

In the ORS 656.245 Medical Services Dispute of

**ADALBERT HERMAN, Claimant**

Contested Case No: H03-128

**PROPOSED AND FINAL ORDER**

December 22, 2004

SAIF CORP., Petitioner

ADALBERT HERMAN, Respondent

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

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### **HISTORY OF THE CASE**

Insurer appeals an administrative order issued on October 13, 2003 by the Medical Review Unit (MRU) of the Workers' Compensation Division (WCD), Department of Consumer and Business Services (director or department). On December 23, 2003, Administrative Law Judge Catherine P. Coburn conducted a hearing in this matter. Petitioner SAIF Corporation (insurer) was represented by attorney Tom Seig. Respondent Adalbert Herman (claimant), *pro se*, failed to appear. Medical provider Michael McQuivey, Registered Physical Therapist appeared as a limited party pursuant to OAR 137-003-0535. SAIF claims adjuster Lynette Henson testified and the record closed on the date of hearing.

### **ISSUE**

Whether physical therapy provided to claimant from June 10, 2003 through June 30 2003 is reimbursable pursuant to OAR 436-010-0230(4)(a).

### **EVIDENTIARY RULINGS**

WCD Exhibits 1 through 16 were admitted into the record without objection

### **FINDINGS OF FACT**

(1) On May 8, 2003, claimant suffered a compensable right hand injury. Insurer accepted "right de Quervain's tenosynovitis." (Ex. 2-2.)

(2) On June 2, 2003, Darrell Miller, MD referred claimant for physical therapy. (Ex. 1-1.)

(3) On June 10, 2003, a physical therapist signed a treatment plan and treatment began. On June 20, 2003, Darrell Miller, MD signed the treatment plan. The treatment plan stated, "He has been referred to physical therapy to decrease symptoms and restore mobility." The treatment plan prescribed physical therapy three times per week for four weeks. The treatment plan listed "modalities and procedures." (Ex. 3.)

(4) Insurer did not receive a copy of the treatment plan from the physical therapist or from Dr. Miller. On August 6, 2003, insurer received a copy of the treatment plan from MRU. (Test. of Henson.)

### CONCLUSION OF LAW

Physical therapy provided to claimant from June 10, 2003 through June 30 2003 is not reimbursable pursuant to OAR 436-010-0230(4)(a).

### OPINION

Jurisdiction lies with the director and I review for substantial evidence or error of law. ORS 656.245(6) and ORS 656.260(16). 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).

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. OAR 436-010-0230(4)(a) 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).

(Emphasis added.)

MRU determined that insurer was liable for the disputed physical therapy even though the treatment plan was untimely pursuant to OAR 436-010-0230(4)(a). MRU reasoned that the rule does not specify that nonpayment is the consequence of untimely submission. However, the court has ruled that strict compliance with the rule is mandatory and furthermore, where a medical provider fails to comply, the insurer is not liable to reimburse the disputed medical bill. *Blanton v. AETNA Insurance Co.*, 139 Or App 283 (1994). *See also: Yuka Hirota*, 6 WCSR 331 (2001); *Tina M. Huntley*, 6 WCSR 334 (2001). Furthermore, inasmuch as MRU's interpretation of its rule conflicts with the court's ruling, I do not defer. *See: Don't Waste Oregon Com. v. Energy Facility Siting Council*, 320 Or 132, 142 (1994) (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).

Here, a physical therapist signed the treatment plan on June 10, 2003, the day treatment began. Dr. Miller signed the treatment plan on June 20, 2003. Neither medical provider provided the treatment plan to insurer as OAR 436-010-0230(4)(a) requires. On August 6, 2003, insurer received the treatment plan from MRU. The treatment plan lists the term "modalities" but fails to specify which modalities would be applied to claimant. Based on the record, I find that the treatment plan was untimely and deficient. For these reasons, it failed to comply with OAR 436-010-0230(4)(a). Therefore, insurer is not liable to reimburse the bills for physical therapy provided to claimant from June 10, 2003 through June 30, 2003.

### **ORDER**

IT IS HEREBY ORDERED that:

The Administrative Order dated October 13, 2003 is reversed.