

In the ORS 656.327 Medical Treatment Dispute of

**David W. White, Claimant**

Contested Case No: 09-025H

**PROPOSED & FINAL ORDER**

August 3, 2010

DAVID W. WHITE, Petitioner

LIBERTY NW INSURANCE CORPORATION, Respondent

Before Kate Donnelly, Administrative Law Judge

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**HISTORY OF THE CASE**

Claimant appeals a February 19, 2009 Administrative Order of Dismissal (DTX 09-0200) issued by the Medical Section Resolution Team (RT) of the Workers' Compensation Division (WCD), Department of Consumer and Business Services (DCBS). The RT concluded that the director lacked jurisdiction over the disputed medical service (a spinal cord stimulator trial proposed by claimant's treating physician, Dr. Phillips, on December 24, 2008) because the proposed medical service was for a condition that had not been accepted by Liberty and claimant had not requested formal written acceptance of the condition as a new and/or medical condition pursuant to ORS 656.262(6)(d) or ORS 656.267(1). Additionally, RT determined that it did not have jurisdiction over the issue whether the proposed treatment was causally related to an accepted condition. The RT did not issue a Defer and Transfer Order referring the causal relationship issue to the Workers' Compensation Board, Hearings Division. Instead, claimant requested a hearing appealing the Order of Dismissal directly to the Workers' Compensation Board, Hearings Division.

A hearing was convened in Eugene, Oregon on November 10, 2009, before Administrative Law Judge (ALJ) Kate Donnelly. Claimant was present and was represented by Michael N. Warshafsky. The employer, CPM Development Corp., and its insurer, Liberty Northwest Insurance Corporation (Liberty), were represented by Ronald W. Atwood. Sean Bernhardt was present as the employer representative. Dr. Lynne Bell testified as an expert witness on behalf of Liberty. The proceedings were recorded by ALJ Donnelly. The hearing was continued for rebuttal reports from Dr. Phillips and Dr. Kurlychek, and the deposition of Dr. Englander, at claimant's request based on Liberty's submission of Exhibit 78. Claimant later waived the right to cross-examine Dr. Englander. Dr. Phillips was deposed on February 23, 2010 (Ex. 91). The record closed on July 6, 2010, following receipt of final written closing arguments.

**ISSUES**

1. Jurisdiction. Whether the Director has jurisdiction over this medical services dispute?

**EVIDENTIARY RULINGS**

At the time of hearing, Exhibits 1 through 84, 3A, 25A, 26A, 43A, 45A, 52A, 52B, 54A, 55A, 55B, 55C, 58A, 63A, 66A, 66B, 68A, 68B, 74A, and 77A through 77I, were admitted into the record. On December 21, 2009, Liberty submitted Exhibit 85. On December 30, 2009,

Liberty submitted Exhibits 86 and 87. On February 25, 2010, claimant submitted Exhibit 66A, pages 1 through 3 (the MMPI-2 test),<sup>1</sup> Exhibit 88 (a February 12, 2010 report from Dr. Kurlychek) and Exhibit 89 (a February 16, 2010 report from Dr. Phillips). There being no objections, Exhibits 85 through 91, and 66A, pages 15 through 17, are hereby admitted into the record at this time.

### FINDINGS OF FACT

The Findings of Fact in the February 19, 2009 Administrative Order of Dismissal are accepted and incorporated in this Proposed and Final Order, with the following supplementation:

At the time Dr. Phillips requested approval of a spinal cord stimulator trial on December 24, 2008, claimant had not yet requested acceptance of his Complex Regional Pain Syndrome (CRPS) condition as a new and/or omitted medical condition.

Per Dr. Phillips, the major contributing cause of claimant's left upper extremity CRPS was the May 30, 2008 MVA (Ex. 54-1). He indicated that the spinal cord stimulator trial was a reasonable, necessary, and appropriate medical procedure to treat the CRPS (Ex. 54-2). Dr. Phillips opined that the spinal cord stimulator trial was partially diagnostic in order to help him confirm his diagnosis, based on the success of the trial, to help him to determine the best course of medical treatment following the trial, and to determine the cause and extent of injury based on the results (Ex. 54-2). Dr. Phillips asserted that the need for a spinal cord stimulator was caused in major part by the work injury.

On February 4, 2009, claimant, acting through his attorney, requested review by the Medical Review Unit (MRU) regarding Liberty's refusal to approve Dr. Phillips' request for authorization of a spinal cord stimulator trial. Dr. Phillips' February 4, 2009 response was included (Exs. 52B; 54A).

The RT requested a response from Liberty on February 11, 2009 (Ex. 55A). On February 12, 2009, Liberty responded that the diagnosis of left upper extremity CRPS was not an accepted condition and that claimant had not requested that Liberty process CRPS as a new condition (Ex. 55C-1). On the Specification of Disputed Medical Issues form, Liberty checked the "yes" boxes for "the service is not causally related to the accepted condition" and "the service is for a new/omitted condition which: ... the worker has not asked for acceptance" (Ex. 55C-2).

An Administrative Order of Dismissal issued on February 19, 2009 dismissing without prejudice claimant's request for review of Liberty's refusal to approve a spinal cord stimulator trial. The RT concluded that, based on Liberty's representation that CRPS was not an accepted condition and claimant had not yet requested acceptance of CRPS, the Director did not have jurisdiction. The RT also concluded that, if claimant still felt the medical service was related to an accepted condition, the Director did not have jurisdiction and claimant should proceed with a request for hearing regarding causal relationship with the Workers' Compensation Board (WCB). The Dismissal Order stated: "The parties may bring remaining medical service issues

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<sup>1</sup> I have renumbered the MMPI-2 report as Exhibit 66A pages 15 through 17 because there already was an Exhibit 66A pages 1 through 3 in the record.

to the director once the new or omitted condition or causal relationship issue is resolved” (Ex. 56-2).

On February 24, 2009, claimant requested that Liberty accept CRPS, left upper extremity as a new and/or omitted condition (Ex. 58). On that same date, claimant requested a hearing regarding the Administrative Order of Dismissal (Ex. 58A).

On May 14, 2009, Liberty denied compensability of the CRPS, left upper extremity condition (Ex. 69).

On September 29, 2009, Dr. Phillips performed the spinal cord stimulator trial with Medtronic stimulator (Ex. 77H).

On November 3, 2009, claimant underwent permanent implantation of the Medtronic spinal cord stimulator (Ex. 83).

A hearing was convened and continued on November 10, 2009 before the undersigned ALJ.

Per Dr. Phillips, he had already diagnosed CRPS prior to the trial of a spinal cord stimulator. Consequently, the trial was not used to diagnose CRPS but was used to see if claimant would benefit from this treatment in order to treat the chronic pain which resulted from his CRPS (Ex. 89-28). Claimant’s good result confirmed his diagnosis.

An Opinion and Order issued on August 3, 2010 under WCB Case No. 09-03931. The undersigned ALJ found that the CRPS condition was compensable and that the spinal cord stimulator trial was causally related to the May 30, 2008 work injury and compensable CRPS condition.

### **FINDINGS OF ULTIMATE FACT**

The proposed medical service was for a new and/or omitted medical condition (CRPS) that had not been accepted by Liberty at the time of the request for medical review and claimant had not yet requested formal written acceptance of the condition as a new and/or medical condition pursuant to ORS 656.262(6)(d) or ORS 656.267(1).

The RT did not have jurisdiction over the medical services dispute at the time of the Order of Dismissal. Consequently, the director lacked jurisdiction to resolve the medical services dispute.

### **CONCLUSIONS AND REASONING**

Claimant contends that the Order of Dismissal should be rescinded. Specifically, claimant argues that he did not have to request acceptance of a new medical condition in order to obtain the diagnostic procedure proposed by Dr. Phillips. Alternatively, claimant contends that, even if the test was not diagnostic, the therapeutic aspect of the test was to reduce pain and other

symptoms caused by the compensable injury and, thus, the test was compensable. Finally, claimant argues that, if it is determined that the CRPS condition is compensable, then the spinal cord stimulator is compensable as treatment for the CRPS.

Liberty responds that the Order of Dismissal should be affirmed because a spinal cord stimulator is not a diagnostic procedure and CRPS is not compensable under this claim.

ORS 656.704(3)(b)(B) vests the Director of the Workers' Compensation Division (Director) with jurisdiction over any dispute regarding whether medical services are excessive, inappropriate, ineffectual or in violation of the rules regarding 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). 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 within the jurisdiction of the Board. ORS 656.704(3)(b)(C).

ORS 656.245(1) provides that for every compensable injury, the insurer or self-insured employer shall cause to be provided medical services for conditions caused in *material part* by the injury for such period as the nature of the injury or the process of recovery requires. *See Sprague v. United States Bakery*, 199 Or App 435, *on recon* 200 Or App 569 (2005) (carriers are responsible for medical services for conditions caused in material part by the compensable injury; they are also responsible for medical services for consequential and combined conditions so long as the medical services are caused in major part by the compensable injury). The phrase "in material part" means a "fact of consequence." *Mize v. Comcast Corp.-AT&T Broadband*, 208 Or App 563, 569-70 (2006).

ORS 656.267(1) requires the worker to clearly request formal written acceptance of a new and/or omitted medical condition claim from the insurer. ORS 656.262(6)(d) provides, in relevant part, that an injured worker who believes that a condition has been incorrectly omitted from a notice of acceptance, or that the notice is otherwise deficient, first must communicate in writing to the insurer or self-insured employer the worker's objections to the notice pursuant to ORS 656.267.

Here, at the time of the Order of Dismissal, claimant had not yet formally requested written acceptance of the CRPS condition from Liberty. The disputed medical treatment was directed at the CRPS condition. Additionally, Liberty asserted in its response to the Director, that the CRPS was not causally related to the accepted conditions. Moreover, the medical evidence supports a conclusion that the spinal cord stimulator trial was not a diagnostic procedure causally related to the accepted conditions of left wrist sprain, bilateral knee contusions with slight abrasions, and cervical thoracic strain. Instead, the proposed medical procedure was intended to indicate whether permanent implantation of a spinal cord stimulator would be a successful treatment option for the CRPS condition. Thus, the medical services dispute did not involve a diagnostic procedure under ORS 656.245(1).

Under such circumstances, I find that the Director did not have jurisdiction over the medical services dispute at the time of issuance of the February 19, 2009 Order of Dismissal.

Accordingly, the Order of Dismissal is affirmed.

**ORDER**

**IT IS THEREFORE ORDERED** that the WCD's February 19, 2009 Administrative Order of Dismissal (DTX 09-0200) is affirmed.