
In the Matter of the ORS 656.245 Medical Services Dispute of

Ainsworth, Jacqueline C., Claimant

Contested Case No: H01-019

FINAL ORDER

February 11, 2002

SAIF CORPORATION, Petitioner

MICHAEL D. FREEMAN, DC, Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

On July 25, 2001, Hearing Officer Ella D. Johnson conducted a telephone hearing. Trial Counsel Jill Blendinger represented SAIF Corporation (insurer). Michael D. Freeman, DC appeared *pro se*. The Department of Consumer and Business Services, Workers' Compensation Division (WCD) waived appearance. Dr. Freeman testified on his own behalf.

The petitioner, SAIF Corporation, filed exceptions to Hearing Officer Johnson's September 11, 2001 Proposed and Final Contested Case Hearing Order, which determined that SAIF was liable for chiropractic care provided by Dr. Freeman on July 28, 2000 and on August 2, 4, 7, 9, 11, 14, 16, 21 and 23, 2000. The respondent, Dr. Freeman, did not respond to the exceptions. Before the Director, the issue is chiropractic medical services. The entire record, consisting of a tape recording of the hearing, all evidence received, and all documents filed, has been considered.

FINDINGS OF FACT

I adopt the Hearing Officer's findings of fact.

CONCLUSIONS OF LAW AND OPINION

Claimant sustained a compensable cervical strain on September 1, 1999. SAIF accepted the injury as a nondisabling claim. Claimant initially sought treatment from family practitioner, Julie Kurian, MD until November 6, 2000. Claimant began treating with Michael Freeman, DC on July 19, 2000. Claimant and Dr. Freeman signed a Form 827 on July 28, 2000 and indicated that claimant was changing her attending physician to Dr. Freeman. Claimant, however, also continued to treat with Dr. Kurian for her neck condition. The insurer enrolled claimant into a Managed Care Organization (MCO) on August 23, 2000.

MRU determined that Dr. Freeman's treatment on July 19 through July 27, 2000 were not compensable because there had been no referral from Dr. Kurian and because there was no signed treatment plan. MRU found that Dr. Freeman became claimant's attending physician on July 28, 2000 and, therefore, his ten chiropractic treatments from July 28 through August 23, 2000 were compensable. (Ex. 17).

The hearing officer affirmed, reasoning that OAR 436-010-0005(2)(c) clarified, rather than expanded, ORS 656.005(12)(b)(B)'s definition of attending physician. She, thus, concluded

that WCD reasonably interpreted the statute as authorizing a chiropractor to act as an attending physician for a period of 30 days or 12 visits from the date of the first chiropractic visit.

Dr. Freeman's Status as an Attending Physician

ORS 656.005(12)(b)(B) defines "attending physician" as:

"A doctor or physician who is primarily responsible for the treatment of a worker's compensable injury and who is *** [f]or a period of 30 days from the date of the first visit on the initial claim or for 12 visits, whichever first occurs, a doctor or physician licensed by the State Board of Chiropractic Examiners for the State of Oregon."

OAR 436-010-0005(2)(c) interprets "attending physician" to mean:

"A doctor or physician who is primarily responsible for the treatment of a worker's compensable injury or illness and who is *** [f]or a period of 30 days from the date of first chiropractic visit on the initial claim or for 12 chiropractic visits, during that 30 day period, whichever first occurs, a doctor or physician licensed by the Board of Chiropractic Examiners for the State of Oregon[.]"

SAIF contends that the above administrative rule conflicts with and impermissibly expands ORS 656.005(12)(b)(B). SAIF asserts that, as used in the statute, "first visit" means first medical treatment, not first chiropractic treatment. Under SAIF's argument, the first medical visit on the claim was on February 9, 2000, which was well beyond 30 days before Dr. Freeman's first treatment in July 2000.

The words "first visit" in ORS 656.005(12)(b)(B) is an inexact statutory term, because the legislature expressed its meaning completely, but the meaning is subject to agency interpretation. *See Altamirano v. Woodburn Nursery, Inc.*, 133 Or App 16 (1995) (citing *England v. Thunderbird*, 315 Or 633, 638 (1993) and *Springfield Education Assn. v. School Dist.*, 290 Or 217 (1980)). An inexact term is reviewed to determine whether the agency's interpretation is legally correct. *Id.* at 21-22.

In *Altamirano*, the court determined whether the agency's interpretation of "claim" (to mean initial claim) was correct in OAR 436-010-005. In order to comport with the purpose and limitation that ORS 656.005(12) imposed, the court applied the common meaning of "claim" in the context of the workers' compensation statutes; *viz.*, initial and aggravation claims. The court concluded that the rule limited the terms of the statute, and thus was an incorrect interpretation of the statute. The court did not address whether the agency's interpretation of "first visit" was correct. *Altamirano*, 133 Or App at 23.

In interpreting a statute, the task is to discern the intent of the legislature. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610 (1993). In construing ORS 656.005(12)(a)(A), the

starting point is the text and context of the statute. If the legislative intent is not clear from the text and context of the statute, the second analysis is to consider the legislative history of the statute. Finally, if those avenues of inquiry do not answer the question, then general maxims of statutory construction may be used. *Id.* at 611-612.

Prior to 1990, chiropractors had the same attending physician status as medical physicians. The 1990 legislature added additional language to ORS 656.005(12), which limited the definition of “attending physician.” ORS 656.005(12) authorizes a chiropractor to be an attending physician “for a period of 30 days from the date of first visit on the initial claim or for 12 visits, whichever first occurs.” Unlike “claim,” “first visit” is not otherwise defined in the statute. The rule defines first visit as “first chiropractic visit” on the initial claim.

“Visit” is commonly used to refer “to go see or stay for a particular purpose.” Webster’s Dictionary, 1980. In the context of the workers’ compensation statutes, a “visit” would be for the purpose of seeking medical services or treatment for an injury or occupational disease. The word “visit” is used twice in ORS 656.005(12). Use of the same term throughout a statute indicates that the term has the same meaning throughout the statute. *PGE*, 317 Or at 611 (citing *Racing Com. V. Multnomah Kennel Club*, 242 Or 572, 586 (1966)). The context of the statute limits chiropractic treatment by restricting either the duration or number of treatments. To restrict the first visit as any medical visit further limits a chiropractor’s authority to treat. For example, an injured worker might seek chiropractic treatment the 25th day after “visiting” a medical doctor. The chiropractor could not treat for either 30 days or 12 visits. To apply the word “visit” consistently, the “first visit” can reasonably be interpreted as the first visit to a chiropractor, who could then treat for the lesser of 30 days or 12 visits on the initial claim. Here, Dr. Freeman treated during the initial claim.¹

Further support is indicated by the statute separately categorizing medical doctor, chiropractor, and consulting physician. The legislature restricted the duration and number of treatment only for chiropractors. Thus, a reasonable inference can be made that these restrictions take effect from the date of the first chiropractic visit.

The rule does not impermissibly expand the terms of the statute. Accordingly, Dr. Freeman qualified as an attending physician from July 28, 2000 until August 23, 2000, when claimant was enrolled in an MCO.

Filing of Form 827

In addition, the hearing officer found that Dr. Freeman had timely filed the Form 827, because it was submitted within five working days from the date claimant designated Dr.

¹ For nondisabling claims, as this claim is, “initial claim” means:

“The first period of medical treatment immediately following the original filing of the occupational injury or disease claim ending when the attending physician does not anticipate further improvement or need for medical treatment, or there is an absence of treatment for an extended period.”

Freeman as her attending physician. She, thus, concluded that OAR 436-010-0220(1) did not apply to defeat reimbursement of the chiropractic treatment.

SAIF contends that Dr. Freeman failed to comply with OAR 436-010-0220(1) because he did not file the Change of Attending Physician Form within five days of the date of first treatment (July 19, 2000). Relying on *Carla J. Kirby*, 5 WCSR 372 (2000), SAIF argues this rule violation renders the treatment not reimbursable.

The chiropractor, in *Kirby*, did not qualify as an attending physician under ORS 656.005(12)(b)(B) because he did not treat the claimant within the initial claim period. Thus, the chiropractic treatment rendered outside the initial claim period was not reimbursable. In *dictum*, the hearing officer also determined that, even if the chiropractor had qualified as an attending physician, his services would not be reimbursable because he violated ORS 436-010-0220(1) by failing to file a Form 829. The director is not bound to follow such *dictum*. *Kirby* is incorrect in stating that a chiropractor's failure to comply with the notice requirements of OAR 436-010-0220(1) renders the chiropractic treatment not reimbursable. *Kirby* is correct to the extent that "clear and timely communication between the medical provider and the insurer facilitates orderly claims processing and timely provision of benefits to the injured worker." *Kirby*, 5 WCSR at 378. Thus, the issue remains whether Dr. Freeman's timely provided notice of his attending physician status.

OAR 436-010-0220(1) states:

"A newly selected attending physician or a referral physician who becomes primarily responsible for the worker's care, shall notify the insurer not later than five days after the date of change or first treatment, using Form 829 (Change of Attending Physician). This form should be completed and submitted only when the previous attending physician is no longer primarily responsible for the worker's care."

Although the rule refers to Form 829, it also lists its title "Change of Attending Physician." The Form 829, (along with four other medical reports), has been consolidated into a single form—a new Form 827. Bulletin 292 (eff. 7/30/99). The change in the form number does not invalidate the requirements of the rule nor render the rule inapplicable. Bulletin 292 further explained that when the new Form 827 was used to report a change of attending physician, the physician "[m]ail the 827 to the insurer or self-insured employer within five calendar days of the change or the date of first treatment."

Here, claimant began treating with Dr. Freeman on July 19, 2000. She, however, did not sign a Form 827 until July 28, 2000. Claimant had not elected to change physicians within five days of her first treatment with Dr. Freeman. Thus, notice should have been provided within five days of the date of change. The parties do not dispute that the Form 827 was submitted on July 28, 2000. Dr. Freeman then qualified as claimant's attending physician. Dr. Freeman is not entitled to be reimbursed for treatment rendered prior to notifying the insurer of his attending

physician status. Therefore, the insurer is liable for the treatment rendered from July 28 to August 23, 2000.

IT IS HEREBY ORDERED that

1. The September 11, 2001 Proposed and Final Contested Case Order is affirmed.
2. SAIF is liable for chiropractic treatment rendered by Dr. Freeman on July 28, 2000 and August 2, 4, 7, 9, 11, 14, 16, 21, 23, 2000.

DATED this 11th day of February, 2002.

**MARY NEIDIG, DIRECTOR
DEPARTMENT OF CONSUMER
AND BUSINESS SERVICES**

By: _____
John Shilts, Administrator
Workers' Compensation Division