

In the Medical Treatment of  
**William L. Hayes, Claimant**  
Contested Case No: 07-014H

**ORDER SETTING ASIDE DISMISSAL AND REMANDING TO MRU**

May 16, 2007

WILLIAM L. HAYES, Petitioner  
INSURANCE CO. OF THE STATE OF PENN., Respondent  
Before Gilah Tenenbaum, Administrative Law Judge

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This matter was set for hearing on April 17, 2007. In lieu of hearing, the parties agreed to submit the matter for a decision based on the written record. Following the arguments of counsel, the record was closed on April 16, 2007. Claimant was represented by attorney Gary Borden. Employer and AIG Claim Services were represented by attorney Dianne Sawyer.

Exhibits 1-16, which were before the Director, are admitted. Proposed exhibits 17 and 18 were not in the record before the Director and are not admitted. Likewise, I have not considered the attachments to claimant's April 12, 2007 argument. OAR 436-001-0225(2). Although not admitted as evidence, these non-evidentiary documents are part of the record pursuant to OAR 436-001-00240(4).

**ISSUES**

The Director dismissed claimant's request for review of a treatment dispute involving proposed surgery at L4-5. Claimant appeals that dismissal. Claimant seeks an attorney fee pursuant to ORS 656.386(1).

**FINDINGS OF FACT**

Claimant has an accepted claim for a lumbosacral strain and L4-5 disc herniation. His attending physician, Dr. Kellogg, requested authorization for a right L4-5 laminotomy and foraminotomy. (exs. 2, 6-1) Insurer took the position that the requested service was for a new or omitted condition for which no claim had been made and that the service was not causally related to the accepted condition. (ex. 7) Insurer also took the position that the treatment was directed to L5-6 and that there might be a question of causation. (exs. 9, 10)

**ULTIMATE FINDINGS OF FACT**

The sole medical evidence is that Dr. Kellogg was requesting approval for treatment to be directed to L4-5.

There is no evidence that Dr. Kellogg was requesting approval for treatment to be directed to L5-6.

## OPINION AND CONCLUSIONS OF LAW

The scope of my review is set forth in OAR 436-001-0225 (2):

In medical service and medical treatment disputes under ORS 656.245, 656.247(3)(a), and 656.327, ... the administrative law judge may modify the director's order only if it is not supported by substantial evidence in the record or if it reflects an error of law. New medical evidence or issues may not be admitted or considered.

I conclude that the Director's order must be reversed because it is not supported by substantial evidence in the record and because it reflects an error of law.

Notwithstanding defense counsel's arguments, there is no medical evidence that Dr. Kellogg's treatment was directed to any conditions at L5-6. Even if I were to consider the contents of counsel's argument as substantive evidence, myelogram findings are not equal to clinical findings. Likewise, a radiologist's comments as to changes in MRI findings are not medical evidence of clinical improvement. (ex. 14-1) *See Aetna Casualty Co. v. Kupetz*, 106 Or App 670, 675 *rev den* 312 Or 16 (1991). The only medical opinion on the relationship between the proposed surgery and the accepted condition is Dr. Kellogg's August 30, 2006 letter, which clearly sets forth his explanation of how the proposed treatment is related to the accepted condition.

The Order is not supported by "substantial" evidence in the record; even if the imaging studies insurer refers to are considered, they are unexplained and do not constitute substantial evidence in support of the order of dismissal.

The Order also reflects an error of law because it was based on a premise that claimant was seeking treatment at L5-6. The MRU suggested that claimant request acceptance of a new or omitted medical condition at L5-6. However, it is not claimant's position that the treatment is directed to L5-6; he was not required to take that step. Claimant's request for reconsideration of the Director's Order makes it clear that the MRU review was misdirected. (ex. 13)

For the above reasons, I conclude that The Director's order is not supported by substantial evidence in the record and it reflects an error of law.

Claimant's position is that the case involves a dispute as to the causal relationship between the proposed treatment and the accepted condition. The fact that the treatment was to be directed to the same spinal level as the accepted condition does not itself establish a causal relationship. Insurer refuted such a relationship. No denial was issued.

The proper action for the MRU is to issue a Defer and Transfer Order so that the Hearings Division can review the issue of the causal relationship between the proposed treatment and the accepted conditions.

Claimant seeks an assessed attorney fee under ORS 656.386(1). However, no such fee is allowable. There has been no denial by insurer. Claimant did not request a hearing from the Board on the causal relationship between the treatment and the accepted condition. Further, there is no evidence that claimant's counsel was instrumental in obtaining rescission of any denial. And finally, the instant Order is not a final, appealable Order.

### **ORDER**

The Director's December 26, 2006 Dismissal Order is set aside, and the case is remanded to the MRU for further proceedings consistent with this Order.