

In the ORS 656.327 Treatment Dispute of

**HEIDI M. BLANK, Claimant**

Contested Case No: H04-100

**PROPOSED AND FINAL ORDER**

December 27, 2004

SENTRY INSURANCE CO & INTERMOUNTAIN CLAIM SERVICES, Petitioner

HEIDI M. BLANK, Respondent

Before Ella D. Johnson, Administrative Law Judge, Administrative Hearings

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**HISTORY OF THE CASE**

Insurer appeals a June 8, 2004 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 claimant was entitled to undergo the proposed partial excision of the fractured sesamoid bone of the right foot by Dr. Green at insurer's expense. On July 22, 2004, the matter was referred to the Office of Administrative Hearings (OAH) for hearing. On September 7, 2004, Administrative Law Judge (ALJ) Ella D. Johnson conducted a telephone hearing in this matter in Salem, Oregon. Attorney Robert Yanity represented petitioner Sentry Insurance Company and its claims processing agent Intermountain Claims Services (insurer). Attorney Ernest M. Jenks represented Heidi M. Blank (claimant). Assistant Attorney General Carol Parks represented WCD. Claimant testified on her own behalf. The record was left open for submission of an additional exhibit by claimant and closed on September 10, 2004.

**ISSUE**

Whether MRU's decision reflects an error of law.

**EVIDENTIARY RULING**

The record consists of WCD's Exhibits 1 through 25, which were admitted into the record without objection. Insurer also offered Exhibits 26 and 27 consisting of an Opinion and Order by a Workers' Compensation Board (WCB) ALJ Sencer and a medical evaluation report authored by Jerome C. Hall, MD (Orthopedic Surgery). Exhibit 27 was admitted without objection and Exhibit 26 was admitted into the record over claimant's relevancy objection.

**FINDINGS OF FACT**

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

(1) Claimant compensably injured her right foot on May 19, 2003. (Ex. 4.) John Mozena, DPM (Podiatry) ordered a MRI, which revealed tibial sesamoiditis and possible

incomplete fracture. (Exs. 2, 6.) After conservative treatment, claimant's pain continued. (Ex. 3.) On July 18, 2003, insurer accepted claimant's claim for a tibial sesamoid fracture of the right foot. (Ex. 8.)

(2) Claimant now lives in San Diego, California. Dr. Mendoza referred her to Dr. Green, DPM (Podiatry). Claimant sought treatment from Dr. Green in early 2003. Dr. Green recommended a partial excision of the fractured sesamoid bone. (Ex. 9.)

(3) On October 2, 2002, insurer informed claimant that she was required to select a DO or MD as her attending physician and that Dr. Green was only authorized to treat her for 30 days or 12 visits, whichever first occurred. (Ex. 10.)

(4) On December 17, 2003, claimant selected Dr. Hall, an orthopedist, as her attending physician. Dr. Hall does not perform foot surgery and referred claimant to Dr. Green for surgery. (Ex. 11.) He referred claimant to Dr. Green because he is a specialist in performing foot surgery. Dr. Hall requested from insurer authorization for Dr. Green to perform the surgery. On February 13, 2004, insurer authorized the surgery, but three days before the surgery was scheduled withdrew its authorization without explanation. (Exs. 13, 15; test. of claimant.)

(5) Claimant requested administrative review by the department. (Ex. 13.) MRU found that, although Dr. Green could not act as claimant's attending physician, there was no impediment to him performing the proposed surgery on referral from Dr. Hall. (Ex. 23.)

### CONCLUSIONS OF LAW

MRU's decision does not reflect an error of law.

### OPINION

This dispute arises under ORS 656.327, and therefore, jurisdiction lies with the director. ORS 656.245(6), 656.704(3). 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, 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 factfinder is persuaded that the facts asserted are more likely true than insurer has failed to meet its burden. *Riley Hill General Contractors v. Tandy Corp.*, 303 Or 390 (1989).

Pursuant to ORS 656.245(1)(a), an insurer is obligated to provide medical services that are materially related to a compensable condition for so long as the nature of the injury or the process of recovery requires. This obligation continues over the worker's lifetime. ORS 656.245(1)(b).

OAR 436-010-0210 states in relevant part:

(3) Attending physicians and authorized nurse practitioners may prescribe treatment to be carried out by persons licensed to provide a medical service. Attending physicians may prescribe treatment to be carried out by persons not licensed to provide a medical service or treat independently only when such treatment is rendered under the physician's direct control and supervision.

Additionally, OAR 436-010-220 states in material part:

(3) The worker is allowed to change his or her attending physician or authorized nurse practitioner by choice two times after the initial choice. Referral by the attending physician or authorized nurse practitioner to another attending physician or authorized nurse practitioner, initiated by the worker, shall count in this calculation. The limitations of the worker's right to choose physicians or authorized nurse practitioners pursuant to this section begin with the date of injury and extend through the life of the claim. For purposes of this rule, the following are not considered changes

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(c) Consultations or referrals for specialized treatment initiated by the attending physician or authorized nurse practitioner;

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Finally, OAR 436-010-350 provides in pertinent part:

(2) Except as otherwise provided by the MCO, when the attending physician or surgeon upon referral by the attending physician or authorized nurse practitioner, believes elective surgery is needed to treat a compensable injury or illness, the attending physician, authorized nurse practitioner, or the surgeon shall give the insurer actual notice at least seven days prior to the date of the proposed surgery. Notification shall give the medical information that substantiates the need for surgery, and the approximate surgical date and place if known.

Interpreting these provisions to allow Dr. Green to perform surgery on claimant pursuant to a referral from claimant's attending physician, Dr. Hall, MRU concluded that claimant was entitled to have the proposed surgery performed by Dr. Green. On appeal, insurer argues that MRU's decision violates the rules concerning attending physicians, contending that a podiatrist should not be authorized to do indirectly what the podiatrist cannot do directly, which is to act as

an attending physician. In support of its argument, insurer points to a WCB ALJ's order, which holds that a podiatrist is not allowed to authorize time loss.

Citing ORS 656.005(12)(a), claimant responds that a podiatrist can qualify as an attending physician and that the WCB ALJ's order holding that a podiatrist act as an attending physician is contrary to well-established law. Therefore, claimant argues that Dr. Green qualifies as an attending physician and is certainly qualified to perform the proposed surgery on referral from Dr. Hall.<sup>1</sup> I agree.

ORS 656.005(12) states:

(12)(a) "Doctor" or "physician" means a person duly licensed to practice one or more of the healing arts in any country or in any state, territory or possession of the United States within the limits of the license of the licentiate.

(b) Except as otherwise provided for workers subject to a managed care contract, "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 677.100 to 677.228 by the Board of Medical Examiners for the State of Oregon or an oral and maxillofacial surgeon licensed by the Oregon Board of Dentistry or a similarly licensed doctor in any country or in any state, territory or possession of the United States; or

(B) For a period of 30 days from the date of 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 or a similarly licensed doctor or physician in any country or in any state, territory or possession of the United States.

(c) "Consulting physician" means a doctor or physician who examines a worker or the worker's medical record to advise the attending physician regarding treatment of a worker's compensable injury.

As set forth above, WCD has interpreted this statute to allow podiatrists to act as attending physicians. Interpreting a statute, the court's, and thus my task, is to determine the legislative intent. ORS 174.020.<sup>2</sup> In order to discern the legislative intent, the first level of analysis is to examine both the text and context of the statute. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610 (1993). The text of the statute is the best evidence of the legislature's intent. *Hadley v. Cody Hindman Logging*, 144 Or App 157 (1996). In interpreting the meaning of an administrative rule, I apply the same method of analysis employed in

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<sup>1</sup> Although the department took no position on the controversy at hearing, counsel for WCD reminded insurer's counsel that there are different rules governing the authorization of time loss than are at issue here.

<sup>2</sup> ORS 174.020 provides in pertinent part:

(1)(a) In the construction of a statute, a court shall pursue the intention of the legislature if possible.

determining the meaning of a statute. *Abu-Adas v. Employment Dept.*, 325 Or 480 1997); *Larry Hemenway*, 5 WCSR 33 (2000). In applying the foregoing method of analysis to statute and administrative rules set forth above, I find that I need go no further than to examine the plain meaning. Neither the statute nor the administrative rules specify that a podiatrist may not act as an attending physician. Moreover, even if a podiatrist is excluded from acting as an attending physician, Dr. Green as a specialist in performing the type of foot surgery needed by claimant, is certainly qualified on referral from Dr. Hall to perform the surgery. Accordingly, I do not find insurer's argument persuasive, and finding no error of law, I affirm.

### **ATTORNEY FEES**

Claimant has successfully defended MRU's order on appeal, and is therefore, entitled to an assessed attorney fee both on administrative review and at hearing. 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 \$2,000 for work performed at hearing. In awarding the maximum allowable fee without special circumstances, I note that 13 hours were devoted to this case on appeal, that claimant's counsel's hourly rate is \$200 per hour, and that he has significant expertise in workers' compensation law gained through 15 years of practice.

### **ORDER**

*IT HEREBY ORDERED* that MRU's Administrative Order dated June 8, 2004 is affirmed. In addition to the \$700 attorney fee awarded for work performed at the administrative review before MRU, insurer shall pay claimant's counsel an assessed fee for work performed at the contested case level in the amount of \$2,000.