

In the ORS 656.245 Medical Services Dispute of

Huskey, Wayne D., Claimant

Contested Case No: HH00-013

AMMENDED PROPOSED & FINAL ORDER

June 13, 2002

DERBORAH VANDEVANTER, Petitioner

TRANSPORTATION INSURANCE/CAN , Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

HISTORY OF CASE

Deborah VanDeVanter, CNA (petitioner) appeals a December 21, 1999 Administrative Order issued by the Medical Review Unit (MRU), Workers' Compensation Division, Department of Consumer and Business Services (WCD or the department). On November 15, 2001, Administrative Law Judge (ALJ) Ella D. Johnson conducted a telephone hearing in this matter. Petitioner failed to appear at the hearing. Respondent insurer Transportation Insurance/CNA (insurer) was represented attorney Damon L. Vickers. The Workers' Compensation Division (WCD) waived appearance. No witnesses testified.

On November 21, 2001, a Proposed and Final Order on Default was issued pursuant to OAR 137-003-670 after insurer placed a *prima facie* case on the record in support of MRU's order concerning the insurer's failure to pay petitioner for the ancillary home care services she provided to claimant from December 27, 1998 through January 7, 1999 prior to her becoming a licensed CNA under *former* OAR 436-010-0210(3) (Admin. Order 98-060, eff. 1/1/99). On November 19, 2001, petitioner wrote to WCD arguing that she had been notified of the date of the hearing but not of the time of hearing and submitted written argument. Although WCD found that petitioner had received proper notice of the time and date of the hearing, WCD remanded this matter for further hearing on March 21, 2002 because the issue of whether the insurer was equitably estopped from denying payment had not been addressed by insurer in the *prima facie* case or in the November 21, 2001 Proposed and Final Order on Default.

Consequently, this matter was set for further hearing on May 15, 2002. Petitioner represented herself *pro se*. Respondent insurer was represented attorney Damon L. Vickers. The Workers' Compensation Division (WCD) waived appearance. Petitioner testified on her own behalf. The record of the November 15, 2001 and May 15, 2002 proceedings, consisting of tape recordings of the hearings, all evidence received, and all hearing papers filed, has been considered. The findings of fact set out below are based on the entire record.

ISSUES

1. Whether insurer is equitably estopped from denying payment in the amount of \$400,00 for home care services provided by VanDeVanter to Wayne D. Huskey (claimant) from December 27, 1998 through January 7, 1999.

2. Whether the insurer established a *prima facie* case that it is not liable for the home care services provided by petitioner to claimant from December 27, 1998 through January 7, 1999.

EVIDENTIARY RULING

WCD Exhibits 1 through 30 were admitted into the record without objection at the November 15, 2001 hearing. Additionally, petitioner's Exhibits 39, 40, and insurer's Exhibits 3A and 3B were admitted into the record without objection at the May 15, 2002 hearing.¹ The record was reopened and re-closed following the May 15, 2002 hearing. Additionally, at the May 15, 2002 hearing, insurer stipulated that payments for petitioner's services to claimant had been made prior to insurer's denial of payment for the period of December 27, 1998 through January 7, 1999.

FINDINGS OF FACT

I affirm and adopt by this reference the Findings of Fact set forth in MRU's December 21, 1999 Administrative Order with the following supplementation.

Claimant is permanently and totally disabled and quadriplegic as a result of compensable injury. He requires 24-hour care, which was prescribed by claimant's attending physician Jennifer Lawlor, MD on August 28, 1998. The care is provided by his family and licensed and unlicensed care providers. (Exs 6, 28).

VanDeVanter was hired by claimant to provide him with home care services on August 27, 1997. At that time petitioner was not a Certified Nursing Assistant (CNA). She was paid \$400 every two weeks. Prior to the period of December 27, 1998 through January 7, 1999, the insurer paid for VanDeVanter's services to claimant. (VanDeVanter's testimony and insurer's stipulation).

On January 22, 1999, claimant requested administrative review concerning the insurer's failure to pay medical services. A May 19, 1999 Administrative Order issued by MRU found that the insurer was liable for home care provided by licensed certified nurse assistants (CNAs)

¹ At the May 15, 2002 hearing, petitioner offered Exhibits 31 through 42. Insurer objected to Exhibits 31, 35 through 38, and 42 based on relevance. Insurer also objected to Exhibits 32, 33, and 41 because they were duplicates of documents already in the record. Inasmuch as Exhibits 31, 35 through 38 and 42 consist of payroll records and correspondence dated beyond the disputed period, I found that they were not relevant to petitioner's equitable estoppel argument and declined to admit them. I also sustained insurer's objections to Exhibits 32, 33, and 42 inasmuch as they were already part of the record.

Bethany Bower and Bobby Casey during 1999 and 2001. (Ex. 6). A second dispute concerning the provision of claimant's wheel chair needs was resolved through MRU's mediation efforts. (Ex. 17).

VanDeVanter provided home care to claimant from December 27, 1998 through January 7, 1999. She was not under the direct control and supervision of Dr. Lawton. VanDeVanter became a licensed CNA. After she became licensed, she was paid \$800 every two weeks. (Exs. 28, 29).

VanDeVanter appealed MRU's December 21, 1999 order on January 6, 2000. (Ex. 29). She claimed that insurer was equitably estopped from asserting nonpayment and that she worked under the supervision of nurses who cared for claimant. (Ex. 29).

VanDeVanter was sent and did receive a Notice of Hearing for the November 15, 2001 telephone hearing in this matter, which set forth the date and time of the hearing and directed petitioner to provide the telephone number to reach her on the date and time of the hearing. She failed to provide the Central Hearing Panel with her telephone number for the November 15, 2001 hearing. The ALJ attempted to call her at the telephone number she had previously provided in her request for hearing, but received no answer. Insurer moved for default or dismissal based petitioner's failure to appear and put a *prima facie* case on the record but did not address petitioner's equitable estoppel argument. The ALJ issued a Proposed and Final Order on Default on November 21, 2001 but did not address petitioner's equitable estoppel argument.

VanDeVanter timely filed exceptions. WCD found that the ALJ correctly concluded that petitioner was in default because of her failure to appear. Nonetheless, WCD withdrew the November 21, 2001 Proposed and Final Order on Default and remanded the case to the ALJ with instructions to conduct further hearing to address petitioner's equitable estoppel argument.

CONCLUSIONS OF LAW

1) Insurer is not precluded from denying payment for the period of December 27, 1998 through January 7, 1999 because there is no proof that insurer knew she was unlicensed and nonetheless continued to pay her wages.

2) Insurer established a *prima facie* case that it is not liable for the home care services provided by petitioner to claimant from December 27, 1998 through January 7, 1999.

OPINION

Jurisdiction lies with the director. ORS 656.245(6) and ORS 656.704(3)(a). The issue arises under ORS 656.245(6). The statute does not specify a standard of review and, therefore, I review *de novo*. *Archie M. Ulbrich*, 2 WCSR 152, 153 (1997). The burden of proving any fact or position falls upon the proponent. ORS 183.450(20). As petitioner, VanDeVanter bears the burden of proving her position and supporting facts by a preponderance of the evidence. ORS 183.450(2).

In the Administrative Order, MRU found that insurer was not liable for the home care

provided by VanDeVanter during the disputed period because she was not licensed. Petitioner subsequently argued in correspondence addressed to WCD raising what appeared to be facts supporting the doctrine of equitable estoppel.

Equitable estoppel

In her correspondence with WCD and at the May 15, 2002 hearing, petitioner argued that insurer should be prevented from denying payment for the services she provided to claimant during the period of December 27, 1998 through January 7, 1999 because up until the disputed period, insurer had paid her wages even though she was not a CNA and was not under the direct supervision of claimant's attending physician. WCD interpreted petitioner's argument to be that insurer was barred by equitable estoppel from denying payment.

The doctrine of equitable estoppel "is that a person may be precluded by his act or conduct *** when it was his duty to speak, from asserting a right which he otherwise would have had." *Meier & Frank v. Smith-Sanders*, 115 Or App 159, 163 (1992), *rev den* 316 Or 142 (1993), quoting *Marshall v. Wilson*, 175 Or 506, 518 (1944). Estoppel only protects a person who changes a position in reliance on another's act or representation. *Meier & Frank*, 115 Or App 163. In *Meier & Frank*, the Court of Appeals found that the employer was estopped from refusing to pay for surgery for a non-accepted claim where the employer authorized the surgery. In previous cases, WCD has ruled that equitable estoppel is applicable to matters before the department. *Jean M. Lewis*, 2 WCSR 33 (1997).

Petitioner testified that insurer knew that she was not a licensed CNA during the disputed time and that she did not know that she had to be a licensed CNA to be paid. She stated that insurer's conduct in paying her wages prior to the denial of payment lead her to believe that she would continue to be paid. She further testified that she would not have continued providing services to claimant had she known that she would not be paid. However, unlike the *Meier & Frank* case, there is no evidence other than her own testimony that insurer authorized the unlicensed services she provided to claimant. She filled out no application form and her employment agreement was with claimant, not insurer. Consequently, I conclude that petitioner has failed to meet her burden of proving that insurer here knew that she was unlicensed but continued to pay her.²

² Citing *In the Matter of the Marriage of DeCair*, 131 Or App 413 (1994), insurer argued that it was not precluded from denying payment for the disputed period by its payment of her wages during the prior periods because equitable estoppel is not a theory of liability used to create a relationship where no contractual relationship exists. In this case, insurer argued petitioner's contractual agreement for employment was with claimant, not the insurer. Additionally, citing *Bennett v. Farmers' Insurance*, 332 Or 138 (2001), insurer argued that equitable estoppel does not apply in circumstances where it is superceded by a statutory provision. Insurer argued that ORS 656.262(10) bars the use of equitable estoppel in this context. That statute states that "merely paying or providing compensation shall not be considered acceptance of a claim or an admission of liability, nor shall mere acceptance of compensation be considered a waiver of the right to question the amount there of." However, inasmuch as I have found that petitioner has failed to meet her burden of proving that the insurer knew she was unlicensed, I need not address insurer's arguments.

Insurer's liability

Under *former* OAR 436-010-0210(3) (Admin. Order 98-060, eff. 1/1/99), an attending physician may prescribe treatment to be independently carried out by persons licensed to provide ancillary medical services, such as home health care, pursuant to a written treatment plan. If the person providing the ancillary service is not licensed to independently provide care, the care must be provided under the direct control and supervision of the attending physician.

In this case, I find that, although VanDeVanter subsequently became a licensed CNA, during the relevant period she was not licensed when she provided home health care to claimant. Moreover, she provided the care without the direct supervision of claimant's attending physician. Consequently, based on the *prima facie* case presented by the insurer, I concur with MRU's conclusion that the insurer is not liable for the disputed care.

ORDER

IT IS HEREBY ORDERED that:

The Administrative Order dated December 21, 2001 is affirmed.

DATED this ____ day of June 2002.

Ella D. Johnson, Administrative Law Judge
Hearing Officer Panel