

In the ORS 656.245 Medical Services Dispute of
Nelson, Robin , Claimant

Contested Case No: HH01-132

PROPOSED & FINAL ORDER

March 12, 2002

ROBIN NELSON , Petitioner

NATIONAL UNION FIRE, Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

PROCEDURAL HISTORY

On November 30, 2001, claimant's attorney requested contested case review of an order by the Medical Review Unit (MRU) of the Workers' Compensation Division (WCD) finding that National Union Fire (insurer) correctly denied reimbursement of a cranial MRI. On January 24, 2002, Hearing Officer Paul Vincent conducted a contested case hearing. Petitioner Robin Nelson (claimant) was represented by attorney Michael Gilbertson. Respondent insurer was represented by attorney Diane Sawyer. The Workers' Compensation Division waived appearance. No testimony was taken. The record closed on the date of hearing.

ISSUE

Whether insurer is liable for an October 27, 2000 MRI.

EVIDENTIARY RULINGS

WCD Exhibits 1-23 were received without objection. Petitioner's Exhibits 14A-C, 15A-B, 20A, and 21A-B were received without objection. Respondent's Exhibits A, 6A-G, 8A and 10-B were received without objection.

FINDINGS OF FACT

I adopt the findings of fact from Administrative Order MS 01-1211, dated November 14, 2001, and make the following supplemental fact findings in addition or in exception to those findings:

After her emergency room treatment with Dr. Peterson, claimant was treated on multiple occasions by attending physician Stewart Swena, MD. On August 22, 2000, claimant was seen for a neuromuscular consultation by Kenneth Isaacs, MD on referral from attending physician Swena. (Ex. 15A). Dr. Isaacs opined that claimant's "difficult" problems were open to two possible approaches for treatment:

The one is to be supportive, continue with physical type therapies, work modifications, and alternate type of work activity. The alternative approach is to attempt further objectification of injury, by having her have objectifying scans such as MRI scan of the brain and cervical spine; orthopedic exam in an

individual attentive to the potential for somatization.

I would generally take the “softer” approach of supportive care...However, trying to achieve objectification is understandable, and would certainly be sensible approach should there in fact be on subsequent exams for those components that are not under volitional control, the development of unequivocal objective signs of injury. (Ex. 15A-7)

On October 13, 2000, Dr. Swena examined claimant and ordered an MRI:

At this point I think we need to try to get more objective findings. It is disturbing her sleep. She has nausea which could be aggravated by Ibuprofen but may be due to the pain also. At this point will go ahead and proceed with further imaging with MRI scan of the cervical spine and of the head to make sure that is OK. (Ex. 21A).

CONCLUSIONS OF LAW AND REASONING

Jurisdiction

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. OAR 436-010-0008(3), (4). No denial of claimant’s accepted lumbar strain has been made. Rather, insurer has denied treatment on the basis that the disputed treatment was not related to the accepted condition; it did not deny compensability of the accepted condition. (Ex. 104C). Insurer did not contend that the disputed procedure was not a diagnostic medical service. Diagnostic medical service disputes are not matters concerning a claim under ORS 656.704(3) and are within the Director’s jurisdiction. See *James P. Fisher*, ___ WCSR ___ (H99-060, September 2000) (Determination of causation is not necessary to resolve dispute); *James R. Hampton*, 7 WCSR ___ (2002)(Final Order).

Since ORS 656.245 prescribes no standard of review, I review *de novo*. *Archie M. Ulrich*, 2 WCSR 152, 153 (1997); OAR 436-010-0225(1). The burden of proving a fact or position rests with the proponent. ORS 183.450(2). As petitioner, claimant bears the burden of proving by a preponderance of the evidence that the administrative order is incorrect. See *Cook v. Employment Div.*, 47 Or 437 (1982) (In the absence of contrary legislation, the standard of proof in an administrative hearing is preponderance of evidence).

Diagnostic Medical Services

The administrative order found that the requested procedure was not diagnostic in nature for the claimant’s compensable condition and therefore not compensable. The claimant points out that the director erred in finding that the emergency room physician, Dr. Peterson, requested

the condition whereas a more careful review of the full record shows that the requested diagnostic treatment was by the attending physician, Dr. Swena, following consultation with a neurologist, Dr. Isaacs. Based on this record, the claimant argues the treatment was reasonable and appropriate. The insurer argues that regardless of whether the treatment is reasonable, the treatment must be directed at the compensable condition. The insurer points out that the director has ruled consistently that diagnostic services designed to rule in or rule out the presence of conditions other than the accepted condition are not compensable, even under circumstance where “but for” the compensable injury the diagnostic service would not have taken place.

In *Hampton* the director determined that diagnostic services designed to rule in or out an unaccepted condition are not diagnostic as that term is used in ORS 656.245:

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 non-compensable condition should be compensable if those services, by eliminating or confirming a non-compensable 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 [disputed procedure] was performed to rule out [an unaccepted condition] rather than to determine the cause or extent of claimant’s accepted [condition].

[A]s 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 [accepted] injury; the [contested] procedure was not. Rather, the latter diagnostic procedure was made necessary by the suspected [unaccepted condition]. Therefore, it is not compensable. *Hampton* at ____.

Here, while the administrative order did not use the phrase “rule in or rule out”, the reasoning was essentially identical to that of *Hampton*:

[T]he threshold issue in dispute is whether the medical service requested ... was diagnostic in nature for [claimant’s] compensable condition. This is a question within the director’s jurisdiction. [Claimant] presented to the emergency room reporting increased right arm symptoms after a pallet struck her right shoulder. Although she reported that she was hit on the head two years ago and

experienced persistent symptoms from that injury, she reported the pallet did not hit her head or neck. It is accepted in the medical community absent a blow to the head, a cranial MRI is not reasonable. Since Ms. Nelson reported that the pallet did not hit her head and she experienced only right arm symptoms, the director is not persuaded the cranial MRI was provided to diagnose [claimant's] right arm symptoms, but rather [to diagnose] persistent symptoms from a previous injury. Therefore, the director concludes the cranial MRI was not provided for the accepted condition and is not compensable. (Ex. 114-3)

Accordingly, I affirm the director's administrative order on the grounds that the service in dispute was ordered to rule in or to rule out an unaccepted condition rather than to determine the cause or extent of claimant's accepted condition.

ATTORNEY FEES

Claimant has not prevailed in a contested case hearing, and therefore, her attorney is not entitled to **ORDER**

IT IS HEREBY ORDERED that:

The Director's Review and Order, MS 01-1211, dated November 14, 2001 is affirmed.

DATED this _____ day of March 2002.

Paul Vincent
Hearing Officer
Hearing Officer Panel