In the Medical Services Dispute of

Jacob E. Mantle, Claimant

Contested Case No: 19-047H

FINAL ORDER

May 25, 2021

JACOB E. MANTLE, Petitioner
SAIF CORPORATION, Respondent

Before Andrew R. Stolfi, Director, Department of Consumer and Business Services

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This matter comes before me for director review under ORS 656.704(2)(a) and OAR 436-001-0246. The Workers' Compensation Division's Medical Resolution Team (MRT), through its manager, Robert Andersen, timely filed exceptions to the April 17, 2020, Proposed and Final Order.[1] The insurer, SAIF Corporation, through its attorney Rachel Schwartz Gilbert, and the worker, Jacob Mantle, through his attorney Jodie Anne Phillips Polich, timely responded.

The worker seeks an order holding that he is not liable to pay for medical services that the parties stipulate were not provided in compliance with the administrative rules and that have been determined not to be causally related to the worker's accepted claim. The worker's request for relief is denied.

FINDINGS OF FACT AND PROCEDURAL HISTORY

I adopt the findings of fact as stated in MRT's August 14, 2019, Administrative Order of Dismissal and as summarized in the April 17, 2020, Proposed and Final Order.[2]

There are two aspects to this dispute. One is whether the medical services at issue, provided in 2018, are causally related to the worker's 2016 accepted claim, which is a matter within the authority of the Workers' Compensation Board. ORS 656.704(3)(b)(C). The other is whether the medical services at issue were provided in violation of the administrative rules, which would generally be a matter within the director's authority. ORS 656.704(3)(b)(B).

As to the first question, Administrative Law Judge Aliza Bethlahmy issued an Opinion and Order (WCB Case No. 19-01892) on August 6, 2019, concluding that there is no causal relationship between the worker's 2016 claim and the medical services he received in 2018. Judge Bethlahmy transferred back to MRT the issue of whether the medical services were provided in violation of rules.[3]

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[1] OAR 436-001-0246(2) allows the division to request director review.

[2] The record contains no evidence of the underlying facts that gave rise to this dispute, of how the dispute originally came before MRT, or of how MRT initially handled the dispute. The only documentation of the underlying facts is what is recited in the previous orders. However, the issues before me are purely legal, and neither party disagrees with MRT's findings of fact.

[3] The Workers' Compensation Board adopted and affirmed Judge Bethlahmy's order by Order on Review issued June 10, 2020 (72 Van Natta 505).

MRT, in the August 14, 2019, Administrative Order of Dismissal, concluded that, based on the parties' stipulation that no treatment plan was provided[4] (as required by rule), MRT could not order the insurer liable for the medical services, even if they were causally related to the worker's accepted claim. Because Judge Bethlahmy found the services were not causally related to the worker's accepted claim, according to MRT, they fall outside of its jurisdiction. MRT concluded it was not able to find that the worker was not liable for the services, and dismissed the matter.

The worker requested a hearing. Administrative Law Judge Jill M. Riechers issued the Proposed and Final Order on April 17, 2020, concluding that MRT's order reflects an error of law. Judge Riechers inferred from the last sentence of ORS 656.327(2)[5] that, "as a matter of law, even if disputed medical treatment has been found not to be causally related to the accepted injury and is consequently not compensable, the director has jurisdiction to review issues concerning provision of medical treatment in violation of the rules, and may order that a worker is not obligated to pay for such services." Judge Riechers vacated MRT's order and remanded the matter to MRT. MRT filed exceptions to Judge Riechers' order.

CONCLUSIONS OF LAW

MRT's Administrative Order of Dismissal may be modified only if it is not supported by substantial evidence in the record or if it reflects an error of law. ORS 656.327(2), 656.245(6).

MRT contends that its order is correct in that it does not have jurisdiction to determine whether the worker is or is not liable for payment for medical services that are not causally related to the worker's accepted claim. First, according to MRT, the workers' compensation statutes and rules do not apply to medical care that is unrelated to a workers' compensation claim. Second, MRT argues Judge Riechers' interpretation of the last sentence of ORS 656.327(2) is too broad, and the director did not determine that the medical treatment was not compensable.[6]

SAIF agrees with MRT's exceptions.

The worker responds that jurisdiction is not about compensability, and MRT has jurisdiction over this matter. The worker's argument is that he has an accepted claim; he sought care for his compensable injury; the medical providers thought they were providing care for his compensable injury; that care was required to be provided according to the rules; this dispute is allowed under ORS 656.327(1); and MRT was required to review the matter. According to the worker, the last sentence of ORS 656.327(2) dictates the outcome. The medical providers failed to follow the

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[4] The August 6, 2019, Opinion and Order states: "The parties stipulated that neither [provider] provided a treatment plan. The parties also stipulated that no request for pre-authorization for any of the disputed services was made."

[5] The last sentence of ORS 656.327(2), discussed in more detail below, states: "The worker is not obligated to pay for medical treatment determined not to be compensable under this section."

[6] MRT also notes that the medical providers, Columbia Medical Clinic and Gateway Sports Medicine & Rehab, should have been copied on the Proposed and Final Order. A copy of this order is being sent to both providers.

rules and the medical providers, not the worker, should bear the consequences. The worker supports Judge Riechers' Proposed and Final Order.

As explained further below, MRT, on behalf of the director, has jurisdiction to determine whether otherwise compensable medical treatment is excessive, inappropriate, ineffectual, or in violation of rules regarding the performance of medical services. ORS 656.327(1), 656.704(3)(b)(B). However, once it is determined that the treatment is not causally related to the worker's accepted claim, the treatment itself falls outside of the workers' compensation system and MRT does not have authority to order the relief requested by the worker.

Authority to review disputes regarding medical services is split between the director[7] and the Workers' Compensation Board, depending on the reasons why the services are in dispute. The relevant provisions of ORS 656.704(3)(b) provide:

> "The respective authority of the board and the director to resolve medical service disputes shall be determined according to the following principles:
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> "* * * * *
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> "(B) Any dispute that requires a determination of whether medical services are excessive, inappropriate, ineffectual or in violation of the rules regarding the performance of medical services, or a determination of whether medical services for an accepted condition qualify as compensable medical services among those listed in ORS 656.245 (1)(c), is not a matter concerning a claim [i.e., it is within the director's authority].
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> "(C) Any dispute that requires a determination of whether a sufficient causal relationship exists between medical services and an accepted claim to establish compensability is a matter concerning a claim [i.e., it is within the board's authority]."

If a dispute, like this one, comes before MRT that requires determinations under both ORS 656.704(3)(b)(B) and (3)(b)(C), the issue within the board's authority is decided first. That is, the board will first decide whether a sufficient causal relationship exists between the medical services and the worker's accepted claim before MRT will decide whether those services are excessive, inappropriate, ineffectual, or in violation of the rules. MRT transfers the causation issue to the board for a determination before it addresses the propriety issue.[8]

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[7] MRT exercises this authority on behalf of the director.

[8] This has been the practice between MRT and the board for many years. *See, e.g.*, *Vicki L. Mangum*, 52 Van Natta 1006, 1007 (2000) (The former MRU deferred its review and transferred the causal relationship issue to the board for resolution first. "Once causation is resolved, the Director proceeds with review of any remaining medical service dispute."); *Sonny Roman*, 56 Van Natta 1706, 1708 (2004) (The former MRU issued a Defer and Transfer order sending the causal relationship issue to the board for a determination before addressing the appropriateness issue. "If causation is at issue, such a determination must be made by the Board before the WCD can review a medical services request to determine whether those services are reasonable and necessary ***."); *Audrey Castillo*, 62 Van Natta 2058, 2061 (2010) (MRT issued a Defer and Transfer Order sending the causation issue to the board before

If the board determines that a sufficient causal relationship does exist between the medical services and the worker's accepted claim, the propriety issue comes back before MRT for resolution. If, however, the board determines that there is not a sufficient causal relationship between the medical services and the worker's accepted claim, the medical services fall outside of the workers' compensation system and there is no need to review the propriety of the services according to workers' compensation law. MRT will dismiss the matter. *See, e.g., SAIF Corp. v. Martinez*, 219 Or App 182, fn. 4 (2008) (MRU's practice of issuing Defer and Transfer Orders "allows the board to determine whether the employer is liable for *any* medical payment before the MRT decides precisely what medical costs the employer must pay." (Emphasis in original)); *Tin T. Tran*, 12 CCHR 238, 239 (2007) ("The board has authority over matters concerning a claim, including disputes that require a determination of whether a sufficient causal relationship exists between medical services and an accepted claim. ORS 656.704(3)(b). Because [the board ALJ] found that the proposed [medical services] were not due to the accepted claim, MRU was correct in finding that all issues raised were resolved and there was nothing for the director to review. Therefore, MRU's dismissal of the matter was appropriate.").[9]

In this case, MRT would have had the authority to determine if the medical treatment provided to the worker in 2018 was provided in violation of the rules, and to determine who is liable to pay for the treatment, if the board had found the treatment to be causally related to the worker's 2016 accepted claim. It is that circumstance in which the last sentence of ORS 656.327(2) comes into play. ORS 656.327 provides:

> "(1)(a) If an injured worker, an insurer or self-insured employer or the [d]irector *** believes that the medical treatment *** that the injured worker has received, is receiving, will receive or is proposed to receive is excessive, inappropriate, ineffectual or in violation of rules regarding the performance of medical services, the injured worker, insurer or self-insured employer must request administrative review of the treatment by the director prior to requesting a hearing on the issue and so notify the parties.
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> "(b) Unless the director issues an order finding that no bona fide medical services dispute exists, the director shall review the matter as provided in this section. ***

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addressing the issue of appropriateness. "[I]t is within the MRT's discretion to transfer a case to the Board if it believes there is a dispute regarding the causal relationship between the proposed medical service and the compensable injury. *See SAIF v. Martinez*, 219 Or App 182, 186 n 4 (2008) ("[the MRT] may, at its discretion, transfer cases to the board via a Defer and Transfer Order if it believes that there is a dispute about both the propriety of the proposed treatment—which it may determine—and the compensability of the condition itself). The MRT has devised the 'Specification of Disputed Medical Issues' form as a means for the carrier to indicate whether the dispute involves a matter concerning a claim or a matter not concerning a claim, or both. In this regard, the form requests that the carrier check 'yes' or 'no' to several questions concerning the medical service, all of which are based on the jurisdictional principles enumerated in ORS 656.704(3)."); *Nathaniel D. Erdkamp*, 63 Van Natta 2125, 2128 (2011) (The former MRU deferred its review of the propriety issue and transferred the causation issue the board. "Because the MRU transferred only the causation dispute, and deferred action on the 'propriety' dispute, that dispute remains pending before the MRU.").

[9] MRU refers to the former Medical Review Unit, the predecessor to MRT.

> "(c) The insurer or self-insured employer shall not deny the claim for medical services nor shall the worker request a hearing on any issue under this section until the director issues an order under subsection (2) of this section.
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> "(2) The director shall review medical information and records regarding the treatment. The director may cause an appropriate medical service provider to perform reasonable and appropriate tests, other than invasive tests, upon the worker and may examine the worker. *** Review of the medical treatment shall be completed and the director shall issue an order within 60 days of the request for review. The director shall create a documentary record sufficient for purposes of judicial review. If the worker, insurer, self-insured employer or medical service provider is dissatisfied with that order, the dissatisfied party may request review under ORS 656.704. The administrative order may be modified at hearing only if it is not supported by substantial evidence in the record or if it reflects an error of law. No new medical evidence or issues shall be admitted. *The worker is not obligated to pay for medical treatment determined not to be compensable under this subsection.*
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> "(3) Upon request of either party, the director may delegate to a physician or a panel of physicians the review of medical treatment under this section. *** The physician or panel shall submit findings to the director within the time limits as prescribed by the director.
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> "* * * * *
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> "(5) The costs of review of medical treatment by the physician or panel of physicians pursuant to this section and costs incurred by the worker in attending any examination required under this section, including child care, transportation, lodging and meals, shall be paid by the insurer or self-insured employer."

(Emphasis added.) Although it is not explicitly stated in the text, this section of the statute has been applied only when the medical treatment at issue is sufficiently causally related to the worker's accepted claim – either because the insurer has not disputed causation or because the board has determined that a sufficient causal relationship exists under ORS 656.704(3)(b)(C) – to be otherwise compensable.

If the medical treatment is otherwise compensable, the director has authority to review it under ORS 656.327 and the last sentence of ORS 656.327(2) – "The worker is not obligated to pay for medical treatment determined not to be compensable under this subsection." – comes into play. If the medical treatment is sufficiently causally related to the worker's accepted claim, the treatment may be determined not compensable under ORS 656.327(2) because it is (or was) excessive, inappropriate, ineffectual, or in violation of the rules. If that is the case, the worker would not be obligated to pay. That is not the case here, however. Here, Judge Bethlahmy determined that the treatment was not compensable because it was not causally related to the worker's accepted claim. The last sentence of ORS 656.327(2) does not apply.

The administrative rules apply in the same way. OAR 436-010-0008(1)(e)[10] provides

> "If the director issues an order declaring an already rendered medical treatment or medical service inappropriate, or otherwise in violation of the statute or medical rules, the worker is not obligated to pay for such."[11]

This rule applies to medical treatment or services that fall under the workers' compensation system to begin with. *See* OAR 436-010-0001(3) ("The purpose of [OAR 436-010, Medical Services,] is to establish uniform guidelines for administering the delivery of and payment for medical services to workers within the workers' compensation system."). The worker contends that MRT has jurisdiction over all care provided to a worker with an accepted claim and all medical providers that provide services to that worker. That is too broad a statement. MRT's authority does not extend to care that is not causally related to the worker's accepted claim, and the rules apply to providers authorized to provide services *under* ORS chapter 656. *See* OAR 436-010-0001(4)(a) ("These rules *** govern all providers of medical services licensed or authorized to provide a product or service under ORS chapter 656.). Likewise, the requirements for a treatment plan in OAR 436-010-0230(7),[12] which the parties stipulate were not followed

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[10] Effective 4/1/2018, WCD Admin. Order 18-054. Excerpts are from the rules that were in effect when the medical services at issue were rendered. *See* OAR 436-010-0001(4)(a) ("These rules apply on or after the effective date ***.).

[11] OAR 436-009-0010(9)(b) (effective 4/1/2018, WCD Admin. Order 18-053) is similarly worded: "If the director issues an order declaring an already rendered medical service or treatment inappropriate, or otherwise in violation of the statute or administrative rules, the worker is not liable for such services."

[12] OAR 436-010-0230(7) provides:

> **(7) Ancillary Services – Treatment Plan.**
> **(a)** Ancillary medical service providers include but are not limited to physical or occupational therapists, chiropractic or naturopathic physicians, and acupuncturists. When an attending or specialist physician or an authorized nurse practitioner prescribes ancillary services, unless an MCO contract specifies other requirements, the ancillary provider must prepare a treatment plan before beginning treatment.
> **(b)** The ancillary medical service provider must send the treatment plan to the prescribing provider and the insurer within seven days of beginning treatment. If the treatment plan is not sent within seven days, the insurer is not required to pay for the services provided before the treatment plan is sent.
> **(c)** The treatment plan must include objectives, modalities, frequency of treatment, and duration. The treatment plan may be in any legible format, e.g., chart notes. If the ancillary treatment needs to continue beyond the duration stated in the treatment plan, the ancillary care provider must obtain a new prescription from the attending or specialist physician or authorized nurse practitioner to continue treatment. The ancillary care provider also must send a new treatment plan to the insurer and physician or authorized nurse practitioner within seven days.
> **(d)** Treatment plans required under this subsection do not apply to services provided under ORS 656.245(2)(b)(A). (See Appendix A "Other Health Care Providers.")
> **(e)** Within 30 days of the beginning of ancillary services, the prescribing provider must sign a copy of the treatment plan and send it to the insurer. If the prescribing provider does not sign and send the treatment plan, the provider may be subject to sanctions under OAR 436-010-0340. However, this will not affect payment to the ancillary provider.

here, apply to services that are sufficiently causally related to the worker's accepted claim to be otherwise compensable.[13]

The worker argues that the medical treatment he received in 2018 does fall under the workers' compensation system. According to the worker, he has a compensable claim for which he sought care, and the medical providers thought they were providing care for his compensable claim. The worker is correct that he has a compensable claim that brings him into the workers' compensation system. However, the 2018 treatment was not provided *for* his compensable claim.[14] As Judge Bethlahmy stated, "I am not persuaded that the disputed medical services are for conditions caused in material part by Claimant's 2016 compensable injury." Ex. 1-7. Because the treatment was ultimately determined not to be related to the worker's compensable claim, it falls outside of the workers' compensation system; ORS 656.327 and the corresponding administrative rules do not apply; and MRT was correct to dismiss the propriety issue.

In holding that the director's authority to review the propriety aspect of a medical services dispute is contingent upon the services being causally related to the worker's accepted claim – in other words, that ORS 656.327 applies only to treatment that is causally related to the worker's accepted claim – it could be argued that MRT is inserting into the workers' compensation statutes what has been omitted. MRT's interpretation, however, is consistent with the way in which the statute and rules have historically been applied, and it is not inconsistent with the wording or context of the statute and rules themselves.

The context of ORS 656.327 supports MRT's interpretation that it does not apply to medical treatment that is not causally related to the worker's accepted claim. For example, under subsections (2) and (3) of ORS 656.327, MRT may bring in an outside provider to perform tests, examine the worker, or review the medical treatment in dispute. If MRT does so, the insurer is obligated to pay the costs of that review in addition to any costs incurred by the worker in attending an examination. ORS 656.327(5). It seems unlikely that the legislature intended for the insurer to pay the costs associated with a review of medical treatment that the insurer is not liable to pay for because the treatment itself is not otherwise compensable.

I conclude that MRT's order does not reflect an error of law and must be affirmed. ORS 656.327(2).

ATTORNEY FEES

> **(f)** Authorized nurse practitioners, out-of-state nurse practitioners, and physician assistants directed by the attending physician do not have to provide a written treatment plan as prescribed in this section.

[13] It is not always known at the time the services are provided whether they are sufficiently related to the worker's accepted claim. If causation is disputed, it is resolved through the litigation process, after the services have already been rendered. *See Gerardo L. Herrera*, 21 CCHR 13, 18 (2016) ("[T]he compensability of a medical service is finally determined only after the service is performed."). Providers are well-advised to follow the rules, however, if they want to be paid for services that are ultimately determined to be compensable.

[14] What the worker thought he was seeking treatment for, and what the providers thought they were treating, is not relevant. Even if it was relevant, there is no evidence in this record that supports the worker's contentions.

The worker has not prevailed and is not entitled to an attorney fee. ORS 656.385(1).

ORDER

The April 17, 2020, Proposed and Final order is not adopted.

The August 14, 2019, Administrative Order of Dismissal is affirmed.

The worker's request for relief is denied.