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In the Matter of the ORS 656.245 Medical Services Dispute of

**Davidson, Brian K., Claimant**

Contested Case No: H03-014

**PROPOSED AND FINAL ORDER**

June 19, 2003

LIBERTY NORTHWEST INSURANCE CORPORATION, Petitioner

BRIAN K. DAVIDSON Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

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**HISTORY OF THE CASE**

Insurer appeals an Administrative Order issued on January 28, 2003 by the Medical Review Unit (MRU) of the Workers' Compensation Division (WCD), Department of Consumer and Business Services (director or department). On May 22, 2003, Administrative Law Judge Catherine P. Coburn conducted a contested case hearing. Petitioner Liberty Northwest Insurance Corporation (insurer) was represented by attorney Meg Carman. Respondent Brian K. Davidson (claimant) was represented by attorney Juli Hall. Christine James, Senior Claims Manager, testified on insurer's behalf and the record closed on the date of hearing.

**ISSUE**

Whether, pursuant to OAR 436-010-0270(7)(c), insurer is liable for mileage reimbursement for trips from Brookings to Ashland.

**EVIDENTIARY RULINGS**

WCD Exhibits 1 through 29 were received into the record without objection. I overruled claimant's hearsay objection to portions of James' testimony.

**FINDINGS OF FACT**

(1) On September 23, 1997, claimant suffered a compensable injury while working as a millwright. Insurer accepted the following conditions: right ankle sprain, left leg tendinitis, left ankle fracture, left foot reflex sympathetic dystrophy. On April 24, 2001, claimant was declared permanently, totally disabled. (Stipulation of the parties.)

(2) Claimant resides in Brookings, Oregon. His attending physician is Thomas McConnell Ewald, MD (Family Physician) whose office is located in Ashland, Oregon. (Ex. 3.) From Brookings to Ashland, it is a 280 mile round-trip requiring 5 hours and 45 minutes. (Ex. 2.) During the trip, claimant suffers nausea and increased pain. (Ex. 7; testimony of James.) Dr. Ewald treats claimant for the compensable conditions, pain management and diabetes. (Exs. 14, 16 and 18.)

(3) Christine James, Senior Claims Manager researched lists of family physicians in the Brookings area through the American Medical Association, the Oregon Board of Medical

Examiners, the internet and the telephone yellow pages. She provided this information to claimant. (Testimony of James.)

(4) On June 15, 2001, James wrote to claimant citing the applicable administrative rule verbatim and explaining her concern about mileage reimbursement for trips to Dr. Ewald's office. James provided claimant with a list of three family physicians who practiced in Brookings within 6 miles of claimant's home. She advised that claimant was entitled to continue seeing Dr. Ewald as his attending physician but future mileage reimbursement would be limited to 12 miles. She (Exs. 2 and 6)

(5) In July 2001, James telephoned claimant and discussed mileage reimbursement. Claimant indicated that he would like to locate an attending physician closer to his home, but that he had trouble finding a physician to treat his diabetes and pain management. James agreed to pay claimant's mileage reimbursement for two more trips from claimant's home in Brookings to Dr. Ewald's office in Ashland. (Testimony of James.)

(6) James contacted a pain management clinic located in North Bend, Oregon and ascertained that Michael Poleman, MD offered pain management and was accepting new patients, including injured workers. James conveyed this information to claimant's attorney. (Testimony of James.)

(7) In August 2001, insurer wrote to Dr. Ewald pointing out that claimant suffered pain during the long car rides to his office and asking Dr. Ewald to assist claimant in locating a family physician closer to his home. Dr. Ewald did not respond. (Exs. 10 and 11.)

(8) Insurer continued reimbursing claimant's mileage to Ashland through May 2, 2002. (Ex. 15.)

(9) On May 3, 2002, insurer notified claimant that although he was entitled to continue treating with Dr. Ewald, it would no longer reimburse full mileage for trips from Brookings to Ashland. Insurer enclosed a copy of the June 15, 2001 letter with a family physician list and an updated list of family physicians located in an expanded geographic area up to 83 miles from claimant's home. (Exs. 2, 5, 6, 15 and 25; testimony of James.)

### **CONCLUSION OF LAW**

Pursuant to OAR 436-010-0270(7)(c), insurer is not liable for mileage reimbursement for trips from Brookings to Ashland.

### **OPINION**

Jurisdiction over medical services disputes lies with the director. ORS 656.245(6) and ORS 656.704(3)(a); OAR 436-010-0008(1). I review for substantial evidence or error of law. ORS 656.245(6). The burden of proving a fact or position rests with the proponent. ORS 184.450(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, an insurer is obligated to provide medical services that are materially related to the compensable injury. Under ORS 656.245(1)(a)<sup>1</sup>, claimant is entitled to all medical services that the “nature of the injury or the process of recovery requires.” The statute authorizes reasonable and necessary medical services for compensable conditions. Travel expenses are “other related services” within the meaning of medical services under ORS 656.245(1). *Stritt v. SAIF*, 37 Or App 893 (1978); *Francoeur v. SAIF*, 17 Or App 37 (1974).

ORS 656.245(1)(e) provides:

Except for services provided under a managed care contract, out-of-pocket expense reimbursement to receive care from the attending physician shall not exceed the amount required to seek care from an appropriate attending physician of the same specialty who is in a medical community geographically closer to the worker’s home. For purposes of this paragraph, all physicians within a metropolitan area are considered to be part of the same medical community.

ORS 656.245(2)(a) provides in part:

The worker may choose an attending physician within the State of Oregon.

Additionally, OAR 436-010-0270(7) provides:

(7) Insurers shall reimburse workers for actual and reasonable costs for travel, prescriptions, and other claim related services paid by a worker in accordance with ORS 656.245(1)(e), 656.325 and 656.327.

(a) Reimbursement by the insurer to the worker for transportation costs to visit their attending physician may be limited to the theoretical distance required to realistically seek out and receive care from an appropriate attending physician of same specialty who is in a

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<sup>1</sup> ORS 656.245 provides in pertinent part:

(1)(a) For every compensable injury, the insurer or self-insured employer shall cause to be provided medical services for conditions caused in material part by the injury for such period as the nature of the injury or the process of the recovery requires, \*\*\*.

(1)(b) Compensable medical services shall include medical surgical, hospital, nursing, ambulances and other related services, \*\*\*.

geographically closer medical community in relationship to the worker's home. All medical practitioners within a metropolitan area considered part of the same medical community and therefore are not considered geographically closer than any other physician in that metropolitan medical community for purposes of travel reimbursement.

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(c) Prior to limiting reimbursement under subsection (7)(a), of this rule, the insurer shall provide the worker a written explanation and a list of providers who can **timely** provide similar services within a reasonable traveling distance for the worker. The insurer shall inform the worker that treatment may continue with the established attending physician; however, reimbursement of transportation costs may be limited as described.

(Emphasis added.)

This dispute arises at the convergence of an injured worker's right to choose an attending physician anywhere in the state, pursuant to ORS 656.245(2)(a), and insurer's right to limit reimbursement of medical mileage pursuant to ORS 656.245(1)(e). MRU determined that insurer is liable for full mileage reimbursement because it failed to comply with the notification requirements specified by OAR 436-010-0270(7)(c). Specifically, MRU construed the rule to require an insurer to ascertain and to notify claimant of particular physicians in the worker's geographic area who can timely provide similar medical services and are willing to accept claimant as a patient. As petitioner, insurer contends that MRU misconstrued the rule. In support of its position, insurer argues that MRU's interpretation conflicts with ORS 656.245(2)(a). Insurer further argues that it complied with OAR 436-010-0270(7)(c) and it correctly limited reimbursement under ORS 656.245(1)(e). In contrast, claimant contends that he has been unable to locate an attending physician closer to his home and that insurer should continue paying full reimbursement.

In interpreting the meaning of a rule, I apply the same method of analysis employed in determining the meaning of a statute, *viz.*, to determine the meaning of the words used, giving effect to the intent of the enacting body, which in this case is the department. *Abu-Adas v. Employment Dept.*, 325 Or 480, 485 (1997); *see also, PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-11 (1993) (court's task in determining legislative intent first is to examine the statute, including context in which the statute is found, and if intent is clear, to proceed no further with its analysis). Where an agency's interpretation of its own rule is plausible and is not inconsistent with the wording of the rule itself, the rule's context, or with any other source of law, there is no basis for asserting that the rule has been misinterpreted by the agency. *Don't Waste Oregon Com. v. Energy Facility Siting Council*, 320 Or 132, 142 (1994).

Focusing on the term, "timely," MRU interpreted OAR 436-010-0270(7)(c), to require an

insurer to provide an injured worker with the names of particular physicians in the same specialty and geographic area who agreed to treat claimant and were currently available to do so. The term “timely” means “early, soon, in time, or opportunely.” *Webster’s New Collegiate Dictionary* (150<sup>th</sup> Anniversary ed. 1981).

I agree with insurer’s argument that MRU misconstrued OAR 436-010-0270(7)(c). To begin, the rule does not require an insurer to determine whether any physicians agree to treat an injured worker. Moreover, ORS 656.245(2)(a) prohibits an insurer from directing an injured worker to seek treatment from particular physicians. The statute accords injured workers the freedom and the responsibility to choose an attending physician. Contrary to MRU’s determination, it is incumbent upon the injured worker to ascertain which physician agrees to treat him.

ORS 656.245(1)(e) limits insurer’s obligation to pay medical mileage for visits to an attending physician practicing the same specialty located geographically closer to claimant’s home. Additionally, OAR 436-010-0270(7)(a) specifies insurer’s obligation to pay medical mileage to “reasonable costs for travel” under the same limitations. Furthermore, OAR 436-010-0270(7)(c) requires an insurer, prior to limiting reimbursement, to provide a written explanation and a list of providers who can timely provide similar services within a reasonable traveling distance for the worker. In the June 15, 2001 and May 3, 2002 letters, insurer complied with the rule.

In conclusion, I find that MRU’s interpretation of OAR 436-010-0270(7)(c) conflicts with ORS 656.245(2)(a), constituting legal error. Based on the record, I find that insurer complied with the notice requirements specified by OAR 436-010-0270(7)(c), and therefore, is entitled to limit reimbursement of medical mileage pursuant to ORS 656.245(1)(e). For these reasons, I reverse.

### **ATTORNEY FEES**

Claimant has not prevailed in a contested case hearing, and therefore, he is entitled to no attorney fee. ORS 656.385(1).

### **ORDER**

IT IS HEREBY ORDERED that:

The Administrative Order dated January 28, 2003 is reversed.

DATED this 19<sup>th</sup> day of June 2003.

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Catherine P. Coburn,  
Administrative Law Judge  
Office of Administrative Hearings