

In the Medical Services of
Kim S. Lee, Claimant
Contested Case No: 09-204H
PROPOSED & FINAL ORDER

April 13, 2010

KIM LEE, Petitioner
SEDGWICK CLAIMS MGMT SERVICES, INC , Respondent
Before Nicholas M. Sencer, Administrative Law Judge

Pursuant to notice, the hearing convened on March 30, 2010 in Portland, Oregon before Administrative Law Judge Nicholas M. Sencer. Claimant was present and represented by her attorney, John Oswald. Neil Jones represented Sedgwick Claims Management Services, the assigned claims agent for the non-complying employer. There was no appearance on behalf of either the employer, Pak West Trans Inc., or the provider of the disputed medical services, Billy Flowers, D.C.

Exhibits 1 through 40, provided by the Workers' Compensation Division, were admitted into the record with the exception of exhibit 39, page 3, which was excluded. Also excluded were proposed exhibits 21A-B, 25A, 27A-B and 29A, which claimant had offered. All excluded exhibits remain in the file as an offer of proof. Claimant requested an opportunity to testify concerning the issue of identifying her attending physician. I denied her request based on the statutory bar to the admission of additional medical evidence. ORS 656.327(2). However, claimant was allowed to testify as an offer of proof and her testimony was recorded in the event my ruling is reversed on appeal. The record closed on March 30, 2010 following recorded closing arguments.

ISSUES

Claimant filed a request for hearing challenging the December 7, 2009 Order of the Workers' Compensation Division in MS 09-1524. The Order provides that Sedgwick is not liable for medical services provided by Billy Flowers, D.C. during the period after September 5, 2008 and through October 2, 2009. The issue for my consideration concerns whether the Order is not supported by substantial evidence in the record or if it reflects an error of law. ORS 656.327(2).

FINDINGS OF FACT

Claimant sustained a compensable injury on July 18, 2008 when she was involved in a motor vehicle accident. On July 29, 2008, claimant came under the care of Billy Flowers, D.C., a chiropractor. Claimant's 18th visit with Dr. Flowers occurred on September 5, 2008.

On August 14, 2008, Dr. Flowers scheduled a comprehensive consultation for claimant with Richard Heitsch, M.D. (Ex 11). Dr. Flowers requested, *inter alia*, "a report containing your recommendation or verification of treatment, diagnosis, prognosis, and length of further treatment." (Ex 11).

In a report dated August 29, 2008, Dr. Heitsch diagnosed claimant's conditions as "cervical and lumbar sprain-strain, left shoulder sprain." (Ex 15). Concerning a treatment plan, Dr. Heitsch wrote, "Continue chiropractic therapy three times weeks [*sic*], start physical and massage therapy three times weekly, will start on Soma and Vicodin. I will follow the patient every two weeks through completion of her treatment." (Ex 15).

Dr. Heitsch signed 19 separate injury treatment plan forms authorizing chiropractic treatment, physical therapy and massage therapy for the period August 20, 2008 through October 26, 2009. (Ex 12). Dr. Heitsch's chart notes reflect that he examined claimant on a regular basis from August 20, 2008 through October 26, 2009. (Ex 13).

On October 13, 2008, Dr. Flowers arranged a referral for claimant to Darrell Brett, M.D. for a comprehensive surgical consultation. (Ex 17). In a report dated October 16, 2008, directed to Dr. Flowers, Dr. Brett explained his examination findings. (Ex 18).

On October 22, 2008, claimant signed an 801-form providing notice of her July 18, 2008 . (Ex 19). On October 27, 2008, Dr. Flowers signed an 827-form indicating a first report of injury or disease. (Ex 20).

On November 11, 2008, claimant underwent a left shoulder MRI at the request of Patrick L. Hanley, M.D. (Ex 21). Copies of the MRI report were provided to Dr. Flowers and to Dale Hirsch, M.D. It does not appear that EPIC Imaging sent a copy of the MRI report to Dr. Heitsch.

On March 26, 2009, Sedgwick issued a Notice of Acceptance of a disabling cervical and lumbar strain. (Ex 26).

On November 5, 2009, claimant's attorney wrote to the Workers' Compensation Division concerning the refusal of Sedgwick to pay for the services of Dr. Flowers. (Ex 30). By letter dated November 19, 2009, the Sedgwick advised the Workers' Compensation Division of its conclusion that Dr. Flowers treated claimant 18 times from July 29, 2008 through September 9, 2008. (Ex 35). The insurer asserted that Dr. Flowers's services after September 9, 2008 are not reimbursable pursuant to the administrative rules.

On December 7, 2009, the Resolution Team/Medical Section of the Workers' Compensation Division issued its Administrative Order in MS 09-1524. (Ex 38). The medical reviewer concluded that Dr. Heitsch did not qualify as claimant's attending physician. The reviewer wrote, "nothing indicates that Dr. Heitsch assumed the role of attending physician or was directing care in that capacity, rather the available record indicates Dr. Flowers was directing Ms. Lee's care as her attending physician." (Ex 38, p 2). On that basis, the medical reviewer concluded that the processing agent was not liable for payment of the medical services that Dr. Flowers provided after September 5, 2008 and through October 2, 2009.

CONCLUSIONS OF LAW AND OPINION

Pursuant to ORS 656.005(12)(b), an "attending physician" means a doctor, physician or physician assistant who is primarily responsible for the treatment of a worker's compensable

injury” Pursuant to ORS 656.005(12)(b)(B), a chiropractor can serve as a worker’s attending physician for a cumulative total of 60 days from the first visit on the initial claim or for a cumulative total of 18 visits, whichever occurs first. Thereafter, chiropractic care is considered an ancillary medical service that must be “prescribed by the attending physician . . . and carried out under a treatment plan prepared prior to the commencement of treatment. . . . The treatment plan shall include objectives, modalities, frequency of treatment, and duration.” OAR 436-010-0230(4)(a).

Claimant argues that the Medical Reviewer erred when she concluded that Dr. Heitsch was not her attending physician. Claimant asserts that as her attending physician, Dr. Heitsch was authorized to prescribe chiropractic care, that he did in fact authorize her treatment with Dr. Flowers and that, accordingly, Sedgwick should be ordered to pay for the services that Dr. Flowers rendered.

The status of attending physician is a question of fact based on the relationship between claimant and the physician. *Joseph P. Christensen*, 57 Van Natta 2687 (2005). In a case where the subject physician treated the worker before and after surgery and referred the worker to consulting physicians, that physician was deemed to be the attending physician. *Debbie I. Jensen*, 48 Van Natta 1235 (1996).

In this case, Dr. Flowers managed claimant’s care in that he treated her throughout the course of her claim, referred her to medical specialists and prepared thorough reports concerning the nature of her injury. I note that Dr. Heitsch also treated claimant throughout the course of her care. However, the only referral that Dr. Heitsch made was to send claimant back to Dr. Flowers for more chiropractic care. It is curious why, if Dr. Heitsch was claimant’s attending physician, he was not in the loop of referring claimant to Dr. Brett and why he was not provided with a copy of the MRI report. Although not in itself determinative, it is also curious why Dr. Flowers signed an 827-form on October 27, 2008, when, accordingly to claimant, Dr. Heitsch became her attending physician on August 20, 2008. Given these facts, it was reasonable for the medical reviewer to conclude that Dr. Flowers continued to serve as claimant’s attending physician throughout the relevant period of time.

Based on the foregoing, I conclude that the December 7, 2009 Order of the Workers’ Compensation Division in MS 09-1524 is supported by substantial evidence in the record and that it does not reflect an error of law. Accordingly, it will be affirmed.

ORDER

IT IS HEREBY ORDERED that the December 7, 2009 Order of the Workers’ Compensation Division in MS 09-1524 is affirmed.