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In the ORS 656.245 Medical Services Dispute of

**DONNA GUMP Claimant**

Contested Case No: H04-108

**PROPOSED AND FINAL ORDER**

November 10, 2004

DONNA GUMP, Petitioner

LIBERTY NORTHWEST INSURANCE CORP., Respondent

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

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**HISTORY OF THE CASE**

Claimant appeals the Administrative Order issued on May 28, 2004 by the Medical Review Unit (MRU) of the Workers' Compensation Division (WCD), Department of Consumer and Business Services (department or director). On August 12, 2004, the department referred the matter to the Office of Administrative Hearings (OAH).

On September 17, 2004, Administrative Law Judge (ALJ) Ella D. Johnson conducted a contested case hearing. Petitioner Donna Gump (claimant) was represented by attorney Charles R. Mundorff. Attorney Ray Smitke represented respondent Liberty Northwest Insurance Corporation (insurer). Claimant testified on her own behalf and the record closed on the date of hearing.

**ISSUE**

Whether MRU incorrectly determined that insurer is not liable for massage therapy provided by Dolores Bingenheimer, MA, LMT from November 11, 2003 through January 15, 2004.

**EVIDENTIARY RULINGS**

WCD Exhibits 1 through 55 were admitted into the record without objection.

**FINDINGS OF FACT**

I adopt and incorporate the findings of fact set forth in MRU's May 28, 2004 Administrative Order, with the following supplementation:

(1) Claimant was compensably injured on January 9, 2003. (Ex. 11.) Insurer accepted the claim for lumbar/cervical strain/sprain. (Ex. 7.) Claimant was found medically stationary on April 28, 2003 and the claim was closed. (Ex. 30)

(2) On November 11, 2003, claimant experienced a recurrence of low back pain after lifting a dog. Dr. Kelly reported an acute aggravation of her original injury and requested palliative care. (Exs. 32, 33.) Claimant sought massage therapy from Bingenheimer on November 11 and 18, 2003. (Ex. 34.) On November 29, 2003, Dr. Kelly signed a prescription for continued massage therapy for 12 visits. (Ex. 35.)

(3) Bingenheimer provided the massage therapy on November 25, December 9, 15, 18, 2003 and January 15, 2004 pursuant to the prescription. Insurer denied payment. (Exs. 34 - 37.)

(4) Claimant requested administrative review of insurer's denial. (Ex. 41.)

### CONCLUSION OF LAW

MRU's decision that insurer is not liable for massage therapy provided by Dolores Bingenheimer, MA, LMT from November 11, 2003 through January 15, 2004 is supported by substantial evidence and does not reflect an error of law.

### OPINION

This dispute arises under ORS 656.245(1)(c)(L), and therefore, jurisdiction lies with the director. ORS 656.245(6). I review the administrative order for substantial evidence or error of law. ORS 656.327(2) and OAR 436-001-0225(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 App 437 (1980) (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 false. *Riley Hill General Contractors v. Tandy Corp.*, 303 Or 390 (1989).

ORS 656.245(1)(a) and (b) requires insurer to provide medical services for conditions caused in material part by the injury for such a period as the nature of the injury or the process of recovery requires. This obligation continues for the life of the injured worker. However, after a worker is declared medically stationary, ORS 656.245(1)(c) limits these medical services to twelve exceptions. Here, claimant's condition became medically stationary on April 28, 2003.

In that regard, ORS 656.245(1)(c) provides in material part:

(c) Notwithstanding any other provision of this chapter, medical services after the medically stationary<sup>1</sup> date are not compensable except for the following:

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(J) With the approval of the insurer or self-insured employer, palliative care<sup>2</sup> that the worker's attending physician referred to in ORS 656.005(12)(b)(A)<sup>3</sup>

<sup>1</sup> ORS 656.0005(17) provides:

'Medically stationary' means that no further material improvement would reasonably be expected from medical treatment or the passage of time.

<sup>2</sup> ORS 656.005(2) provides:

'Palliative care' means medical service rendered to reduce or moderate temporarily the intensity of an otherwise stable medical condition, but does not include those medical services rendered to diagnose, heal or permanently alleviate or eliminate a medical condition.

<sup>3</sup> ORS 656.005(12)(b)(A) provides:

prescribes and that is necessary to enable the worker to continue current employment or a vocational training program.

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(L) Curative care provided to a worker to stabilize a temporary Waxing and waning of symptoms of the worker's condition.

The chart notes of claimant's attending physician, Dr. Kelly, reveal that after several months of not requiring care, claimant experienced a reoccurrence of pain after lifting. MRU found that the care provided to claimant was curative care to stabilize a temporary waxing and waning of claimant's symptoms and did not require preauthorization. I agree. MRU did not address insurer's argument that the massage therapy was not reimbursable because it was not rendered under the direct control of supervision of the attending physician. Instead, MRU determined that the massage therapy was not reimbursable because the treatment plan did not contain all of the elements for a complete treatment plan as required by OAR 436-010-0230(4)(a).

In that regard, OAR 436-010-0230 provides in pertinent part:

(4)(a) Except as otherwise provided by an MCO, ancillary services including but not limited to physical therapy or occupational therapy, by a medical service provider other than the attending physician, authorized nurse practitioner, or specialist physician shall not be reimbursed unless prescribed by the attending physician, authorized nurse practitioner, or specialist physician and carried out under a treatment plan prepared prior to the commencement of treatment and sent by the ancillary medical service provider to the attending physician, authorized nurse practitioner, or specialist physician, and the insurer within seven 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).

(b) The attending physician, authorized nurse practitioner, or specialist physician shall sign a copy of the treatment plan within 30 days of the commencement of treatment and send it to the insurer. Failure of the physician or nurse practitioner to sign or

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“(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;”

mail the treatment plan may subject the attending physician or authorized nurse practitioner to sanctions under OAR 436-010-0340, but shall not affect payment to the ancillary medical service provider

The rule requires that an ancillary service, such as massage therapy, must be carried out under a treatment plan prepared prior to commencement of the treatment and signed by the attending physician within 30 days of beginning treatment. The rule requires the treatment plan to contain “objectives, modalities, frequency of treatment, and duration.” The record before me establishes that the treatment plan here does not contain the objectives for the massage therapy. These requirements are to be strictly enforced. *Aetna Casualty Co. v. Blanton*, 139 Or App 283, 287 (1996). Consequently, I concluded that MRU correctly determined that the treatment was not reimbursable because the plan was incomplete.

At hearing, claimant argued that if the treatment plan is incomplete, the remedy is for WCD to sanction the attending physician. I disagree. The plain meaning of the language of the above quoted rule states that, if the treatment plan does not meet the requirements of the rule, the sanction is the treatment “shall not be reimbursable.” OAR 436-010-0230(4)(a). She further argued that OAR 426-010-0230 (4)(b) is the provision that is applicable to this case.

I do not find claimant’s argument persuasive based on the plain meaning of the rule. MRU correctly found that subsection (4)(a) of the rule to is applicable provision. I defer to MRU’s interpretation of the applicability of its own rule. *Don’t Waste Oregon Com. v. Energy Facility Siting*, 320 Or 132 (1994). Consequently, I find no error of law.

Substantial evidence exists to support an administrative order “when the record, viewed as a whole, would permit a reasonable person to make that finding.” ORS 183.482(8)(c). The “substantial evidence” standard of review can be overcome only when “credible evidence apparently weighs overwhelmingly in favor of one finding and the [director] finds the other without giving a persuasive explanation. *Armstrong v. Asten-Hill Co.*, 90 Or App 292, 295 (1998).

Based on the record, I find that a reasonable person could reach MRU’s conclusion, and therefore, the administrative order is supported by substantial evidence. Accordingly, finding no basis for modifying the administrative order, I affirm.

#### ATTORNEY FEES

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

#### ORDER

IT IS HEREBY ORDERED that:

The Administrative Order dated May 28, 2004 is affirmed.