

In the Medical Services Matter of  
**ROBERT J. MOORE, Claimant**  
Contested Case No: H05-097  
**PROPOSED AND FINAL ORDER**  
February 28, 2006

SEDGWICK CLAIMS MGMT SERVICE, INC., Petitioner  
ROBERT J. MOORE, Respondent  
Before Daina Upite, Administrative Law Judge, Administrative Hearings

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### **HISTORY OF THE CASE**

Sedgwick Claims Mgmt. Serv., Inc. (Sedgwick) appeals a June 21, 2005 Administrative Order issued by the Medical Review Unit (MRU) of the Workers' Compensation Division (WCD), Department of Consumer and Business Services. In the Order, MRU concluded that Sedgwick was liable for medical services provided to Robert J. Moore (Claimant) by Timothy Hill, MD. Sedgwick's appeal was referred to the Office of Administrative Hearings (OAH) for hearing on July 19, 2005.

On November 21, 2005, Administrative Law Judge (ALJ) Daina Upite of the OAH conducted a telephone hearing in this matter. Attorney David Levine represented Sedgwick. Attorney Philip Garrow represented Claimant. No one appeared on behalf of MRU/WCD or Dr. Hill. No testimony was offered, and the record was closed that day.

On January 12, 2006, the hearing record was transferred to ALJ Lawrence S. Smith of the OAH for preparation of this Proposed and Final Order. The whole record, including the recording of the hearing, was reviewed.

### **ISSUE**

Whether Sedgwick had received a valid request for approval of a lower extremity EMG for Claimant at the time that Claimant requested MRU review.

### **EVIDENTIARY RULINGS**

WCD's Exhibits 1 through 16 were admitted without objection.

Claimant's Exhibits 7A, 11A, 11B, and 13A were offered and received provisionally at the hearing, pending a ruling in this Order regarding relevance. The Exhibits are medical reports from Claimant's doctors and are relevant in regards to determining whether notice was provided to Insurer and whether the EMG services were provided. They are therefore admitted for those purposes.

## FINDINGS OF FACT

(1) On September 3, 2003, Claimant injured his right foot when he fell from a ladder at work. (Ex. 1.) He received non-surgical and surgical treatment for this injury from Dr. Holmboe, his treating physician, but the pain in his foot persisted. (Ex. 3.)

(2) Sedgwick accepted Claimant's claim for disabling right calcaneus fracture. (Ex. 2.) His condition became medically stationary on November 4, 2004. (Ex. 5.) Claimant's claim was closed on January 20, 2005, with temporary disability ending on October 28, 2004. (Ex. 6.)

(3) Claimant continued to have right foot pain and sought further treatment from Dr. Holmboe, who suspected injury to nerves in the foot. He referred Claimant to a physiatrist, Dr. Timothy Hill, for a consultation. (Ex. 3.)

(4) Dr. Hill examined Claimant on December 14, 2004, and noted the prior treatment and the continuing pain since. He opined that an S1 radiculopathy was unlikely, but needed to be investigated due to continuing right ankle weakness. Dr. Hill made treatment recommendations, including a lower extremity EMG, which would be beneficial in determining whether Claimant had a residual sural neuropathy or a right S1 radiculopathy. Dr. Hill submitted his findings to Dr. Holmboe. (Ex. 4.)

(5) On January 6, 2005, Dr. Holmboe examined Claimant again and noted at one point in his report, "Dr. Hill has evaluated [Claimant] and he is expecting to get EMG and nerve conduction studies to help evaluate nerve complaints involving the lower right extremity." As part of the Plan portion of his report, Dr. Holmboe "also recommended that [Claimant] continue to follow with Dr. Hill for further evaluation of sciatica and possible radicular type injury." (Ex. A3 at 3.)

(6) On March 16, 2005, MRU received a request from Claimant's attorney for review because Sedgwick had not authorized payment for the EMG services. With this request was a copy of Dr. Hill's December 14, 2004 report that recommended EMG services. (Ex. 8.) On April 5, 2005, Sedgwick responded that it was not required to pre-authorize diagnostic studies and that it had not received a request from an attending physician or a bill from a provider, so it was not authorizing payment at that time. (Ex. 11.)

(7) Dr. Hill performed the right leg EMG on Claimant on May 25, 2005, which turned out to be normal. (Ex. 11B.) Sedgwick does not deny the compensability of these EMG services and has paid for them. (Admission of Sedgwick.)

## CONCLUSION OF LAW

Sedgwick did not receive a valid request for approval of a lower extremity EMG for Claimant by the time that Claimant requested MRU review.

## OPINION

Issues regarding medical service and treatments are within WCD's jurisdiction. ORS 656.245(6) and 656.704(3)(a). The review of such decisions is for substantial evidence or error of law. ORS 656.245(6) and OAR 436-001-0225(1). The burden of producing evidence to support a fact or position rests with the proponent. ORS 184.450(2). As petitioner, Sedgwick bears the burden of proving by a preponderance of the evidence that the administrative order reflects an error of law.

"For every compensable injury, the insurer \* \* \* shall cause to be provided medical services for conditions caused in material part by the injury \* \* \* including such medical services as may be required after a determination of permanent disability." ORS 656.245(1)(a). "Services that are necessary to diagnose the worker's condition" are compensable after the worker's condition is medically stationary. ORS 656.245(1)(c)(H).

MRU determined that Sedgwick is liable for the diagnostic procedure of the EMG and related services. Sedgwick admits that the cost of the EMG services was reimbursable and in fact, claimed without contradiction by Claimant that it had paid for the services. Sedgwick contends that the administrative order reflects an error of law because it was not obligated to pay for the EMG before it did and that WCD lacks authority to order Sedgwick to pay for the services and to assess an attorney fee because Sedgwick had not denied payment for Claimant's EMG services at the time the Administrative Order was issued. In response, Claimant contends that MRU correctly applied the law in concluding that Sedgwick knew of the recommendation to perform an EMG and in effect denied payment by delaying payment.

OAR 436-010-0220(2) provides in relevant part:

Except for emergency services, or otherwise provided for by statute or these rules, all treatments and medical services must be authorized by the injured worker's attending physician or authorized nurse practitioner to be reimbursable.

Nothing in the record establishes that Sedgwick was advised by Dr. Holmboe, Claimant's attending physician, that the EMG services recommended by Dr. Hill were also Dr. Holmboe's recommendation. Dr. Holmboe's report from examining Claimant on January 6, 2005, seems to support Dr. Hill's recommendation of the EMG services, but there is no evidence in the record that this report was provided to Sedgwick, even after Sedgwick replied on April 5, 2005, that it had received no request from the attending physician (Dr. Holmboe) for the EMG services. The letter to MRU from Claimant's attorney on March 16, 2005, refers only to Dr. Hill's report. Dr. Hill is not Claimant's treating or attending physician. Without a recommendation from Dr. Holmboe, the treating or attending physician, Sedgwick was not obligated to pay for the EMG services before it did. Therefore, no dispute existed to allow for an assessment of an attorney fee.

## ATTORNEY FEE

The Administrative Order in this case is set aside because Sedgwick was not obligated to pay for the EMG services at the time of the order due to the lack of notice. ORS 656.385(1) provides in relevant part: "In all cases involving a dispute over compensation benefits pursuant

to ORS 656.245, 656.260, \* \* \*, where a claimant finally prevails after a proceeding has commenced before the Director of the Department of Consumer and Business Services, the director shall require the insurer or self-insured employer to pay a reasonable attorney fee to the claimant's attorney." There was no dispute over the services, and in fact, Sedgwick prevailed at hearing, so no attorney fee is ordered.

**ORDER**

IT IS HEREBY ORDERED:

MRU's June 21, 2005 Administrative Order is set aside.