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In the ORS 656.260 Managed Care Dispute of

**TIMOTHY S. PIFHER, Claimant**

Contested Case No: H05-028

**PROPOSED AND FINAL ORDER**

MAY 2, 2005

TIMOTHY S. PIFHER, Petitioner

SAIF 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 February 2, 2005 by the Medical Review Unit (MRU) of the Workers' Compensation Division (WCD), Department of Consumer and Business Services (department or director). On March 7, 2005, the department referred the matter to the Office of Administrative Hearings (OAH). On April 22, 2005, Administrative Law Judge Catherine P. Coburn conducted a hearing in Salem, Oregon. Petitioner Timothy S. Pifher (claimant) appeared without benefit of counsel. Attorney David L. Runner represented respondent SAIF Corporation (insurer). Caremark Comp Managed Care Organization (MCO) waived appearance. Claimant testified on his own behalf and the record closed on the date of hearing.

### **ISSUE**

Whether MRU correctly determined that palliative care recommended by Robert C. Hartog, MD on July 9, 2004 was not reimbursable pursuant to OAR 436-010-0290(1).

### **EVIDENTIARY RULINGS**

WCD Exhibits 1 through 23 were admitted into the record without objection. Claimant offered proposed Supplementary Exhibit 24, a letter written by Dr. Hartog on March 11, 2005. However, no new medical evidence is admissible at the contested case hearing. ORS 656.260(16) and OAR 436-001-0225(1). Therefore, Exhibit 24 was not admitted.

### **FINDINGS OF FACT**

The findings of fact contained in the administrative order dated February 2, 2005 are adopted and incorporated with the following supplementation:

(1) On July 17, 2002, claimant suffered a compensable back injury while working on a water system. While shoveling and bending copper tubing, he fell to the ground. (Ex. 1; testimony of claimant.) In August 2002, insurer accepted a lumbosacral strain and enrolled claimant in the MCO. (Ex. 4.) Claimant sought treatment from Dr. Hartog and returned to work. (Testimony of claimant.)

(2) In 2002, claimant suffered onset of lumbar pain while shoveling on a water system.

He sought treatment from Byron Akita, DC and returned to work. (Ex. 2; testimony of claimant.) Claimant continued intermittent treatment with Dr. Akita and continued working. (Testimony of claimant.)

(3) On July 9, 2004, Dr. Hartog prescribed 12 chiropractic adjustments over the following six months. (Exs. 8 and 9.) The medical record does not indicate how the recommended chiropractic treatment was related to the work injury or how it would enable claimant to continue working. (Exs. 7, 8 and 9.)

### CONCLUSION OF LAW

MRU correctly determined that palliative care recommended by Robert C. Hartog, MD on July 9, 2004 was not reimbursable pursuant to OAR 436-010-0290(1).

### OPINION

WCD has jurisdiction over this medical service dispute involving an MCO enrolled injured worker. ORS 656.704(3)(a), ORS 656.245 and ORS 656.260. I review for substantial evidence and 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 rests with the proponent. ORS 183.450(2); *Salem Decorating v. National Council on Comp. Ins.*, 116 Or App 170 (1992), *rev den* 315 Or 643 (1993). As the proponent of his position, claimant bears the burden of proving by a preponderance of evidence that the administrative order is incorrect. *Harris v. SAIF*, 292 Or 683 (1982) (General rule regarding allocation of burden of proof is that burden is on the proponent of the fact or position.); *Cook v. Employment Div.*, 47 Or 437 (1982) (In the absence of legislation adopting a different standard of proof, the standard 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).

Pursuant to ORS 656.245(1), an insurer is obligated to provide medical services for compensable conditions 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).

ORS 656.005(2) provides:

'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.

Additionally, OAR 436-010-0290 provides:

(1) When the worker's attending physician believes that palliative care is appropriate to enable the worker to continue current employment or a current vocational training program, the attending

physician must first submit a written request for approval to the insurer. The request shall:

- (a) Describe any objective findings;
- (b) Identify by ICD-9-CM diagnosis, the medical condition for which palliative care is requested;
- (c) Detail a treatment plan which includes the name of the provider who will render the care, specific treatment modalities, and frequency and duration of the care, not to exceed 180 days;
- (d) Explain how the requested care is related to the compensable condition; and
- (e) Describe how the requested care will enable the worker to continue current employment, or a current vocational training program, and the possible adverse effect if the care is not approved.

In interpreting the meaning of a rule, I apply the same method of analysis employed in determining the meaning of a statute, *viz.*, to determine 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, 485 (1997); *see also PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-611 (1993) (court's task in determining legislative intent first is to examine the text, including context in which statute is found and, if 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 Council*, 320 Or 132, 142 (1994). Here, MRU applied OAR 436-010-0290(1) and determined that Dr. Hartog's palliative care request failed to meet the rule's requirements. I agree. The palliative care request does not indicate how the recommended chiropractic treatment was related to the work injury or how it would enable claimant to continue working. Accordingly, I find that claimant has failed to meet his burden and affirm the administrative order.

### **ORDER**

IT IS HEREBY ORDERED that:

The Administrative Order dated February 2, 2005 is affirmed.