

1 **EVIDENTIARY RULINGS**

2 Workers' Compensation Division (WCD) Exhibits 1 through 100 were received without
3 objection. Claimant's Supplementary Exhibits 101 through 103 were received over respondent's
4 timeliness objection.

5 **FINDINGS OF FACT**

6 I adopt the findings of fact contained in the administrative order on appeal with the
7 following supplementation.

8 On December 29, 1997, claimant worked as a chemical operator and suffered a
9 compensable injury. While cleaning a chemical hopper, claimant experienced onset of right
10 shoulder pain. (Ex. 1). Claimant sought treatment with John R. Reichle, MD who diagnosed a
11 right rhomboid strain. (Exs. 2 and 3). Dr. Reichle prescribed conservative treatment including
12 modified work and physical therapy. (Exs. 6, 7 and 12). Claimant's symptoms resolved by the
13 end of January, 1998 and he returned to full duty. (Exs. 15-1 and 24-1). (Exs. 6 and 7). On
14 February 10, 1998, insurer accepted a nondisabling claim for a right rhomboid strain. (Ex. 12).¹

15 On June 12, 1998, claimant returned to Dr. Reichle complaining of increased right
16 shoulder pain. (Ex. 15). Dr. Reichle confirmed the right rhomboid diagnosis and prescribed
17 modified work and physical therapy. (Ex. 15-2). Dr. Reichle referred claimant to Roy Rusch,
18 MD. (Ex. 22).

19 On July 29, 1998, Dr. Rusch diagnosed "right posterior shoulder girdle strain
20 (myofascitis), rule out possible cervical nerve root irritation. Triceps weakness on the right,
21 cause unexplained." (Ex. 24-1). In August 1998, claimant designated Roy Rusch, MD as his
22 attending physician. (Ex. 25). Dr. Rusch administered subacromial injections and authorized
23 time off work. (Ex. 24).

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1 A September 1998 cervical MRI was essentially normal. (Exs. 26 and 24-4). A March
2 1999 right shoulder MRI was essentially normal. (Ex. 24-12).

3 On March 8, 1999, Clyde Farris, MD examined claimant at the insurer's request. (Ex.
4 41). Dr. Farris declined to make a precise diagnosis and recommended further diagnostic testing.
5 (Ex. 41-7). Dr. Farris referred claimant to Timothy L. Keenan, MD. (Ex. 46).

6 In May, 1999, Dr. Keenan examined claimant and noted that he suffered neck pain
7 radiating into the right shoulder. Dr. Keenan did not make a specific diagnosis but referred
8 claimant for injection therapy and a potential discogram. (Ex. 46). In September 1999, claimant
9 chose Dr. Keenan, MD as his attending physician. (Ex. 63).

10 In May, 1999, Dr. Keenan referred claimant to Roy Slack, MD for evaluation. (Ex. 45).
11 The accepted rhomboid strain became medically stationary on August 11, 1999. (Ex. 79).

12 In August 1999, John W. Thompson, MD examined claimant at insurer's request. (Ex.
13 54). Dr. Thompson opined, "Certainly, at this time it does not appear to me that a rhomboid
14 strain was the correct diagnosis. I feel that he may very well have an internal disc disruption in
15 the cervical spine probably at the C4-5 level." (Ex. 54-7). Dr. Thompson noted that the pain
16 radiation pattern was consistent with a C4-5 or C5-6 problem. (Ex. 54-8).

17 On December 13, 1999, Dr. Keenan requested MCO authorization for a C3-4, C4-5 and
18 C5-6 discogram. (Ex. 69). On January 6, 2000, the MCO denied compensability of the cervical
19 discogram on grounds that it is outside the scope of the accepted rhomboid strain. (Ex. 71).

20 **CONCLUSIONS OF LAW AND REASONING**

21 Jurisdiction lies with the director of the department. ORS 656.704(3)(b)(B); ORS
22 656.245(6). The statutes do not specify a standard of review, and therefore, I review *de novo*.
23 See *Archie M. Ulrich*, 2 WCSR 152, 153 (1997); OAR 436-001-0225(1). The burden of proving

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¹ In December 1998, insurer reclassified the claim as disabling. (Exs. 30 and 78).

1 a fact or position rests with the proponent. ORS 184.450(2). As petitioner, claimant bears the
2 burden of proving by a preponderance of the evidence that the administrative order is incorrect.
3 See *Cook v. Employment Div.*, 47 Or 437 (1982) (In the absence of contrary legislation, the
4 standard of proof in an administrative hearing is preponderance of evidence).

5 In the administrative order, MRU determined that the proposed cervical discogram is not
6 compensable as a diagnostic service because the medical record fails to establish a causal
7 relationship between the discogram and the accepted right rhomboid strain. Similarly, insurer
8 contends that the proposed discogram is not compensable because it is not causally related to the
9 accepted condition. In contrast, claimant contends that MRU erred by failing to consider
10 whether the medical record established a causal relationship between the proposed discogram
11 and the industrial injury.

12 Pursuant to ORS 656.245(1), an insurer is obligated to provide medical services that are
13 materially related to a compensable injury for such period as the nature of the injury or the
14 process of recovery requires. This obligation continues over the injured worker's lifetime.

15 Pursuant to ORS 656.245(1)(c), medical services after the medically stationary date are not
16 compensable with certain exceptions. Pursuant to ORS 656.245(1)(c)(H), medical services that
17 are necessary to diagnose the worker's condition are compensable. ORS 656.245(1)(c)(H)
18 provides:

19 “(c) Notwithstanding any other provision of this chapter, medical
20 services after the worker's condition is medically stationary are not
21 compensable except for the following:

22 “(H) Services that are necessary to diagnose the worker's
23 condition.”

24 When diagnostic services are necessary to determine the cause or extent of the
compensable injury, such services are compensable whether or not the condition discovered as a

1 result is compensable. *Counts v. International Paper Company*, 146 Or App 768 (1997);
2 *Charles Newbeck*, 3 WCSR 305 (1998). In *Counts*, the court placed the burden on the claimant
3 to show that the compensable injury made the diagnostic tests necessary.

4 I agree with claimant’s argument that MRU erred by limiting its review to a causal
5 relationship between the accepted condition and the proposed diagnostic service. ORS
6 656.245(1)(c)(H) requires the fact finder to consider the causal relationship between the
7 industrial injury and the proposed diagnostic service. If the medical record establishes a causal
8 link between the industrial injury and the proposed diagnostic service, then the diagnostic service
9 is compensable whether it reveals a compensable or noncompensable condition.

10 Here, the medical record is replete with expert opinions questioning the accuracy of the
11 original diagnosis which became the accepted condition. As early as June 1998, the initial
12 attending physician, Dr. Reichle noted a possible cervical condition. Subsequently, in separate
13 independent medical examinations, both Dr. Thompson and Dr. Farris disputed the right
14 rhomboid diagnosis. Dr. Thompson identified a cervical problem and Dr. Farris recommended
15 additional diagnostic testing. Furthermore, claimant produced reports from Drs. Rusch, Keenan
16 and Slack questioning the accuracy of the original diagnosis. Claimant’s former attending
17 physician, Dr. Rusch and current attending physician, Dr. Keenan opined that the proposed
18 cervical discogram “is a reasonable diagnostic procedure that could result in a more precise
19 diagnosis.” Dr. Slack agreed. Based on the evidence, I conclude that the proposed cervical
20 discogram is necessary to determine the cause and extent of the December 29, 1997 work
21 injury.² Therefore, the proposed discogram is compensable as a diagnostic medical service
22 within the meaning of ORS 656.245(1)(c)(H).

23 _____
24 ² Compensability of any cervical condition is a separate issue over which the Workers’ Compensation Board
Hearings Division has jurisdiction. ORS 656.704(3)(b)(A) and (C).

1 Attorney Fees

2 Claimant has prevailed in a contested case hearing, and therefore, is entitled to a
3 reasonable attorney fee. ORS 656.385(1). Claimant’s attorney submitted a statement of services
4 requesting \$3,500 as an attorney fee. Considering the factors listed in OAR 436-001-0265,
5 \$3,500 is a reasonable fee for claimant’s attorney’s services in this case.

6 **ORDER**

7 IT IS HEREBY ORDERED that:

- 8 1. Administrative Order MMS 00-511 dated December 8, 2000 is reversed.
9 2. Insurer shall pay claimant’s attorney a fee of \$3,500.

10 Dated this _____ day of September, 2001

11 _____
12 Catherine P. Coburn
13 Administrative Law Judge
Central Hearings Panel

14 **NOTICE OF REVIEW AND APPEAL RIGHTS**

15 As provided in ORS 183.460, the parties are entitled to file written exceptions, including argument, to this
16 Proposed and Final Contested Case Hearing Order. The exceptions must be served on the parties and filed
17 following the date of service of this order. Written responses to exceptions must be filed within 20 days of
18 service of the exceptions. Replies, if desired, must be filed within 10 days of service of the response.

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

21 After this order becomes final, you are entitled to judicial review pursuant to the provisions of ORS 183.480.
22 Judicial review may be obtained by filing a petition with the Court of Appeals within 60 days from the date
23 that this order becomes final.

24 Mail any exceptions and a copy of any petition for judicial review to:

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