reaffirmed her opinion in the October 12, 2006 Proposed and Final Order on Reconsideration.

Claimant's argument in her exceptions is as follows: "Claimant continues to assert for the reasons argued below that [the Workers' Compensation Division] has jurisdiction to resolve this dispute and that OAR 436-009-0030(9) should be applied to resolve this matter."

Employer responds that claimant's exceptions should be dismissed because claimant has not perfected director review under OAR 436-001-0246(2)(a)⁴ by not providing any argument or authority to support modification of the ALJ's order. Although employer does not interpret claimant's request for director review as a written exception, OAR 436-001-0246(2)(a) does not require that exceptions take any particular form or have any particular content. Claimant filed exceptions within 30 days of the mailing date of the proposed order, and that is all the rule requires. I therefore decline to dismiss claimant's exceptions.

Claimant refers to her arguments made below. In her request for reconsideration of ALJ Donnelly's July 24, 2006 proposed order, claimant argued that if the division had the authority to adopt OAR 436-009-0030(9), it also has the authority to resolve disputes arising under that rule. However, the director's rulemaking authority⁵ is separate and distinct from the director's authority to resolve certain types of disputes.⁶

Claimant also argued that this is a medical services dispute, over which the director has authority. I disagree. This is not a dispute over compensable medical services under ORS 656.245, nor a dispute over fees or bills for compensable medical services under ORS 656.248.⁷ Rather, this is a dispute arising out of a DCS, over which the board has authority.

I agree with the conclusion reached by MRU and ALJ Donnelly that the director lacks authority to order employer to pay for medical services for a claim that is not compensable. Authority over this dispute lies with the board. Therefore, I need not reach claimant's remaining arguments.

IT IS HEREBY ORDERED the October 12, 2006 Proposed and Final Order on Reconsideration is affirmed.

accordance with subsection (4) of this section. The insurer or self-insured employer shall notify each affected service provider of the results of the settlement."

⁴ OAR 436-001-0246 provides, in part:

"(2) The parties or the division may initiate director review of a proposed and final order by filing exceptions as follows:

"(a) Written exceptions must be filed with the administrator within 30 days of the mailing date of the proposed and final order."

⁵ See ORS 656.726(4).

⁶ See ORS 656.704.

⁷ The director also has authority over medical disputes arising under ORS 656.247, 656.260, and 656.327. See ORS 656.704(3)(a). Claimant does not argue that this dispute arises under any of those provisions.