

In the ORS 656.245 Medical Services Dispute of

Jerone S. Hawkins, Claimant

Contested Case No: 05-184H

PROPOSED & FINAL ORDER

June 6, 2006

LIBERTY NW INSURANCE CORP, Petitioner

JERONE S. HAWKINS, Respondent

Before Gregory J. Naugle, Administrative Law Judge, Workers' Compensation Board

Pursuant to notice, a hearing was scheduled in this matter for March 24, 2006 in Salem, Oregon before Administrative Law Judge Gregory Naugle. Claimant is represented by attorney Brian Pocock. The employer, International Door & Latch, and its insurer, Liberty Northwest Insurance Corporation, are represented by attorney Phillip Nyburg. Prior to hearing, the parties agreed to submit the matter on documentary record.

Exhibits 1 through 29, as identified in the March 1, 2006 exhibit list prepared by the Department of Consumer and Business Services (Department) were admitted into evidence without objection. The record closed on May 15, 2006, following receipt of the insurer's final argument.

ISSUES

Whether substantial evidence supports the December 7, 2005, Abate, Withdraw, and Republish Administrative Order which found that claimant's proposed arthroscopic left wrist surgery is a compensable and reimbursable diagnostic service, or whether MRU made an error of law in its Administrative Order.

FINDINGS OF FACT

On June 9, 2003, claimant sustained a compensable injury that was accepted for nondisabling left wrist tendonitis. (Ex. 3).

On December 5, 2003, claimant was found medically stationary. (Ex. 4).

On March 10, 2004, claimant had a left wrist MRI and that was interpreted by Jon Ekstrom, M.D., whose conclusions included "no evidence of flexor tendon or musculotendinous junction injury." (Ex. 5).

On April 29, 2004, orthopedic surgeon Richard Matteri, M.D., performed an IME on claimant. (Ex. 6). On exam there was mild diffuse swelling of the left wrist compared to the right. Dr. Matteri's impression was "tendinitis of the right [sic] wrist attributable to a June 1, 2003 work injury now medically stationary" and "ongoing wrist pain, resolving." (Ex. 6-9). Dr. Matteri opined that claimant's current symptoms are part of the normal resolution process of his initial wrist injury and that no further treatment is necessary.

On May 10, 2004, Trek Lyons, M.D., indicated that he concurred with Dr. Matteri's IME report. (Ex. 7).

On May 7, 2004, Dr. Kenneth Butters indicated that he concurred with Dr. Matteri's IME report. (Ex. 8).

On November 19, 2004, claimant was evaluated by hand surgeon Kenneth Wilson, M.D., complaining of continued left wrist pain from his June 2003 injury. (Ex 9). On exam, claimant had normal range of motion, normal two-point sensation, negative carpal tunnel syndrome and ulnar neuropathy tests, no evidence of arthritis, and normal wrist instability tests. Abnormal Allen test with no flow through the radial artery on the left side, decreased left grip strength due to pain and no evidence of tendinitis in any of the six dorsal compartments, or the wrists, or digital flexors were found. Dr. Wilson's impression was chronic wrist chronic left wrist pain with undetermined etiology. He recommended a cortisone injection to help determine if there is an intra-articular pathology. Other options were an arthroscopy. Dr. Wilson recommended waiting another six months to see if improvement over time occurs, noting "if he continues to have pain, then I believe an arthroscopy would at least rule out intra-articular pathology that could lead to further problems." (Ex. 9-2).

On May 18, 2005, Dr. Wilson wrote two letters to the insurer. He noted claimant's continued complaints from the June 2003 injury almost two years ago. He opined that "a wrong diagnosis was made and he needs an arthroscopy to determine if there is a tear in the wrist area." He diagnosed a ligament injury within the wrist and requested "authorization to perform an arthroscopy to show this diagnosis." (Ex. 12, 13).

Dr. Wilson, in August 10, 2005 correspondence to the insurer, indicated that he disagreed with an IME by Dr. Button. (Ex. 16). He indicated that by his history and examination, claimant had pain directly in the ulnar side of the wrist, and that he has seen claimant four times since the original injury. He noted that MRIs and x-rays do not show a triangular fibrocartilage complex tear five to ten percent of the time and that the injection's failure to significantly relieve the pain is not uncommon in TFCC tears. He recommended that claimant undergo a wrist arthroscopy to determine if he has interarticular problems there.

On August 10, 2005, the insurer issued a partial denial indicating "we are unable to accept a right wrist ligament injury." (Ex. 18).

Claimant requested administrative review of the refusal to authorize claimant's left wrist arthroscopy. (Ex. 15, 17).

On December 7, 2005, the Department issued an Abate, Withdraw, and Republish Administrative Order finding that claimant's proposed left wrist surgery is a compensable and reimbursable diagnostic service. (Ex. 25).

On December 15, 2005, the insurer submitted a request for hearing disputing findings contained in the order and the conclusion that the diagnostic arthroscopy qualifies as compensable treatment when the compensability of the underlying condition has been formally denied. (Ex. 26).

CONCLUSIONS OF LAW AND OPINION

Pursuant to ORS 656.704, hearings regarding Department orders addressing medical

services disputes are conducted by an Administrative Law Judge of the Workers' Compensation Board. In medical service and treatment disputes an ALJ may modify the Department'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. ORS 656.327(2); OAR 436-001-0225(2).

The insurer argued errors of law were made in allowing a diagnostic procedure to determine the possible existence of an already denied condition and that the Director lacked jurisdiction because the dispute is a matter concerning a claim. The insurer also argued that the Order is not supported by substantial evidence. As follows, the insurer does not meet its burden of proving that an error of law was made or that the Order lacks substantial evidence. ORS 184.450(2).

Errors of Law

As claimant has established a compensable injury, he is entitled to "medical services for conditions caused in material part by the injury." ORS 656.245(1)(a). ORS 656.245(1)(c)(H) also provides that after the worker is medically stationary, services necessary to diagnose the worker's condition are compensable.

In *Counts v. International Paper Co.*, 146 Or App 768, 770 (1997), the Court of Appeals stated "for the diagnostic services at issue to be compensable, claimant had to show that his compensable injury made those tests necessary" concluding that "if diagnostic services are necessary to determine the cause or extent of a compensable injury, the tests are compensable whether or not the condition that is discovered as a result of them is compensable." (*Id.* at 771). Thus, the focus is not on the denied condition, but rather, whether the proposed surgery is necessary to diagnose or determine the extent of the compensable June 2003 injury. Here, Dr. Wilson's May 18, 2005 correspondence indicates that the proposed surgery was "to determine if there is a tear in the wrist area" and to diagnose a ligament injury from the June 2003 injury, which satisfies the requirements of the respective statutory provisions.

The insurer also contended that no causal relationship exists between the accepted condition and proposed surgery and argued that the Director lacked jurisdiction because the dispute is a matter concerning a claim. The Court of Appeals in *Roseburg Forest Prods. v. Langley*, 156 Or App 454, (1998) examined ORS 656.245 and ORS 656.704 in circumstances similar to those present here and concluded that "it was the legislature's intent that disputes over medical services related to compensable claims be decided by the Director, no matter when or how those disputes first arose." (*Id.* at 462). Accordingly, as the current dispute is over medical services related to a compensable claim, jurisdiction is with the Department.

Substantial Evidence

The insurer argued that the record does not support the need for the proposed surgery or that the compensable injury materially caused a need for the surgery.

Substantial evidence exists to support a finding of fact when the record, viewed as a whole, would permit a reasonable person to make that finding. ORS 183.482(8)(c). To

determine whether substantial evidence exists, I am required to:

“Look at the whole record with respect to the issue being decided, rather than at one piece of evidence in isolation. If an agency’s finding is reasonable, keeping in mind the evidence against the findings as well as the evidence supporting it, there is substantial evidence.” *Armstrong v. Asten-Hill Co.*, 90 Or App 200, 206 (1988).

Here, MRU addressed the evidence by Dr. Wilson and provided sufficient reasoning to establish that the proposed services are necessary to diagnose and determine the extent of claimant’s compensable injury. There is no persuasive evidence in the record otherwise. Accordingly, MRU had substantial evidence to conclude that the services proposed by Dr. Wilson were compensable.

In sum, I conclude that no error of law was made and that there is substantial evidence in the record to support that the proposed arthroscopy was for diagnostic purposes and to determine the extent of the original compensable injury and not, as insurer contends, for the purpose of establishing the existence of a new condition. Accordingly, the insurer is obligated to pay for the surgery under ORS 656.245(1)(a) and ORS 656.245(1)(c)(H).

As the request for hearing was initiated by the insurer and the compensation awarded was not disallowed or reduced, claimant’s attorney is entitled to an assessed attorney fee. ORS 656.385(3); *see also* OAR 436-001-0265(2). After considering the pertinent statute and rule as they apply to this case, I conclude that a reasonable attorney fee is one thousand dollars (\$1,000.00). The matter was of average complexity, with the quality of the legal representation and value of the interests involved and risk that the attorney's efforts may go uncompensated, supporting the amount awarded.

ORDER

IT IS HEREBY ORDERED:

1. The December 7, 2005, Abate, Withdraw, and Republish Administrative Order is affirmed; and
2. Claimant’s attorney is awarded a reasonable attorney fee of one thousand dollars (\$1,000.00) to be paid by the insurer.