

In the ORS 656.327 Medical Treatment Dispute of
SANDRA SCHNIEDERMAN, Claimant

Contested Case No: H04-163

PROPOSED AND FINAL ORDER

JANUARY 13, 2005

NATIONAL UNION FIRE INSURANCE COMPANY, Petitioner

SANDRA SCHNEIDERMAN, Respondent

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

HISTORY OF THE CASE

Insurer appealed the September 15, 2004 Administrative Order issued by the Medical Review Unit (MRU) of the Workers' Compensation Division, Department of Consumer and Business Services (WCD or the department). On November 3, 2004, the department referred the matter to the Office of Administrative Hearings (OAH). On December 15, 2004, Administrative Law Judge (ALJ) Catherine P. Coburn conducted a contested case hearing. Attorney Thomas P. Busch represented National Union Fire Insurance Company, Gallagher Bassett claims administrator and Blockbuster Video Company (insurer). Attorney John M. Oswald represented respondent Sandra Schneiderman (claimant). Claimant testified on her own behalf and the record closed on December 22, 2004 following receipt of supplemental exhibits.

ISSUE

(1) Whether MRU correctly determined that insurer failed to comply with OAR 436-010-0250(3) and (5).

(2) If so, whether insurer is barred from disputing medical appropriateness of the surgical request.

EVIDENTIARY RULINGS

WCD Exhibits 1 through 53 and insurer's Supplementary Exhibit P15A¹ were admitted into the record without objection. Pursuant to ORS 656.327(2)² and OAR 436-001-0225(1),³ I sustained claimant's objection to insurer's proposed Supplementary Exhibit P54 because it is a medical record dated after the administrative order was issued. It is included in the record as an

¹ I renumbered insurer's exhibits with "P" for Petitioner in order to distinguish them from the WCD exhibits.

² ORS 656.327(2) provides in pertinent part:
 At the contested case hearing, the administrative order may be modified only if it is not supported by substantial evidence or if it reflects an error of law. **No new medical evidence or issues shall be admitted.** (Emphasis added.)

³ OAR 436-001-0225(1) provides:
 Review of medical service (ORS 656.245 and 656.247(3)(a) and treatment (ORS 656.327 and 656.260) disputes is for substantial evidence or error of law. **New medical evidence or issues may not be considered at the contested-case hearing.** (Emphasis added.)

offer of proof. Insurer withdrew the remaining proposed exhibits as duplicates.

FINDINGS OF FACT

(1) On January 31, 2003, claimant suffered a compensable back injury while working as a video store manager. (Ex. 6; testimony of claimant.) Insurer accepted a lumbar disc protrusion, left L5-S1. (Ex. 10.)

2) On April 11, 2003 Darrell Brett, MD performed a discectomy at left L5-S1. (Ex. 12.) Following surgery, claimant experienced some pain relief but by September 2003, the pain was the same as before the surgery. (Ex. 18-4).

(3) On September 26, 2003, William Carr, MD (Orthopedic Surgery) and Paul Williams, MD (Neurosurgeon) conducted an independent medical examination (IME). (Ex. 18.) They recommended against surgery. (Exs.18-8, 38 and 39.) Dr. Brett disagreed with the independent medical examination report (IME). (Ex. 19.)

(4) On November 17, 2003, Dr. Brett's office requested authorization for a second surgery. The proposed surgery was bilateral L5-S1 posterior interbody fusion. (Ex. 24.) On November 21, 2003, insurer denied surgical authorization based on the IME results. (Exs. 24 and 46.) On November 24, 2003, Dr. Brett performed the surgery which was valued at \$22,797.60. (Exs. 25 and 50-2.)

(5) In January 2004, claimant returned to regular full time work. She continues to experience low back pain radiating into the left leg and foot. (Testimony of claimant.)

(6) On January 28, 2004, insurer notified Dr. Brett that it disputed the reasonableness and necessity of the November 2004 surgery. (Ex. 29.)

CONCLUSIONS OF LAW

(1) MRU correctly determined that insurer failed to comply with OAR 436-010-0250(3) and (5).

(2) MRU correctly determined that insurer is barred from disputing medical appropriateness of the surgical request.

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(3). 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).

Under ORS 656.245 and ORS 656.327, the insurer is required to provide medical services for a compensable injury unless the treatment is excessive, inappropriate, ineffectual or in violation of the administrative rules. OAR 436-010-0250 provides in pertinent part:

- (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 shall give the insurer actual notice at least seven days prior to the date of the proposed surgery**. Notification shall give 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 shall 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 Form 440-3228 (Elective Surgery Notification) to the recommending physician. When requested, the consultation shall be completed within 28 days after notice to the physician.
- (4)(a) Within seven days of the consultation, the insurer shall notify the recommending physician of the insurer's consultant's findings.
- (b) When the insurer's consultant disagrees with the proposed surgery, the recommending physician and insurer shall endeavor to resolve any issues raised by the insurer's consultant's report. Where medically appropriate, the recommending physician, with the insurer's agreement to pay, shall obtain additional diagnostic testing, clarification reports or other information designed to assist them in their attempt to reach an agreement regarding the proposed surgery.
- (c) The recommending physician shall provide written notice to the insurer, the worker and the worker's representative when further attempts to resolve the matter would be futile by signing Form 440-3228.

(5) If the insurer believes the proposed surgery is excessive, inappropriate, or ineffectual and cannot resolve the dispute with the recommending physician, the insurer shall 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 Form 440-3228, or to timely request administrative review pursuant to this rule shall bar the insurer from later disputing whether the surgery is or was excessive, inappropriate, or ineffectual.**

(6) If the recommending physician and consultant disagree about the need for surgery, the insurer may inform the worker of the consultant's opinion. The decision whether to proceed with surgery remains with the attending physician and the worker.

(7) A recommending physician who prescribes or proceeds to perform elective surgery and fails to comply with the notification requirements in section (2) of this rule, may be subject to civil penalties as provided in ORS 656.254(3)(a) and OAR 436-010-0340.

(Emphasis added.)

In construing the meaning of an administrative rule, I apply the same method of analysis employed in 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 Siting Council*, 320 Or 132 (1994).

The director has held that OAR 436-010-0250 is valid and must be strictly applied. *John B. Foster*, 9 CCHR 1 (2004); *on recon* 9 CCHR 256 (2004). See also *Glenn R. Horn*, 9 CCHR 93 (2004), *on recon* 9 CCHR 201 (2004). In the administrative order, MRU determined that insurer failed to comply with the timeliness requirements specified by OAR 436-010-0250(3) and (5), and therefore, is barred from disputing whether the proposed surgery is excessive, inappropriate or ineffectual. MRU ruled on the timeliness issue but did not address the medical appropriateness question.

Insurer does not dispute that it failed to meet the timelines specified by subsections (3), (4) and (5). Rather, insurer contends that MRU erred by applying subsection (5), and therefore, it is not barred from contesting medical appropriateness. Furthermore, insurer contends that subsection (5) was not properly invoked because the condition precedent under subsection (2) was not met. In support of its position, insurer argues that Dr. Brett failed to timely request authorization within seven days prior to the date of surgery. Insurer argues that the plain

meaning of the rule requires a physician to notify an insurer seven days prior to the date of surgery, or eight days including the date surgery takes place. Here, Dr. Brett requested authorization on November 17 and performed surgery on November 24. I agree with insurer's construction of subsection (2) and I further agree with insurer's contention that Dr. Brett failed to timely notify the insurer of the proposed elective surgery.

However, I disagree with insurer's argument concerning the proper remedy. Insurer contends that if a physician fails to comply with subsection (2), then subsections (3), (4) and (5) concerning insurer's timelines are not invoked and insurer is not barred from contesting medical appropriateness even if insurer failed to comply with its prescribed deadlines. The rule must be read as a whole. It establishes deadlines for each party and consequences for each party in the event of noncompliance. Under subsection (5), when an insurer misses its prescribed deadlines, it is barred from contesting medical appropriateness. Under subsection (7), when a physician misses his prescribed deadline, he may be subject to civil penalties.⁴ Contrary to insurer's argument, the rule contains no provision that one subsection is a condition precedent that must be met before another subsection is triggered. Inasmuch as insurer does not dispute that it failed to comply with the deadlines prescribed in OAR 436-010-0250(3), (4) and (5), I conclude that MRU did not err by applying subsection (5) and determining that insurer is barred from contesting medical appropriateness. Accordingly, I affirm.

ATTORNEY FEES

Claimant has finally prevailed in a contested case hearing, and therefore, is entitled to a reasonable attorney fee. ORS 656.385(1). Considering the factors listed in OAR 436-001-0265, I find that \$2,200 (8.8 hours x \$250) is a reasonable fee for claimant's attorney's services in this matter.

ORDER

IT HEREBY ORDERED:

The Administrative Order dated September 15, 2004 is affirmed.

⁴ Whether the department enforces the remedies equally is a separate question.