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In the Matter of the ORS 656.245 Medical Services Dispute of

**Sumpter, Brian, Claimant**

Contested Case No: H01-035

**PROPOSED & FINAL ORDER**

February 28, 2002

LIBERTY NORTHWEST INSURANCE CORPORATION, Petitioner

BRIAN SUMPTER, Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

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**PROCEDURAL HISTORY**

On October 23, 2000, claimant's attorney requested a review by the Medical Review Unit (MRU) of the Workers' Compensation Division (WCD) of the insurer's refusal to continue to reimburse the claimant for his athletic club membership fees. MRU issued an Administrative Order on February 23, 2001 which found that the athletic club membership and use of a personal trainer (athletic club membership) constituted compensable medical services and was reimbursable. On November 15, 2001, Hearing Officer Paul Vincent conducted a contested case hearing. Petitioner Liberty Northwest Insurance Corporation (insurer) was represented by attorney Scott Monfils. Respondent Brian Sumpter (claimant) was represented by attorney Douglas A. Swanson. The Workers' Compensation Division appeared through Assistant Attorney General Carol Parks. Insurer called no witnesses. Claimant testified on his own behalf. The record closed on the date of hearing.

**ISSUE**

Is a health club membership a reimbursable medical service pursuant to ORS 656.245(1)(b), when an injured worker is permanently, totally disabled and those services are provided outside the direct control and supervision of the attending physician?

**EVIDENTIARY RULINGS**

WCD Exhibits 1-56 were received without objection. Respondent's Exhibits 56A, 57, 58 and 59 received without objection. Petitioner's Exhibit 57A was received without objection. Judicial notice was taken of a pending contested order in the matter of Jennifer McNeil, contested case H00-110, involving a similar issue to this case. Since the date of this hearing, an order has issued in that matter. Jennifer McNeil, 7 WCSR 667, 303, 342 (2002).

**FINDINGS OF FACT**

The parties have not disputed the factual findings of Administrative Order MS 01-010, dated February 23, 2001 and WCD requests that I adopt them. Having reviewed the record in its entirety, I adopt and incorporate the findings of fact contained in that order, Exhibit 52, in their entirety. I make the following additional fact findings:

The services provided by the membership include a weight lifting program and working

with a personal trainer who assists the claimant in the development of a personal fitness program appropriate to his current physical abilities. The personal trainer assists claimant in the use of equipment that he would otherwise be unable to use due to his disability. The trainer has met personally with claimant and his attending physician to discuss claimant's personal conditioning requirements and physical abilities. (Exs. 52, 58; Testimony of Brian Sumpter).

### CONCLUSIONS OF LAW AND REASONING

Jurisdiction over this medical services dispute lies with the director. ORS 656.245(6); OAR 436-010-0008(1). 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, insurer 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).

Pursuant to ORS 656.245(1), an insurer is obligated to provide medical services for a compensable injury for such period as the nature of the injury or the process of recovery requires. This obligation continues for the life of the injured worker. ORS 656.245(1)(b). An insurer is obligated to provide medical services to an injured worker who is permanently, totally disabled after the accepted conditions become medically stationary. ORS 656.245(1)(c)(A).

ORS 656.245(1)(b) provides in relevant part:

“Compensable medical services shall include medical, surgical, hospital, nursing, ambulances and other related services, and drugs, medicine, crutches and prosthetic appliances, braces and supports and where necessary, physical restorative services.”

WCD has also promulgated OAR 436-10-0210(3) which provides:

“Attending physicians may prescribe treatment to be carried out by persons licensed to provide a medical service or by persons not licensed to provide a medical service. Those persons not licensed to treat independently or not licensed to provide a medical service, may only provide treatment prescribed by the attending physician which is rendered under the physician's direct control and supervision.”

The underlying dispute is whether the health club membership is exempt from or subject to OAR 436-010-0210(3). In support of its determination that the athletic club membership is not reimbursable, insurer relies on several previous contested case determinations by the director that have found such memberships to be compensable, but not reimbursable. See Robert Crockford, 1 WCSR 758 (1996); Ivan Redman, 2 WCSR 218 (1997); Michael Edwards, 3 WCSR 334 (1998).

WCD and claimant have argued persuasively that the athletic club membership in dispute is compensable as “physical restorative services.” The meaning of this term is not defined by statute, administrative rule or case law. WCD Trial Memorandum. Webster’s Dictionary defines “physical” as “of or pertaining to matter or nature; pertaining to the body (in contrast to the mind).” The New Lexicon Webster’s Dictionary of the English Language, page 758 (1989). “Restorative” is defined by the same source as “capable of restoring one’s health or strength.” *Id.* at 849. The disputed services are athletic club membership fees. The services provided by the membership include a weight lifting program and working with a personal trainer who assists the claimant in the development of a personal fitness program appropriate to his current physical abilities and also assists claimants in the use of equipment that he would otherwise be unable to use due to his disability. (Exs. 52, 58; Testimony of Brian Sumpter). The use of the weight lifting equipment pertains to the body and is thus “physical” in nature. Claimant’s attending physician opined that the athletic club activities were extremely important to the claimant’s physical and mental health. (Ex. 52). The attending physician also stated that since the claimant has been denied use of the athletic club facilities his physical and mental condition have deteriorated, there has been increased pain and more falls. Since the evidence indicates that the athletic club membership benefits the claimant by keeping his condition from deteriorating, the program satisfies the definition of “restorative.” This finding is consistent with previous determinations by the director that such memberships are compensable medical services. See *Redman, supra*; *Edwards, supra*; *McNeil, supra*.

WCD also argues that I must interpret OAR 436-010-0210(3) as inapplicable to athletic club memberships because the services provided do not constitute “treatment” as that term is used in OAR 436-010-0210(3):

“WCD does not interpret this rule so as to apply to athletic club memberships because the services provided by those entities does not constitute the type of “treatment” for which direction and supervision is needed. At an athletic club an injured worker may come and go using the equipment as that worker’s medical condition and schedule allows.” WCD Trial Memorandum at 4.

An administrative agency’s interpretation of its own rule must be upheld if the interpretation is plausible and not inconsistent with “the wording of the rule itself, or with the rule’s context, or with any other source of law.” *Don’t Waste Oregon Comm. V. Energy Facility Siting Council*, 320 Or 132, 142 (1994).

WCD argues persuasively that the interpretation provided by WCD must be adopted because any other interpretation of this rule would impermissibly narrow the statutory provisions of ORS 656.245(1). As WCD points out, the issue of whether every medical service is “treatment” under OAR 436-010-0210(3) has been previously dealt with in *SAIF v. Glubrecht*, 156 Or App 339 (1998):

“If all medical services were, in fact, treatment, then doctors would have to prescribe patients’ transportation to the doctor’s office and would even have to supervise that transportation. The rule requiring doctors to prescribe treatment and control and supervise the provision of that treatment was clearly not written

to apply to transportation to appointments, nor was it written to apply to remodeling services. The agency's interpretation of its own rule is plausible." Glubrecht at 352-353.

As pointed out by WCD, the services provided by an athletic club are different in nature from the types of services typically provided by a licensed health care provider and do not require the continuous involvement of a health care provider. It is not so specialized that it needs monitoring by a medical specialist. Additionally, an injured worker need not schedule appointments to utilize the services of an athletic club and can use the club's equipment as and when the worker's condition allows.

While the issue of whether athletic club memberships are reimbursable if the services are provided outside of the "direct control and supervision" of the attending physician has been previously addressed by the Director, none of the previous decisions addressed the issue of why the disputed rule applies to these services and, particularly, whether the services in dispute constitute "treatment" as that term is used in OAR 436-010-0210(3). I find the director's interpretation of "treatment" as limited to "traditional medical treatment which must be performed by a licensed medical provider or under the direct control and supervision of the attending physician" to be a reasonable interpretation. WCD Trial Memorandum at 6. Finally, I also find persuasive WCD's argument that any other interpretation of OAR 436-010-0210(3) "would limit the scope of ORS 656.245(1) because many of those services are of the type that cannot be provided if the attending physician must control and supervise the activities. Such an application of the rule, therefore, would be invalid."

In the cases cited by insurer, the director has consistently held that OAR 436-010-0210(3), and the identical text of the former OAR 436-010-0210(7), barred the reimbursement of athletic club memberships. However, none addressed specific issue raised by the director here, what constitutes "treatment" for purposes of OAR 436-010-0210(3). The hearings officer in Crockford described her interpretation of former OAR 436-010-0210(7) in these terms:

"The rules also provide that "direct control and supervision" means the physician is on the same premises, at the same time, as the person providing the medical service ordered by the physician. OAR 436-010-0005 (7). These rules have long been interpreted to bar reimbursement of membership in athletic clubs. Marilyn A. Robinson, 41 Van Natta 2104 (1989); see also Thomas A. Facht, 43 Van Natta 880 (1991). While Board cases are not binding on me, I may adopt their reasoning if it is persuasive. I find these cases to present not only a reasonable interpretation of these rules, but rather the only possible interpretation of these rules. There is, of course, no question that I am bound by the rules. *Aetna Casualty & Surety Company v. Blanton*, 139 Or App 283 (1996)." Crockford at 759.

The order in Redman, while not citing Crockford, reached the same conclusion on similar facts:

"To help the claimant regain the necessary fitness for his impending

surgery, the claimant's attending physician prescribed workouts at an athletic club. ORS 656.245(1)(b) states, "compensable medical services shall include \*\*\* physical restorative services."

“Physical conditioning at an athletic club equates with physical restorative services. Therefore, the membership was a compensable medical service.

“The second step in resolving whether the insurer is responsible to reimburse the claimant for the athletic club membership is to determine if the membership was reimbursable.

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“The claimant's workouts at the athletic club were not carried out by a medical service provider. Nor were the workouts under the direct control and supervision of the claimant's physician. Therefore, the athletic club membership is not a reimbursable medical service.” Redman at 219.

Likewise, in Edwards the director's contested case order found a swim therapy program compensable but non-reimbursable:

“MRU determined that the swim therapy ... violated OAR 436-010-0210(7) as a medical service provided by a person “not licensed to treat independently or not licensed to provide a medical service” and not “rendered under the physician's direct control and supervision.” This violation, MRU concluded, prevented the services from being reimbursed. I agree that the violation occurred and reach the same conclusion.

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“Claimant disputes the validity of the determination in Redman that a swim therapy program, though compensable, is not reimbursable if administered in violation of OAR 436-010-0210(7). Claimant cites Danny S. Johns, 46 Van Natta 278 (1994) as authority for the proposition that the director need not require strict compliance with the rule and that the physician's prescription, treatment plan and subsequent monitoring indicate a substantial compliance that is sufficient to require reimbursement. While the director may, and often does, look to determinations of the Workers' Compensation Board for precedent, he is not required to do so. In this matter, the direct precedent established by the director in Redman is in conflict with the Board's more general determination. While I find claimant's argument appealing, I find that my decision is constrained by the precedent found in Redman.” Edwards at 335.

Despite the precedent of Crockford, Edmonds and Redman, in McNeil the director argued that the director's previous decisions were wrongly decided and urged that the contested case order find the athletic club membership reimbursable. Despite the director's argument, the

contested case order in McNeil found the athletic club membership non-reimbursable because the agency's position was inconsistent with previous decisions:

"If, in reviewing an administrative agency's interpretation of its own rule, I find the agency's interpretation to be plausible and not inconsistent with the wording of the rule itself, or with the rule's context, or with any other source of law, I must uphold the agency's interpretation. *Don't Waste Oregon Comm. v. Energy Facility Siting Council*, 320 Or 132 (1994). See, e.g., *Safeway Stores, Inc. v. Cornell*, 148 Or App 197, 111 (1997) (applying *Don't Waste Oregon* to ALJ's interpretation of an administrative rule in the context of a medical services dispute). Assuming that WCD applies OAR 436-010-0210(3) uniformly in cases where the injured worker is permanently, totally disabled and in those cases where he is not, I find that WCD's interpretation of OAR 436-010-0210(3) is plausible and not inconsistent with the rule's wording or context. However, WCD's interpretation is inconsistent with its own decision in *Redman*. In *Redman*, the director held that an athletic club membership, prescribed by an injured worker's attending physician was not reimbursable because it failed to comply with the administrative rule requiring such medical services, if rendered by non-licensed persons, to take place within the physician's direct control and supervision. WCD, joined by claimant, rely on *Glubrecht* arguing that since reimbursability of prosthetic appliances is exempt from OAR 436-010-0210(3), other related services or physical restorative services such as gymnasium memberships are also reimbursable even if rendered outside the physician's direct control and supervision. I find WCD and claimant's argument unpersuasive." McNeil, 7 WCSR at \_\_\_\_.

While I agree with the conclusion in McNeil that there has been consistent precedent in the director's previous opinions on non-reimbursement of athletic club memberships, I nevertheless find that the director has shown that these previous cases are distinguishable because they do not address the interpretation of "treatment" as defined in OAR 436-010-0210(3) and I defer to the agency's plausible interpretation of its own rule.

### **ATTORNEY FEES**

Claimant has prevailed in a contested case hearing, and therefore, his attorney is entitled to a reasonable attorney fee. ORS 656.385(1). Considering the factors listed in OAR 436-001-0265, a reasonable fee for claimant's attorney's services in this case is \$5,000.

### **ORDER**

IT IS HEREBY ORDERED that:

The Director's Review and Order dated November 8, 2000 is affirmed on other grounds.

DATED this 28<sup>th</sup> day of February 2002.

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Paul Vincent  
Hearing Officer  
Hearing Officer Panel