

In the Managed Care Dispute of
DAVID BIEGHLER, Claimant
Contested Case No: H05-161
PROPOSED AND FINAL ORDER
January 12, 2006

DAVID BIEGHLER, Petitioner
SAIF CORP., Respondent
Before Catherine P. Coburn, Administrative Law Judge, Administrative Hearings

HISTORY OF THE CASE

Claimant appeals the Administrative Order issued on September 23, 2005 by the Medical Review Unit (MRU) of the Workers' Compensation Division (WCD), Department of Consumer and Business Services (department or director). On October 31, 2005, the department referred the matter to the Office of Administrative Hearings (OAH). On December 13, 2005, Administrative Law Judge Catherine P. Coburn conducted a hearing in Beaverton, Oregon. Attorney Peter O. Hansen represented petitioner David Bieghler (claimant). Attorney Jerome B. Larkin represented respondent SAIF Corporation (insurer). Managed Healthcare Northwest Managed Care Organization (MCO) waived appearance. No witnesses testified and the record closed on the date of hearing.

At hearing, claimant asserted a Motion for Remand, arguing that MRU should consider new medical evidence in the interest of substantial justice. Insurer opposed the motion.

ORS 656.260(16) provides:

At the contested case hearing, the administrative order may be modified only if it is not supported by substantial evidence in the record or reflects an error of law. **No new medical evidence or issues shall be admitted.** The dispute may also be remanded to the managed care organization for further evidence taking, correction or other necessary action if the director determines the record has been improperly, incompletely or otherwise insufficiently developed. Decisions by the director regarding medical disputes are subject to review under ORS chapter 183. (Emphasis added.)

Additionally, OAR 436-001-0225(1) provides:

In medical service and medical treatment disputes under ORS 656.245, 656.247(3)(a), and 656.327, and managed care disputes under ORS 656.260(16), the administrative law judge may modify the director's order only if it is not supported by substantial evidence in the record or if it reflects an error of law.

New medical evidence or issues may not be admitted or considered. (Emphasis added.)

In construing a statute or an administrative rule, the same method of analysis is employed. The court's task, and thus mine, is to ascertain the meaning of the words used, giving effect to the intent of the enacting body, which is the legislature or the department, respectively. *Abu-Adas v. Employment Dept.*, 325 Or 480, 485 (1997); *Larry Hemenway*, 5 WCSR 33 (2000); *see also PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-11 (1993) (court's task in determining legislative intent first is to examine the statute including context in which the statute is found and, if intent is clear, to proceed no further with its analysis).

Applying this analysis to ORS 656.260(16) and OAR 436-001-0225(1), I find I need proceed no further than the text. The plain meaning establishes a legislative intent to close the record to new medical evidence after MRU's review. Therefore, I deny the Motion for Remand.

ISSUE

Whether MRU incorrectly determined that insurer is not liable for Oxycontin prescribed by David Bradburn, M.D.

EVIDENTIARY RULINGS

WCD Exhibits 1 through 30 were admitted into the record without objection. Claimant withdrew Supplementary Exhibit 24A.¹ Pursuant to ORS 656.260(16) and OAR 436-001-0225(1), I ruled that Claimant's Supplementary Exhibits 29A, 31 and 32 were inadmissible.

FINDINGS OF FACT

1. On January 5, 2004, claimant suffered a compensable injury when he fell off of an oil tanker while working as a truck driver. (Ex. 2.) On January 27, 2004, insurer accepted an L1 compression fracture and enrolled claimant in an MCO. (Exs. 7 and 8.) Subsequently, insurer accepted a mesial lingual cusp fracture of tooth #30, left shoulder strain, left shoulder capsular tear and left shoulder glenoid labral tear. (Exs. 11, 13 and 20-5.)

2. On March 4, 2004, claimant designated Ronald L. Teed, M.D. as his attending physician. (Ex. 10.)

3. On December 1, 2004, claimant designated Scott Gordon, M.D. as his attending physician. (Ex. 15.)

4. On January 6, 2005, Dr. Teed recommended a pain management program and in March 2005, claimant began participating. (Ex. 17.) On May 13, 2005, Dr. Teed noted that the Chronic Pain management team had placed claimant on Oxycontin. (Ex. 17-4.)

5. On March 22, 2005 and on April 13, 2005, Dr. Bradburn prescribed Oxycontin. (Exs.

¹ I renumbered claimant's Supplementary Exhibits consecutively with the WCD Exhibits.

19-2 and 19-3.)

6. On May 22, 2005, insurer wrote to Dr. Teed, providing a copy of OAR 436-009-0090(4) and requesting the required documentation. (Ex. 24.) Dr. Teed replied, "We will work on transferring attending to Dr. Bradburn as discussed." (Ex. 24-2.)

CONCLUSION OF LAW

MRU correctly determined that insurer is not liable for Oxycontin prescribed by David Bradburn, M.D.

OPINION

The director has jurisdiction over medical service and managed care disputes. ORS 656.704(3), ORS 656.245(6) and ORS 656.260(16). I review for substantial evidence or error of law. OAR 436-001-0225(1). The burden of proving a fact or position falls upon the proponent. ORS 183.450(2). 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 the 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 insurer is not liable for the disputed medication. Claimant contends that the medication is compensable because attending physician Teed referred claimant to the pain management program, where he was prescribed with Oxycontin. In support of his position, claimant argues that Dr. Teed did not object to claimant use of the medication. In contrast, 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. OAR 436-010-0220(2) provides:

The worker may have only one attending physician or authorized nurse practitioner at a time. *** Except for emergency services, or otherwise provided for by statute or these rules, all treatments and medical services must be authorized by the injured worker's attending physician or authorized nurse practitioner to be reimbursable.

Here, Dr. Teed is claimant's attending physician. Dr. Bradburn, rather than Dr. Teed, prescribed Oxycontin. Therefore, the prescription is not compensable.

Next, OAR 436-009-0090(4) provides:

Payment for Oxycontin and COX-2 inhibitors is limited to an initial five-day supply unless the prescribing medical service

provider writes a clinical justification for prescribing that drug rather than a less costly drug with a similar therapeutic effect.

Insurer requested documentation from attending physician Dr. Teed and he failed to provide it. Therefore, the disputed medication is not compensable.

ATTORNEY FEES

Claimant has not prevailed in a contested case hearing and is not entitled to an attorney fee. ORS 656.385(1).

ORDER

IT IS HEREBY ORDERED that:

The Administrative Order dated September 23, 2005 is affirmed.