In the ORS 656.245 Medical Services Dispute of

JAMES G. EARNEST, Claimant

Contested Case No: H04-107

PROPOSED AN FINAL ORDER

MARCH 9, 2005

JAMES G. EARNEST, Petitioner

SAIF CORP., Respondent

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

HISTORY OF THE CASE

Claimant appeals the Administrative Order issued on June 9, 2004 by the Medical Review Unit of the Workers' Compensation Division (WCD), Department of Consumer and Business Services (department or director). On September 10, 2004, the department referred the matter to the Office of Administrative Hearings (OAH). On February 15, 2005, Administrative Law Judge Catherine P. Coburn conducted a hearing in Beaverton, Oregon. Attorney Michael Gilbertson represented petitioner James G. Earnest (claimant). Attorney Mary Goebel Adams represented respondent, SAIF Corporation (insurer). Tara Lee Leonard, Natural Therapeutic Specialist (NTS) appeared as a limited party pursuant to OAR 137-003-0535(2) and the record closed on the date of hearing.

The MRU addressed the same issue in an earlier Administrative Order dated October 9, 2003. MRU determined that the disputed massage therapy was not reimbursable because the record lacked a treatment plan as required by OAR 436-010-0230(4)(a).[1] Claimant appealed and on December 18, 2003, I conducted a contested case hearing. January 22, 2004, I issued an Interim Order Remanding the matter back to MRU for reconsideration in light of the court's ruling in *SAIF Corp., v. Ross,* 191 Or App 212 (December 10, 2003) (adequate treatment plan may be presented in various chart notes and prescriptions signed by different doctors on different dates). On June 9, 2004, MRU issued the administrative order currently on appeal.

ISSUE

[1] 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 our 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).

Whether insurer is liable for massage therapy provided to claimant by Tara Lee Leonard, NTS, from September 26, 2001 through June 27, 2002.

EVIDENTIARY RULINGS

WCD Exhibits 1 through 22 were admitted into the record without objection.

FINDINGS OF FACT

(1) On November 9, 1983, claimant suffered a compensable injury while working in a plywood mill. Insurer accepted upper back strain, neck fusion, medication induced sleep apnea and depression. The claim remains open. (Exs. 1, 2, 3, 4 and 15.)

(2) On September 18, 2001, Mark C. Paul, MD referred claimant for massage therapy for chronic neck pain weekly for two months. (Ex. 6.)

(3) On September 26, 2001, claimant sought massage therapy from Tara Lee Leonard, Natural Therapeutic Specialist (NTS) who practices in Missoula, Montana. (Ex. 11; testimony of Leonard.) Leonard holds a national massage therapist license but is not licensed by the State of Montana because Montana does not require massage therapy licensure. (Testimony of Leonard.) Leonard telephoned insurer for authorization and submitted notes, prescription and procedure codes. Insurer subsequently telephoned Leonard twice to ascertain her location and the nature of her practice. (Ex. 11.)

(4) On November 13, 2001, Dr. Paul referred claimant for massage therapy for chronic neck pain weekly for three months. (Ex. 6.)

(5) February 20, 2002, Leonard received insurer's bill analysis disallowing payment. Leonard telephoned insurer and was informed that payment was disallowed because the massage therapy was rendered not under a physician's direct control and supervision. (Exs. 8 and 11.)

(6) On 10 occasions from September 26, 2001 through December 21, 2001, Tara Lee Leonard, NTS provided massage therapy services to claimant in her own office and not in any doctor's office. (Exs. 8 and 12; testimony of Leonard.)

(7) On April 15, 2002, S.D. Kemple, DO recommended that claimant continue massage therapy once per week. (Ex. 9.) On July 15, 2002, Dr. Kemple recommended that claimant continue massage therapy to relieve muscle spasm, tension and pain. (Ex. 10.)

CONCLUSION OF LAW

Insurer is liable for massage therapy provided to claimant by Tara Leonard, NTS, from September 26, 2001 through June 27, 2002.

OPINION

Jurisdiction lies with the director and I review for substantial evidence or error of law. ORS 656.245(6), ORS 656.260(16) and 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 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, workers' compensation law imposes some limitations on the provision of palliative care[2] such as massage therapy

In the administrative order on appeal, MRU determined that the disputed massage therapy was not reimbursable. MRU first determined that the treatment plan was adequate under OAR 436-010-0230(4)(a). However, MRU relied on two 1985 Workers' Compensation Board cases to establish that "licensed massage technicians/therapists (LMTs) are not licensed." (Adm. Order, p. 4.) MRU further reasoned that "OAR 436-010-0005(30)[3] defines 'medical treatment' to include medical services that require a physician's prescription. LMT services do not require a physician prescription." (Adm. Order, p. 4.) Finally, MRU construed OAR 436-010-0210(3) to mean that massage therapy is reimbursable only when provided under the direct control and supervision of the attending physician. Since Leonard provided the disputed massage therapy in her own office and not under the direct control and supervision of the attending physician, MRU concluded that the services are not reimbursable.

Claimant first contends that insurer is barred from disputing reimbursability by the doctrine of *equitable estoppel.* Claimant next contends that OAR 436-010-0210(3) allows Leonard to provide reimbursable massage therapy outside the attending physician's direct supervision and control because she is licensed. In contrast, insurer contends that the administrative order is correct and should be affirmed.

Equitable Estoppel

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

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[2] ORS 656.005(20) provides:
(20) "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.

[3] OAR 436-010-0005(30) provides:
"Medical Treatment" means the management and care of a patient for the purpose of combating disease, injury, or disorder. Restrictions on activities are not considered treatment unless the primary purpose of the restrictions is to improve the worker's condition through conservative care.

> "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), *rev den* 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, Leonard, NTS, telephoned insurer three times in order to ascertain the conditions of reimbursement. The medical provider supplied information to insurer and assumed that payment would be forthcoming. However, the record contains no evidence that insurer represented that the bills would be reimbursed. The only written notice insurer provided was a notice of disallowance. Therefore, the doctrine does not apply and insurer is not estopped from disallowing reimbursement of the disputed massage therapy.

<u>Reimbursability</u>

OAR 436-010-0210(3) provides:

> Attending physicians and authorized nurse practitioners may prescribe treatment to be carried out by persons licensed to provide a medical service. Attending physicians may prescribe treatment to be carried out by persons not licensed to provide a medical service or treat independently only when such treatment is rendered under the physician's direct control and supervision. 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 *viz.,* to ascertain the meaning of the words used, giving effect to the intent of the enacting body, which in this case is the department. *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 several rules. First, I find that MRU's reliance on 1985 Workers' Compensation cases is misplaced because the governing administrative rules have been amended

since then. Next, I find that MRU incorrectly interpreted OAR 436-010-0005(30) because the text of the rule does not limit reimbursable medical services to those requiring a physician's prescription. Finally, the plain meaning of OAR 436-010-0210(3) permits attending physicians to prescribe treatment to be carried out by persons who are licensed to provide a medical service. The text of the rule requires only unlicensed providers to render services under the direct supervision and control of the attending physician. Here, Dr. Paul prescribed massage therapy and Leonard, NTS, holds a national massage therapist license. Consequently, Leonard's bills for massage therapy provided to claimant are reimbursable even though she provided services outside Dr. Paul's direct supervision and control. Furthermore, I conclude that MRU's interpretation of OAR 436-010-0005(30) and OAR 436-010-0210(3) reflect errors of law and accordingly, I reverse.

ATTORNEY FEES

Claimant has prevailed in a contested case hearing and is entitled to a reasonable attorney fee. ORS 656.385(1). At the close of hearing, claimant's attorney represented that he had devoted 6.0 hours to this matter. Considering the factors listed in OAR 436-001-0265, I find that $900 (6 X $150) is a reasonable fee for claimant's attorney's services in this case.

ORDER

IT IS HEREBY ORDERED that:

1. The Administrative Order dated June 9, 2004 is reversed.

2. Insurer shall pay claimant's attorney a fee of $900.