
IN THE MATTER OF THE ORS 656.327 TREATMENT DISPUTE OF
SHULTZ, SHERMAN L., CLAIMANT
CONTESTED CASE NO: H03-078
PROPOSED & FINAL ORDER

December 19, 2003

SHERMAN L. SHULTZ, Petitioner
LIBERTY NORTHWEST INSURANCE CORPORATION, Respondent
Before Ray Myers, Administrative Law Judge, Office of Administrative Hearings

HISTORY OF THE CASE

Sherman L. Shultz (claimant) appeals a May 8, 2003 Administrative Order issued by the Medical Review Unit (MRU) of the Workers' Compensation Division (WCD), Department of Consumer and Business Services (the director or the department) which determined that Liberty Northwest Insurance Corporation (Liberty or the insurer) is not liable for a passenger seat modification to Mr. Shultz's van and for an electric scooter. On June 19, 2003, the matter was referred to the Office of Administrative Hearings (OAH) for hearing

On August 15 2003, Administrative Law Judge (ALJ) Paul Vincent conducted a telephone hearing in this matter in Salem, Oregon. Attorney Nelson Hall represented Mr. Shultz. Attorney Ray Smitke represented Liberty. WCD waived appearance. Mr. Shultz testified. The record closed following the hearing.

After the hearing, the OAH assigned the matter to Administrative Law Judge Ray Myers to review the record and to write this order. The record of this proceeding, consisting of tape recordings of the hearing, all evidence received and all hearing papers filed, has been considered. The findings of fact and conclusions of law are based upon the entire record.

ISSUES¹

1. Under ORS 656.245(1), is Liberty liable for reimbursing Mr. Shultz for the cost of modifying the passenger seat of his van?
2. Under ORS 656.245(1) is Liberty liable for reimbursing Mr. Shultz for the cost of an electric scooter?

EVIDENTIARY RULING

The record consists of Exhibits 1 through 59, which were admitted into the record without objection.

¹ MRU also decided that Liberty is liable for modifying the van and reimbursing claimant for an exercise machine and supporting table. Neither party challenged those decisions, which will be affirmed.

FINDINGS OF FACT

I adopt MRU's Findings of Fact with the following supplementation:

1. Mr. Shultz is a 66 year old logger who injured both his legs while working for Liberty's insured, Helicopter Logging. (Ex. 1.) Liberty accepted "left above knee amputation, right pelvis fracture, right acetabular femur fracture, right hip dislocation, sigmoid colon injury and respiratory depression." (Ex. 2.) By Notice of Closure dated December 10, 2002, Liberty awarded permanent total disability. (Ex. 44.)

2. Mr. Shultz requires a wheelchair for mobility. (Ex. 37.) Liberty has purchased a manual wheelchair, an electric wheelchair and a conversion van for him. Mr. Shultz has requested that Liberty reimburse him for an electric scooter and for a movable passenger seat for his conversion van. Liberty has denied both the electric scooter and the movable passenger seat as not reasonable and necessary. (Ex. 31; test. of Shultz.)

3. Mr. Shultz lives on two acres. He is able to park on an asphalt pad and get to his home in either the electric chair or the manual chair. However, he cannot safely get onto the rest of his property in either the electric or the manual chair. He has purchased an electric scooter, which allows him to go to the mailbox or into his yard or down the road to visit his neighbors. (Test. of Shultz.) The scooter is necessary to maintain a reasonable quality of life. (Ex. 57.)

4. Without a movable passenger seat in the conversion van, when he is not the driver, Mr. Shultz must remain in his wheelchair, which is secured to the floor at a 45 degree angle behind the driver. He is strapped into his chair with only a lap belt. (Test. of Shultz.) Being able to transfer into a seat is safer than remaining in the chair. (Ex. 57.)

CONCLUSIONS OF LAW

1. Under ORS 656.245(1), Liberty is not liable for reimbursing Mr. Shultz for the cost of modifying the passenger seat of his van.

2. Under ORS 656.245(1), Liberty is liable for reimbursing Mr. Shultz for the cost of an electric scooter.

OPINION

This dispute arises under ORS 656.245(1)(c)(A), and therefore, jurisdiction lies with the director. ORS 656.245(6). I review for substantial evidence or error of law. ORS 656.245(6), ORS 656.327 and OAR 436-120-0225(3). 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).

A worker who has been awarded permanent total disability is entitled to medical services under ORS 656.245(1)(c)(A). However, the injured worker is only entitled to services that are not excessive, inappropriate, ineffectual or in violation of rules. ORS 656.327(1)(a). Any party may challenge past, present or future medical services that are alleged to be excessive inappropriate, ineffectual or in violation of rules. In this case, Liberty contended that the motorized scooter and the movable passenger seat were not reimbursable because they were excessive, inappropriate, ineffectual or in violation to the medical services rules. MRU found that the movable passenger seat was not reimbursable under this statute because it is not necessary for the nature of injury. MRU also found that the motorized scooter was not reimbursable because it is not necessary to make him self-sufficient. Thus, Mr. Shultz bears the burden of proving by a preponderance of the evidence that MRU erred as a matter of law or that there was no substantial evidence to support its decisions.

In *SAIF v. Glubrecht*, 156 OR App 339 (1998), the Court of Appeals stated:

One purpose of the Workers' Compensation Act is to "restore the injured worker physically and economically to a self-sufficient status in an expeditious manner and to the greatest extent practicable." ORS 656.012(2)(c). The function of a wheelchair, and of the necessary accompanying structural modifications to the claimant's home, is to *promote self-sufficiency* and to allow the individual independently to gain access to, and use, the rooms in his or her home. (emphasis added.)

Id at ____.

In this case as in Mr. Glubrecht's case, Mr. Shultz seeks independent access to and use of his property, rather than just his home. However, the principle seems the same. If a purpose of the worker's compensation act is to promote self-sufficiency to the greatest extent possible, then the motorized scooter is well within that purpose. MRU stated:

A basic objective of Workers' Compensation as contained in ORS 656.012 is to restore the injured worker physically and economically to a self-sufficient status in an expeditious manner and to the greatest extent practicable. While it could be argued that the electric scooter restores Mr. Shultz to be self-sufficient to the greatest extent practicable, the director must balance that argument with the medical opinions indicating the electric scooter is not necessary for Mr. Shultz to be self-sufficient. The director concludes that while the electric scooter would improve Mr. Shultz's quality of life, Liberty is not responsible for the purchase of such scooter.

I find that MRU erred as a matter of law by requiring that the medical opinions support a finding that the motorized scooter is necessary for Mr. Shultz to be self-sufficient. The test is not whether the requested item is necessary to self-sufficiency, rather it is, as the *Glubrecht* court stated, whether the requested item promotes self-sufficiency.

Dr. Saviers stated that a motorized scooter would allow him mobility around his property and without it he has no access to much of the property. He admitted that a motorized scooter is not necessary for community mobility. Similarly, Dr. Glassman stated that while not necessary to survival, a motorized scooter is necessary for Mr. Shultz to maintain the quality of his life. These are the only opinions on the need for the motorized scooter. They support the conclusion that it promotes self-sufficiency. Thus, applying the correct legal standard to the facts, Liberty is liable to reimburse Mr. Shultz for the motorized scooter.

The adjustable seat is not so clear. MRU stated that it was not persuaded that the adjustable seat is a medical service necessitated by Mr. Shultz compensable injury. MRU relied on the fact that Mr. Shultz can ride as a passenger in his van with his wheelchair held in. It noted that a movable seat is probably safer, but is not necessitated by the injury. Dr. Saviers did not comment on this modification. Dr. Glassman's only comment on this modification is that "it is probably safer." No expert states that it is necessary to promote self-sufficiency. I conclude that there is substantial evidence to support MRU's conclusion that the adjustable seat is necessitated by the compensable injury. Liberty is not liable for the adjustable passenger seat modification.

ATTORNEY FEES

Mr. Shultz has prevailed on the motorized scooter issue. Therefore, he has prevailed and is entitled to attorney fees. ORS 656.385(1). Applying the factors set forth in OAR 436-001-0265, I find that claimant's counsel is entitled to an assessed fee in the amount of \$3,500.

ORDER

IT HEREBY ORDERED that MRU's Administrative Order dated May 8, 2003 is affirmed in part and reversed in part. That part of MRU's order that found Liberty not liable to reimburse Mr. Shultz for a motorized scooter is reversed. The balance of MRU's order is affirmed.