

In the Medical Service Dispute of
Patrick D. McKinney, Claimant

Contested Case No: 06-035H

FINAL ORDER

February 1, 2007

HARTFORD UNDERWRITER'S INSURANCE COMPANY, Petitioner
PATRICK D. MCKINNEY, Respondent

Before Cory Streisinger, Director, Department of Consumer and Business Services

On July 28, 2006, Administrative Law Judge (ALJ) Nicholas M. Sencer, of the Hearings Division of the Workers' Compensation Board (WCB), issued an Opinion and Order in this matter. On August 3, 2006, Petitioner (claimant) filed a Request for Review with WCB. On August 7, 2006, ALJ Sencer filed an Order of Withdrawal of the Opinion and Order. The same day, ALJ Sencer issued a Proposed and Final Order.¹ On August 10, 2006, the Workers' Compensation Division (WCD) sent a letter to the parties notifying them that the Request for Review had been forwarded from WCB and was considered a filing of exceptions to the Proposed and Final Order. Respondent Hartford Underwriter's Insurance Company (insurer), through its attorney John E. Snarskis, filed a response on August 14, 2006. Claimant had 10 days in which to file a reply to insurer's response.² Claimant did not file a reply within that timeframe; however, on September 6, 2006, he sent a letter to WCD requesting that the letter be considered the text to the exceptions filed. I interpret the letter of September 6, 2006 to be a reply that was filed untimely; therefore, it is not considered in the issuance of this Final Order.

This matter comes before the director for a final order. The issue is whether there is substantial evidence supporting the January 20, 2006 Administrative Order issued by the Medical Review Unit (MRU). The scope of my review is for substantial evidence and errors of law. I reverse the Proposed and Final Order because the WCB has jurisdiction over the underlying issue.

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

On the Specification of Disputed Medical Issues form, insurer checked as issues: 1) the service is not causally related to the accepted condition; and 2) "Other" in that the T1-2 is not an accepted condition.

The underlying issue is whether insurer is liable for the cost of the T1-2 discography. MRU found that the discography was not a compensable diagnostic medical service and insurer was not liable for the cost. MRU stated that diagnostic service disputes such as this one fall under the ORS 656.704(3)(a)³ exemption of disputes arising under ORS 656.245 from "matters

¹ The Opinion and Order was withdrawn because it contained the wrong title. The reissued Proposed and Final Order contained the correct title, which was the only change made to the order.

² OAR 436-001-0246(2).

³ ORS 656.704(3)(b) is discussed in further detail below.

concerning a claim,” and are therefore solely within the director’s jurisdiction. The parties did not raise jurisdiction as an issue before ALJ Sencer. The ALJ concluded that MRU’s determination that the discography was not a compensable diagnostic medical service was supported by substantial evidence in the record.

MRU’s order was issued on January 20, 2006. On April 19, 2006, the Court of Appeals issued its opinion in *AIG Claim Services, Inc. v. Cole*, 205 Or App 170 (2006). The employer in *Cole* argued that the diagnostic service at issue was not causally related to the compensable injury. The court affirmed the board’s determination that the issue of causation was within the jurisdiction of the Workers’ Compensation Board, under ORS 656.704(3)(b)(C). On December 22, 2006, the director issued a final order holding that the director does not have jurisdiction over medical service disputes in which the insurer disputes the causal relationship between the service and the compensable condition. *Hazel M. Hand*, 11 CCHR 297 (2006). In that case the director affirmed the ALJ’s order vacating MRU’s order and dismissing the request for administrative review, agreeing with the ALJ that the board had jurisdiction over the dispute.

Here, as in *Cole* and *Hazel M. Hand*, insurer raised the issue that the discography was not causally related to the accepted condition. However, the dispute was brought before MRU prior to the court’s decision in *Cole* and the director’s final order in *Hazel M. Hand*. Accordingly, MRU’s order finding that the director has jurisdiction over the causation issue, and the ALJ’s order affirming MRU, must be reversed to conform to those more recent cases.

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 casual relationship to the accepted claim. As in MRU’s order, the director has previously held that she has jurisdiction when the issue is whether the compensable injury made those tests necessary or the tests were to determine the extent of the injury.

Insurer raised the issue that the proposed T1-2 discography was not related to the compensable condition. That issue is a matter concerning a claim under ORS 656.704(3)(b)(C). Therefore, it is within the jurisdiction of the Workers' Compensation Board.

ORDER

IT IS HEREBY ORDERED that:

The Proposed and Final Order issued August 7, 2006 is reversed. The Administrative Order dated January 20, 2006 is vacated. This matter is dismissed.