
In the Matter of the ORS 656.245 Medical Services Dispute of

Theresa M. Patterson, Claimant

Contested Case No: H04-045

PROPOSED AND FINAL ORDER

August 9, 2004

EXPLORER INSURANCE COMPANY, Petitioner

THERESA M. PATTERSON, Respondent

Before Catherine P. Coburn, Administrative Law Judge

HISTORY OF THE CASE

Insurer appeals the Administrative Order issued on March 3, 2004 by the Medical Review Unit (MRU) of the Workers' Compensation Division (WCD), Department of Consumer and Business Services (department or director). On April 23, 2004, WCD referred the matter to the Office of Administrative Hearings. On July 8, 2004, Administrative Law Judge (ALJ) Catherine P. Coburn conducted a contested case hearing. Attorney David P. Levine represented petitioner Explorer Insurance Company (insurer). Attorney Scott M. McNutt represented respondent Theresa M. Patterson (claimant). No witnesses testified and the record closed on the date of hearing.

ISSUES

- (1) Whether MRU incorrectly determined that insurer is liable for physical therapy recommended by Paula Crone, D.O.
- (2) Whether MRU incorrectly determined that insurer is liable for psychological counseling recommended by Dr. Crone.

EVIDENTIARY RULINGS

WCD Exhibits 1 through 97 were admitted into the record without objection.

FINDINGS OF FACT

- (1) On February 25, 1997, claimant suffered a compensable injury while working as a wholesale grocery merchandiser. (Ex. 1.) In May 1997, insurer accepted cervical and lumbar strains. In November 1997, insurer accepted right C6-7 disc herniation and left C5-6 disc herniation. (Exs. 3, 4, 41 and 62.)
- (2) Darrell C. Brett, M.D., performed spinal surgeries in 1998, 1999 and 2001. (Exs. 6, 33, and 82-7.) On January 8, 2002, the compensable conditions became medically stationary and on February 8, 2002, the claim was closed with a permanent partial disability award. (Exs. 37, 39 and 42.)

(3) On January 25, 2002, claimant designated Dr. Crone as her attending physician. (Ex. 38.)

(4) On April 10, 2003, claimant entered a vocational authorized training plan (ATP) and the claim was reopened. (Ex. 46.) On May 27, 2003, Dr. Crone released claimant from work due to increased medical symptoms. (Exs. 47, 49, 52, 56, 57.) On June 11, 2003, the ATP ended. (Exs. 60 and 63.) On July 16, 2003, insurer denied an aggravation claim. (Ex. 58.)

(5) On July 17, 2003, insurer closed the claim listing the medically stationary date as January 8, 2002. (Ex. 60.) In an Order on Reconsideration dated August 14, 2003, the department rescinded the previous closure for lack of a current medical closing examination and reopened the claim. (Ex. 65.)

(6) On September 11, 2003 and again on December 2, 2003, Dr. Crone referred claimant to physical therapy three times per week for four weeks. (Ex. 84.) On December 2, 2003, Dr. Crone referred claimant for evaluation and treatment of depression “related to chronic injury and physical limitations.” (Ex. 83.) On December 2, 2003, the parties deposed Dr. Crone concerning the aggravation claim. (Ex. 82.)

(7) In an Opinion and Order dated February 12, 2004, Workers’ Compensation Board ALJ Albert W. Hogue affirmed the aggravation denial and affirmed the Order on Reconsideration. (Ex. 88.)

CONCLUSIONS OF LAW

(1) MRU correctly determined that insurer is liable for physical therapy proposed by Dr. Crone.

(2) MRU incorrectly determined that insurer is liable for psychological counseling proposed by Dr. Crone.

OPINION

Jurisdiction over this medical service dispute lies with the director. ORS 656.245(6); OAR 436-010-0008(1). I review for substantial evidence or error of law. ORS 656.245(6) and OAR 436-001-0225(1). The burden of proving a fact or position rests with the proponent. ORS 184.450(2). As petitioner, insurer bears the burden of proving by a preponderance of the evidence that the administrative order is incorrect. *See Cook v. Employment Div.*, 47 Or App 437 (1980) (In the absence of contrary legislation, the standard of proof in an administrative hearing is preponderance of evidence). Proof by a preponderance of evidence means that the fact finder is persuaded that the facts asserted are more likely true than false. *Riley Hill General Contractors v. Tandy Corp.*, 303 Or 390 (1989).

The underlying question is which subsection of ORS 656.245(1) applies to the facts of the case. MRU applied ORS 656.245(1)(a) and (b) because the claim is in open status and determined that insurer is liable for the disputed medical services. In contrast, insurer contends

that it is not liable for the disputed medical services because they fail to satisfy the criteria set forth in ORS 656.245(1)(c).¹ Subsection (c) applies only to claims after the medically stationary² date. Here, the claim remains in open status, as established by the August 2003 Order on Reconsideration and the February 2004 Opinion and Order. Consequently, the case arises under ORS 656.245(1)(a) and (b), rather than subsection (c). Accordingly, insurer's argument that the proposed medical treatment fails to satisfy subsection (c) is unpersuasive.

ORS 656.245(1) provides in pertinent part:

(a) For every compensable injury, the insurer or self-insured employer shall cause to be provided medical services for conditions caused in material part by the injury for such period as the nature of the injury or the process of the recovery requires
*****.

(b) Compensable medical services shall including medical surgical, hospital, nursing, ambulances and other related services, and drugs, medicine, crutches and prosthetic appliances, braces, and supports and where necessary, physical restorative services. ***** The duty to provide such medical services continues for the life of the worker.

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).

Physical Therapy

¹ ORS 656.245(1) provides in pertinent part:

(c) Notwithstanding any other provision of this chapter, medical services after the worker's condition is medically stationary are not compensable except for the following:

(H) Services that are necessary to diagnose the worker's condition

(J) With the approval of the insurer or self-insured employer, palliative care that the worker's attending physician referred to in ORS 656.005(12)(b)(A) prescribes and that is necessary to enable the worker to continue current employment or a vocational training program.

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

² ORS 656.005(17) provides:

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

MRU determined that the proposed physical therapy was reimbursable under ORS 656.245(a) and (b). I agree. Following a work injury, an insurer is obligated to provide medical services for conditions caused in material part by the injury for such period as the nature of the injury or the process of the recovery requires. ORS 656.245(1)(a). This obligation continues over the injured worker's lifetime. ORS 656.245(1)(b). Here, attending physician Crone prescribed physical therapy directed toward the accepted spinal conditions. Dr. Crone specified that the physical therapy prescription was for three times per week for four weeks and listed CPT codes. ³ Based on the record, I agree with MRU's conclusion that the proposed physical therapy is reimbursable.

Psychological Counseling

MRU determined that the proposed psychological counseling was reimbursable under ORS 656.245(a) and (b). I disagree. Insurer contends that the proposed psychological counseling is not reimbursable because it does not fall within the scope of acceptance. The record reflects that no psychological condition has been accepted. However, claimant contends that the proposed psychological counseling is reimbursable under ORS 656.245(1)(b) as a diagnostic medical service.

In *Counts v. International Paper Company*, 146 Or App 768 (1997), the court addressed the compensability of diagnostic medical services. The court held that, in order for diagnostic services to be compensable, claimant must show that the compensable injury made the tests necessary. The court further stated that diagnostic medical services are compensable if they are necessary to determine the cause and extent of a compensable injury. Here, the record fails to establish that the proposed psychological counseling is necessary to determine the extent of the 1977 work injury. The record contains only Dr. Crone's cryptic prescription note. The record contains no chart note or letter from Dr. Crone explaining a causal link between the work injury and the need for diagnostic testing of an unaccepted condition. Therefore, MRU's determination is not supported by substantial evidence. Accordingly, I reverse and find that the proposed psychological counseling is not reimbursable.

ATTORNEY FEES

MRU awarded claimant's attorney a fee of \$1,140 for services rendered at the agency level. In light of the factors listed in OAR 436-001-0265, I agree that \$1,140 is a reasonable fee for claimant's attorney's services before MRU.

Claimant has prevailed in the contested case hearing on one issue is entitled to a reasonable attorney fee for his services here. ORS 656.385(1). On October 9, 2003, claimant's attorney submitted a statement of services requesting a fee in the amount of \$1,500. Considering the factors listed in OAR 436-001-0265, in particular the split decision, I find that \$750 is a reasonable fee for claimant's attorney's services in this case.

³ Insurer does not question the CPT codes.

ORDER

IT IS HEREBY ORDERED that:

The Directors Review and Order dated March 3, 2004 is modified.

1. Insurer is liable for physical therapy proposed by Dr. Crone.
2. Insurer is not liable for psychological counseling proposed by Dr. Crone.
3. Insurer shall pay claimant's attorney a fee of \$1,140 for services rendered before MRU.
4. Insurer shall pay claimant's attorney a fee of \$750 for services rendered before OAH.

DATED this 10th day of August, 2004.