

In the ORS 656.327 Medical Treatment Dispute of

Janine D. Jones, Claimant

Contested Case No: 07-146H

PROPOSED & FINAL ORDER

March 17, 2009

JANINE D. JONES, Petitioner

LIBERTY NW INSURANCE CORP., Respondent

Before Steve Rissberger, Administrative Law Judge

Hearing convened in Portland on February 20, 2009 before Administrative Law Judge Steve Rissberger. Claimant was present with her attorney, Gary Borden. The employer, Hagen Inc., and the insurer, Liberty NW Ins. Corp., were represented by their attorney, Stacy Tela-Kerber. Exhibits 1-53 were admitted into evidence. The record closed following final argument at the conclusion of the hearing.

ISSUES

Medical Services Dispute—Preauthorization—Jurisdiction: Whether the Medical Resolution Team (MRT), acting on behalf of the Director, erred by issuing an Administrative Order of Dismissal, rather than transferring this matter to the Workers Compensation Board for resolution?

FINDINGS OF FACT

Claimant worked as a cake decorator and a bakery worker for the employer, Haagen. She filed an 801 form asserting a claim for left arm, wrist and hand symptoms.

The employer's workers' compensation insurer, Liberty Northwest, issued an initial notice of acceptance on September 1, 2005 accepting a left forearm tendonitis condition as non-disabling. (Ex. 5.) Liberty also eventually accepted a left radial tunnel syndrome, a left shoulder strain, a left trapezius strain and a cervical strain.

Michael J. O' Neill, M.D., claimant's attending physician, eventually referred claimant to OHSU's comprehensive pain center during the summer of 2007. Pamela Campbell, M.D., of the OHSU Pain Center, evaluated claimant on July 6, 2007. She recommended that claimant undergo a multi-stage treatment plan for chronic left arm and shoulder pain, including Botox injections into the left trapezius, epidural steroid injections into the cervical spine, medication trials and physical therapy. (Ex. 34.)

On October 18, 2007, claimant's legal counsel sent a letter to the Workers Compensation Division (WCD) indicating that Liberty had denied Dr. Campbell's proposed treatment plan. The letter requested that WCD review this matter and, if appropriate, award penalties and attorney fees pursuant to ORS 656.262(11). (Ex. 42.) WCD's Medical Resolution Team (MRT) sent an inquiry to Liberty regarding the disputed medical services.

Liberty filled out a form entitled Specification of Disputed Medical Issues in late October 2007. Using a check-the-box format, a representative for Liberty indicated that the dispute involving Dr. Campbell's treatment plan related to a service for a new or omitted medical condition for which the worker had not requested acceptance. (Ex. 45.)

On November 5, 2007, Kate Maloney, a case manager for Liberty, responded more fully by letter. Maloney stated that no formal denial had been issued, no bills had been received and that claimant was not medically stationary at the time of Dr. Campbell's evaluation, so preauthorization of the medical services recommended by Dr. Campbell would not have been required. In addition, Maloney stated that the list of diagnoses included in Dr. Campbell's evaluation included several conditions that had not been accepted by Liberty. (Ex. 48.)

Acting on behalf of the Director, MRT issued an Administrative Order of Dismissal on November 21, 2007. The Order concluded that preauthorization was not required for the treatment plan proposed by Dr. Campbell on July 6, 2007. (Ex. 51.)

CONCLUSIONS OF LAW AND OPINION

The sole issue raised by this case is the legal viability of MRT's Administrative Order of Dismissal, issued on November 21, 2007. In that order, MRT found that Liberty is not required to preauthorize treatment recommended by Dr. Campbell, including epidural steroid injections and physical therapy.¹ Claimant argues that this case raises questions of medical causation that lie outside MRT's jurisdiction, thus MRT committed an error of law by not issuing a Defer and Transfer Order and forwarding this case to the Workers' Compensation Board. Liberty argued that MRT's dismissal order addressed a very limited issue, entirely within MRT's jurisdiction, and further that the dismissal order properly found that Liberty was not required to preauthorize the medical services proposed by Dr. Campbell. If claimant prevails, claimant also seeks an assessment of attorney fees.

This is a medical services dispute arising under ORS 656.327. The Director's rule, OAR 436-001-0225, provides the applicable standard of review. Subsection (2) of the rule provides that in medical services disputes:

“the administrative law judge may modify the director'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.”

Claimant asserts that MRT, acting on behalf of the Director, should have referred this matter to the Workers Compensation Board. ORS 656.704(3) addresses the authority of WCB and the Director to resolve disputes relating to the compensability of medical services. ORS 656.704(3)(b) sets out three types of medical service disputes that potentially arise in the context of a claim and establishes which forum has jurisdiction to resolve them: (1) pursuant to ORS 656.704(3)(b)(A), a dispute concerning the compensability of the medical condition for which

¹ In effect, this means that Liberty has no obligation to approve or deny curative medical services, such as those recommended by Dr. Campbell, until the services have been performed and Liberty has been presented with a bill.

medical services are proposed is a “matter concerning a claim” and is within the Board’s jurisdiction; (2) under ORS 656.704(3)(b)(B), a dispute concerning whether medical services are excessive, inappropriate, ineffectual or in violation of the rules regarding the performance of medical services, or whether medical services for an accepted condition qualify as compensable medical services among those listed in ORS 656.245(1)(c), is not “a matter concerning a claim” and falls within the jurisdiction of the Director; and, finally, (3) ORS 656.704(3)(b)(C) provides that a dispute concerning whether a sufficient causal relationship exists between medical services and an accepted claim to establish compensability is a “matter concerning a claim,” within the Board’s jurisdiction. *See AIG Claim Services v. Cole*, 205 Or App 170, *rev den*, 341 Or 244 (2006).

Claimant argues that this case presents the third type of medical services dispute under ORS 656.704(3)(b)—a dispute concerning whether a sufficient causal relationship exists between the requested treatment and claimant’s accepted conditions. Claimant’s position here is understandable. Nevertheless, I am persuaded that the Director decided this case based on matters entirely within its jurisdiction.

Claimant’s argument here is based—at least, in part—on a misreading of MRT’s Order. The second line of MRT’s order contains an issue statement, consisting of a single sentence. It states that “[t]he issue is whether Liberty Northwest Corporation is required to pre-authorize treatment as proposed by Pamela Campbell, M.D.” (Ex. 51, p.1) The Conclusion and Opinion section repeats the same issue statement. (Ex. 51, p. 2) As claimant’s legal counsel noted at hearing, the order also includes a discussion of Liberty’s contention that claimant’s medical services request was not directed at claimant’s accepted conditions—an argument that could be interpreted to raise medical causation issues. Further, the order contains language suggesting that claimant file a request to have a new or omitted medical condition added to his claim. However, this discussion appears to be dicta. I am not persuaded that it provided the basis for the Director’s ruling. The concluding paragraph of the Conclusion and Opinion section of MRT’s order incorporates the following declarative statement: “[t]he director finds that pre-authorization is not required for treatment as proposed by Dr. Campbell on July 6, 2007.” (Ex. 51, p. 2.) This language directly addresses the Director’s issue statement and, as I understand the order, provides the basis for the dismissal of claimant’s request for review. I am persuaded that this is a matter within the Director’s jurisdiction.

A related consideration here is timing. Liberty has not actually denied coverage for the services recommended by Dr. Campbell. Rather, the insurer has refused to preauthorize these services. Liberty is not required to preauthorize curative medical services unless the requested service involves a surgical procedure.² *See Alton H. Shotwell*, 45 Van Natta 856 (1993). In light of the procedural context of this case, claimant’s compensability-based challenge to Liberty’s actions is premature.

In sum, I am not persuaded that MRT erred in finding that Liberty was not required to preauthorize the medical treatment recommended by Pamela Campbell, M.D. MRT decided this

² Claimant did not directly challenge this aspect of MRT’s ruling during the hearing. Instead, claimant focused primarily on jurisdictional arguments.

case based on a preauthorization issue under ORS 656.704(3)(b)(B). MRT's decision was not based on a matter concerning a claim within the meaning of either ORS 656.704(3)(b)(C) or ORS 656.704(3)(b)(A). The Director's Administrative Order of Dismissal should be affirmed.

ORDER

The Director's Administrative Order of Dismissal, issued on November 21, 2007, is affirmed