

In the ORS 656.245 Medical Services Dispute of

**JOHN BASSANI, Claimant**

Contested Case No: H05-074

**PROPOSED AND FINAL ORDER**

September 29, 2005

JOHN BASSANI, Petitioner

LIBERTY NORTHWEST INSURANCE CORP., 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 April 19, 2005 by the Medical Review Unit (MRU) of the Workers' Compensation Division (WCD), Department of Consumer and Business Services (department or director). On May 17, 2005, the department referred the matter to the Office of Administrative Hearings (OAH). On August 11, 2005, Administrative Law Judge Catherine P. Coburn conducted a hearing in Beaverton, Oregon. Attorney James T. Guinn represented petitioner John Bassani (claimant). Attorney Sally Anne Currey represented respondent Liberty Northwest Insurance Corporation (insurer). Claimant testified on his own behalf and the record closed on September 27, 2005 following receipt of written argument.

At hearing, insurer asserted a motion for dismissal, contending that claimant lacked standing to request a hearing and claimant opposed the motion. I denied insurer's motion because an injured worker has standing to request a hearing concerning compensability of his medical treatment, even if it is ultimately determined that he is not liable. ORS 656.245(6).

**ISSUE**

Whether MRU correctly determined that insurer is not liable for prolotherapy provided to claimant by David A. Milroy, DC, from May 10, 2002 through July 8, 2004.

**EVIDENTIARY RULINGS**

WCD Exhibits 1 through 39 were admitted into the record without objection. Claimant's Supplementary Exhibit 4a and insurer's Supplementary Exhibit 4 p.4A were also admitted into the record without objection. Finally, insurer withdrew Supplementary Exhibit 11 A as a duplicate of Exhibit 23.

**FINDINGS OF FACT**

(1) Claimant suffered work injuries on May 1, 2001 and May 8, 2003. (Testimony of claimant.) Following these work injuries, insurer accepted a lumbar strain, L4-5 disc herniation/bulges/lesion and coccyx contusion. (Exs. 2 and 19.) On May 10, 2002, Frederick L. Mitchell, MD referred claimant to David A. Milroy, DC. (Ex. 3.)

(2) Dr. Milroy began treating claimant on May 10, 2002. (Ex. 4-1.) On May 28, 2003,

Dr. Milroy wrote a treatment plan listing, *inter alia*, ligament injections containing Lidocaine 2%, Bupivacaine .5% Dextrose 50%. The treatment plan does not list prolotherapy. (Ex. 10.)

(3) At Dr. Milroy's request, on June 4, 2002, claimant telephoned insurer's claims examiner and eventually spoke with a claims supervisor. (Testimony of claimant.) They discussed physical therapy and injection therapy. (Ex. 4 p. 4a.) Claimant had no knowledge of different types of injections. (Testimony of claimant.) The claims supervisor telephoned the physical therapist<sup>1</sup> and advised that insurer would continue to authorize physical therapy. (Ex. 4-p. 4a.)

(4) On July 5, 2002, claimant telephoned the claims supervisor who indicated that he would investigate why medical bills were not paid. (Ex. 4A.) They did not discuss different types of injections. (Testimony of claimant.) Claimant reported to Dr. Milroy's office that insurer had approved injections. (Ex. 4-5; testimony of claimant.)

(5) On July 11, 2002, Dr. Mitchell informed insurer that claimant was receiving "ligamentous injections." (Ex. 5.)

(6) On September 16, 2003, Dr. Milroy noted that claimant had a caudal epidural steroid injection. (Ex. 11.)

(7) Insurer paid Dr. Milroy for treatment provided beginning May 10, 2002. (Ex. 6.) On August 10, 2004, insurer notified Dr. Milroy's office that a nurse had reviewed the file and determined that some services provided to claimant were not compensable. (Ex. 12.) Insurer requested repayment for the noncompensable portion of claimant's treatment and Dr. Milroy's office reimbursed insurer the amount requested. (Exs. 12, 13, 14, 15 and 23.) In November 2004, insurer repaid Dr. Milroy for treatment provided to claimant with the exception of CPT code 20550 (injections) which was prolotherapy. (Ex. 21-2.) Claimant requested administrative review, asserting that insurer owes Dr. Milroy \$2,900. (Exs. 22 and 30.)

(8) Dr. Milroy last treated claimant on July 8, 2004. (Ex. 4-45.) On April 7, 2005, Dr. Milroy's office informed MRU that the injections consist of 0.5% Bupivacaine, 2% Lidocaine, and 50% Dextrose. (Ex. 35-2.)

### CONCLUSION OF LAW

MRU correctly determined that insurer is not liable for prolotherapy provided to claimant by David A. Milroy, DC, from May 10, 2002 through July 8, 2004.

### OPINION

Jurisdiction lies with the director and I review for substantial evidence or error of law. ORS 656.245(6); OAR 436-001-0225(1). 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

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<sup>1</sup> The therapist's phone number is not that of Dr. Millroy's office.

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). Proof by a preponderance of the 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).

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. This obligation continues over the injured worker's lifetime. ORS 656.245(1)(b). However, ORS 656.245 authorizes the director to exclude certain medical procedures from compensability. ORS 656.245(3) provides:

(3) Notwithstanding any other provision of this chapter, the director, by rule, upon the advice of the committee created by ORS 656.794<sup>2</sup> and upon the advice of the professional licensing boards of practitioners affected by the rule, may exclude from compensability any medical treatment the director finds to be unscientific, unproven, outmoded or experimental. The decision of the director is subject to a contested case review under ORS chapter 183.

Additionally, OAR 436-009-0015 provides in pertinent part:

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(6) Pursuant to ORS 656.245 (3), the director has excluded from compensability the following medical treatment. While these services may be provided, medical providers shall not be paid for the services or for treatment of side effects.

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(e) Prolotherapy;

### 1. Applicability of Rule

At hearing, claimant raised a question concerning the adoption date of the rule. OAR 436-009-0015(6)(e) became effective on July 1, 1999, before the disputed treatment was

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<sup>2</sup> ORS 656.794 provides:

There shall be created an advisory committee on medical care. This committee shall consist of members appointed by and serving at the pleasure of the Director of the Department of Consumer and Business Services to advise the director on matters relating to the provision of medical care to workers. The director by rule shall determine the composition of the committee. Membership of the committee shall include representatives of the types of health care providers that are most representative of health care providers providing medical care services to injured workers. The committee shall also include one representative of insurers, one representative of employers, one representative of workers, one representative of managed care organizations and other persons as the director may determine are necessary to carry out the purpose of the committee. Members of the committee shall be paid travel and other necessary expenses for service as a member. Such payments shall be made from the Consumer and Business Services Fund.

provided. Consequently, prolotherapy was a noncompensable treatment at the time Dr. Milroy provided it to claimant.

## 2. Equitable Estoppel

WCD has previously applied this doctrine in *Jean M. Lewis*, 2 WCSR 33 (1997).

“The doctrine of equitable estoppel ‘is that a person may be precluded by his act or conduct \*\*\*when it was his duty to speak, from asserting a right which he otherwise would have had.’” *Meier & Frank v. Smith-Sanders*, 115 Or App 159, 163 (1992), *reversed* 316 Or 142 (1993), quoting *Marshall v. Wilson*, 175 Or 506, 518 (1944). Estoppel only protects a person who changes a position in reliance on another’s act or representation. *Meier & Frank, supra*. In *Meier & Frank*, the Court of Appeals found the employer was estopped from refusing to pay for surgery for a non-accepted claim where the employer authorized the surgery.” *Lewis* at 34.

Here, the detrimental reliance was Dr. Milroy’s and not claimant’s. There was no detriment to claimant; he obtained medical treatment without liability as explained below. However, Dr. Milroy was not entitled to rely on any representation made by the insurer because he failed to communicate directly with insurer and to provide accurate information. Instead, at Dr. Milroy’s request, claimant telephoned insurer concerning unpaid medical bills. Unfortunately, claimant knew nothing of different types of injections and did not inform insurer that Dr. Milroy was providing prolotherapy injections. Consequently, claimant conveyed flawed information back to Dr. Milroy when he indicated that insurer had authorized injections without specifying what type of injections. Finally, insurer made no misrepresentation. In the first telephone call, the claims supervisor told claimant that he would investigate why medical bills were not paid. In the second telephone call, the communication was unclear concerning what type of therapy was requested or authorized. For these reasons, I find that the doctrine of equitable estoppel inapposite.

## 3. Contract

Claimant contends that insurer is bound by a contract between the parties whereby insurer agreed to pay for the disputed medical treatment. In support of his position, claimant relies on the telephone conversation he held with insurer supervisor John Fowler on July 5, 2002. However, as explained above, the record establishes that the parties did not have a meeting of the minds concerning what specific type of medical treatment was requested and whether insurer approved it. Therefore, claimant’s argument is unpersuasive.

## 4. Claimant’s Liability

OAR 436-009-0015 provides: Limitations on Medical Billings

(1) An injured worker shall not be liable to pay for any medical service related to an accepted compensable injury or illness or any

amount reduced by the insurer pursuant to OAR chapter 436. A medical provider shall not attempt to collect payment for any medical service from an injured worker, except as follows:

- (a) When the injured worker seeks treatment for conditions not related to the accepted compensable injury or illness;
- (b) When the injured worker seeks treatment that has not been prescribed by the attending physician or authorized nurse practitioner, or a specialist physician upon referral of the attending physician or authorized nurse practitioner. This would include, but not be limited to, ongoing treatment by non-attending physicians in excess of the 30 day/12 visit period or by nurse practitioners in excess of the 90 day period, as set forth in ORS 656.245 and OAR 436-010-0210;
- (c) When the injured worker seeks palliative care that is either not compensable or not authorized by the insurer or the director pursuant to OAR 436-010-0290, after the worker has been provided notice that the worker is medically stationary;
- (d) When the injured worker seeks treatment outside the provisions of a governing MCO contract after insurer notification in accordance with OAR 436-010-0275; or
- (e) When the injured worker seeks treatment after being notified that such treatment has been determined to be unscientific, unproven, outmoded, or experimental.

Here, claimant received medical treatment that the director deems noncompensable pursuant to OAR 436-009-0015(6)(e). Under these circumstances, the administrative scheme assigns the risk of nonpayment to the medical provider and not to the injured worker. Therefore, claimant is not liable for the prolotherapy that Dr. Milroy provided.

## 5. Conclusion

In conclusion, I find that the prolotherapy provided by Dr. Milroy is not compensable pursuant to OAR 436-009-0015(6)(e). Furthermore, insurer is not liable under either the doctrine of equitable estoppel or contract law. Finally, claimant is not liable for the disputed treatment pursuant to OAR 436-009-0015. Accordingly, I affirm.

### ***ATTORNEY FEES***

Claimant has not prevailed in a contested case hearing and is entitled to no attorney fee. ORS 656.385(1).

### **ORDER**

IT IS HEREBY ORDERED that:

The Administrative Order dated April 19, 2005 is affirmed