
In the Matter of the ORS 656.245 Medical Services Dispute of

Ainsworth, Jacqueline C., Claimant

Contested Case No: H01-019

FINAL ORDER

February 25, 2003

SAIF CORPORATION, Petitioner
MICHAEL D. FREEMAN 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. Michael D. Freeman, DC appeared *pro se*. The Department of Consumer and Business Services, Workers' Compensation Division and the claimant waived appearance. Dr. Freeman testified on his own behalf.

SAIF 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 August 2, 4, 7, 9, 11, 14, 16, 21, and 23, 2000. Dr. Freeman did not respond to the exceptions.

The Director issued a Final Order on February 11, 2002 which found that Dr. Freeman qualified as an attending physician and that SAIF was liable for a portion of the treatment provided by Dr. Freeman. Specifically, the Director determined that the term "visit" in ORS 656.005(12) was not statutorily defined. In order to use the term "visit" consistently throughout the statute, the term "first visit" meant first chiropractic visit on the claim. To accept SAIF's interpretation—to restrict the first visit to any medical visit—would impermissibly limit the scope of the statute by restricting a chiropractor's ability to treat as an attending physician. Thus, the Director concluded that a chiropractor could be an attending physician for 30 days from the first chiropractic visit or 12 visits, whichever occurs first.

On April 12, 2002, SAIF filed a Petition for Reconsideration and Request for Stay pursuant to OAR 137-003-0675. Pursuant to the April 17, 2002 Order Granting Reconsideration and Stay, the Director granted SAIF's petition. An agency may withdraw its order for purposes of reconsideration. ORS 183.482(6), OAR 137-003-0675(5). On reconsideration, the order may be modified, affirmed, or reversed. The entire record, consisting of a tape recording of the hearing, all evidence received, and all documents filed, has been considered.

On reconsideration, SAIF argues that the Director's rule, *former* OAR 436-010-0005(2), limited the terms of the statute by inserting the modifier "chiropractic" before the term "visit" contrary to ORS 174.010 and *Altamirano v. Woodburn Nursery*, 133 Or App 16 (1995).

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.”

Former 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[.]”

In *Altamirano*, the court determined whether the agency correctly interpreted the term “claim” in promulgating OAR 436-010-005.¹ 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; namely, initial and aggravation claims. The court concluded that the rule, by defining claim as “initial claim,” 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.

Before 1990, chiropractors had the same attending physician status as medical doctors. In 1990, substantial changes were made to the workers’ compensation law. As part of those changes, the Management Labor Advisory Committee’s (MLAC) initial legislative concept limited the definition of “attending physician” to mean “a medical doctor or osteopathic physician licensed by the Board of Medical Examiners for the State of Oregon.”² Management Labor Advisory Committee Executive Summary of LC 369-18, Section 3. MLAC believed that a medical doctor or doctor of osteopathy had broader training and, thus, would be in a better position to be a “gatekeeper” to make referrals to other treating physicians. However, legislative leaders did not think that a “gatekeeper” function was critical to having managed care organizations (MCOs). *Report from The Governor’s Workers’ Compensation Labor Management Advisory Committee To President John Kitzhaber, Speaker Vera Katz, Senate Minority Leader John Brennehan, House Minority Leader Larry Campbell* 1 (May 1, 1990).

¹ *Former* OAR 436-10-005(1)(c) defined attending physician as: “For 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 State Board of Chiropractic Examiners for the State of Oregon ***.”

² ORS 656.005(12) as introduced read: “*** ‘Attending physician’ means a **medical** doctor or [*physician*] **doctor of osteopathy licensed under ORS 677.100 to 677.228 by the Board of Medical Examiners for the State of Oregon and ***.**” LC 369-20, 5/1/90 (emphasis in original).

Under MLAC's legislative concept that created the MCO scheme, Section 10 provided:

“Allows a medical services provider who *is not in a MCO and not* qualified to be an attending physician to provide medical services to injured workers for a period of 30 days from the date of injury or disease or for 12 visits, whichever first occurs without the authority of the attending physician. ***.” MLAC Executive Summary of LC 369-18 (emphasis in original).

This Section 10 of LC 369-18 became ORS 656.245(3)(b)(A), which read:

“(b) A medical service provider who is not a member of a [MCO] is subject to the following provisions:

“(A) A medical service provider who is not qualified to be an attending physician may provide compensable medical service to an injured worker for a period of 30 days from the date of injury or occupational disease or for 12 visits, whichever first occurs, without the authorization of an attending physician. Thereafter, medical service provided to an injured worker without the written authorization of an attending physician is not compensable.” Or Laws 1990, ch 2, §10 (SB 1197 §10).

ORS 656.245(3) was intended to apply to chiropractors, as well as other medical services providers other than medical doctors or osteopathic doctors. Minutes, Special Committee on Workers' Compensation, May 3, 1990, page 7. Under this provision, a non-attending physician, who was not a member of a MCO, could only treat for 30 days from the date of injury or for 12 visits.

Thereafter, ORS 656.005(12)'s proposed definition of attending physician was amended to include chiropractors as attending physicians. The 1A amendment read:

“(12)(b) ‘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 655.100 to 677.228 by the Board of Medical Examiners for the State of Oregon or a board certified oral surgeon licensed by the Oregon Board of Dentistry; or**

“(B) **For a period of 30 days from the date of first visit or for 12 visits, whichever first occurs, a doctor or physician licensed by the State Board of Chiropractic Examiners for the State of Oregon.**”

During the May 4, 1990 work session, the phrase “on the claim” was added after “first visit.” Annette Talbott, counsel to the Senate Labor Committee explained:

“Starting with the 1A amendment, there is an addition on line 11 after ‘first visit’ it should read ‘on the claim.’

“This would allow chiropractors to treat and authorize time loss for the first 30 days from the first 30 days from the first visit on the claim or for 12 visits, whichever first occurs ***.” Minutes, Special Committee on Workers’ Compensation, May 4, 1990, page 19.

SAIF contends that Ms. Talbott’s use of the term “for the first 30 days,” in explaining how the period “from the first visit on the claim” would be calculated, demonstrates that the amendment was intended to allow chiropractors to serve as attending physicians at the beginning of treatment on a claim.

However, the inclusion of the phrase “on the claim” could reasonably mean that the legislature intended to grant a chiropractor attending physician status only on the initial claim. This is consistent with the 1995 amendment to ORS 656.005(12)(b)(B), which added the word “initial” before “claim” to clearly provide that chiropractors were limited to attending physician status only on the initial claim and not other claims, such as aggravation or new medical condition claims. Or Laws 1995, ch 332, §1 (SB 369 §1); *see also Manuel Altamirano*, 47 Van Natta 1499, 1501 (1995) (the legislature clearly intended that SB 369 §2 amendment to ORS 656.005(12)(b)(B) be construed to adopt the Director’s definition of a “claim” as promulgated in OAR 436-10-005(1)).

Unlike *former* ORS 656.245(3)(b)(A), which used the phrase “from the day of injury,” ORS 656.005(12)(b)(B) used the phrase “from the first visit.” If the legislature had intended a similar limitation in ORS 656.005(12)(b)(B), it could have used the same language as in *former* ORS 656.245(3)(b)(A). It did not. The legislature’s choice of terminology in ORS 656.005(12)(b)(B) was purposeful. *See e.g., SAIF v. Allen*, 320 Or 192, 203 (1994) (the term “claim” in ORS 656.386 was not similarly confined as in ORS 656.245(2)). This purposeful choice of language shows the intent to provide a different window of treatment for chiropractors.³ That window starts with the first chiropractic visit and continues for the lesser of 30 days or 12 visits.

In *SAIF v. Jensen*, 183 Or App 439 (2002), however, the court stated the meanings of ORS 656.245(2)(b)(A) and ORS 656.005(12)(b) are plain. In *Jensen*, the claimant suffered a December 1997 injury. The record is unclear when the claimant first sought treatment, but he began treating with a chiropractor on February 20, 1998. Relying on ORS 656.245(2)(b)(A), SAIF paid the chiropractor only for treatments provided during the 30 days from the initial visit on February 20, 1998. The hearing officer determined that SAIF was responsible for medical services from February 20, 1998 to July 2, 1999. In interpreting that statute, the court reversed the hearing officer’s holding that ORS 656.245(2)(b)(A) did not apply to denied claims. The

³ This conclusion is supported by a letter from House Minority Leader Larry Campbell and Ron Grensky of the Senate Labor Committee to Matt Hennessee, Administrator of the Workers’ Compensation Division, regarding their understanding of the amendments to ORS 656.005(12) in response to WCD’s rules implementing that statute (attached). The letter indicates that the 30-day window was a negotiated alternative to the language “30 days from the date of injury” to allow the 30-day period to run from the first chiropractic visit. *Lahmann v. Grand Aerie of Fraternal Order of Eagles*, 180 Or App 420, 433 n.15 (2002) (although after-the-fact summaries of legislative history have little weight in determining legislative intent, it may be relied upon to support conclusion court drew from the testimony that was before the legislature).

court stated:

“There is no language that qualifies the 30-day or 12-visit limit for nonattending physicians set out in ORS 656.245(2)(b)(A) based on the status of the claim, and we are prohibited from inserting language into that statute. ORS 174.010.

“The meanings of ORS 656.245 and ORS 656.005(12)(b) are plain. A chiropractor who is not a member of a managed care organization can be an attending physician only for 30 days from the date of first *treatment* or 12 visits, whichever first occurs.” 183 Or App at 443 (emphasis added).

In interpreting ORS 656.245(2)(b)(A), the court did not address the differences in language in that statute -- “30 days from the date of injury” -- with ORS 656.005(12)(b)’s language -- “30 days from the date of first visit on the initial claim” -- nor did it explain its use of the term “treatment” to reconcile the two statutes. That question was not before the court; only the question of payment to a chiropractor when the chiropractor no longer qualified as an attending physician. Here, however, the question is whether the chiropractor qualified as an attending physician. For the reasons stated above, the 30-day or 12-visit limitation starts from the first chiropractic visit on the initial claim.

On reconsideration, as supplemented herein, the Director republishes her prior order. The parties’ rights of appeal shall run from the date of this order.

IT IS SO ORDERED.

DATED 25th of February, 2003

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

By: _____
John Shilts, Administrator
Workers' Compensation Division