

In the ORS 656.327 Medical Treatment Dispute of

STEVEN G. HUMBERT, Claimant

Contested Case No: H05-021

PROPOSED AND FINAL ORDER

June 10, 2005

ROSEBURG FOREST PRODUCTS, Petitioner

STEVEN G. HUMBERT, Respondent

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

HISTORY OF THE CASE

Insurer appeals the Administrative Order issued on January 3, 2005 by the Medical Review Unit (MRU) of the Workers' Compensation Division (WCD), Department of Consumer and Business Services (department or director). On February 24, 2005, the department referred the matter to the Office of Administrative Hearings (OAH). On May 12, 2005, Administrative Law Judge Catherine P. Coburn conducted a hearing in Beaverton, Oregon. Attorney R. Ray Heysell represented petitioner Roseburg Forest Products and its claims administrator, RLC Industries (insurer). Attorney Christine Jensen represented respondent Steven G. Humbert (claimant). No witnesses testified and the record closed on the date of hearing.

ISSUE

Whether MRU correctly determined, pursuant to OAR 436-010-0250 that insurer is barred from contesting the medical appropriateness of an elective L4-5 and L5-S1 fusion revision.

EVIDENTIARY RULINGS

WCD Exhibits 1 through 211 were admitted into the record without objection.

FINDINGS OF FACT

I hereby adopt and incorporate the findings of fact contained in the administrative order dated January 31, 2005 with the following supplementation:

(1) On August 18, 1992, claimant suffered a back injury while working in a lumber mill. (Ex. 10.) Insurer accepted a lumbar strain. (Ex. 18.)

(2) Since 1992, claimant has experienced extensive medical treatment including L4-5 and L5-S1 fusion in October 2002. (Ex. 128.)

(3) On September 21, 2004¹ the office of Christopher G. Miller, MD, faxed a surgical authorization request to insurer. (Ex. 195.) In the accompanying chart note, Dr. Miller provided

¹The date of service reflects a typographical error. It is dated 1964, which is claimant's birthdate, rather than 2004. The fax date is September 21, 2004 and the transcription approval date is September 23, 2004

information substantiating the need for surgery and specified that claimant would undergo lumbar surgery after examination with a urologist. (Ex. 194.)

(4) On November 17, 2004, insurer provided a Form 440-3228 to Dr. Miller and he returned it on November 18, 2004. (Ex. 197.)

(5) On November 30, 2004, claimant requested administrative review of the medical appropriateness of the proposed surgery. (Ex. 200.)

(6) In the administrative order, MRU determined that insurer was barred from contesting the medical appropriateness of the proposed surgery because it had failed to meet the deadlines prescribed by OAR 436-010-0250. MRU did not consider and made no ruling on the question whether the proposed surgery was excessive, inappropriate, ineffectual or in violation of the rules under ORS 656.327. (Ex. 207-8.)

CONCLUSION OF LAW

MRU incorrectly determined, pursuant to OAR 436-010-0250 that insurer is barred from contesting the medical appropriateness of an elective L4-5 and L5-S1 fusion revision.

OPINION

Jurisdiction lies with the director. ORS 656.327(2). I may modify the administrative order only if it is not supported by substantial evidence in the record or reflects an error of law. ORS 656.327(2) and OAR 436-001-0225(1). 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 App 437 (1980) (In the absence of contrary legislation, the standard of proof in administrative hearings 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 (1998). Having reviewed the record, I find that insurer has met its burden.

MRU determined that insurer is liable for the disputed elective surgery. MRU found that insurer responded to the surgery authorization request untimely under OAR 436-010-0250, and therefore, was barred from contesting the medical appropriateness of the proposed surgery. Finally, MRU did not reach the question whether the proposed surgery was medically inappropriate.

Insurer contends that it is not barred from contesting medical appropriateness of proposed surgery. In support of its position, insurer argues that OAR 436-010-0250 is invalid because it contravenes ORS 656.327 and the director exceeded his statutory authority in promulgating it. In contrast, claimant contends that the administrative order is correct and should be affirmed.

Under ORS 656.245(1)(a), an insurer is obligated to provide medical services for conditions caused in material part by the work injury for such period 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, an insurer is not required to provide treatment that is excessive or medically inappropriate under ORS 656.327.

ORS 656.327 provides in pertinent part:

(1)(a) If an injured worker, an insurer or self-insured employer or the Director of the Department of Consumer and Business Services believes that the medical treatment, not subject to ORS 656.260, that the injured worker has received, is receiving, will receive or is proposed to receive is excessive, inappropriate, ineffectual or in violation of rules regarding the performance of medical services, the injured worker, insurer or self-insured employer shall request review of the treatment by the director and so notify the parties.

(b) Unless the director issues an order finding that no bona fide medical services dispute exists, the director shall review the matter as provided in this section. Appeal of an order finding that no bona fide medical services dispute exists shall be made directly to the Workers' Compensation Board within 30 days after issuance of the order. The board shall set aside or remand the order only if the board finds that the order is not supported by substantial evidence in the record. Substantial evidence exists to support a finding in the order when the record, reviewed as a whole, would permit a reasonable person to make that finding. The decision of the board is not subject to review by any other court or administrative agency.

(2) The director shall review medical information and records regarding the treatment. The director may cause an appropriate medical service provider to perform reasonable and appropriate tests, other than invasive tests, upon the worker and may examine the worker. Notwithstanding ORS 656.325 (1), the worker may refuse a test without sanction. **Review of the medical treatment shall be completed and the director shall issue an order within 60 days of the request for review.** The director shall create a documentary record sufficient for purposes of judicial review. If the worker, insurer, self-insured employer or medical service provider is dissatisfied with that order, the dissatisfied party may request a contested case hearing before the director pursuant to ORS chapter 183. At the contested case hearing, the administrative order may be modified only if it is not supported by substantial

evidence in the record or if it reflects an error of law. No new medical evidence or issues shall be admitted. If the director issues an order declaring medical treatment to be not compensable, the worker is not obligated to pay for such treatment. Review of the director's order shall be by the Court of Appeals pursuant to ORS chapter 183.

Additionally, OAR 436-010-0250 provides:

(1) "Elective Surgery" is surgery which may be required in the process of recovery from an injury or illness but need not be done as an emergency to preserve life, function or health.

(2) Except as otherwise provided by the MCO, when the attending physician or surgeon upon referral by the attending physician or authorized nurse practitioner, believes elective surgery is needed to treat a compensable injury or illness, the attending physician, authorized nurse practitioner, or the surgeon must give the insurer actual notice at least seven days prior to the date of the proposed surgery. Notification must provide the medical information that substantiates the need for surgery, and the approximate surgical date and place if known.

(3) When elective surgery is recommended, the insurer may require an independent consultation with a physician of the insurer's choice. The insurer must notify the recommending physician, the worker and the worker's representative, within seven days of receipt of the notice of intent to perform surgery, whether or not a consultation is desired by submitting a completed Form 440-3228 (Elective Surgery Notification) to the recommending physician. If the form is not completed the physician is not required to respond. When requested, the consultation must be completed within 28 days after notice to the physician.

(4)(a) Within seven days of the consultation, the insurer must notify the recommending physician of the insurer's consultant's findings.

(c) The recommending physician must notify the insurer, the worker and the worker's representative by signing Form 440-3228 or providing other written notification that further attempts to resolve the matter would be futile.

(5) If the insurer believes the proposed surgery is excessive, inappropriate, or ineffectual and cannot resolve the dispute with the recommending physician, the insurer must request an administrative review by the director within 21 days of the notice

provided in subsection (4)(c) of this rule. **Failure of the insurer to timely respond to the physician's elective surgery request by submitting a completed Form 440-3228, or to timely request administrative review under this rule shall bar the insurer from later disputing whether the surgery is or was excessive, inappropriate, or ineffectual.**

(Emphasis added.)

The question presented is whether OAR 436-010-0250² contravenes ORS 656.327. In interpreting a statute, the court's, and thus my charge is to determine the legislative intent. ORS 174.020³ *PGE v. Bureau of Labor and Industries*, 317 Or 606 (1993). In order to discern the legislative intent, the first level of analysis is to examine both the text and context of the statute. 317 Or at 610-611. The test of the statute is the best evidence of the legislature's intent. If the legislature's intent is unclear, I consider legislative history, and if still unclear, I apply the general maxims of statutory construction. *Id.* In applying the foregoing method of analysis to ORS 656.327, I find I need go no further than the plain meaning of the statute.

When a party requests administrative review of a medical appropriateness dispute, the mandatory provisions contained in ORS 656.327 require the director to take one of two actions. Under subsection (1)(b), the director must review the medical appropriateness question unless it issues an appealable order finding no *bona fide* dispute. Where there is a *bona fide* dispute, subsection (2) requires the director to review the medical information and issue an order within 60 days of the request for review. Implicit in the language of subsection (2) is the requirement that the director make a ruling on the question whether the disputed medical treatment is appropriate, based on the medical information and records. In contrast, under OAR 436-010-0250(5), if an insurer fails to meet certain deadlines, then the director will not make a ruling on the medical appropriateness question. However, ORS 656.327 is mandatory and contains no provision excusing the director from its duty to rule on medical appropriateness disputes. Inasmuch as OAR 436-010-0250 directly contravenes ORS 656.327, the rule is invalid.

The legislature has authorized the director to make and declare all rules which are reasonably required to administer ORS chapter 656, including medical appropriateness disputes. ORS 656.726.⁴ However, this delegation does not include authority to promulgate a rule that contravenes any provision of the statute.

² The director has held that OAR 436-010-0250 must be strictly applied. *John B. Foster*, 9 CCHR 1 (2004); *on recon* 9 CCHR 256 (2004). See also *Sandra Schneiderman*, 10 CCHR 29 (2005); *Glenn R. Horn*, 9 CCHR 93 (2004), *on recon* 9 CCHR 201 (2004).

³ ORS 174.020(1)(a) provides:

In the construction of a statute, a court shall pursue the intention of the legislature if possible.

⁴ ORS 656.726 provides in pertinent part:

(4) The director hereby is charged with duties of administration, regulation and enforcement of ORS 654.001 to 654.295, 654.750 to 654.780 and this chapter. To that end the director may:

(a) Make and declare all rules and issue orders which are reasonably required in the performance of the director's duties.

Here, insurer failed to meet the deadlines prescribed by OAR 436-010-0250. In a chart note, dated September 21, 2004, Dr. Miller notified insurer of the proposed surgery. Insurer provided Form 440-3228 to Dr. Miller on November 17, 2004, more than seven days later, in violation of OAR 436-010-0250(3). Moreover, insurer did not request administrative review within 21 days of receiving the notice of the proposed surgery as required by OAR 436-010-0250(5). For these reasons, MRU found that insurer was barred from contesting the medical appropriateness of the proposed lumbar fusion. Even though the parties maintained a *bona fide* dispute, MRU did not evaluate the medical evidence or make any ruling concerning the medical appropriateness of the proposed surgery as required by ORS 656.327. Having reviewed the record, I conclude that the administrative order reflects an error of law. Finally, I remand the matter to MRU for a ruling on the question whether the L4-5 and L5-S1 decompression and fusion revision proposed by Dr. Miller is medically appropriate. OAR 436-001-0170(1).

ATTORNEY FEES

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

ORDER

IT IS HEREBY ORDERED that:

The Administrative Order dated January 31, 2005 is reversed.