

In the Managed Care of
Matthew A. Walters, Claimant

Contested Case No: 09-051H

PROPOSED & FINAL ORDER

July 9, 2009

AIG DOMESTIC CLAIMS, Petitioner
MATTHEW A. WALTERS, Respondent

Before John Shilts, Workers' Compensation Division Administrator

Pursuant to notice, a hearing was held and the record was closed in Portland, Oregon on July 7, 2009 before Administrative Law Judge Brazeau. Claimant appeared with his attorney, Scott McNutt, Jr. Container Care, International and AIG Domestic Claims appeared through Rodger Hepburn, Attorney at Law.

Exhibits 1 through 90, which appear in the Workers' Compensation Division's May 1, 2009 Exhibit List, are hereby admitted into evidence for purpose of this proceeding.

ISSUES

1. The employer requests a hearing from the Division's March 23, 2009 Administrative Order, which found claimant entitled to diagnostic medical services and prescription medications related to his accepted condition;
2. Claimant asserts that the employer should be assessed a penalty and associated attorney fee for its alleged unreasonable failure to process claimant's claim for medical services;
3. Claimant requests an assessed attorney fee of \$4,500 should claimant successfully defend the Division's Administrative Order;

FINDINGS OF FACT

Claimant compensably injured his back and right shoulder in October of 2004 while removing a tire from a chassis. He was diagnosed with strains of the right shoulder and thoracic spine and was prescribed physical therapy. He was released to return to regular work duty in early January 2005, although he remained symptomatic in his neck, mid-back and right arm. Dr. Gerry became claimant's attending physician at that time.

Claimant underwent an MRI scan on February 2, 2005 and was diagnosed with a disc protrusion at T7-8. Dr. Gerry then referred him to Dr. Rosenbaum, who found that claimant was not a candidate for surgical intervention.

The employer accepted claimant's claim for right shoulder and cervical strains as nondisabling on May 18, 2005. It changed the status of the claim to disabling on June 8, 2005.

On August 23, 2005, Dr. Schilperoort examined claimant on behalf of the employer. He opined that claimant's accepted strains had resolved without permanent impairment and that any

ongoing symptoms were due to degenerative changes in the thoracic and lumbar spine. He recommended no additional treatment, except for anti-inflammatory medication for his thoracic and lumbar degenerative changes. Dr. Gerry concurred with Dr. Schilperoort's report and opinion on September 19, 2005.

Dr. Lorber saw claimant on referral from Dr. Gerry on September 19, 2009. He recommended additional medication for claimant's symptoms but could offer no specific treatment modalities for his thoracic spine symptoms. Dr. Lorber took over claimant's care at that time.

In February 2006, claimant's attorney made a claim for an L5-S1 disk injury, which was denied by the employer on February 28, 2006. Four days later, the employer advised claimant that his accepted claims had been declared medially stationary and that he might be entitled to palliative care for those conditions. I closed claimant's claim the same day with no award of permanent disability compensation.

Claimant returned to Dr. Lorber on March 14, 2006, complaining of ongoing symptoms in his mid-back. Dr. Lorber recommended that claimant obtain additional medications from his Kaiser Health provider.

On May 24, 2006, an Order on Reconsideration issued, affirming the employer's Notice of Closure in all respects.

On June 8, 2006, the employer issued a denial of claimant's claim for a T7-8 disc protrusion. Thereafter, the parties entered into a Claim Disposition Agreement, whereby the employer (among other things) accepted claimant's claim for a T7-8 disc protrusion and paid claimant a sum of money in exchange for his release for all rights on the claim except for ongoing compensable medical services. The Board approved the parties' agreement on August 31, 2007.

On May 22, 2008, claimant was seen by Dr. Miller, complaining of mid-back pain. Dr. Miller completed a Form 827 and checked the box advising that claimant had reported an "aggravation" of his original injury. He did not check the box pertaining to "palliative care." Dr. Miller saw claimant again on July 11, 2008 and found that although claimant's ongoing mid-back complaints appeared "real," there were no specific focal areas to treat. Dr. Miller, therefore, recommended that claimant visit a pain management clinic for possible therapies such as epidural injections for pain relief.

Claimant visited Dr. Miller again on November 24, 2008, continuing of significant pain in his mid-back. Claimant reported that his workers' compensation carrier had not responded to various requests by his attorney for a referral to a pain management clinic.

On September 30, 2008, claimant's counsel made a formal request to the insurer to respond to claimant's request for a referral to a pain clinic.

Claimant visited an emergency room on November 2, 2008, complaining of significant mid-back pain. Dr. Jacobson saw him there. She noted no change in underlying neurological findings and recommended that he “establish” a relationship with a physician for the provision of additional palliative care.

On December 12, 2008, Dr. Rosenbaum responded to an inquiry from the employer’s attorney, noting that claimant’s underlying conditions remained essentially unchanged and medically stationary. He opined that a pain management regiment would constitute “palliative” care and that injections and nerve blocks would also be considered palliative.

On December 16, 2008, claimant’s counsel requested that the Medical Review Unit review Dr. Miller’s proposed pain management program request.

On January 5, 2009, Dr. Miller responded to an inquiry from the employer’s counsel, disagreeing with Dr. Rosenbaum’s report and opinion. He advised that steroid injections would be “at least palliative and possibly curative.” Dr. Miller also recommended that a pain management program include education, disability prevention and perhaps a psychological evaluation.

On December 29, 2008, the employer responded to claimant’s request for review by the Medical Review Unit, advising that claimant’s underlying condition had been denied and that the employer had not received a palliative care request or a treatment plan. On January 15, 2009, the employer further responded by arguing that a pain management program is not a medical service under ORS 656.245(1)(b) and that until a request for palliative care and a treatment plan were submitted, the employer had nothing to which to respond.

On March 23, 2009, the Medical Review Unit issued an Administrative Order, ordering the employer to provide “diagnostic services and prescription medications” to which claimant was entitled for is accepted conditions. It also awarded claimant’s attorney a fee of \$360. On March 27, 2009, the employer timely filed a request for hearing from the Department’s order.

CONCLUSIONS OF LAW AND OPINION

1. The Director’s Order

The employer has requested a hearing from the Department’s order, arguing that the order was incorrect as a matter of law. It is the employer’s burden of proof in that regard.

436-010-0008(13)(a) provides that in a hearing regarding the review of a director’s order regarding medical services, the order may be modified only if it is not supported by substantial evidence in the record or if it reflects an error of law. Substantial evidence exists to support a finding in the director’s order when the record, reviewed as a whole, would permit a reasonable person to make that finding.

The issue before the director was whether a pain management program proposed by Dr. Miller was appropriate for the claimant. The employer argued to the director, as it argues now,

that the proposed pain management program constituted a “palliative care” request and that no proper request in that regard had been made as of the time of the director’s order. The director agreed and held that claimant was not entitled to palliative care. The director then held, however, that the pain management program proposed by Dr. Miller constituted “diagnostic” and/or services related to “prescription medications,” all of which are considered compensable medical services by ORS 656.245(1)(c)(B), (D), and (H) after a worker has become medically stationary.

The issue before the Hearings Division, therefore, is whether or not there was substantial evidence to support the director’s conclusion that the care being proposed by Dr. Miller constituted “diagnostic” medical services, “prescriptions” or services necessary to monitor prescribed medications. After carefully reviewing the record before the director, I conclude that there was substantial evidence to support the director’s order. Were I reviewing the order *de novo*, my conclusion might differ, for I believe that there is at least some question as to whether the treatment plan proposed by Dr. Miller qualifies as “diagnostic” and/or “prescription” medical services under ORS 656.245(1)(c). Under the “substantial evidence” review standard, however, I believe there was sufficient evidence to “permit a reasonable person” to make the findings reached by the director.

As the director noted, one purpose of Dr. Miller’s request for a pain management program was to have program personnel evaluate the specific causes of claimant’s ongoing pain. In that regard, a “reasonable person” could find that Dr. Miller’s request for diagnostic services, at least in part. The director also found that Dr. Miller recommended at least the consideration of epidural and nerve block injections in an attempt to address claimant’s intractable pain. It is clear from Dr. Miller’s reports that he was recommending those injections as a possible substitution for the long-term narcotic prescription medications claimant had received. Thus, the recommended injections could be seen by a “reasonable person” as a substitution of one compensable prescription medical service for another.

Under the standard of review required by law, I conclude that the director’s order should be affirmed.

2. Penalties

Claimant also asserts that the employer should be assessed a penalty for its alleged unreasonable failure to process his medical services claim. I find, however, that the employer had a legitimate doubt as to its liability for processing. There was a great deal of evidence in this record that the medical services proposed by Dr. Miller were palliative. As the director found in the administrative order, claimant was not entitled to palliative care because, among other reasons, that no palliative care request for treatment plan had ever been presented to the employer for its consideration. As the director found, the employer’s duty to begin processing a request for palliative care was not triggered under ORS 656.245(1)(c)(J) until the required request and treatment plan were submitted. Because those documents were not submitted here, I find that the employer’s failure to begin processing was reasonable. A penalty, therefore, is not warranted.

Claimant also requests an assessed attorney fee for prevailing against the employer's appeal of the director's order. He suggests a fee of \$4,500. The employer objects. The fee is awardable under ORS 656.385(3), which provides for it when the employer requests a hearing on a contested case and an ALJ finds that the worker's compensation should not be reduced.

After reviewing the factors set forth in OAR 438-015-0010(4) and applying them to this case, I find that a reasonable fee is \$1,500. There is evidence in the record that the cost of claimant's proposed pain management program will be approximately \$1,500. Claimant might not have received the program, however, but for the substantial efforts put forth by his counsel in defending the director's order. The hearing was brief and claimant's counsel was not required to submit additional evidence at the hearing before the undersigned.

ORDER

The director's Administrative Order dated March 23, 2009 is affirmed.

For prevailing against the employer's request for hearing, claimant's attorney is awarded a reasonable attorney fee of \$1,500, to be paid by the employer.

Claimant's request for the assessment of penalties and attorney fees associated with the penalties is denied.