

In the ORS 656.260 Managed Care Dispute of

**ROCKY L. GORDON, Claimant**

Contested Case No: H04-040

**PROPOSED & FINAL ORDER**

September 30, 2004

ROCKY L. GORDON, Petitioner

SAIF CORPORATION, Respondent

Before Catherine P. Coburn, Administrative Law Judge, Administrative Hearings

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### **HISTORY OF THE CASE**

Claimant appeals the Administrative Order issued on February 3, 2004 by the Medical Review Unit (MRU) of the Workers' Compensation Division (WCD), Department of Consumer and Business Services (director or department). On April 2, 2004, the department referred the matter to the Office of Administrative Hearings (OAH). On August 18, 2002, Administrative Law Judge Catherine P. Coburn conducted a contested case hearing. Petitioner Rocky L. Gordon (claimant) was represented by attorney James Dodge. Respondent SAIF Corporation (insurer) was represented by attorney David L. Runner. Claimant testified on his own behalf and called Margo C. Gordon as a witness. I held the record open to allow both attorneys an opportunity to clarify the accepted medical conditions and the record closed on September 1, 2004.

### **ISSUE**

Whether home health services, provided by claimant's wife from April 24, 2003 through July 30, 2003 are reimbursable.

### **EVIDENTIARY RULINGS**

WCD Exhibits 1 through 193 were admitted into the record without objection. I sustained insurer's objection to claimant's Proposed Supplementary Exhibit 194 because no new medical evidence is admissible in a contested case hearing arising under ORS 656.260. *See* ORS 656.260(16) and OAR 436-001-0225(4).

### **FINDINGS OF FACT**

I adopt the findings of fact contained in the Administrative Order dated February 3, 2004 with the following supplementation:

(1) In 1998, claimant underwent neck and back surgeries. (Exs. 9 and 13.) In 2001, he had right hand surgery and in 2002, he had coronary bypass surgery. (Ex. 128.) He suffers pre-existing diabetes and hypertension. (Exs. 18 and 33.)

(2) On May 21, 2002, claimant suffered a right knee injury while performing road maintenance. (Ex. 17.) Following the work injury, claimant developed right knee septic bursitis

and was hospitalized for purulence aspiration and placement of a PICC<sup>1</sup> line which was complicated by gastrointestinal bleeding. (Exs. 18 and 128.)

(3) In 2002, insurer accepted prepateller bursitis right knee, right knee septic bursitis and left arm deep venous thrombosis. (Exs. 37 and 70.)

(4) On July 29, 2002, insurer enrolled claimant in Oregon Health Systems managed care organization (MCO). (Ex. 39.) Dawn E. Bost, M.D. was not an MCO panel member but OHS authorized her as a temporary provider on condition that she comply with the MCO contract. (Exs. 39, 50 and 59.) The MCO requires pre-certification for any specialized care. (Ex. 59.)

(5) Claimant's wife is a certified home health provider. (Ex. 108; testimony of Margo Gordon.) Claimant's wife received home health training at Sacred Heart Home Health Care Service. (Ex. 194; testimony of Margo Gordon.)

(6) On February 7, 2003, Dr. Bost prescribed post-surgical home health services and claimant requested insurer to authorize services to be provided by claimant's wife. (Exs. 108 and 109.) On February 18, 2003, insurer denied the request for post surgical home health services. An OHS Medical Advisor reviewed the request and opined that home health services were not required following excision of a prepatellar bursa. (Ex. 112.)

(7) On April 23, 2003, Dr. Timothy Straub, MD performed surgical excision of calcific bursa, right knee. (Ex. 130.) Post-surgery, claimant's wife provided care for claimant at home including dressing, toileting, showering, bandages, monitoring medications and transportation to medical appointments. Claimant seeks \$18,329 at \$8.56 per hour for 2,141 hours of home health care. (Exs. 153 and 155; testimony of Margo Gordon.)

(8) On May 12, 2003, William G. Moshofsky, MD performed laproscopic cholecystectomy. (Ex. 140.)

(9) On July 30, 2003, Dr. Bost stated that claimant's wife had provided excellent home health care that was medically reasonable and necessary. (Ex. 153.)

(10) On June 26, June 27, July 1, July 30 and July 31, 2003, claimant's activities were recorded on surveillance films. (Ex. 172.)

(11) On September 16, 2003, Dr. Straub noted that on the surveillance films, claimant engaged in activities that were inconsistent with the information claimant had provided. Dr. Straub stated, "This is a difficult situation \*\*\* when I visualize a tape showing activities significantly in excess of the restriction that the patient reports he is having. It does make me wonder whether any additional medical treatment is necessary regarding the patient's knee at this point in time." (Ex. 164.) Dr. Straub opined that the right knee condition was medically stationary. (Exs. 165 and 172.)

(12) Attending physician Dawn Bost, M.D. viewed the surveillance films and on September 24, 2003, she stated "[claimant] appeared to have full range of motion and

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<sup>1</sup> Intravenous antibiotic line threaded through the upper arm and into a cardiac chamber. (Testimony of Margo Gordon.)

was able to stand and walk for a period of approximately two hours without sitting. He was able to twist, bear significant weight on the right leg, lift a heavy picnic table, walk on uneven ground, and fully extend, bend and twist at the knee. He was noted to use a cane to and from the doctor's office, physical therapy and pharmacy. During the time at Winchester Bay he did not use a cane on the film dated June 26<sup>th</sup> when earlier at the physician's office and physical therapy office he did use a cane but he still did intermittently have a limp." (Ex. 168-1.) Dr. Bost suggested that the inconsistencies might be due to claimant's use of pain medications. She stated, "I am somewhat perplexed about his use of the cane when he presented at various pharmacies, physical therapy appointments and physical appointments, and not while at Winchester Bay." (Ex. 168-2 and 172.) She agreed that the right knee condition was medically stationary. (Ex. 168-2 and 172.)

(13) In 2004, insurer accepted gastrointestinal bleeding and reopened the claim for aggravation. (SAIF letter August 23, 2004.)<sup>2</sup>

### CONCLUSION OF LAW

Home health services, provided by claimant's wife from April 24, 2003 through July 30, 2003 are not reimbursable.

### OPINION

The director exercises jurisdiction over MCO disputes. ORS 656.260(6). I review for substantial evidence and error of law. ORS 656.260(16). The burden of proving a fact or position rests with the proponent. ORS 183.450(2); *Harris v. SAIF*, 292 Or 683 (1982). 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 App 437 (1980) (In the absence of contrary legislation, the standard of proof in administrative hearings 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 false. *Riley Hill General Contractors v. Tandy Corp.*, 303 Or 390 (1989).

MRU determined that the disputed home health care services were not reimbursable because claimant failed to provide contemporaneous documentation from the attending physician. Claimant contends that the home health services his wife provided were reimbursable because they were medically necessary and because claimant's wife had to forego earned wages. In contrast, insurer contends that the services were not reimbursable for several reasons. First, insurer contends that the record does not contain contemporaneous medical authorization as required by OAR 436-010-0210. Next, insurer contends that the home health services were not authorized by the MCO contract as required by OAR 436-015-0070. Finally, citing ORS 656.327, insurer contends that the home health care services were excessive and inappropriate

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<sup>2</sup> Insurer has denied the following conditions: coronary artery blockage and any related conditions or injuries, adverse reaction with diabetes, high blood pressure, adjustment disorder, depression, anxiety disorder, alleged foreign metallic body in right knee, abscesses. Additionally, the following conditions are currently claimed but not yet accepted or denied: right knee tenosynovitis, right knee arthritis, right knee Baker's cyst.

based on surveillance films.

Pursuant to ORS 656.245(1)(a), an insurer is obligated to provide medical services that are materially related to a compensable work injury 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). Pursuant to ORS 656.245(4) and ORS 656.260, an insurer may contract with a state-certified MCO to provide medical services to enrolled injured workers.

### Competence

OAR 436-010-0210(3) provides in pertinent part:

Attending physicians may prescribe treatment to be carried out by persons licensed to provide a medical service or by persons not licensed to provide a medical service. \*\*\* Reimbursement to a worker for home health care provided by a worker's family member is not required to be provided under the direct control and supervision of the attending physician if the family member demonstrates competency to the satisfaction of the attending physician.

In construing the meaning of an administrative rule, I apply the same method of analysis employed in determining the meaning of a statute. *Abu-Adas v. Employment Dept.*, 325 Or 480 (1997); *Larry Hemenway*, 5 WCSR 33 (2000). See also *PGE v. Bureau of Labor and Industries*, 317 Or 606 (1993) (court's task in determining the legislative intent is to first examine the statute, including text and context, and if the intent is clear, to proceed no further with its analysis.) Where an agency's interpretation of its own rule is plausible and 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 Siting Council*, 320 Or 132 (1994). Here, MRU interpreted OAR 436-010-0210(3) to require an attending physician's contemporaneous authorization of home health services provided by a family member. Contemporaneous authorization is required in order to ensure the delivery of competent health care to injured workers. I find that MRU's interpretation of the rule is plausible and not inconsistent with the rule's context or any other source of law, and therefore, I defer.

Here, claimant seeks reimbursement for home health services provided from April through July 2003. However, attending physician Bost did not attest to the competence of claimant's wife until July 30, 2003 after the services had been provided. Pursuant to OAR 436-010-0210(3), home health services are reimbursable only if the attending physician authorizes them contemporaneously. Inasmuch as Dr. Bost authorized the home health services only after the fact, they are not reimbursable.

### MCO Contract

OAR 436-015-0070 provides in pertinent part:

(1) The MCO shall authorize a physician who is not a member of the MCO to provide medical services to an enrolled worker if the physician qualifies as a primary care physician. For purposes of this rule, the physician must:

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(d) Agree to comply with all terms and conditions regarding services governed by the MCO. For purposes of this section, the phrase "all terms and conditions regarding services governed by the MCO" means MCO treatment standards, protocols, utilization review, peer review, dispute resolution, billing and reporting procedures, and fees for services in accordance with OAR 436-015-0090;

The MCO authorized Dr. Bost, who is not a panel member, as claimant's attending physician on condition that she comply with the MCO contract which requires pre-certification for specialized medical services such as home health care. On February 7, 2003, Dr. Bost prescribed post-surgical home health services. However, the MCO did not approve the request as medically necessary. Inasmuch as the home health care services were not precertified as required by the MCO contract, they are not reimbursable.

#### Excessive Medical Services

Pursuant to ORS 656.327, insurers are not required to provide medical services that are excessive, inappropriate, ineffectual or in violation of administrative rules. Dr. Bost opined that post-surgical home health services were medically necessary and the MCO Medical Advisor disagreed. Surveillance films, taken on five days in June and July 2003 show that claimant was not incapacitated to the extent that he represented to his medical providers. Both Dr. Straub and Dr. Bost stated that claimant's behavior on film was inconsistent with his presentation at medical appointments. Based on the surveillance films and the opinions of Dr. Straub and Dr. Bost, I find that the disputed home health services were excessive and therefore, were not reimbursable.

#### Conclusion

In conclusion, I find that the disputed home health services were not preauthorized as required by OAR 436-010-0210(3). Moreover, the disputed home health services were not precertified as required by the MCO contract. Furthermore, the disputed home health services were excessive as established by the surveillance films. For these reasons, I agree with MRU's determination that the home health services were not reimbursable. Accordingly, I affirm.

#### **ATTORNEY FEES**

Claimant has not prevailed in a contested case hearing, and therefore, he is not entitled to an attorney fee. ORS 656.385(1).

**ORDER**

IT IS HEREBY ORDERED that:

The Administrative Order dated February 3, 2004 is affirmed.