

In the ORS 656.260 Managed Care Dispute of

Toni L. Anderson, Claimant

Contested Case No: 10-137H

FINAL ORDER

March 15, 2011

TONI L. ANDERSON, Petitioner

SAIF CORPORATION, Respondent

Before Kevin Willingham for John Shilts,

Workers' Compensation Division Administrator

Insurer SAIF Corporation (insurer) refused to reimburse claimant Toni L. Anderson (claimant) \$314.62 for compression stockings. Following administrative review, the Workers' Compensation Division's Resolution Team (RT) issued an Administrative Order on July 29, 2010, affirming insurer's action. After holding a hearing, Administrative Law Judge (ALJ) Chuck Mundorff issued an Amended Proposed and Final Order on December 14, 2010, reversing RT's order, and ordering insurer to pay the reimbursement and attorney's fees. Insurer now requests director review.

FACTUAL SUMMARY

For clarity, I summarize the facts as RT found them. Claimant has an accepted compensable condition of aggravation of pre-existing chronic venous stasis condition. Insurer refused to reimburse claimant for compression stockings purchased between June 24, 2008 and March 10, 2009. Insurer stated that its denial was due to a failure by claimant to provide sufficient authorization by her attending physician for purchase of the stockings. Insurer possessed several documents that purported to authorize the purchase, but questioned the authenticity of the doctor's signature on those documents.

RT found a medical supplier had faxed insurer on May 6, 2008, requesting authorization for the purchase of compression stockings. That document identifies Dr. Moser as the ordering doctor.

RT noted in its factual findings that the record contains a letter from claimant's attorney to Dr. Moser asking whether the compression stockings were reasonable and necessary to treat claimant's accepted condition. Dr. Moser responded on June 1, 2010, by checking a box indicating "yes" and apparently signing the letter. Insurer told RT in a letter that this signature did not match others on documents Dr. Moser purportedly signed.

CONCLUSIONS OF LAW

In this managed care dispute I may only modify the administrative order if it is not supported by substantial evidence or reflects an error of law. New medical evidence or issues may not be admitted or considered at the hearing. OAR 436-001-0225(2).¹ Substantial evidence supports a finding of fact "when the record, viewed as a whole, would permit a reasonable

¹ Although insurer enrolled claimant in an MCO, insurer made the decision here, not the MCO.

person to make that finding." ORS 183.482(8)(c). In reviewing a finding to determine whether substantial evidence supports it, the reviewing body must "evaluate evidence against the finding as well as evidence supporting it to determine whether substantial evidence exists to support that finding. If a finding is reasonable in light of countervailing as well as supporting evidence, the finding is supported by substantial evidence." *Garcia v. Boise Cascade Corp.*, 309 Ore 292, 295, (1990).

Insurer asserts ALJ Mundorff made factual findings which is improper under the standard of review. *See Kraft v. Liberty NW Ins. Corp.*, 205 Or App 59, 62-63 (2006). The Findings of Fact section of ALJ Mundorff's order states that he adopts the factual findings of the administrative order. The ALJ did expressly supplement the factual findings but only with the procedural developments that occurred after RT issued its order. The conclusions section of ALJ Mundorff's order does refer to evidence in the record on matters not identified as fact findings in the administrative order. These are not factual findings. They are references to evidence in the record that must be considered in determining whether the record supports the fact findings in the administrative order. In any event, ALJ Mundorff expressly relied primarily on the June 1, 2010 letter in reaching his conclusions. RT did describe that letter in its fact findings, so there is no factual dispute about the letter's existence.

ALJ Mundorff did not reverse RT's factual findings. He found RT had committed a legal error in not recognizing the June 1, 2010 letter as a retroactive authorization. I agree with this conclusion. There is no factual dispute as to the existence of the letter. The dispute is whether this document legally constitutes authorization. Authorization need not take a specific form and it is a question of law whether the facts establish authorization was given. *See Lederer v. Viking Freight, Inc.*, 193 Or App 226, 234-236 (2004), *modified on other grounds and adhered to on reconsideration*, 195 Or App 94 (2004). The statutes and rules do not expressly require advance authorization or prohibit retroactive authorization. The letter states it is medically probable the stockings are "reasonable and necessary and required to treat the accepted condition." This is legally sufficient to constitute authorization.

Insurer argues allowing retroactive authorization diminishes the attending physician's authority in managing care. Insurer suggests the attending physician will be reduced to "rubber stamping" care after the fact. Insurer provides no reason to believe a licensed medical professional, responsible for conforming with ethical standards, would be more likely to approve inappropriate care after it is provided, than before the care is provided. If an injured worker does not obtain advance authorization, that worker accepts the risk the attending physician will not provide authorization and the service will not be compensable.

Insurer asserted to RT, and implies here, that the signature on the June 1 letter is not Dr. Moser's. RT did not make a finding on this question. No evidence, such as an examination by a handwriting expert, was presented to RT on this issue. Insurer did not present testimony on this issue at the hearing. If RT found the June 1 letter was not authentic, it failed to explain the basis for doing so. There is only an allegation on this question in a letter from insurer to RT. There is no evidentiary basis upon which to adopt insurer's allegation.

For the first time at hearing, insurer argued the stockings are a “medical supply” under OAR 436-009-0080(4), and that, under ORS 656.245(1)(c), medical supplies are not compensable after an injured worker is medically stationary. The rule states, in part:

“Medical supplies are materials that may be reused multiple times by the same person, but a single supply is not intended to be used by more than one person, including . . . elastic stockings”

ORS 656.245(1)(c) lists the medical services that are compensable after a worker is medically stationary. The statute does not expressly list medical supplies. Insurer argues post-medically stationary medical supplies are therefore not compensable.² ALJ Mundorff rejected this argument. He indicated that he believed the stockings were covered as a prosthetic device under ORS 656.245(1)(c)(D). ORS 656.245(1)(c) provides, in part:

“Notwithstanding any other provision of this chapter, medical services after the worker’s condition is medically stationary are not compensable except for the following:

* * * * *

(D) Prosthetic devices, braces, and supports.”

Insurer is partially correct that stockings are defined as medical supplies. OAR 436-009-0080(4). However, stockings also fall within the definition of compensable items included in ORS 656.245(1)(c)(D), which includes prosthetics and supports. OAR 436-009-0080(2) states “[a] prosthetic is . . . any device aiding performance of a natural function. For example: . . . crutches” OAR 436-009-0080(3) states “[a]n orthosis is an orthopedic appliance or an apparatus used to . . . improve the function of a moveable body part. For example [a] brace” Stockings are comparable to braces and crutches. They support the leg and improve the function of the leg and the circulatory system. They are therefore compensable for medically stationary workers under ORS 656.245(1)(c)(D).

IT IS HEREBY ORDERED RT’s July 29, 2010 Administrative Order is reversed. ALJ Mundorff’s December 14, 2010 Amended Proposed and Final Order is affirmed. Insurer is ordered to pay for claimant’s compression stockings ordered from June 24, 2008, through March 10, 2009. The attorney fee award in the Amended Proposed and Final Order is also affirmed and insurer is ordered to pay those fees.

² The term “medical supplies” does not appear anywhere in ORS 656.245. The statute does not expressly identify medical supplies as compensable either before or after a worker becomes medically stationary. Insurer does not address this point. The rule that explains how various items should be paid for does not purport to define what items are compensable after a worker is medically stationary. See OAR 436-009-0080(4).