

In the ORS 656.245 Medical Services Dispute of

Brown, Ben , Claimant

Contested Case No: HH02-027

PROPOSED & FINAL ORDER

July 2, 2002

BEN BROWN , Petitioner

SAIF CORPORATION , Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

HISTORY OF THE CASE

Claimant appeals an administrative order issued on February 12, 2002 by the Medical Review Unit (MRU) of the Workers' Compensation Division (WCD), Department of Consumer and Business Services (director or department). On June 26, 2002, Administrative Law Judge Catherine P. Coburn conducted a hearing in this matter. Petitioner Ben Brown (claimant), *pro se*, failed to appear. Respondent SAIF Corporation (insurer) was represented by attorney Michael Fetrow. No witnesses testified and the record closed on the date of hearing.

The record of this proceeding, consisting of all evidence received, and all hearing papers filed, has been considered. The findings of fact set out below are based upon the entire record.

ISSUE

Pursuant to Notice of Hearing, the issue is whether osteopathic manipulation and hot packs prescribed by Gordon Canzler, DO after the medically stationary date are compensable under ORS 656.245(1)(c)(J).

EVIDENTIARY RULINGS

WCD Exhibits 1 through 22 were received into the record without objection.

FINDINGS OF FACT

I adopt and incorporate the findings of fact contained in the administrative order with the following supplementation:

(1) On September 28, 1983, claimant suffered a compensable injury. (Ex. 1). The accepted condition became medically stationary on December 16, 1985 and the claim was closed in January, 1986 with a 15 percent unscheduled permanent partial disability award. (Exs. 4 and 5.)

(2) On December 27, 2001, Dr. Canzler submitted a palliative treatment request. (Ex. 13). On January 2, 2002, insurer denied the palliative treatment request because claimant was not working. (Ex. 14). On February 12, 2002, claimant reviewed the history of his relations with insurer and wrote that he had not worked since the date of injury in 1983. (Ex. 22).

(3) Claimant was notified of the date of the telephone hearing and failed to appear.

CONCLUSIONS OF LAW AND REASONING

Jurisdiction lies with the director. ORS 656.245(6). The statute does not specify a standard of review and therefore, I review *de novo*. OAR 436-001-0225(1). See *Archie M. Ulbrich*, 2 WCSR 152 (1997). The burden of proving a fact or position falls upon the proponent. ORS 183.450(2). As petitioner, claimant bears the burden of proving by a preponderance of evidence that the administrative order is incorrect. *Cook v. Employment Div.*, 47 Or 437 (1982) (In the absence of legislation adopting a different standard, the standard of proof in an administrative hearing is preponderance of evidence).

Where respondent failed to appear at hearing after being duly notified of the time of the hearing, and his failure to appear is not due to circumstances beyond his reasonable control, I may issue default order upon a showing of a *prima facie* case made upon the record. OAR 137-003-0670. Here, claimant was notified by mail and by telephone of the hearing date. Claimant failed to appear and offered no explanation of any circumstances that would constitute circumstances beyond his reasonable control.¹ Therefore, I find that a default order is appropriate.

MRU determined that the disputed palliative treatment was not compensable because claimant was not employed or enrolled in a vocational program as required by ORS 656.245(1)(c)(J). MRU further determined that claimant was liable for the disputed medical services pursuant to OAR 436-009-0015(1)(c).

Pursuant to ORS 656.245(1)(a), an insurer is obligated to provide medical services that are materially related to a compensable condition for so long as the nature of the injury or the process of recovery requires. This obligation continues over the worker's lifetime. ORS 656.245(1)(b). However, pursuant to ORS 656.245(1)(c), after the work-related condition becomes medically stationary, the insurer is no longer liable for payment of medical services with some exceptions. ORS 656.245(1)(c)(J) provides in part:

¹ Two and one half hours after the hearing convening time, claimant telephoned my support staff and left a message indicating that he had received the hearing notice but he waived his appearance at a telephone hearing because he preferred an in-person hearing and that he expected to receive an order in the mail.

(c) Notwithstanding any other provision of this chapter, medical services after the worker's condition is medically stationary² are not compensable except for the following:

(J) With the approval of the insurer or self-insured employer, palliative care³ that the worker's attending physician referred to in ORS 656.005(12)(b)(A)⁴ prescribes and that is necessary to enable the worker to continue current employment or a vocational training program.

The compensable condition became medically stationary in December 1985 and the claim was closed in January 1986. Dr. Canzler characterized the disputed treatment as "palliative".

The record establishes that claimant was not employed and was not enrolled in a vocational training program in December 2001 when Dr. Canzler requested approval of palliative care. Furthermore, in May 2002, claimant stated that he had not worked since the 1983 date of injury. The record contains no evidence that claimant enrolled in a vocational training program at any time. Therefore, I find that respondent made a *prima facie* case on the record establishing that the disputed treatment is not compensable pursuant to ORS 656.245(1)(c)(J). Accordingly, insurer is not liable for the disputed treatment.

² "'Medically stationary' means that no further material improvement would reasonably be expected from medical treatment or the passage of time." ORS 656.0005(17).

³ ORS 656.005(2) provides:

'Palliative care' means medical service rendered to reduce or moderate temporarily the intensity of an otherwise stable medical condition, but does not include those medical services rendered to diagnose, heal or permanently alleviate or eliminate a medical condition.

⁴ ORS 656.005(12)(b)(A) provides:

"(b) Except as otherwise provided for workers subject to a managed care contract, 'attending physician' means a doctor or physician who is primarily responsible for the treatment of a worker's compensable injury and who is: "(A) A medical doctor or doctor of osteopathy licensed under ORS 677.100 to 677.228 by the Board of Medical Examiners for the State of Oregon or an oral and maxillofacial surgeon licensed by the Oregon Board of Dentistry or a similarly licensed doctor in any country or in any state, territory or possession of the United States;"

OAR 436-009-0015(1)(c) provides:

- (1) An injured worker shall not be liable to pay for any medical service related to an accepted compensable injury or illness or any amount reduced by the insurer pursuant to OAR chapter 436. A medical provider shall not attempt to collect payment for any medical service from an injured worker, except as follows:
 - (c) When the injured worker seeks palliative care that is either not compensable or not authorized by the insurer or the director pursuant to OAR 436-010-0290, after the worker has been notified that the worker is medically stationary.

There is no question that claimant was notified of the claim closure in 1986. Several years later, claimant sought noncompensable palliative care from Dr. Canzler. Therefore, Dr. Canzler may seek payment from claimant.

ORDER

IT IS HEREBY ORDERED that:

The Administrative Order dated February 12, 2002 is affirmed.

DATED this _____ day of July 2002.

Catherine P. Coburn
Administrative Law Judge
Hearing Officer Panel