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In the Matter of the Compensation of  
**TODD E. COLE, Claimant**  
WCB Case No. 02-04695  
ORDER ON REVIEW  
Floyd H Shebley, Claimant Attorneys  
Reinisch Mackenzie et al, Defense Attorneys

Reviewing Panel: Members Kasubhai, Bock and Langer

The insurer requests review of those portions of Administrative Law Judge (ALJ) Riechers' order that: (1) directed it to pay for diagnostic medical services; and (2) awarded an assessed fee under ORS 656.386(1). On review, the issues are medical services, attorney fees and jurisdiction. We vacate in part and affirm in part.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact."

CONCLUSIONS OF LAW AND OPINION

Jurisdiction

We adopt and affirm the ALJ's reasoning and conclusions.

Compensability of Medical Services

We adopt and affirm the ALJ's reasoning and conclusions.

Authority to Order Reimbursement of Medical Services

After determining that the disputed medical services were compensable diagnostic medical services, the ALJ ordered reimbursement of those services. The ALJ reasoned that, because the medical services were a form of compensation, she had the authority to order reimbursement.

On review, the insurer disagrees with the ALJ's action, contending that, even if the ALJ had authority to determine the casual relationship between the disputed medical services and the accepted injury, the Workers' Compensation Division (WCD) had exclusive authority to determine whether the medical services were medically appropriate. We agree.

The medical services dispute started when a physician, Dr. Slack, requested WCD administrative review regarding payment of discography services provided to claimant on March 7, 2001. The WCD Medical Review Unit (MRU) wrote to Dr. Slack on July 22, 2002 and stated that administrative review was premature because the insurer challenged compensability of the rendered medical service. It advised claimant to request a hearing with the Workers' Compensation Board (WCB) if he believed that the disputed medical service was related to the compensable claim. (Ex. 85B). Claimant filed a requested hearing with WCB.

While we agree with the ALJ's determination of the causation issue, WCD has exclusive authority to determine whether medical services are "excessive, inappropriate, ineffectual or in violation of the rules regarding the performance of medical services," and "whether medical services for an accepted condition qualify as compensable medical services among those listed in ORS 656.245(1)(c)\*\*\*." ORS 656.704(3)(b)(B).

In light of this statute, the remaining issue regarding the medical services dispute, including the ultimate reimbursement of the disputed medical services, depends on WCD's determination of whether those services satisfy the statutory standard in ORS 656.704(3)(b)(B). Therefore, we find that the ALJ did not have authority to order reimbursement of the disputed medical services. Instead, the ALJ should have assigned a separate WCB case number to that portion of the parties' dispute pertaining to the "propriety" of treatment/reimbursement issues. The ALJ should then have issued a separate order under that WCB case number, dismissing claimant's hearing request insofar as it pertained to those issues, and transferring that case to WCD for resolution.

Accordingly, we vacate that part of the ALJ's order that purported to resolve the "propriety" of the treatment/reimbursement issues.<sup>1</sup>

#### Attorney Fees

Reasoning that claimant had prevailed with regard to whether the disputed discography was a compensable medical service, the ALJ awarded an assessed fee under ORS 656.386(1). On review, the insurer argues that the ALJ had no authority to award an assessed fee because claimant had not finally prevailed on the treatment dispute. The insurer observes that WCD's medical review must still

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<sup>1</sup> The ALJ is directed to obtain a new WCB case number to pertain to these issues and then issue an order dismissing claimant's hearing request insofar as it pertains to those issues and transferring the matter to WCD for further action.

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address those aspects of the treatment dispute under its jurisdiction before payment of medical services may be ordered.

In *Sonny Roman*, 56 Van Natta 1706 (2004), the carrier argued that the claimant did not "finally prevail" over a denied claim, as required under ORS 656.386(1)(a), because, even though the ALJ concluded that the claimant's accepted condition remained the major contributing cause of his need for chiropractic treatment, the claimant did not receive compensation until WCD determined that the treatment was reasonable and necessary. We rejected that argument, reasoning that, to the extent the denied claim was within our jurisdiction, we could award an assessed fee under ORS 656.386(1)(a). Thus, if a claimant's claim for medical services is denied, and that denial falls within the jurisdiction of the Board, we found in *Roman* that the ALJ or the Board can award an assessed fee under ORS 656.386(1)(a). 56 Van Natta at 1709.

In this case, we have affirmed the ALJ's decision regarding jurisdiction over the medical services causation issue and the ALJ's finding that the disputed medical services were compensable. In light of our reasoning in *Roman*, we affirm the ALJ's assessed attorney fee award.

Claimant's attorney is also entitled to an assessed fee for services on review regarding the compensability of medical services. ORS 656.382(2); *see Roman*, 56 Van Natta at 1711. After considering the factors set forth in OAR 438-015-0010(4) and applying them to this case, we find that a reasonable fee for claimant's attorney's services on review regarding that issue is \$1,500, payable by the insurer. In reaching this conclusion, we have particularly considered the time devoted to the issue (as represented by claimant's respondent's brief), the complexity of the issue, and the value of the interest involved. We do not award a fee for services devoted to the attorney fee issue. *See Dotson v. Bohemia, Inc.*, 80 Or App 233 (1986).

### ORDER

The ALJ's order dated September 6, 2002 is affirmed in part and vacated in part. That portion of the ALJ's order that directed the insurer to pay for medical services is vacated. The remainder of the ALJ's order is affirmed. The ALJ is directed to take further action regarding the propriety of medical treatment/jurisdictional issues consistent with this order. For services on review, claimant's attorney is awarded an assessed fee of \$1,500, to be paid by the insurer.

Entered at Salem, Oregon on October 12, 2004