

In the ORS 656.245 Medical Service Dispute of

TROY SMITH, Claimant

Contested Case No: H05-023

PROPOSED AND FINAL ORDER

APRIL 21, 2005

TROY SMITH, Petitioner

SAIF CORP., Respondent

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

HISTORY OF THE CASE

Claimant appeals the Administrative Order issued on February 17, 2005 by the Medical Review Unit (MRU) of the Workers' Compensation Division (WCD), Department of Consumer and Business Services (department or director). On March 4, 2005, the department referred the matter to the Office of Administrative Hearings (OAH). On April 13, 2005, Administrative Law Judge Catherine P. Coburn conducted a hearing in Beaverton, Oregon. Attorney James R. Kirkpatrick represented petitioner Troy Smith (claimant). Attorney Jerome P. Larkin represented respondent SAIF Corporation (insurer). Ann Smith testified on claimant's behalf and the record closed on the date of hearing.

ISSUE

Whether home health care services, rendered by claimant's wife, from March 21, 2004 through April 28, 2004, are compensable under ORS 656.245.

EVIDENTIARY RULINGS

WCD Exhibits 1 through 59 were admitted into the record without objection.

FINDINGS OF FACT

(1) On March 20, 2004, claimant suffered a compensable injury while working in a concrete block manufacturing plant. (Ex. 25) Claimant's right foot and ankle were caught in machinery and he suffered a crushed right ankle and right thigh laceration. (Ex.2) Insurer accepted comminuted impaction fracture of the distal anterior aspect of the right tibia (pilon fracture), right medial malleolar fracture, right ankle syndesmotric disruption and laceration to the anteromedial right thigh and mild right ACL sprain. (Exs. 29 and 37)

(2) On the date of injury, Robert L. Shannon, MD performed surgery. (Exs. 11 and 16; testimony of Ann Smith.) On the following day, March 21, 2004, Dr. Shannon discussed post-surgical care with claimant's wife, Ann Smith. He demonstrated unwrapping the ankle bandage three times per day and performing flexion exercises four times per day. (Testimony of Ms. Smith.) On March 21, 2004, claimant was released from the hospital with the restriction, "No weight-bearing on the right leg." (Ex. 23-1; testimony of Ms. Smith.)

(3) At home, claimant was bedridden, with the exception of bathroom use, for four to six

weeks. During this period, Ms. Smith, who is not a licensed medical provider, rendered 24-hour care. (Ex. 24; testimony of Ms. Smith.) On April 28, 2004, the right ankle cast was removed and claimant became ambulatory on crutches. (Ex. 33; testimony of Ms. Smith.) At about the same time, claimant's pain medications were reduced and he became more functional. (Testimony of Ms. Smith.)

(4) On October 5, 2004, Dr. Shannon wrote,

“As far as the help that [claimant's] wife offered him postoperatively in their house, I think this was important for his recovery. Specific activities that she performed that I think helped him recover were positioning of his ankle in an elevated position, using ice packs, and also helping him with transfers and ambulation. I think given the severity of his ankle injury she did help him recover more quickly. If she had not have been there, it would have likely been necessary to arrange for home health nursing to help with his care. Overall, I think she was an integral part of his recovery. As far as the time that the care she gave him was necessary, I think several weeks is a reasonable time.”

(Ex. 42.)

CONCLUSION OF LAW

Home health care services, rendered by claimant's wife, from March 21, 2004 through April 28, 2004, are not compensable under ORS 656.245.

OPINION

Jurisdiction lies with the director. ORS 656.245(6). I review for substantial evidence or error of law. ORS 656.245(6) and OAR 436-001-0225(1) The burden of proving a fact or position falls upon the proponent. ORS 183.450(2). *Harris v. SAIF*, 292 Or 683 (1982). 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 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).

MRU determined that the disputed home health care services were not compensable under OAR 436-010-0210(3) for two reasons. First, the record does not contain the attending physician's written prescription for home health care services before the services were rendered. Second, MRU found no evidence that Ms. Smith demonstrated competency to the attending physician's satisfaction. Claimant first contends that Dr. Shannon's verbal instructions to Ms. Smith in the hospital concerning post-operative home health care constitute a prescription. Claimant further contends that Dr. Smith's October 2004 letter satisfies the rule's requirements.

In contrast, insurer contends that the administrative order is supported by substantial evidence and it should be affirmed.

Pursuant to ORS 656.245, an insurer is obligated to provide medical services for conditions caused in material part by the compensable injury for such period as the nature of the injury or process of recovery requires. Additionally, 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.¹

(Emphasis added.)

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); *Larry Hemenway*, 5 WCSR 33 (2000). In *Springfield Education Ass'n v. School District*, 290 Or 217 (1980), the court identified three classes of statutory terms, each conveying a different degree of deference. Here, the disputed term is "prescribe" which I classify as an inexact term. Consequently, according to *Springfield*, I apply the analysis set forth *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-611 (1993). In order to discern the intent of the enacting body, which is the department, the first level of analysis is to examine the text and context of the rule. If the intent is unclear, I consider legislative history, and if still unclear, I apply the general maxims of statutory construction. *Id.*

The term "prescribe" is defined as follows:

prae-before + *scribe* to write. 1. originally, to write beforehand. 2. to set down as a rule or direction; order; ordain; direct; 3. to order or advise as a medicine or treatment; said of physicians.

Webster's New World Dictionary, 1968 p. 1152.

I agree with MRU's interpretation of the term "prescribe" within the meaning of OAR 436-010-0210(3). The rule requires the attending physician to write his authorization of home health care services prospectively. The rule further requires the attending physician to approve the family member's

¹ The text of the rule is grammatically incomprehensible unless WCD intended the attending physician to supervise the reimbursement rather than the home health care services. It reads, "Reimbursement *** 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."

competence prospectively. Here, claimant seeks compensability of home health care services rendered from March 21 through April 28, 2004. However, Dr. Shannon did not prescribe these services in writing or address Ms. Smith's competence until October 2004, several months later. Therefore, the disputed services are not reimbursable.

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 interpreted OAR 436-010-0210(3) to require an attending physician's written authorization of home health services provided by a family member before the services are rendered. Furthermore, MRU interpreted the rule to require an attending physician's approval of the family member's competence before the home health care services are rendered. I find that MRU's interpretation of the rule is plausible and not inconsistent with the rule's context or any other source of law, and therefore, I defer.

Finally, the director has previously ruled that home health care provided by a family member is not compensable in the absence of the attending physician's contemporaneous authorization. In *Gordon L. Rocky*, 9 CCHR 341 (2004), claimant's wife was a certified home health provider and rendered care to her husband for three months following a compensable work injury. The director held that the home health care services were not compensable because the attending physician had not prescribed it contemporaneously.

Here, claimant seeks compensability for home health services provided by his wife from March 21, 2004 when claimant was released from the hospital until April 28, 2004 when his cast was removed and he became ambulatory on crutches. However, the record contains no prescription for home health services written before the services were rendered. Furthermore, attending physician Shannon did not attest to the competence of claimant's wife until October 2004, several months after the services were rendered. Pursuant to OAR 436-010-0210(3), home health services are compensable only if the attending physician authorizes them and approves the providers' competence prospectively. Inasmuch as Dr. Shannon authorized the home health services only after the fact, they are not compensable.

ATTORNEY FEES

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

ORDER

IT IS HEREBY ORDERED that:

The Administrative Order dated February 17, 2005 is affirmed.