

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

5 In the Matter of the ORS 656.245 Medical) **PROPOSED AND FINAL CONTESTED**
6 Services Dispute of) **CASE HEARING ORDER**
7)
8 CHRISTINE GARVER, Petitioner) Contested Case No: H01-056
9 v.) Claim No: 071-063655
10) Date of Injury: 07/23/99
11) WCD No: G94-6057
12 AMERICAN HOME ASSURANCE CO. &) Order No: MS 01-301
13 AIG CLAIM SERVICE, INC., Respondent.)

14 Claimant appeals an Administrative Order issued by the Medical Review Unit (MRU) of
15 the Workers' Compensation Division, Department of Consumer and Business Services (WCD).
16 On August 22, 2001, Administrative Law Judge Ella D. Johnson conducted a telephone hearing
17 in this matter. The record closed on November 19, 2001 following receipt of the response from
18 WCD to a transmitted question concerning jurisdiction. Petitioner Christine Garver (claimant)
19 was represented by attorney Margaret Weddell. Attorney Del Brenneman represented respondent
20 insurer American Home Assurance Co. and its claims processing agent, AIG Claim Services,
21 Inc. (insurer or AIG). WCD waived appearance. No witnesses testified.

22 The record of this proceeding, consisting of a tape recording of the hearing, all evidence
23 received, and all hearing papers filed, has been considered. The findings of fact set out below are
24 based on the entire record.

25 **JURISDICTION**

On October 31, 2001, I issued an Interim Order Transmitting Question, which asked
WCD to answer the following question in relation to this matter:

In cases where a claimant has not been declared medically stationary and the issue
is whether certain diagnostic services are related to the compensable condition,

1 does the Director or the Workers' Compensation Board have jurisdiction to hear
2 the matter and render a decision under ORS 656.704(3)?

3 On November 19, 2001, WCD replied that pursuant to ORS 656.704(3)(b)(B) the
4 Director of the Department of Consumer and Business Services (the director) has jurisdiction to
5 determine whether a medical service for an accepted medical condition qualifies as a
6 compensable medical service. Relying on *Counts v. International Paper Co.*, 146 Or App 768
7 (1997), *Roseburg Forest Products v. Langley*, 156 Or App 454 (1998), and *James R. Hampton*, 5
8 WCSR 336 (2000), WCD reasoned that disputes which do not require a determination of the
9 compensability of a medical condition or the causal relationship between the medical service and
10 the accepted claim to establish compensability of the claim fall within the director's jurisdiction
11 because they are not "matters concerning a claim."

12 Here, the issue is whether SAIF is liable for payment for the proposed diagnostic
13 discogram at C5-6 in relation to claimant's C6-7 accepted condition. Consequently, I conclude
14 that the director has jurisdiction over this dispute.

15 ISSUE

16 Whether SAIF is liable for payment for the proposed diagnostic discogram at C5-6 in
17 relation to claimant's C6-7 accepted condition.

18 Insurer also raised the issue of whether the medical appropriateness of the proposed
19 discogram should be remanded to MRU. For the reasons set forth below, I find that remand to
20 address the medical appropriateness of the proposed discogram is unnecessary.

21 EVIDENTIARY RULING

22 The record consists of WCD Exhibits 1 through 24 and 26 through 44, which were
23 received into evidence without objection. WCD's Exhibit 25 was excluded at claimant's request
24 and without insurer objection because it concerned settlement offers. Claimant's Exhibit 45 was
25 admitted over insurer's objection based on timely submission.

FINDINGS OF FACT

I affirm and adopt MRU’s “Finding of Fact” set forth in the April 12, 2001 Administrative Order, with the following supplementation.

On January 10, 2000, AIG accepted claimant’s disabling claim for right upper arm strain and herniated cervical disc at C6-7. On January 11, 2000, AIG authorized the C6-7 anterior cervical discectomy proposed by Francisco X. Soldevilla, MD (Neurosurgery). Dr. Soldevilla performed the surgery on February 8, 2000 and noted a “very large amount of disk material beneath the posterior longitudinal ligament compressing the thecal sac and in particular the right C6-7 nerve root. Thereafter, claimant’s right arm pain completely resolved. (Exs. 5-7, 39).

On February 22, 2000, Dr. Soldevilla examined claimant and noted that, although claimant’s right arm pain had resolved, she now had left arm pain. He prescribed conservative treatment with steroids. A cervical MRI was performed on March 8, 2000, which was unremarkable and revealed only a high postoperative signal at C6-7. (Exs. 7-11).

On May 3, 2000, Roy A. Slack, MD (Spinal Diagnostics) performed a right therapeutic cervical epidural steroid injection. Dr. Slack identified the C5-6 motion segment to be the primary pain generator for claimant’s current symptoms of neck, shoulder, periscapular, and headache pain. (Ex. 12).

An insurer’s medical examination (IME) was performed by Paul Williams, MD (Neurosurgery), and Steven Fuller, MD (Orthopedic Surgery). They opined that claimant’s current left upper extremity symptoms were not related to her accepted condition and that her subjective symptoms outweighed the objective findings. (Ex. 13).

On May 31, 2000, Dr. Soldevilla noted that Dr. Slack had identified claimant’s pain generator at C5-6. He requested authorization to perform an anterior cervical discectomy and fusion at C5-6. (Ex. 15). On July 27, 2000, Dr. Soldevilla commented:

“[Claimant’s] work up reveals no instability at C6/7 and EMG studies are normal. The only other test we can do is a discogram at C5/6 to see

1 if this is a pain generator requiring surgery. Otherwise, I have nothing
2 else to offer from a neurosurgical perspective.” (Ex. 20). (Emphasis in
3 original).¹

4 Dr. Fuller opined on October 27, 2000 following an updated file review that claimant
5 demonstrated pain behavior during IMEs on May 22 and August 22, 2000. He opined that her
6 ongoing complaints of pain were secondary to her pain behavior and were not the result of
7 organic pathology. (Ex. 23).

8 On January 3, 2001, claimant requested review by the department of insurer refusal to
9 authorize the proposed discogram treatment. (Ex. 24).

10 On January 17, 2001, Gregory M. Strum, MD (Orthopedic Surgery), who had performed
11 an IME in August 2000 (Ex. 21) reviewed the tests and narrative reports performed since August
12 2000. He opined that there was no basis to perform a discogram of claimant’s C5-6 disc space.
13 He based his opinion on the lack of objective findings and a March 8, 2000 MRI study, which
14 indicated that the disc space was normal. (Ex. 26).

15 In response to claimant’s request to the department for resolution of this dispute, insurer
16 stated that it had refused authorization because the need for the discogram was not related to the
17 accepted condition and it was excessive, inappropriate, ineffectual or in violation of the medical
18 service rules. (Exs. 28, 30).

19 On March 19, 2001, Dr. Soldevilla opined that:

20 “While initially she had right arm pain, it is entirely possible that, after
21 having the surgical decompression at C6/7, she may have had some
22 foraminal encroachment which, subsequently, was manifested as left
23 arm pain.” (Ex. 39).

24 In its April 12, 2001 Administrative Order, MRU did not address insurer’s argument that
25 the discogram was excessive, inappropriate, and ineffectual or in violation of the medical service

¹ I find Dr. Soldevilla’s comment in this regard to be curious in light of his May 31, 2000 request for surgery which acknowledged that C5/6 was the pain generator.

1 rules because MRU determined that the need for the discogram was not related to claimant's
2 accepted condition. (Ex. 41).

3 On July 19, 2001, Dr. Soldevilla agreed with claimant's attorney's statement that
4 "surgery at one disc level places stress on the adjacent disk levels and creates a kind of domino
5 effect." He also agreed that the proposed discogram was diagnostic, and without a discogram, he
6 could not determine whether claimant's pain complaints were related to the C5/6 disc space or
7 whether her current condition was a consequence of her accepted condition. (Ex. 45).

8 Claimant's condition was not medically stationary when claimant requested resolution of
9 this dispute and the dispute was referred to Hearing Officer Panel.

10 **FINDINGS OF ULTIMATE FACT**

11 Claimant's current pain complaints and the proposed discogram of C5-6 are not related to
12 her accepted right arm strain and herniated C6-7 disc condition.

13 **CONCLUSIONS OF LAW AND REASONING**

14 In this proceeding, claimant seeks authorization and payment of a diagnostic discogram
15 ordered by Dr. Soldevilla, which was denied by insurer, as unrelated to claimant's accepted
16 condition. When the issue is whether a disputed medical service is related to a previously
17 accepted injury, the director has exclusive jurisdiction pursuant to ORS 656.704(3). *James R.*
18 *Hampton*, 5 WCSR 336 (2000). The burden of proving any fact or position rests with its
19 proponent. ORS 183.450(2). As petitioner, claimant bears the burden of proving by a
20 preponderance of evidence that the need for the discogram is related to her accepted condition.
21 *See Cook v. Employment Div.*, 47 Or 437 (1882).
22

23 This matter arises under ORS 656.245(1)(c)(H). In hearings before the director, "the
24 scope of review is *de novo* unless otherwise prescribed by statute or administrative rule." OAR
25 436-001-0225(1). Inasmuch as ORS 656.245(1)(c)(H) does not specify any other standard of
review, I review this matter *de novo*. *Archie M. Ulbrich*, 2 WCSR 152, 153 (1997).

1 MRU found that the medical record established that claimant's current pain complaints
2 and her need for a discogram at the C5-6 level were not related to claimant's accepted C6-7
3 condition. Consequently, MRU concluded that the proposed discogram was not a compensable
4 medical service because the C5-6 level was not part of the accepted condition.

5 Claimant argued at hearing that the discogram is a compensable diagnostic service. In
6 support of her argument, she cited *Roseburg Forest Products v. Langley*, 156 Or App 454 (1998)

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8 In *Roseburg*, the claimant began experiencing radiating pain in her left lower extremity
9 and foot following closure of her compensable claim for lumbosacral strain. Her attending
10 physician ordered a series of diagnostic tests, including a myelogram and a CT scan, to obtain
11 more information on what was causing her symptoms. The myelogram and a CT scan revealed
12 no sign of a disc herniation or nerve root compression but there was evidence of a degenerative
13 disc condition. The court held that if is any relationship between the diagnostic test and the
14 compensable condition, the diagnostic test is compensable. *See also Counts v. International*
15 *Paper*, 146 Or App 768 (1997) (if diagnostic services are necessary to determine the cause or
16 extent of a compensable injury, the tests are compensable whether or not the condition
17 discovered as a result is compensable).

18 In contrast to *Roseburg*, the evidence here does not establish that a relationship between
19 claimant's accepted C6-7 condition and the need to perform the discogram at C5-6. The medical
20 evidence establishes that claimant's current pain relates to the C5-6 disc space. At Dr.
21 Soldevilla's request, Dr. Slack performed a study of claimant's pain symptoms and identified the
22 C5-6 motion segment to be the primary pain generator for claimant's current pain symptoms.
23 Based on Dr. Slack's study and identification of the C5-6 pain generator, Dr. Soldevilla
24 requested authorization to perform an anterior cervical discectomy and fusion at C5-6. When the
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1 surgery was denied as unrelated to the accepted condition, Dr. Soldevilla then requested
2 authorization for a discogram to further evaluate the cause of claimant's pain after previously
3 accepting Dr. Slack's opinion that the cause was the C5-6 pain generator.

4 Furthermore, Dr. Soldevilla's attempts to relate the accepted C6-7 to claimant's current
5 condition and need for the discogram are inconsistent and therefore unpersuasive. On July 27,
6 2000, after already establishing that claimant's pain was caused by a C5-6 pain generator and
7 requesting authorization for an anterior cervical discectomy and fusion at C5-6, Dr. Soldevilla
8 states that the "only other test we can do is a discogram at C5-6 to see if this is a pain generator
9 requiring surgery." On March 19, 2001, Dr. Soldevilla opined that claimant "may have had some
10 foraminal encroachment which, subsequently, was manifested as left arm pain." However, on
11 July 19, 2001, he agreed with the statement of claimant's counsel that "surgery at one level
12 places stress on adjacent disk levels and creates a domino effect."
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14 Finally, Drs. Williams, Fuller, and Strum all noted the lack of objective findings. They
15 attributed claimant's pain complaints to pain behavior and concluded that her pain complaints
16 were not the result of organic pathology.

17 Consequently, on this record, I find that claimant has failed to meet her burden of proving
18 that the need for the discogram is related to her accepted condition. Accordingly, MRU's order
19 denying compensability of the service is affirmed.
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21 ATTORNEY FEES

22 Because claimant has not prevailed in this matter, her counsel is not entitled to attorney
23 fees. ORS 656.385(1).
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ORDER

IT IS HEREBY ORDERED that: MRU’s Administrative Order MS 01-301 is affirmed.

DATED this _____ day of December 2001.

Ella D. Johnson
Administrative Law Judge
Hearing Officer Panel

NOTICE OF REVIEW AND APPEAL RIGHTS

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