

**BEFORE THE DIRECTOR
DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
WORKERS' COMPENSATION DIVISION**

In the Matter of the Medical Treatment)	FINAL ORDER
Dispute of James R. Hampton, Claimant)	
)	
SAIF CORPORATION, Petitioner)	
)	Contested Case No: H99-115
v.)	Claim No: 7857850E
)	Date of Injury: 06/01/98
JAMES R. HAMPTON, Respondent)	WCD File No: G907659

On September 24, 1999, Hearing Officer Paul Vincent conducted a telephone hearing. Todd Hammond represented petitioner SAIF Corporation (insurer). Respondent, claimant James R. Hampton, appeared and was represented by his attorney, Michael Bliven. The Department of Consumer and Business Services, Workers' Compensation Division (WCD) waived appearance. Respondent Hampton was the only witness. The hearing was continued until November 22, 1999 for further development of the record. The record closed on October 26, 2000.

In the interim, Senate Bill 728 (SB 728), which amended ORS 656.245 and 656.704 became effective on October 23, 1999. A September 28, 2000 Order Remanding to Hearing Officer found that SB 728 retroactively applied, that the Director had authority to determine whether WCD retained jurisdiction, and that the case be remanded to the hearing officer to determine the dispute.

On May 23, 2001, respondent filed exceptions to that portion of the May 11, 2001 Proposed and Final Contested Case Hearing Order which failed to award an assessed attorney fee. The petitioner, SAIF Corporation, filed exceptions on May 29, 2001 to the May 11, 2001 Order that determined the medical treatment provided on June 26, 1998, which included a right mediastinotomy with lymph node biopsy, was compensable diagnostic services for claimant's accepted chest wall strain. Before the Director, the issues are jurisdiction, diagnostic medical services, and attorney fees. The entire record, consisting of a tape recording of the hearing, all evidence received, and all documents filed, has been considered. The WCD did not respond to the exceptions.

Findings of Fact

I accept the hearing officer's findings of fact.

Conclusions of Law and Opinion

Jurisdiction

SAIF contests the September 28, 2000 Remand Order to assert that the Director lacks jurisdiction. SAIF contends that the June 26, 1998 biopsy procedure was not provided as a diagnostic service for a condition caused by claimant's accepted chest wall condition; and thus, ORS 656.245(1)(a) rather than ORS 656.245(1)(c)(H) applies. SAIF thus argues that because compensability is at issue as provided by ORS 656.704(3)(b)(C), jurisdiction lies with the Workers' Compensation Board. I disagree.

ORS 656.704(3)(b) provides:

“The respective authority of the board and the director to resolve medical services disputes, other than disputes arising under ORS 656.260, shall be determined according to the following principles:

“(A) Any dispute that requires a determination of the compensability of the medical condition for which medical services are proposed is a matter concerning a claim.

“(B) Any dispute that requires a determination of whether medical services are excessive, inappropriate, ineffectual or in violation of the rules regarding the 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), is not a matter concerning a claim.

“(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.”

The Director has jurisdiction over medical disputes arising under ORS 656.245(1) in cases where compensability of the condition to which medical services are directed is not at issue. *See* OAR 436-010-0008(3), (4). No claim for, or denial of, claimant's lung condition has been made. Rather, SAIF's letter¹ denied treatment on the basis that the disputed treatment was not related to the accepted condition; it did not deny compensability of the lung condition. (Exs. 109, 119, 129, 134.) SAIF concedes that the biopsy procedure was a diagnostic medical service. Diagnostic medical service disputes are not matters concerning a claim under ORS 656.704(3) and are, thus, within the Director's jurisdiction. *See James P. Fisher, ___ WCSR ___* (H99-060, September 2000) (Determination of causation is not necessary to resolve dispute.)

¹ In particular, SAIF's letter denied the disputed bills as “not related to our accepted condition as chart notes clearly indicate Mr. Hampton was being seen for his pneumonia and preexisting lung condition” which are “coincidental findings.” (Ex. 129).

Evidentiary Ruling

At the October 26, 2000 hearing, the hearing officer admitted respondent's October 12, 2000 submission containing exhibits 120B, 120C, 120D, 124A, 124B, 124C, 150, 151 over the insurer's objections. Contrary to the insurer's arguments at hearing and in its exceptions, the September 28, 2000 remand order did not limit the evidentiary record. My instructions to the hearing officer included reinstating the matter and scheduling a date for continuation of the hearing. I had previously noted that the prior hearing had been continued to further develop the record. My instruction to reopen the record "for the purposes of argument on the underlying issue" was to limit closing argument to the merits of the case, since jurisdictional issues had already been decided. The above exhibits were properly admitted.

The insurer's October 18, 2000 submission of exhibit 150 was renumbered to 150A and was admitted without objection.

Diagnostic Medical Services

At the time of injury, claimant was 50 years old. He has been a two-packs a day smoker for about 30-40 years. On June 1, 1998, while working as a flagger, claimant experienced pain in his chest, upper back, and shoulder blades after turning construction zone signs. (Ex. 47). Claimant woke the next day with persistent chest pain that was worse with deep breath and movement. He was hospitalized for testing. Chest x-rays showed bilateral infiltrates and abnormal adenopathy on the right. (Exs. 2, 3, 10). Chest CT scan ruled out aortic dissection or aortic aneurysm, but revealed multiple enlarge mediastinal lymph nodes and pneumonia. (Exs. 2, 4). Dr. Lorence diagnosed: "1. pneumonia; 2. rule out lung cancer with adenopathy; and 3. chest pain, most likely musculoskeletal, but cannot exclude it somehow relates to an underlying potential malignancy." (Exs. 3, 1). Dr. Lorence referred claimant to Dr. Stibolt for a pulmonary consultation. Dr. Stibolt diagnosed bronchogenic carcinoma and recommended a bronchoscopy to determine the extent of the cancer in order to determine the treatment approach. (Ex. 2). Claimant was discharged from the hospital on June 4, 1998. His diagnoses were: 1) pneumonitis; 2) upper chest pain, which appeared to be chest wall pain; 3) mediastinal adenopathy and hilar adenopathy, with concern that it was lung carcinoma. (Ex. 32). The June 5, 1998 bronchoscopy was negative for tumor or cancer. (Exs. 40, 90).

Dr. Breen saw claimant on June 11, 1998 and felt that claimant had a chest wall strain, but also possible lung cancer. He was willing to treat the chest wall strain, but referred claimant to OHSU for other medical problems. (Ex. 49). Claimant thereafter began treating with Steven Sebers, DC. Dr. Sebers' findings were consistent with a musculoskeletal strain. He diagnosed left thoracic outlet syndrome, and cervical, thoracic, left shoulder girdle strains/sprains. The diagnosis of shoulder girdle strain encompassed the chest wall strain. (Exs. 52, 150A pp. 3, 6, 8).

Dr. Bisio performed right anterior mediastinotomy with biopsy of the lymph nodes on June 26, 1998. His post-operative diagnosis was mediastinal lymphadenopathy. (Exs. 55, 66) The biopsy ruled out lung cancer, but demonstrated reactive lymphoid hyperplasia, a condition of uncertain cause. (Exs. 91, 151).

Claimant's chest pain resolved around July 1998. (Ex. 93). Claimant, however, continued to complain of neck pain, and left arm and hand pain. (Exs. 98, 111, 118).

The insurer accepted the June 1, 1998 injury for cervical strain, upper thoracic strain and chest wall strain. (Exs. 95, 131). The insurer only disputes the medical services performed on June 26, 1998, including right mediastinotomy with lymph node biopsy. The WCD medical reviewer (MRU) determined that the insurer was liable for these services as diagnostic medical services. MRU reasoned that the medical providers could not assign the cause of claimant's symptoms to his accepted chest wall strain until all other possible reasons for his symptoms were ruled out. (Ex. 137). Relying on the opinions of Dr. Breen and Dr. Stibolt, the hearing officer affirmed, concluding that the medical services were rendered to determine the cause of claimant's compensable chest wall pain/strain.

Claimant, MRU and the hearing officer attempt to invoke the same standard that the court rejected in *Counts v. International Paper Co.*, 146 Or App 768 (1997). The claimant in *Counts* argued "that diagnostic services related to a noncompensable condition should be compensable if those services, by eliminating or confirming a noncompensable condition, help determine whether a claimant's symptoms are actually related to the compensable injury." *Counts*, 146 Or App at 771. Here, the medical evidence establishes that the mediastinal biopsy was performed to rule out lung cancer rather than to determine the cause or extent of claimant's accepted chest wall strain.

Drs. Lorence, Lorish, Stibolt² and Sebers provided opinions regarding the need for the diagnostic services. Their opinions establish the following. Claimant was initially seen for chest pain³ of an unknown type. The chest CT scan, bone scan, EKGs, and chest x-rays were directed toward that complaint. (Exs. 150, 150A pp. 5, 10). These tests, however, revealed abnormalities, which was suspected lung cancer. (Exs. 149-7, 150A-5). Further testing—the pulmonary consultation, the bronchoscopy, and the mediastinal biopsy were directed to rule out lung cancer. (Exs. 147, 148, 150).

The doctors were not concerned that the June 1998 injury caused the cancer. Ruling out lung cancer may have assisted in determining whether claimant's chest wall pain was due to the accepted chest wall strain. However, as the court stated in *Counts*, claimant must show that his compensable injury made those tests necessary. 146 Or App at 770. Here, the earlier tests were made necessary by the June 2, 1998 injury; the subsequent June 26, 1998 biopsy procedure was not. Rather, the latter diagnostic procedure was made necessary by the suspected lung cancer. Therefore, it is not compensable.

² I disagree with the hearing officer that Dr. Stibolt's opinion supports claimant's position. Dr. Stibolt initially felt that claimant had cancer, but that further diagnostic workup—bronchoscopy and mediastinal biopsy-- was needed to determine the cause. He opined that during the workup, the differential diagnosis for claimant's findings included pathology related to his injury, but that the final diagnosis did not exclude that this may be due to an occupational injury. (Ex. 151). His opinion indicates that part of the workup was directed toward the work injury and part toward the suspected lung cancer.

³ Dr. Lorish explained that hilar adenopathy does not typically cause chest wall pain. (Ex. 149-9).

Attorney Fees

Because claimant has not prevailed, I do not reach the issue of attorney fees. ORS 656.385(1).

IT IS HEREBY ORDERED that:

The May 11, 2001 Proposed and Final Contested Case Hearing Order is reversed. SAIF is not liable for the June 26, 1998 diagnostic procedures.

DATED this day of September, 2001.

**MARY NEIDIG, DIRECTOR
DEPARTMENT OF CONSUMER
AND BUSINESS SERVICES**

By: _____
John Shilts, Administrator
Workers' Compensation Division

NOTICE OF APPEAL RIGHTS

THIS ORDER BECOMES FINAL ON THE DATE OF SERVICE TO THE PARTIES. AFTER THIS ORDER BECOMES FINAL, YOU ARE ENTITLED TO JUDICIAL REVIEW PURSUANT TO THE PROVISIONS OF ORS 183.480. JUDICIAL REVIEW MAY BE OBTAINED BY FILING A PETITION WITH THE COURT OF APPEALS WITHIN 60 DAYS FROM THE DATE OF SERVICE OF THIS ORDER.

Please mail a copy of any petition for judicial review to:

**Technical Coordinator
Policy Consultation Unit
Workers Compensation Division
Department of Consumer and Business Services
350 Winter Street NE, Rm 27
Salem, OR 97301-3879**