

In the ORS 656.245 Medical Services Dispute of

Suzanne M. Gatch, Claimant

Contested Case No: 06-151H

PROPOSED & FINAL ORDER

January 22, 2007

KATHERINE KNOWLES LMT, Petitioner

SUZANNE M. GATCH, Respondent

Before Kate Donnelly, Administrative Law Judge

Pursuant to notice, a hearing was held and closed on December 27, 2006 in Eugene, Oregon before Administrative Law Judge Kate Donnelly. The party requesting the hearing, Katherine L. Knowles, LMT (dba CHIWORKS), was present and represented herself. Claimant was not present; however, she was represented by her attorney, John C. DeWenter. The self-insured employer, Housing Authority and Community Service of Lane County, and its claims processing agent, CIS Workers' Compensation Group (CIS), were represented by attorney, Courtney Kreutz.

Proposed exhibits 1 through 56 were admitted.

ISSUE

Katherine L. Knowles contests the Director's September 11, 2006 Administrative Order MS 06-909 which determined that neither CIS, nor claimant, was liable for payment of message therapy services provided by Ms. Knowles from May 4, 2004 through June 22, 2004.

FINDINGS OF FACT

The Findings of Fact in the September 11, 2006 Administrative Order are accepted and incorporated in this Proposed and Final Order, with the following supplementation.

CIS initially accepted a cervical strain condition which Dr. Hill determined to be medically stationary on April 8, 2004 (Exs. 12-6; 14). The claim was closed by a Notice of Closure dated April 28, 2004, awarding 3 percent unscheduled permanent partial disability (PPD) (Ex. 14). A July 7, 2004 Order on Reconsideration affirmed the Notice of Closure in all respects (Ex.23).

On May 4, 2004, claimant requested that the acceptance be expanded to include: (1) cervical disc herniation at C5-6; (2) cervical degenerative changes at the C5-6 level; and (3) a combined condition consisting of the October 18, 2002 cervical strain and the medical conditions listed in (1) and (2) (Ex. 15).

On June 4, 2004, the employer denied the above conditions (Ex. 18). Subsequently, the employer withdrew its June 3, 2004 denial and accepted, retroactively to October 18, 2002, the claim for cervical strain combined with preexisting cervical degenerative changes at the C5-6 level (Exs. 26-2; 28).

On November 17, 2004, the employer denied claimant's current condition (Ex. 29). A November 18, 2004 Notice of Closure closed the newly accepted condition (cervical strain combined with preexisting cervical degenerative changes at the C5-6 level) with no additional award of unscheduled PPD (Ex. 31). An April 5, 2005 Order on Reconsideration rescinded the November 18, 2004 Notice of Closure on the grounds that the November 17, 2004 denial did not qualify as a major contributing cause denial (Ex. 36-2).

On May 4, 2005, the employer issued a current condition denial of the combined cervical condition (cervical strain combined with preexisting cervical degenerative changes at the C5-6 level) (Ex. 37). A May 25, 2005 Notice of Closure awarded no additional PPD or temporary disability (Ex. 39). A June 23, 2005 Order on Reconsideration affirmed the May 25, 2005 Notice of Closure with the exception of the medically stationary date, which was changed to March 7, 2005 based on Dr. Stowell's, claimant's attending physician, report of that date (Ex. 40-2).

Subsequently, the parties entered into a settlement stipulation wherein the employer accepted claimant's current condition of left C6 radiculopathy combined with preexisting cervical degenerative changes at C5-6, retroactive to October 18, 2002, the date of injury (Ex. 44-2). The parties agreed that claimant has been medically stationary since March 7, 2005, and remained medically stationary (Ex. 44-2).

Katherine Knowles never submitted a treatment plan for the massage treatment provided from May 4, 2004 through June 22, 2004.

CONCLUSIONS OF LAW AND OPINION

This case presents a Medical Services dispute under ORS 656.245. The subject of the dispute is the September 11, 2006 Administrative Order which found that CIS and claimant were not liable for massage services provided by Katherine Knowles for the period from May 4, 2004 through June 22, 2004.

Petitioner, Katherine Knowles, has the burden of showing that the Administrative Order is not supported by substantial evidence or that it reflects an error of law. OAR 436-001-0225(2).

The scope of review in this case is controlled by OAR 436-001-0225(2), which provides, in part, that in medical service and medical treatment disputes under ORS 656.245, 656.247(3)(a) and 656.327, 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 on law.

Under "substantial evidence" review, the reviewing tribunal "look[s] at the whole record with respect to the issue being decided, rather than at one piece of evidence in isolation. If an agency's finding is reasonable, keeping in mind the evidence against the finding as well as the evidence supporting it, there is substantial evidence." *Armstrong v. Asten-Hill Co.*, 90 Or App 200, 206 (1988). Thus, "substantial evidence" review "is not what has been referred to as the

‘any evidence’ rule *** but it is also not *de novo* review.” *Id.* (citation omitted); *see also United Sates Bakery v. Shaw*, 199 Or App 286, 288-89 (2005). Under a substantial evidence review, the administrative law judge may not supplement the evidentiary record developed by the MRU. *Liberty Northwest Ins. Corp. v. Kraft*, 205 Or App 59, 62-63 (2006).

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 436-010-0230(4)(a) provides:

“(a) Except as otherwise provided by an MCO, ancillary services including but not limited to physical therapy or occupational therapy, by a medical service provider other than the attending physician, authorized nurse practitioner, or specialist physician will not be reimbursed unless prescribed by the attending physician, authorized nurse practitioner, or specialist physician and carried out under a treatment plan prepared prior to the commencement of treatment and sent by the ancillary medical service provider to the attending physician, authorized nurse practitioner, or specialist physician, and the insurer within seven days of beginning treatment. The treatment plan shall include objectives, modalities, frequency of treatment, and duration. The treatment plan may be recorded in any legible format including, but not limited to, signed chart notes. Treatment plans required under this subsection do not apply to services provided under ORS 656.245(2)(b)(A).

The Director determined that CIS was not liable for Katherine Knowles services provided from May 4, 2004 through June 22, 2004 after concluding that Ms. Knowles had not ever prepared a treatment plan, as required by rule. The Director further determined that claimant was not liable for the disputed massage therapy under OAR 436-009-0015(1) because none of the exceptions provided in sections (a) through (e) of the rule applied to claimant.

The Court of Appeals has ruled that strict compliance with the rule is mandatory and furthermore, where a medical provider fails to comply, the insurer is not liable to reimburse the disputed medical bill. *AETNA Casualty & Surety v. Blanton*, 139 Or App 283 (1996). The insurer is not liable for services provided before the requirements of a treatment plan are met. *SAIF v. Ross*, 192 Or App 200 (2004).

Here, there is no evidence that Ms. Knowles ever provided a treatment plan for the disputed services. Consequently, I find that substantial evidence supports the Director’s order concluding that CIS is not liable for the disputed services.

Ms. Knowles argues that CIS never required a treatment plan prior to the disputed services and paid for her services despite the absence of a treatment plan. This is essentially an

equitable estoppel argument. For equitable estoppel to apply, there must be (1) a false representation, (2) made with knowledge of the facts, (3) with the intent that the other party rely, (4) when the other party was ignorant of the truth, and (5) the other party must have been induced to rely upon the representation to his or her detriment. *Coos County v. State of Oregon*, 303 Or 173, 180-81 (1987).

Here, the record does not establish that CIS made a “false representation” that was intended to be relied on by Ms. Knowles, or that Ms. Knowles was induced to rely upon a representation to her detriment. As a medical services provider, providing services to injured workers under the Oregon Workers’ Compensation statute, Ms. Knowles should have educated herself regarding the requirements under the Director’s Administrative Rules. Under *Blanton*, strict compliance with the rules is mandatory. Therefore, equitable estoppel does not bar CIS from denying reimbursement of the massage services.

I also find that the Director correctly concluded that claimant was not liable for the disputed massage therapy services under OAR 436-009-0015(1) and that none of the exceptions in subsections (a) through (e) apply. OAR 436-009-0015 provides:

- (1) An injured worker is not liable to pay for any medical service related to an accepted compensable injury or illness or any amount reduced by the insurer according to OAR chapter 436. A medical provider shall not attempt to collect payment for any medical service from an injured worker, except as follows:
 - (a) When the injured worker seeks treatment for conditions not related to the accepted compensable injury or illness;
 - (b) When the injured worker seeks treatment that has not been prescribed by the attending physician or authorized nurse practitioner, or a specialist physician upon referral of the attending physician or authorized nurse practitioner. This would include, but not be limited to, ongoing treatment by non-attending physicians in excess of the 30 day/12 visit period or by nurse practitioners in excess of the 90 day period, as set forth in ORS 656.245 and OAR 436-010-0210;
 - (c) When the injured worker seeks palliative care that is either not compensable or not authorized by the insurer or the director under OAR 436-010-0290, after the worker has been provided notice that the worker is medically stationary;
 - (d) When the injured worker seeks treatment outside the provisions of a governing MCO contract after insurer notification in accordance with OAR 436-010-0275; or

(e) When the injured worker seeks treatment after being notified that such treatment has been determined to be unscientific, unproven, outmoded, or experimental.

Here, claimant's treatment was related to an accepted compensable injury. Therefore, the exception under OAR 436-009-0015(1)(a) does not apply. The employer subsequently accepted additional conditions retroactive to the date of injury. Thus, all of claimant's treatment in May through June 22, 2004 was for compensable conditions.

The exception under OAR 436-009-0015(c) does not apply because only the compensable cervical strain was medically stationary on April 8, 2004. The later accepted condition of "left C6 radiculopathy combined with preexisting cervical degenerative changes at C5-6, retroactive to October 18, 2002, the date of injury" was determined to be medically stationary on March 7, 2005. Thus, all compensable conditions were not medically stationary at the time of the disputed massage services.

None of the other exceptions under OAR 436-009-0015(1); *i.e.*, subsections (b), (d) and (e), apply to this claim. Consequently, I affirm the Director's conclusion that claimant is not liable for the disputed massage therapy services from May 4, 2004 through June 22, 2004.

Because the Director's order is supported by substantial evidence and does not contain errors of law, the order should be affirmed.

ORDER

IT IS THEREFORE ORDERED that the September 11, 2006 Administrative Order in case number MS 06-909 is affirmed.