

In the Matter of the ORS 656.327 Medical Treatment Dispute of

**Lusby, Judy M., Claimant**

Contested Case No: H03-065

**PROPOSED AND FINAL ORDER**

November 7, 2003

LIBERTY NORTHWEST INSURANCE CORPORATION, Petitioner

JUDY M. LUSBY, Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

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**HISTORY OF THE CASE**

Insurer appeals an Administrative Order issued on May 7, 2003 by the Medical Review Unit (MRU) of the Workers' Compensation Division (WCD), Department of Consumer and Business Services (director or the department). On June 17, 2003, the matter was referred to the Office of Administrative Hearings. On October 30, 2003, Administrative Law Judge (ALJ) Catherine P. Coburn conducted a hearing in this matter. Petitioner Liberty Northwest Insurance Corporation (insurer) was represented by attorney Darren Lee. Respondent Judy M. Lusby (claimant) was represented by attorney Joe DiBartolomeo. No witnesses testified and the record closed on the date of hearing.

**ISSUE**

Whether an RS-4 Sequential Stimulator prescribed by John Misko, MD is appropriate medical treatment for claimant's accepted condition.

**EVIDENTIARY RULINGS**

WCD Exhibits 1 through 42 as well as insurer's Supplementary Exhibit 41A were received into the record without objection. Insurer submitted a legible replacement copy of Exhibit 25 which is received into the record without objection.

**FINDINGS OF FACT**

(1) On April 12, 1986, claimant was compensably injured while working as a waitress. (Ex. 1.) Insurer accepted a low back strain and disc herniation at L3-4 and L4-5. (Ex. 2.) Claimant has undergone eight spinal surgeries including L3-4, L4-5 and L5-S1 fusions. (Exs. 4-1 and 19.) The most recent surgery took place on September 17, 2002 when John Misko, MD re-fused L4-5 bilaterally. (Ex. 19.)

(2) On September 24, 2002, attending physician Misko requested authorization for an RS-4 Sequential Stimulator for a minimum of three months. Dr. Misko prescribed the device for pain and spasm control prior to surgery and to help restore muscle function following surgery. Dr. Misko advised that no substitutions for the RS-4 should be allowed. (Ex. 20.)

(3) Insurer denied authorization and claimant appealed. (Exs. 21 and 23.) On November 12, insurer submitted a Specification of Disputed Medical issues listing two grounds for the disapproval. “The service is excessive, inappropriate, ineffectual, or in violation of the medical service rules.” “The service is experimental and/or not scientifically proven to be effective treatment.” (Ex. 24.)

(4) On November 20, 2002, Gary Rischitelli, MD, insurer’s Medical Director, reviewed the request and opined that no evidence supported the medical necessity of the request. (Ex. 25.)

(5) On January 3, 2003, claimant submitted to MRU an article published in a 2002 *Journal of Clinical Physiology and Functional Imaging*. (Ex. 30).

(6) On January 15, 2002, Dr. Rischitelli reviewed the *Journal of Clinical Physiology and Functional Imaging* article and opined that RS-4 Sequential Stimulator provides no proven clinical benefit. (Ex. 31.)

(7) On January 31, 2003, MRU requested Patrick E. Golden, MD to serve as physician reviewer. (Ex. 33.) On February 6, 2003, Dr. Golden, MD opined that the disputed medical treatment<sup>1</sup> is unproven and inappropriate. (Ex. 36.)

### OPINION

Jurisdiction lies with the director. ORS 656.704(3)(a). I may modify the administrative order only if it is not supported by substantial evidence in the record or reflects an error of law. ORS 656.327(2) and OAR 436-001-0225(3). 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 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). Proof by a preponderance of evidence means that the fact finder is persuaded that the facts asserted are more likely true than false. *Riley Hill General Contractors v. Tandy Corp.*, 303 Or 390 (1989).

Pursuant to ORS 656.245(1), an insurer is obligated to provide medical services for a compensable condition for so long as the nature of the injury or the process of recovery requires. However, pursuant to ORS 656.327(1)(a), an insurer is not obligated to provide medical services that are excessive, inappropriate, ineffectual or in violation of administrative rules.

#### Experimental

Insurer contends that the RS-4 Sequential Stimulator is experimental and therefore is inappropriate treatment under ORS 656.327. MRU declined to address the question because insurer did not pursue the administrative process prescribed by OAR 436-010-0300 which implements ORS 656.245. Insurer contends that this constituted legal error and I agree.

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<sup>1</sup> The parties stipulate that “RS-4 Sequential Stimulator” and “Interferential Stimulation Devices (IF)” are synonymous medical terms. (Exs. 25-3 and 36-5.)

ORS 656.245(3) provides:

Notwithstanding any other provision of this chapter, the director, by rule, upon the advice of the committee created by ORS 656.794 and upon the advice of the professional licensing boards of practitioners affected by the rule, may **exclude from compensability** any medical treatment the director finds to be unscientific, unproven, outmoded or experimental. The decision of the director is subject to a contested case review under ORS 183.310 to 183.550.

(Emphasis added.)

In construing a statute, my task is to discern the intent of the legislature. The first level of analysis is to examine the text and context of the statute. If the legislature intent is clear, no further inquiry is necessary. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-11 (1993). Here, the text reads that the department may “exclude from compensability” any medical treatment it deems experimental. The statutory text reflects the legislature’s intent to authorize the department to designate certain forms of unproven medical treatment noncompensable uniformly in every worker’s compensation claim. The department has fulfilled this task by promulgating OAR 4360009-0015(6)<sup>2</sup> which lists certain types of medical treatment that are noncompensable in every workers’ compensation claim.

OAR 436-010-0300(1) provides:

If an injured worker or insurer believes that any medical treatment is unscientific, unproven as to its effectiveness, outmoded, or experimental, either party **may** initiate a request for exclusion of the medical treatment from compensability pursuant to ORS 656.245(3). The request shall include documentation on why the medical treatment should be excluded from compensability for workers’ compensation claims. Request for administrative review of an individual worker’s treatment under ORS 656.327 does not initiate review under this process.

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<sup>2</sup> OAR 436-009-0015(6) provides:

Pursuant to ORS 656.245(3), the director has excluded from compensability the following medical treatment. While these services may be provided, medical providers shall not be paid for the services or for treatment of side effects.

- (a) DMSO, except for treatment of compensable interstitial cystitis.
- (b) Intradiscal electrothermal therapy (IDET)
- (c) Surface EMG tests,
- (d) Rolfing,
- (e) Prolotherapy, and
- (f) Thermography.

(Emphasis added.)

In interpreting the meaning of an administrative rule, I apply the same method of analysis employed in determining the meaning of a statute *viz.*, to ascertain 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).

I find that OAR 436-010-0300(1) does not apply to the present case. First, the rule implements ORS 656.245 while insurer denied the disputed treatment under ORS 656.327. Next, the rule contains the permissive verb "may" and is not mandatory. Accordingly, if a party chooses not to proceed under ORS 656.245(3) and OAR 436-010-0300(1), it does not waive its contention that the disputed medical treatment is experimental and inappropriate under ORS 656.327. Moreover, the text of the statute and rule specify that a request under ORS 656.245(3) and OAR 436-010-0300(1) pertains to worker's compensation claims in general. In contrast, a denial under ORS 656.327 may pertain to the medical treatment of a particular injured worker only. Therefore, if an insurer elects not to proceed under ORS 656.245(3) and OAR 436-010-0300(1) to establish that a medical procedure is not compensable in any workers' compensation claim, it is not precluded from contending that the same medical treatment is experimental and inappropriate in a particular case under ORS 656.327. Inasmuch as MRU's interpretation of OAR 436-010-0300(1) is inconsistent with the wording of the statute and rule, I do not defer. Finally, I conclude that MRU committed legal error by declining to address the experimental question. *See Juan Cisneros*, 5 WCSR 120 (2000) (Failure to consider substantive issue warranted remand). Accordingly, I remand to MRU for determination whether the disputed medical treatment was experimental and inappropriate under ORS 656.327(1)(a).

#### Appropriateness

Additionally, insurer contests the medical appropriateness of the disputed medical treatment under ORS 656.327(1)(a). In support of its position, insurer contends that the administrative order is not supported by substantial evidence and that MRU erred by relying on the opinion of the attending physician. In contrast, claimant contends that the administrative order is correct and should be affirmed. Inasmuch as I remand the matter to MRU for its determination of the experimental question, I do not reach the medical appropriateness issue.

#### **ATTORNEY FEES**

ORS 656.385(1) provides:

In all cases involving a dispute over compensation benefits

pursuant to ORS 656.245, 656.260, 656.327, or 656.340, where a claimant finally prevails in a contested case order by the Director of the Department of Consumer and Business Services, the director shall require the insurer or self-insured employer to pay a reasonable attorney fee to the claimant's attorney.

On remand, claimant has not "finally prevailed", and therefore, is entitled to no attorney fee.

**ORDER**

IT IS HEREBY ORDERED that:

The matter is remanded to MRU for determination whether the RS-4 Sequential Stimulator is experimental and inappropriate medical treatment for claimant's compensable condition under ORS 656.327(1)(a).

DATED this 7th day of November 2003.

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