
In the ORS 656.245 Medical Services of

Clay D. Parker II, Claimant

Contested Case No: 11-083H

PROPOSED & FINAL ORDER

September 27, 2011

CLAY D. PARKER II, Petitioner

ESIS, Respondent

Before Kate Donnelly, Administrative Law Judge

HISTORY OF THE CASE

Claimant appeals the Administrative Order MS 11-0475 issued on May 27, 2011 by the Medical Section Resolution Team (RT) of the Workers' Compensation Division (WCD), Department of Consumer and Business Services (Director). Pursuant to notice, a hearing convened in Eugene, Oregon on September 8, 2011 before Administrative Law Judge (ALJ) Kate Donnelly. Claimant was not present but he was represented by his attorney, Christine Jensen. The employer, Comcast Cable Corporation, and its claims processing agent, ESIS,¹ were not present and were not represented by an attorney. There was no testimony taken. The record closed on September 8, 2011 with claimant's recorded closing argument.

EXHIBITS

Exhibits 1-36 were submitted by WCD on June 17, 2011 and are hereby admitted into the record.

ISSUES

1. Whether RT incorrectly determined that ESIS was not responsible for reimbursement of Z-coil shoes purchased on November 17, 2009 and December 4, 2010.
2. Claimant seeks an attorney fee pursuant to ORS 656.385(1) should he prevail in this matter.
3. Claimant seeks a penalty pursuant to ORS 656.262(11)(a) for unreasonable claims processing.

¹ The Administrative Order referred to the insurer as Old Republic Insurance Corporation and to its claims processing agent as ESIS. However, the Notice of Hearing issued on June 20, 2011 lists only ESIS on the notice. Consequently, I will refer to the carrier/claims processing agent as ESIS.

FINDINGS OF FACT

The Findings of Fact in the May 27, 2011 Administrative Order are accepted and incorporated in this Proposed and Final Order with the following supplementation.

At the time of Dr. Copperman's prescription for z-coil shoes in 2009 and 2010, claimant's occupation was Line Maintenance for Qwest. This job required claimant to be on his feet daily in the field (Ex. 11).

On September 10, 2009, Dr. Copperman stated:

"[claimant] continues to have intermittent discomfort and he is looking at a usual pattern of winter being a lot worse than summer. He would like to try Z-coil shoes to see if that will relieve his discomfort. He has a damaged disc and shoes that will minimize impact might in fact give him a significant degree of relief. I have prescribed a pair of Z-coil shoes and he will pursue insurance coverage" (Ex. 11-10).

The official name for Z-coil shoes is "Z-Coil Pain Relief Footwear" (See Exs. 17-1-2; 18; 19).

CONCLUSIONS OF LAW AND OPINION

This case presents a Medical Services dispute under ORS 656.245. The subject of the dispute is the May 27, 2011 Administrative Order which found that ESIS was not liable for reimbursement of Z-Coil shoes purchased on November 17, 2009 and December 4, 2010.

Claimant 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.

The basis of the RT's opinion was that the Z-Coil shoes did not qualify as a prosthetic or an orthosis under OAR 436-009-0080(2) or (3). Instead, the RT found that the Z-Coil shoes qualified as an article under OAR 436-010-0230(10). The RT found that under the first portion of the rule, Dr. Copperman did not document any objective improvement in claimant's condition while using the shoes and, therefore, the "documentation" failed to justify that the nature of the injury or the process of recovery required the Z-Coil shoes to be furnished. The RT next addressed the second portion of the rule which requires a report justifying why the worker requires an item not usually considered necessary in the great majority of workers with similar impairments. The RT asserted:

"Although [claimant] is performing a physical job and dealing with chronic pain complaints, these circumstances are no different from many other workers with similar impairments" (Ex. 34-5).

Based on this reasoning, the RT found the documentation did not provide sufficient justification as required by the rule.

Claimant argues that the RT made an error of law when it found that the Z-Coil shoes did not qualify as a prosthetic or an orthosis. In the alternative, claimant contends that the Z-Coil shoes are reimbursable under OAR 436-0090025(1) because this rule is a general rule and applies if none of the other rules apply.

ESIS waived appearance and made no argument regarding the Administrative Order. However, its initial response to the RT was that the shoes were excessive, inappropriate, or ineffectual (See Ex. 34-3).

After reviewing the applicable rules and case law, I conclude that the Z-Coil shoes qualify as an orthosis or a prosthetic rather than an article such as a bed, hot tub, chair, Jacuzzi or traction device. Consequently, I find that the Z-Coil shoes should be analyzed under either OAR 436-009-0080(2) or OAR 436-009-0080(3).

OAR 436-009-0080(2) provides:

"A prosthetic is an artificial substitute for a missing body part *or any device aiding performance of a natural function*. For example: hearing aids, eye glasses, crutches, wheelchairs, scooters, artificial limbs, etc. Unless otherwise provided by contract, the insurer shall pay the fee for a prosthetic at the provider's usual rate." (*emphasis added*).

OAR 436-009-0080(2) provides:

"An orthosis is an orthopedic appliance or apparatus used to support, align, prevent or correct deformities, or to improve the function of a moveable body part. For example:

brace, splint, shoe insert or modification, etc. Unless otherwise provided by contract, the insurer shall pay the fee for an orthosis at the provider's usual rate."

"Orthosis" is defined as "an external orthopedic appliance, e.g., a brace or splint, that prevents or assists movement of the spine or the limbs." Stedman's Medical Dictionary 1384 (28th ed. 2006).

Here, the RT cited a dictionary for a definition of "orthopedic" rather than "orthosis" and commented that it was "not persuaded the Z-Coil shoes meet the definition of an orthopedic appliance or apparatus" (Ex. 34-4). The RT also concluded that Dr. Copperman's chart notes failed to indicate that he prescribed the Z-Coil shoes to support, align, prevent or correct deformities, or to improve the function of a moveable body part. I disagree, Dr. Copperman noted in his September 10, 2009 chart note that claimant had a damaged disc and shoes that minimize impact might in fact give claimant a significant degree of relief (Ex. 11-10). In other words, Dr. Copperman expected the Z-Coil shoes to improve the function of a moveable body part by providing support.

Clearly, the Z-Coil shoes are similar to a shoe modification used to support or improve the function of a moveable body part such as the spine. The Z-Coil shoes are a type of specialized shoe designed for pain relief. They are not the type of shoes that are ordinarily purchased by workers. Claimant has a long history of chronic back pain and he has a job that requires him to be on his feet daily, working in the field. The medical record reveals that the use of the Z-Coil shoes decreased claimant's pain at least 20 percent. When he stopped using the shoes, his pain increased back to previous levels. Thus, I conclude that the Z-Coil shoes improved the function of a body part and should be analyzed as an orthosis under OAR 436-009-0080(3).

The Z-Coil shoes could also be considered a prosthetic that would be analyzed under OAR 436-009-0080(2). The shoes are "a device aiding the performance of a natural function;" *i.e.* walking in such a way as to reduce pain in the low back. However, I find that the Z-Coil shoes more closely fit the definition of an orthosis.

Past case law establishes that shoes prescribed by a physician are compensable medical services. For example, in *Russell L. Minton*, 10 CCHR 395 (2005), although the final issue was entitlement to attorney fees, the underlying issue was reimbursement for a fourth pair of shoes where the worker's treating physician had only written a prescription for three pairs. The Director agreed with the claimant that the employer had disputed whether the fourth pair of shoes was compensable and, therefore, the dispute more appropriately fell under ORS 656.245 as a disapproval of medical services.

In a recent case, *Toni L. Anderson*, 16 CCHR 202 (2011), the director affirmed an ALJ's Amended Proposed and Final Order that reversed the RT's Administrative Order. The insurer had argued that the prescribed compression stockings were a "medical supply" under OAR 436-009-0080(4) and that under ORS 656.245(1)(c), medical supplies were not compensable after an injured worker was medically stationary. The ALJ rejected this argument and indicated that he believed the stockings were covered as a prosthetic device under ORS 656.245(1)(c)(D). The

director agreed that the insurer was partially correct that stockings are defined as medical supplies. However, the director determined that stockings also fell within the definition of compensable items included in ORS 656.245(1)(c)(D) which included prosthetics and supports. After citing OAR 436-009-0080(2) defining prosthetics and OAR 436-009-0080(3) defining an orthosis, the director concluded that stockings were comparable to braces and crutches because they support the leg and improve the function of the leg and the circulatory system. Consequently, the stockings were found to be compensable for medically stationary workers under ORS 656.245(1)(c)(D).

Here, the Z-Coil shoes are comparable to a brace, splint, shoe insert or modification that was prescribed to improve the function of a moveable body part. Thus, I find that OAR 436-009-0080(3) applies instead of OAR 436-010-0230(1). Unlike OAR 436-010-0230(1), OAR 436-009-0080(3) does not require a report that establishes that the "nature of the injury or the process or recovery requires" the item be furnished. Furthermore, OAR 436-009-0080(3) does not require a report that specifically sets forth why the worker requires an item not usually considered necessary in the great majority of workers with similar impairments.

Dr. Copperman's chart notes clearly document that the Z-Coil shoes were effective and appropriate treatment for claimant's chronic back pain resulting from the accepted L5-S 1 disc herniation. There is nothing in this record that shows that the shoes were excessive. Consequently, I find that ESIS is liable for reimbursement of Z-Coil shoes purchased on November 17, 2009 and December 4, 2010.

Under such circumstances, I find that claimant has met his burden of establishing that the Administrative Order reflects an error of law. Accordingly, the May 27, 2011 Administrative Order is reversed.

Attorney Fee pursuant to ORS 656.385(1)

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." Claimant seeks an attorney fee of \$1,200 based on his appeal of this matter, the benefit to claimant and the approximately 4 and 1/2 hours spent on the case. 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 \$1, 200 payable by ESIS. 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).

Penalty under ORS 656.262(11)(a) for unreasonable claims processing

Claimant seeks a penalty pursuant to ORS 656.262(11)(a) for ESIS's unreasonable claims processing. Claimant raised the penalty issue on April 1, 2011 when he requested review of the matter by the RT (*See* Ex. 21-1). Specifically, claimant contends that ESIS's September 28, 2009 email to Dr. Copperman was unreasonable because it provided no explanation for its refusal to approve the Z-Coil shoes. Claimant further argues that because ESIS disputed the prescription for the shoes it should have gone to the RT to get a ruling. Instead, ESIS did nothing even after receiving claimant's request for reimbursement on February 14, 2011 (*See* Ex. 21-1-2).

Under ORS 656.262(11)(a), if an insurer or self-insured employer unreasonably delays or unreasonably refuses to pay compensation, the insurer or self-insured employer shall be liable for an additional amount up to 25 percent of the amount "then due." The standard for determining an unreasonable resistance to the payment of compensation is whether, from a legal standpoint, the carrier had a legitimate doubt as to its liability. *International Paper Co. v. Huntley*, 106 Or App 107 (1991). If so, the refusal to pay is not unreasonable. "Unreasonableness" and "legitimate doubt" are to be considered in the light of all the evidence available to the insurer. *Brown v. Argonaut Insurance*, 93 Or App 588, 591 (1988).

Dr. Copperman prescribed Z-Coil shoes on September 10, 2009 (Ex. 14). At that time, claimant was a member of Providence MCO (*See* Ex. 13). On September 17, 2009, Cathy Plank, the claims adjuster for ESIS, notified Dr. Copperman that claimant was enrolled in the Providence MCO and the request for the Z-Coil shoes should be faxed to them (Ex. 15).² On September 28, 2009, Cathy Plank informed Dr. Copperman that she had received his request for Z-Coil shoes and after review of the request she was not approving the shoes under claimant's claim (Ex. 16). Ms. Plank provided no explanation for her refusal to approve the prescription for the Z-Coil shoes.

Claimant purchased a pair of Z-Duty Boots on November 17, 2009 (Ex. 17-1). He paid cash for the boots. The invoice indicated that he would remit to Providence MCO for reimbursement (Ex. 17-1-2). There is no evidence in this record showing whether claimant remitted the bill to Providence MCO for reimbursement.

On November 4, 2010, Dr. Copperman wrote a second prescription for Z-Coil shoes (Ex. 21-6). Claimant purchased the second pair of Z-Coil shoes on December 4, 2010 (Ex. 19). The invoice indicated that he would "remit for repayment" (Ex. 19).

On January 31, 2011, claimant requested reimbursement for the Z-Coil shoes from Cathy Plank at ESIS (Ex. 20-1). This request was received by ESIS on February 14, 2011 (Ex. 21-2). However, ESIS took no action regarding the reimbursement request for the Z-Coil shoes.

² As noted in the Administrative Order, the RT contacted Providence MCO and was informed that the Z-Coil shoes were not an item that would have required precertification, as the cost would not meet their threshold for review (*See* Ex. 34-3).

Claimant requested RT review on April 4, 2011. In response to the RT inquiry, ESIS indicated that they had paid for a prescription reimbursement request for Hydrocodone-APAP on March 15, 2011 but had not paid for reimbursement of the Z-Coil shoes purchased on November 17, 2009 and December 4, 2010 (See Exs. 28-2; 34-2-3). When ESIS completed the form from RT on April 25, 2011, ESIS provided no reason for the nonpayment of the billing (See Ex. 28-2).

On April 29, 2011, Cathy Plank faxed a Specification of Disputed Medical Issues form to the RT (See Ex. 36-2). Ms. Plank checked the "No" box on the form for "The service is excessive, inappropriate, ineffectual" (Ex. 36-2). On May 2, 2011, Ms. Plank sent a corrected copy of the form to RT indicating that the disputed medical service was excessive, inappropriate, and ineffectual (See Ex. 36-1). This is the first indication in the record that the reason ESIS disapproved the medical services and denied reimbursement of the medical services was that the prescribed shoes were excessive, inappropriate and/or ineffectual.

Additionally, there is nothing in this record indicating that ESIS ever advised Dr. Copperman why it was not approving his prescription for the Z-Coil shoes. Ms. Plank simply stated that ESIS would not approve the shoes in claimant's claim. Dr. Copperman's chart note of September 10, 2009 indicates that the shoes were being prescribed for pain relief for the accepted L5-S 1 herniated disc condition. He strongly supported claimant doing a trial of the Z-Coil shoes to see if claimant would get significant pain relief (Ex. 11-10). Dr. Copperman's subsequent chart notes reflect that claimant experienced a 20 percent decrease in pain when he wore the shoes. Thus, the Z-Coil shoes were effective and appropriate treatment.

Under such circumstances, I find that ESIS did not have a legitimate doubt as to its liability at the time it denied approval of the Z-Coil shoes or thereafter. I further find that ESIS unreasonable delayed the payment of compensation in this case by failing to respond to claimant's reimbursement request in a timely manner. Accordingly, I find that ESIS should pay claimant a 25 percent penalty on the amounts due; i.e., 25 percent of \$580 equals \$145.

ORDER

IT IS HEREBY ORDERED that ESIS shall reimburse claimant for his Z-Coil shoes purchased on November 17, 2009 and December 4, 2010.

IT IS FURTHER ORDERED that ESIS is assessed a reasonable attorney fee pursuant to ORS 656.385(1) in the amount of \$1,200 to be paid directly to Christine Jensen, claimant's attorney.

IT IS FURTHER ORDERED that pursuant to ORS 656.262(11)(a), ESIS shall pay a 25 percent penalty in the amount of \$145 to be paid directly to claimant.