

1 **BEFORE THE HEARING OFFICER PANEL**
2 **STATE OF OREGON**
3 **for the**
4 **DEPARTMENT OF CONSUMER AND BUSINESS SERVICES**
5 **WORKERS' COMPENSATION DIVISION**

4 **In the Matter of the ORS 656.245**)
5 **Medical Services Dispute of**) **PROPOSED AND FINAL**
6 **Jeffery D. Munro, Claimant**) **CONTESTED CASE**
7) **HEARING ORDER**
8 JEFFREY D. MUNRO, Petitioner)
9)
10 v.) Contested Case No: H00-038
11) Claim No: 001033-012-88-WC-01
12 OLD REPUBLIC INSURANCE COMPANY,) Date of Injury: 7-21-99
13 Respondent) WCD File No: A945621
14)
15)

16 Claimant appeals an Administrative Order issued on March 9, 2000 by the Benefits Section of the
17 Workers' Compensation Division (WCD), Department of Consumer and Business Services (department or
18 director). On January 16, 2000, Administrative Law Judge (ALJ) Catherine P. Coburn conducted a hearing
19 in this matter. Petitioner Jeffrey D. Munro (claimant) appeared *pro se* and moved for postponement in order
20 to retain counsel. Respondent, including Roadway Express (employer), Old Republic Insurance Company
21 (insurer) and claims administrator Gallagher Bassett Services Incorporated was represented by attorney
22 Ronald L. Bohy. On January 16, 2000, over insurer's objection, I allowed claimant's motion for
23 postponement.
24

On December 7, 2001, ALJ Coburn conducted a reset hearing. Petitioner Jeffrey Munro failed to
appear. Insurer was represented by attorney Ronald L. Bohy. WCD waived appearance.

Pursuant to OAR 137-003-0670, if a party who was notified of the time and place of the hearing fails
to appear at hearing not due to circumstances beyond his reasonable control, the administrative law judge
may issue a default order only upon a showing of a *prima facie* case made on the record. Respondent was
notified of the time and place of the hearing by letter dated October 18, 2001. On November 19, 2001,
respondent telephoned Hearing Officer Panel staff and indicated that he was aware of the hearing set for
December 7, 2001 at 9:00 a.m. Accordingly, I find that claimant was duly notified of the time and place of

1 the hearing.

2 On the date of hearing at 10:30 a.m., claimant contacted the ALJ by telephone. Claimant confirmed
3 that he received notice of the hearing date and time and that he provided the cell phone number to the
4 Hearing Officer Panel. Claimant reported that he failed to appear at hearing because his cell phone battery
5 ran down the night before the hearing, he engaged a charger, and therefore, did not hear the phone ring in
6 the morning. I find that these facts do not constitute circumstances beyond claimant's reasonable control.
7 Under the circumstances, I conclude that a default order is appropriate.

8 On the date of hearing at 10:30 a.m., claimant moved for postponement of the hearing in order to
9 retain counsel. Pursuant to OAR 137-003-0525, the ALJ has discretion to set the date and time of the
10 hearing. Inasmuch as a hearing eleven months earlier was postponed for the same reason, I denied
11 claimant's request for postponement.

12 The record of this proceeding, consisting of a tape recording of the hearing, all evidence received,
13 and all hearing papers filed, has been considered. The findings of fact set out below are based upon the
14 entire record.

15 ISSUE

- 16 1. Has claimant exercised three choices of attending physician?
17 2. If so, does the record contain medical evidence to justify a change to a fourth attending
18 physician?
19 3. May Eric Long, M.D. serve as attending physician prior to issuance of insurer's April 19, 2000
20 partial denial?

21 EVIDENTIARY RULINGS

22 Workers' Compensation Division (WCD) Exhibits 1 through 24 as well as insurer's Supplementary
23 Exhibits 25 through 27, 17A through 21A and 19Ba were received without objection.

24 FINDINGS OF FACT

I adopt the findings of fact contained in the administrative order on appeal with the following

1 supplementation.

2 On July 21, 1999, claimant suffered a compensable low back injury while working as a trucking
3 dockworker. (Ex. 1). On the date of injury, claimant sought treatment with Eric Stroud, D.C. (Ex. 2.) On
4 July 26, 1999, claimant designated James N. Yarusso, M.D. as his attending physician. (Ex. 5). On August
5 16, 1999, claimant changed his attending physician to Michael L. Adams, M.D. at Kaiser Permanente. (Exs.
6 11 and 15). On August 30, 1999, Dr. Adams released claimant to regular work. (Ex. 15).

7 On October 29, 1999, insurer accepted a disabling claim for a lumbosacral strain. (Ex. 17A). On
8 December 20, 1999, a Notice of Closure issued listing the medically stationary date as November 15, 1999
9 and awarding no permanent partial disability. (Ex. 19B).

10 In December 1999, claimant sought treatment from Eric W. Long, M.D. who diagnosed disc
11 derangement at L4-5 and L5-S1. (Ex. 19D). On December 22, 1999, claimant filled out an 829 form
12 naming Eric W. Long, M.D. as his attending physician. (Ex. 19C).

13 In an Order on Reconsideration dated February 10, 2000, the department affirmed the Notice of
14 Closure. (Ex. 21A). On January 24, 2000, claimant asserted claims for disc derangement at L4-5 and L5-
15 S1. (Ex. 19F.) On April 19, 2000, insurer issued a partial denial of disc derangement at L4-5 and L5-S1
16 and the current low back condition. (Ex. 25). On July 12, 2000, the Workers' Compensation Board issued
17 an Opinion and Order affirming the Notice of Closure and determining that the claim was not closed
18 prematurely. (Ex. 26). On October 3, 2000, the Workers' Compensation Board issued an Opinion and
19 Order affirming insurer's April 2000 partial denial. (Ex. 27).

20 **CONCLUSIONS OF LAW AND REASONING**

21 Jurisdiction lies with the director. ORS 656.245(6). The statute does not specify a standard of
22 review and therefore, I review *de novo*. OAR 436-001-0225(1). *See Archie M. Ulrich*, 2 WCSR 152
23 (1997). In a default proceeding, the party who appears may prevail by establishing a *prima facie* case made
24 on the record. OAR 137-003-0655. Here, insurer appeared through counsel at hearing and may prevail by
showing a *prima facie* case to establish the facts asserted.

1 In the Administrative Order, WCD determined that claimant had exhausted the three statutory
2 choices of attending physician and that the medical evidence did not justify a change to Dr. Long as a fourth
3 attending physician. Insurer contends that the administrative order is correct and should be affirmed.
4 Insurer further argues that it is not liable for medical services rendered by Dr. Long prior to issuance of the
5 partial denial, because he treated noncompensable conditions.

6 Pursuant to ORS 656.245(1), an insurer is obligated to provide medical services that are materially
7 related to a compensable injury for such period as the nature of the injury or the process of recovery
8 requires. This obligation continues over the injured worker's lifetime. ORS 656.245(1)(b). Pursuant to
9 ORS 656.245(2)(a) and OAR 436-010-0220(3), an injured worker may choose three attending physicians
10 over the course of a claim. ORS 656.005(12)(b)(B) provides that a chiropractor may serve as attending
11 physician for 30 days or 12 visits whichever first occurs. On the date of injury, claimant sought treatment
12 from Dr. Stroud, D.C. Accordingly, Dr. Stroud served as claimant's first attending physician.
13 Subsequently, claimant changed his attending physician to Dr. Yarusso, M.D and later to Dr. Adams. Based
14 on the record, I conclude that insurer has shown a *prima facie* case establishing that claimant has exercised
15 the three statutory choices of attending physicians.

16 Pursuant to ORS 656.245(2)(a), an injured worker may choose a fourth attending physician only
17 with the approval of either the insurer or the director. Here, claimant requested approval of Dr. Long as his
18 fourth attending physician and insurer denied the request. WCD affirmed insurer's denial. OAR 436-010-
19 0220 enumerates the factors that are considered in determining whether a fourth choice of attending
20 physician is justified. OAR 436-010-0220(7) provides:

21 “(7) After receipt and review, the director will issue an order advising whether
22 the change is approved. On a case by case basis consideration may be given,
but is not limited, to the following:

23 “(a) Whether there is medical justification for a change, including whether the
24 attending physician can provide the type of treatment that is appropriate for
the worker's condition.

1 “(b) Whether the worker has moved to a new area and wants to establish an
2 attending physician closer to the worker’s residence.

3 “(c) Whether such a change will cause unnecessary travel costs and/or lost
4 time from work.

5 “(d) Whether a worker has an attending physician that works in a group
6 setting/facility and the worker sees another group member due to team
7 practice, coverage, or on-call routines.”

8 I agree with WCD’s conclusion that the record does not contain medical evidence to justify a fourth
9 choice of attending physician. Based on the evidence, I conclude that insurer has shown a *prima facie* case
10 to establish that claimant is not entitled to a fourth attending physician choice.

11 Pursuant to ORS 656.245(1) an insurer is obligated to provide medical services for conditions that
12 are materially related to a compensable claim. The only accepted condition is a lumbosacral strain. Dr.
13 Long treated disc derangements at L4-5 and L5-S1. In December 1999, when Dr. Long rendered treatment,
14 the disc derangements did not fall within the scope of the accepted condition. Furthermore, the disc
15 derangements as well as the current low back condition have been finally determined through litigation to be
16 non-work-related medical conditions. Therefore, insurer is not liable for payment for Dr. Long’s services.

17 **ORDER**

18 IT IS HEREBY ORDERED that:

19 The Administrative Order dated March 9, 2000 is affirmed.

20 Dated this _____ day of December 2001

21 _____
22 Catherine P. Coburn
23 Administrative Law Judge
24 Hearing Officer Panel

NOTICE OF APPEAL RIGHTS

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As provided in OAR 137-003-0650, the parties are entitled to file written exceptions, including argument, to this Proposed and Final Order. The exceptions must be served on the parties and filed with the Administrator of the Workers' Compensation Division at the address set forth below within 30 days following the date of service of the order. Written responses to exceptions must be filed within 20 days of service of the exceptions. Replies, if desired, must be filed within 10 days of service of the response.

If no exceptions are filed, this order shall become final upon expiration of 30 days following the date of service on 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 that this order becomes final.

Mail any exceptions and 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, Room 27
Salem, OR 97301-3879