
In the ORS 656.260 Managed Care Dispute of
Toni L. Anderson, Claimant
Contested Case No: 10-137H

AMENDED PROPOSED & FINAL ORDER

December 14, 2010

TONI L. ANDERSON, Petitioner
SAIF CORPORATION, Respondent

Before Chuck Mundorff, Administrative Law Judge

A Proposed and Final Order issued in this matter on December 10, 2010. That Order contained a scrivener's error and the Order is republished as follows.

A hearing convened in Eugene, Oregon on November 9, 2010 before Administrative Law Judge Chuck Mundorff. The claimant was not present but was represented by her attorney Christopher D. Moore. The employer, Danlin Inc., and its insurer, the SAIF Corporation, were represented by attorney Dennis Ulsted. The record closed on November 9, 2010 following recorded closing arguments.

EXHIBITS

Exhibits 1-68 were submitted by Workers' Compensation Division on September 3, 2010 and are hereby admitted into the record.

ISSUES

Claimant appeals from an Administrative Order issued by the Medical Section Resolution Team (RT) which held that SAIF Corporation was not liable for reimbursement of compression stocking purchased by claimant from June 24, 2008 to March 10, 2009. (Ex. 67). Claimant seeks an attorney fee should she prevail in this matter as well as the contingent attorney fee awarded by an Opinion and Order that issued regarding compensability of the contested stockings on March 10, 2010. (Ex. 53).¹

STANDARD OF REVIEW

This managed care dispute arises under ORS 656.245 and 656.260. I review for substantial evidence and error of law. ORS 656.260(16); *Liberty Northwest v. Kraft and DCBS*, 205 Or App 59 (2006).

¹ Claimant also raises an issue of jurisdiction in that SAIF's response to the RT raised an issue of compensability of the right leg treatment denying that SAIF had any responsibility for treatment of the right leg. As such, claimant requests that the issue be addressed in this order as compensability was previously determined by Opinion and Order dated March 10, 2010. (Ex. 53). SAIF did not contend at hearing that it was contesting compensability of the right leg condition and the Opinion and Order of March 10, 2010 has become final as a matter of law. That order in fact determined that claimant's treatment bilaterally was compensable and SAIF is estopped from contesting compensability at this point.

FINDINGS OF FACT

I adopt the “Findings of Fact” as set forth in the July 29, 2010 Administrative Order with the following supplementation.

On July 29, 2010 the WCD ordered that SAIF was not liable for claimant’s compression stockings. (Ex. 67). Claimant timely requested a hearing on August 16, 2010. The Director referred the matter to the Board on August 19, 2010.

CONCLUSIONS OF LAW AND OPINION

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 appealing party, claimant bears the burden of proving by a preponderance of evidence that the WCD’s July 29, 2010 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 required to provide medical services for compensable conditions for such period as the nature of the injury or the process of recovery requires. ORS 656.260 and 656.245(4) authorize insurers to provide medical services to injured workers through a contract with a state-certified managed care organization.

Claimant argues that RT erred as a matter of law in interpreting OAR 436-010-0220(2) to require contemporaneous or pre-authorization from the attending physician in order for claimant to be reimbursed for compensable medical supplies. Claimant argues that claimant’s attending physician, in fact, authorized the compression stockings and that the RT ignored that evidence in its order. (Ex. 58). She also argues that her chronic condition was one which required ongoing medical supplies and that essentially the attending had standing orders for compression stockings when claimant needed them. Finally, claimant argues that pursuant to ORS 656.262(1) SAIF had an obligation to process the claim. In 2008, when the prosthetic company requested payment, its form indicated that the stockings were authorized by Dr. Moser, the attending physician. Relying on the Court’s holding in *Lederer v. Viking Freight, Inc.*, 193 Or App 226 (1996), claimant argues that SAIF was required to inquire if in fact Dr. Moser had prescribed the stockings if it questioned the authorization.

SAIF responds first, that the facts are sufficient to support the RT’s order and there is no error of law that would compel over turning the decision. Second, that claimant did not comply with the rules by failing to make a written request from the carrier for post-closure medical treatment. Finally, SAIF argues that “elastic stockings” are not compensable treatment post-

closure as they are defined as a “medical supply” and are not enumerated in the list of compensable medical treatment in ORS 656.245(1)(c).

OAR 436-010-0220(2) reads in pertinent part:

“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.”

As noted in the Findings of Fact, after claimant initially requested reimbursement for the stockings, an issue of the continued compensability was adjudicated. (Ex. 53). Subsequent to the issuance of the ALJ’s Opinion and Order finding the treatment compensable, Dr Moser reiterated his authorization of the stockings. (Ex. 58). Additionally, the record is replete with references prior to the compensability hearing from Dr. Moser that he authorized compression stockings as compensable medical services. (Exs. 5, 7, 8, 18, 28).

At the time of review by the RT, the record contained the authorization of Dr. Moser. (Ex. 58). OAR 436-010-0220(2) does not in fact require pre-authorization or contemporaneous authorization – it just requires authorization, as the plain language of the rule indicates. It was error for the RT to hold that there was no authorization from Dr. Moser for compression stockings in the record in light of exhibit 58. The balance of SAIF’s arguments regarding the compensability of “medical supplies” are not well taken. *See*, ORS 656.245(1)(c)(D).

ORS 656.385(1) provides that claimant is entitled to a reasonable attorney fee in this medical service dispute because he finally prevailed after a proceeding had commenced pursuant to ORS 656.245. ORS 656.385(1) further provides, “***an attorney fee awarded pursuant to this subsection may not exceed \$2000 absent a showing of extraordinary circumstances.” After considering the factors set forth in OAR 438-015-0010(4) and applying them to this case, I find that a reasonable fee for claimant’s attorney’s services at hearing regarding the medical services issue is \$2000 (Two thousand dollars) payable by the insurer. In reaching this conclusion, I have particularly considered the time devoted to the issues, the complexity of the issues, the value of the interest involved, the risk that counsel may go uncompensated, the lack of a showing of extraordinary circumstances, and the statutory limitation on assessed attorney fees in medical service disputes under ORS 656.385(1).

ORDER

IT IS HEREBY ORDERED that SAIF Corporation shall pay for claimant’s compression stockings from June 24, 2008 through March 10, 2009.

IT IS FURTHER ORDERED that SAIF Corporation is assessed a reasonable attorney fee pursuant to ORS 656.385(1) in the amount of \$2000.00 to be paid directly to claimant’s attorney, as well as the \$4,000.00 attorney fee and reasonable costs awarded on a contingent basis in the March 10, 2010 order.