
In the ORS 656.245 Medical Services Dispute of

SHAWNA HOPKINS, Claimant

Contested Case No: H04-132

PROPOSED AN FINAL ORDER

MARCH 31, 2005

SHAWNA HOPKINS, Petitioner

LIBERTY NORTHWEST INSURANCE CO., Respondent

Before Daina Upite, Administrative Law Judge, Administrative Hearings

HISTORY OF THE CASE

Claimant appeals an administrative order issued on July 23, 2004 by the Medical Review Unit of the Workers' Compensation Division (WCD), Department of Consumer and Business Services (department or director). On January 11, 2005, Administrative Law Judge Daina Upite conducted a hearing in Salem, Oregon. Petitioner Shawna Hopkins (Claimant) appeared by and through her attorney, Adian Martin. Respondent, Liberty Northwest Insurance Corporation (Insurer) was represented by attorney Ray Smitke. Neither party called any witnesses.

The record remained open until January 14, 2005 to receive from Mr. Martin a Statement of Services and a copy of the case referred to in the hearing. These documents were received January 14, 2005, whereupon the record closed.

ISSUE

Whether an orthopedic adjustable bed and zero gravity chair requested for claimant by Robert Bien, M.D., are reimbursable medical services under ORS 656.245(1)(b).

EVIDENTIARY RULINGS

Workers' Compensation Division (WCD) Exhibits 1 through 42 were received without objection.

FINDINGS OF FACT

(1) Claimant sustained a back injury at work on January 29, 1997. (Ex. 1.) Claimant again injured her back at work in January 1998. (Ex. 3.) The insurer accepted the disabling claim as recurrent L5-S1 disc herniation and closed the claim October 9, 1998, after claimant became medically stationary on August 25, 1998. (Exs. 5-6.) The insurer updated its acceptance notices June 1, 1999 and August 14, 2000, specifying acceptance of L5-S1 disc herniation in the August 14, 2000 notice. (Exs. 7, 8.) The claim was closed again on August 21, 2000, after it was determined that claimant became medically stationary on June 13, 2000. (Ex. 9.)

(2) On June 10, 2003, Drs. Douglas Bald, orthopedic surgeon, and Paul Williams, neurosurgeon, examined claimant at the insurer's request. (Ex. 12.) The examining physicians

concluded that claimant's lower lumbar arachnoiditis is directly related to the January 1997 work injury and subsequent surgical procedures. (Ex. 12 at 8.) Subsequently, the insurer accepted the condition of adhesive arachnoiditis as part of the disabling injury claim. (Ex. 13, 14.)

(3) On July 15, 2003, Robert Bien, M.D., claimant's physician, submitted requests for an adjustable orthopedic bed, Tempur-Pedic memory foam mattress, and a zero-gravity chair. (Exs. 16-18.)¹ Dr. Bien signed pre-printed forms addressed "To whom it may concern" containing general information about the advantages of the zero-gravity chair, adjustable bed, and memory foam mattress, filling in only claimant's name and diagnosis. (*Id.*) Despite requests from the insurer and the Medical Review Unit for additional medical information and a prescription from Dr. Bien, the record contains no prescription or other information from Dr. Bien. (Exs. 27, 30.)

(4) The insurer also requested a prescription and medical justification from Dr. Jason Garber of the Western Regional Center for Brain & Spine Surgery in Las Vegas, Nevada. (Ex. 22.) Dr. Garber responded that claimant would certainly benefit from the memory foam mattress and adjustable bed, but he provided no specific medical justification for those items. Dr. Garber noted that claimant has had lumbar disc degeneration, a posterior decompression, discectomy, and a spinal cord stimulator for chronic lower extremity pain. (Ex. 24.)

(5) The requested items were to be supplied by Relax the Back in Las Vegas, Nevada. The requested items included two twin-size Tempur-Pedic mattresses, two split king-size adjustable beds, and one zero gravity chair, for a total invoice amount of \$6,858.64, including delivery. (Ex. 20.)

CONCLUSIONS OF LAW

The Administrative Order correctly determined that the insurer is not required to pay for an orthopedic bed and zero gravity chair for claimant.

OPINION

Jurisdiction over this medical services dispute lies with the director. ORS 656.245(6); OAR 436-010-0008(1). I review for substantial evidence and errors of law. OAR 436-001-0225(1). The burden of proving a fact or position rests with the proponent. ORS 184.450(2). As petitioner, claimant 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 factfinder is persuaded that the facts asserted are more likely true than false. *Riley Hill General Contractors v. Tandy Corp.*, 303 Or 390 (1989).

The Medical Review Unit determined that the orthopedic adjustable bed and zero gravity chair requested by Dr. Bien for claimant were not compensable medical services under ORS

¹ The signature on the "Health Care Provider" line is illegible on Exhibits 16, 17 and 18, but the parties stipulated at the hearing that the documents were signed by Dr. Bien.

656.245 and OAR 436-010-0230(10). Claimant contends that the items are compensable medical services. Specifically, claimant argues that the director applied the wrong legal standard in denying the request. The insurer contends that the administrative order is correct and should be affirmed.

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 worker's lifetime. ORS 656.245(1)(b).

The director has adopted administrative rules to provide uniform guidelines for administering payment for medical services to injured workers. OAR 436-010-0002. With respect to articles such as beds and chairs, OAR 436-010-0230(10) provides:

Articles including but not limited to beds, hot tubs, chairs, Jacuzzis, and gravity traction devices are not compensable unless a need is clearly justified by a report which establishes that the "nature of the injury or the process of recovery requires" the item be furnished. The report must specifically set forth why the worker requires an item not usually considered necessary in the great majority of workers with similar impairments. Trips to spas, to resorts or retreats, whether prescribed or in association with a holistic medicine regimen, are not reimbursable unless special medical circumstances are shown to exist.

MRU determined that the compensability of the items requested by claimant must be analyzed under the above-cited rule. MRU further determined that the requested items are not compensable because the need for the items was not clearly justified by a report establishing that the "nature of the injury and the process of recovery" require the items be furnished, as well as establishing specifically why items not usually considered necessary were required by this worker.

In construing the meaning of an administrative rule, the same method of analysis is used as for determining the meaning of a statute. *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 Facility Siting*, 320 Or 132 (1994).

MRU's determination that the requested items must be found compensable under OAR 436-010-0230(10) is a plausible interpretation of its own rule, and not inconsistent with the rule, the context of the rule, or any other source of law. Therefore, in order to be compensable, the requested items must meet the criteria of OAR 436-010-0230(10).

The preponderance of the evidence does not establish that the orthopedic bed and zero gravity chair meet the criteria for compensability under OAR 436-010-0230(10). There is no medical report that clearly justifies the need for these items, or that establishes that the nature of claimant's injury and process of recovery require the items. Dr. Garber identified claimant's medical conditions, but did not explain how the requested items would assist the process of recovery. Furthermore, there is no medical report that specifically states why claimant requires these items, which are not usually considered necessary for the majority of workers with similar impairments. Therefore, MRU correctly determined that the insurer is not required to pay for the the requested items.

Claimant contends that medical services are compensable "for so long as the nature of the injury or the process of recovery requires," and that the additional criterion found in OAR 436-010-0230(10) does not apply because it imposes a standard not found in the statute. Even if claimant were correct in her argument, the evidence does not meet even the standard cited by claimant. There is no clear medical explanation as to how or why claimant's *process of recovery* requires an orthopedic bed and zero gravity chair. Moreover, the director has broad discretion to promulgate rules reasonably required in the performance of the director's duties, which include administration, regulation, and enforcement of ORS Chapter 656. ORS 656.726(4). Thus, it is within the director's authority to promulgate rules governing payment for medical services such as an orthopedic bed and zero gravity chair.

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 Director's Administrative Order dated July 23, 2004, is affirmed.