

In the Matter of the ORS 656.248 Medical Fee Dispute of

**Glenn, Julie A., Claimant**

Contested Case No: H03-032

**FINAL ORDER**

March 31, 2004

LUKE LKAJA PHYSICAL THERAPY, Petitioner

AMERICAN MOTORIST INS. CO., Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

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American Motorists Insurance Company (American), by and through its attorney Jerald Keene, timely filed exceptions to Administrative Law Judge (ALJ) Paul Vincent's July 15, 2003 Proposed and Final Contested Case Hearing Order. Luke Klaja Physical Therapy (Klaja), *pro se*, timely submitted a response. This matter comes before the director for issuance of a final order.

The issues raised by the parties are whether American is liable to reimburse Klaja for services provided to claimant from April 18, 2002 through May 15, 2002, and if so, whether Klaja is entitled to service charges. The entire record has been reviewed, including the exhibits received into evidence, the audio recording of the hearing, and the parties' written arguments.

The director may adopt the proposed order as the final order or may modify the proposed order. OAR 137-003-0655(6), 436-001-0275(3). If the director modifies the proposed order in any substantial manner, the agency must identify and explain the modifications. OAR 137-003-0665(3). The director may only modify the ALJ's findings of historical fact if the director determines that the finding is not supported by a preponderance of the evidence in the record. OAR 137-003-0665(4).

**FINDINGS OF FACT**

Claimant sustained a compensable left shoulder injury in May 1997 and American accepted a non-disabling left shoulder strain. (Ex. 2).

On March 29, 2002, claimant reported to her attending physician Alden Glidden, MD, that she had reinjured her shoulder. Dr. Glidden directed claimant to take Aleve and contact him if she did not improve. On April 17, 2002, claimant again contacted Dr. Glidden, and reported no symptom improvement. Dr. Glidden referred claimant to Klaja for an exercise program. (Ex. 1-5).

Claimant first treated at Klaja on April 18, 2002, and was seen by Thomas Bentley, PT, who recommended in-pool exercise, ultrasound, electrical stimulation, soft tissue mobilization, and more exercise followed by ice therapy. (Ex. 4-1). An initial treatment plan was prepared on April 18, 2002, and included a diagnosis, treatment goals, modalities and procedures, and frequency and duration of treatment. (Ex. 6). A copy of the plan, which did not include Dr. Glidden's signature, was sent to American. (Ex. 19). The treatment plan was signed by Dr. Glidden on April 19, 2002. (Ex. P1). Klaja received the treatment plan signed by Dr. Glidden on April 26, 2002. (Ex. P2). By the time Klaja received the signed treatment plan from Dr.

Glidden, American had begun returning the billings on the claim, stating that the claim was closed and that no claim for aggravation was filed. (Exs. 8, 15, 19). The first rejected billing was received back by Klaja prior to April 26, 2002. Klaja did not send the signed copy of the treatment plan to American. (Ex. 19). Claimant received treatment at Klaja through May 15, 2002.

On February 27, 2003, the Medical Review Unit sent Dr. Glidden a written request for chart notes for all dates of service and copies of all orders and signed treatment plans for physical therapy ordered for Ms. Glenn. (Ex. 17). On March 4, 2003, Dr. Glidden submitted chart notes for Ms. Glenn, but did not submit a treatment plan for the physical therapy provided by Klaja from April 18 through May 15, 2002. (Ex. 18).

### CONCLUSIONS OF LAW AND OPINION

The administrative order found that there were no treatment plans signed by Dr. Glidden for the physical therapy provided by Klaja from April 18 through May 15, 2002. The order concluded that the disputed billing was not reimbursable because a signed treatment plan was not submitted to American.

In the request for a hearing, Klaja pointed out that American was provided with a copy of the treatment plan when Klaja sent the first billing to insurer on April 22, 2002. This treatment plan was actually signed by Dr. Glidden on April 19, 2002, but was not received back by Klaja until April 26, 2002. Klaja submitted the signed copy into the record at hearing, although it was unavailable to WCD during its review. (Ex. P1). At hearing, Klaja conceded that insurer might not have received a signed copy of the treatment plan, but argued that given American's behavior in returning billings, it was unfair to hold them to every detail of a procedural rule when they were trying to communicate with American.

The ALJ was not persuaded by American's argument that the treatment plan produced by Klaja did not support reversing the administrative order because it could be back-dated and should be discounted. The ALJ reasoned that Exhibits P1 and P2 reflected a business practice record that would not allow the signed treatment plan to have been forged or back-dated. The ALJ relied on Klaja's log, (Exhibit P2), and found that Klaja had received a signed copy of the treatment plan from Dr. Glidden's office on April 26, 2002.

Alternatively, American argued that the signed treatment plan was not submitted timely to insurer, within 30 days of beginning treatment, as required by OAR 436-010-0230(4). American asserted that, based on *Aetna Casualty & Surety Co. v. Blanton*, 139 Or App 283 (1996), OAR 436-010-0230(4) must be strictly applied and no reimbursement may be made unless a treatment plan, signed by the physician, is provided to the insurer within 30 days.

The ALJ found this case distinguishable from *Blanton* because in this case, a copy of the treatment plan was actually sent to the insurer within 30 days of beginning treatment. The ALJ concluded that OAR 436-010-0230(4) was a "procedural rule" and waived its application (pursuant to OAR 436-010-0003(2)), reasoning that, based on American's conduct in sending billings back to Klaja, American's actual awareness of the proposed treatment plan and the

billings for treatment, it was unjust for American to raise this procedural rule as a defense to payment.

American argues that the ALJ erred by failing to apply OAR 436-010-0230(4)(a) as written. American contends that the facts and circumstances in *Aetna Casualty & Surety Co. v. Blanton*, 139 Or App at 283, compel the same result here; *i.e.*, American is not liable for the disputed treatment because it was not provided with a timely signed copy of a treatment plan pursuant to the rule. American also asserts that the omission of a signature is not a mere “procedural” requirement, and was not the appropriate object of a decision to waive “procedural” rules under OAR 436-010-0003(2).

In *Blanton*, the court interpreted *former* OAR 436-10-040(3)(a) and concluded that the rule requiring a written treatment plan would not be waived, even when the attending physician had verbally approved the plan. In *Blanton*, the attending physician did not sign the treatment plan until several weeks after the chiropractor had begun treatments. The court explained that *former* OAR 436-10-040(3)(a) stated that reimbursement “shall not” be required without a prior written, approved treatment plan signed within seven days of the commencement of treatment. The court held that services provided before the attending physician signed the treatment plan were not reimbursable.

OAR 436-010-0230(4)(a) (WCD Admin. Order No. 01-065; eff. 1/1/02) provides:

Except as otherwise provided by the MCO, ancillary services including but not limited to physical therapy or occupational therapy, by a medical service provider other than the attending physician or specialist physician shall not be reimbursed unless prescribed by the attending physician or specialist physician and carried out under a treatment plan prepared prior to the commencement of treatment and signed by the attending physician or specialist physician within 30 days of beginning treatment. The medical service provider shall provide an initial copy of the treatment plan to the attending physician or specialist physician and the insurer within seven days of beginning treatment. A copy of the treatment plan signed by the attending physician or specialist physician shall be provided to the insurer by the medical service provider within 30 days of beginning treatment. The treatment plan shall include objectives, modalities, frequency of treatment, and duration. The treatment plan may be recorded in any legible format including, but not limited to, signed chart notes. Treatment plans required under this subsection do not apply to services provided pursuant to ORS 656.245(2)(b)(A).

Claimant’s attending physician was Dr. Glidden. On April 17, 2002, Dr. Glidden referred claimant to Klaja for an exercise program. (Ex. 1-5). Claimant began treating with Klaja on April 18, 2002, and an initial treatment plan was prepared on that date. (Exs. 4, 6). A copy of the treatment plan, which had not been signed by Dr. Glidden, was sent to American on April 22, 2002. (Ex. 19).

Dr. Glidden signed the treatment plan on April 19, 2002. (Ex. P1). Klaja received the signed treatment plan on April 26, 2002. (Ex. P2). However, Klaja did not send a signed copy

of the treatment plan to insurer. (Ex. 19). At the time the March 12, 2003 administrative order issued, there was no evidence of an adequate treatment plan signed by the attending physician. (Ex. 18). Although OAR 436-010-0230(4)(a) provides that the treatment plan may be recorded in any legible format, including signed chart notes, there were no such chart notes from Dr. Glidden that included all the required elements.

OAR 436-010-0230(4)(a) provides that a medical service provider shall not be reimbursed unless prescribed by the attending physician and carried out under a treatment plan “prepared prior to the commencement of treatment and signed by the attending physician or specialist physician within 30 days of beginning treatment.” Here, the treatment plan was prepared before the commencement of treatment and it was signed by Dr. Glidden within 30 days of beginning treatment. Therefore, Klaja complied with that portion of the rule.

OAR 436-010-0230(4)(a) further provides that the medical service provider shall provide an initial copy of the treatment plan to the attending physician or specialist physician and the insurer within seven days of beginning treatment. The record establishes that Klaja complied with that portion of the rule as well. Dr. Glidden received a copy of the treatment plan by April 19, 2002. (Ex. P1). Klaja provided a copy of the treatment plan, unsigned by Dr. Glidden, to American on April 22, 2002. (Ex. 19). American does not dispute that the treatment plan included the necessary objectives, modalities, frequency of treatment, and duration.

Nevertheless, the record does not establish that a copy of the treatment plan signed by Dr. Glidden was provided to American within 30 days of beginning treatment. OAR 436-010-0230(4)(a) provides, in part: “A copy of the treatment plan signed by the attending physician or specialist physician shall be provided to the insurer by the medical service provider within 30 days of beginning treatment.”

American argues that the attending physician’s signature on the treatment plan prepared by an ancillary provider provides objective documentation that the attending physician has actually seen and approved the plan. American contends that the requirement of the attending physician’s signature operates to prevent ancillary providers from effectively prescribing their own care.

Klaja argues that American originally declined to pay for the disputed medical services because it needed an “827” from Dr. Glidden to reopen the claim. Klaja asserts that when American was returning its billings, Klaja was focused on obtaining the “827” form. Under those circumstances, when Klaja received the signed treatment plan from Dr. Glidden, Klaja saw no reason to continue sending documents to American that would likely be rejected and returned.

Like the rule applied in *Blanton*, the requirements of OAR 436-010-0230(4)(a) are mandatory. Klaja did not comply with the requirement that a copy of the treatment plan signed by the attending physician “shall be provided to the insurer by the medical service provider within 30 days of beginning treatment.” I find that the mandatory provisions of OAR 436-010-0230(4)(a) must be complied with in order to receive reimbursement of the disputed physical therapy treatments. See *Aetna Casualty & Surety Co. v. Blanton*, 139 Or App at 287-88.

I turn to the ALJ's conclusion that OAR 436-010-0230(4) was a "procedural rule." The ALJ waived the application of that rule pursuant to OAR 436-010-0003(2), reasoning that, based on American's conduct in sending submitted billings back to Klaja, American's actual awareness of the proposed treatment plan and billings, it was unjust for American to raise this procedural rule as a defense to payment.

OAR 436-010-0003(2) provides: "Applicable to this chapter, the director may, unless otherwise obligated by statute, in the director's discretion waive any procedural rules as justice so requires."

"Procedural law" is defined as "[t]hat which prescribes method of enforcing rights or obtaining redress for their invasion[.]" *Black's Law Dictionary* 1203 (6th ed. 1990). "As a general rule, laws which fix duties, establish rights and responsibilities among and for persons, natural or otherwise, are 'substantive laws' in character, while those which merely prescribe the manner in which such rights and responsibility may be exercised and enforced in a court are 'procedural laws.'" *Id.* (internal citations omitted).

Here, OAR 436-010-0230(4) creates mandatory duties on the part of ancillary medical providers that are required in order to obtain reimbursements. The administrative rule does not merely prescribe a method of enforcing rights. Consequently, I find that OAR 436-010-0230(4) is a substantive rule, rather than a procedural rule and, therefore, OAR 436-010-0003(2) does not apply.

In summary, because Klaja failed to comply with the mandatory requirements of OAR 436-010-0230(4)(a), I conclude that American is not liable for the medical services provided to claimant from April 18, 2002 through May 15, 2002.<sup>1</sup> See *Aetna Casualty & Surety Co. v. Blanton*, 139 Or App at 287-88.

## **ORDER**

**IT IS HEREBY ORDERED** that:

The July 15, 2003 Proposed and Final Order is reversed and the Medical Review Unit's March 12, 2003 Administrative Order is affirmed.

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<sup>1</sup> In light of this disposition, it is not necessary to address Klaja's request for service charges.