

In the Matter of the ORS 656.327 Medical Treatment Dispute of

Burland, Theodore F., Claimant

Contested Case No: H03-038

PROPOSED AND FINAL ORDER

June 19, 2003

THEODORE F. BURLAND, Petitioner

SAIF CORPORATION, Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

HISTORY OF THE CASE

Claimant appeals an administrative order issued on March 12, 2003 by the Medical Review Unit (MRU) of the Workers' Compensation Division (WCD) of the Department of Consumer and Business Services (director or department). On June 4, 2003, Administrative Law Judge Catherine P. Coburn conducted a hearing in this matter. Petitioner Theodore F. Burland (claimant) was represented by attorney Vance D. Day. Respondent SAIF Corporation (insurer) was represented by attorney Gary Wallmark. The Workers' Compensation Division (WCD) waived appearance. Claimant and Kathleen F. Burland testified on his behalf and no other witnesses testified. The record closed on the date of hearing.

ISSUE

Whether insurer is liable for payment for home health care services rendered to claimant from October 26, 2001 through April 4, 2002.

EVIDENTIARY RULINGS

WCD Exhibits 1 through 111 were admitted into the record without objection.

FINDINGS OF FACT

(1) On April 13, 2001, while working as a millwright, claimant suffered a traumatic injury, falling approximately 20 feet onto a cement floor. (Exs. 4 and 13.) On April 17, 2001, insurer accepted the following medical conditions: periorbital hematoma of the right eye/forehead, open right elbow fracture, abrasion of the left medial thumb, oblique fracture through the right medial tibial plateau, right sacral ala fracture, superior and inferior pubic rami fractures on the right, and fracture through the transverse process on the right at L5. (Ex. 11.) Claimant underwent several surgeries. (Exs. 5, 8, 9, 15.) On May 9, 2002, insurer accepted post traumatic stress disorder. (Ex. 100.)

(2) On April 24, 2001, Erik D. Blake, MD noted that claimant would be discharged to live with his family and that he required minimal to modest assistance for mobility and activities of daily living. (Ex. 20-1.) Claimant was released from Salem Hospital Rehabilitation Center (Salem Rehab) on April 30, 2001. (Ex. 22.)

(3) From May 2, 2001 through October 25, 2001, insurer paid a supplemental allowance for home health care services provided to claimant by his wife. (Exs. 24, 34, 43, 45, 46, 63, 65, 76, 79.)

(4) Claimant's attending physician was Michael D. Wicks, MD. (Ex. 40; testimony of claimant and Kathleen Burland.) On October 23, 2001, Dr. Wicks prescribed home health care through January 14, 2002. (Ex. 40-12.)

(5) On October 24, 2001, Thomas Ellis, MD, who treated the leg conditions, opined that claimant was able to bathe and dress independently. (Ex. 78.)

(6) On October 26, 2001, Robert M. Orflay, MD, who treated the arm conditions, opined that claimant was able to bathe and dress independently. (Ex. 77.)

(7) On November 6, 2001, insurer reimbursed claimant for home health care through October 26, 2001 and notified claimant that was the final supplemental allowance payment. (Ex. 82.)

(8) On November 20, 2001, Dr. Wicks opined that claimant needed home care. (Ex. 15-19.)

(9) On January 29, 2002, claimant reported to Salem Rehabilitation Associates that he was functionally independent in his activities at home. The occupational therapy note indicates, "He is able to take care of his activities at home. However, it has been an issue regarding his wife being his caregiver or not. At this point it appears that he can take care of his daily activities in his home environment." (Ex. 90-2.)

(10) On April 22, 2002, David J. Heck, MD (Psychiatry) examined claimant at insurer's request. He opined that claimant did not need home health care beyond November 2001. (Ex. 97-24.)

(11) On January 28, 2003, Peter A. Grant, MD (Physical Medicine and Rehabilitation) examined claimant at MRU's request. He opined that home health care was not needed for the period in question. (Ex. 107).

CONCLUSIONS OF LAW AND REASONING

This case presents a medical treatment dispute arising under ORS 656.327. Jurisdiction lies with the director. ORS 656.245(1)(c)(J) and ORS 656.327(1). I may modify the administrative order only if it is not supported by substantial evidence in the record or if it reflects an error of law. ORS 656.327(2); OAR 436-001-0225(3). The burden of proving a fact or position rests with the proponent. ORS 183.450(2). As petitioner, claimant bears the burden of proving by a preponderance of evidence that the administrative order is incorrect. *See Cook v. Employment Div.*, 47 Or 437 (1982) (In the absence of contrary legislation, the standard of proof 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).

An insurer is obligated to provide medical services for conditions materially caused by the work injury for such period as the nature of the injury or the process of recovery requires. ORS 656.245(1). This obligation continues over the injured worker's lifetime. ORS 656.245 (1)(b). However, medical treatment that is excessive, inappropriate, ineffectual or violates administrative rules is not reimbursable. ORS 656.327. OAR 436-010-0210(3) governs the provision of home health care to injured workers. An amended rule took effect on January 1, 2002 during the period in question.

OAR 436-010-0210(3) (eff. 4/21/00) provides:

Attending physicians may prescribe treatment to be carried out by persons licensed to provide a medical service or by persons not licensed to provide a medical service. Those persons not licensed to treat independently or not licensed to provide a medical service, may only provide treatment prescribed by the attending physician which is rendered under the physician's direct control and supervision.

MRU determined that home health care provided to claimant from October 26, 2001 through December 31, 2001 was not reimbursable because Mrs. Burland is not licensed and the care was not rendered under attending physician Wick's direct control and supervision.

OAR 436-010-0210(3) (eff. 1/1/02) provides:

Attending physicians may prescribe treatment to be carried out by persons licensed to provide a medical service or by persons not licensed to provide a medical service. Those persons not licensed to treat independently or not licensed to provide a medical service, may only provide treatment prescribed by the attending physician which is rendered under the physician's direct control and supervision. Reimbursement to a worker for home health care provided by a worker's family member is not required to be provided under the direct control and supervision of the attending physician if the family member demonstrates competency to the satisfaction of the attending physician.

MRU determined that home health care provided to claimant from January 2, 2002 through April 4, 2002 was not reimbursable because the weight of medical evidence established that claimant did not need home health care after November 2001.

Substantial Evidence

Claimant does not raise specific errors of law, but argues that MRU's findings are not supported by substantial evidence. In order to determine whether substantial evidence exists, I am required to:

“[L]ook at the whole record with respect to the issue being decided, rather than 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. For instance, and in the context which is likely to occur in workers' compensation cases, if there are doctors on both sides of a medical issue, whichever way the [director] finds the facts will probably have substantial evidentiary support.***The difference between the 'any evidence' rule and the substantial evidence test***will be decisive only when the credible evidence apparently weighs overwhelmingly in favor of one finding and the [director] finds the other without giving a persuasive explanation.”
Armstrong v. Asten-Hill Co., 90 Or App 200, 206 (1988).

Claimant argues that MRU erred by failing to defer to the opinion of attending physician Wicks concerning claimant's need for home health care. Depending on the record in each case, the opinion of the attending physician may or may not be properly given greater weight and the court will affirm the finding if it is supported by substantial evidence in the record. *Dillon v. Whirlpool Corp.*, 172 Or App 484, 487-489 (2001). Having reviewed the record in its entirety, I conclude that MRU's reliance on the opinions of Dr. Ellis, Dr. Orflay, Dr. Heck and Dr. Grant was reasonable. To use *Armstrong* language, I cannot say that the evidence weighs overwhelmingly against MRU's conclusion. I conclude that MRU's determinations are supported by substantial evidence in the record.

Equitable Estoppel

Claimant argues that the doctrine of equitable estoppel prohibits insurer from denying continued reimbursement for home health care. 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.” *Meir & Frank v. Smith Sanders*, 115 Or App 159, 163 (1992), *rev den* 316 Or 142 (1993), quoting *Marshall v. Wilson*, 175 Or 506, 518 (1994). Equitable estoppel protects only a person who changes a position in reliance on another's act or representation. *Meir & Frank, supra*. Here, claimant did not change his position in reliance on any representation insurer made. On November 6, 2001, insurer reimbursed claimant for home health care and notified him that it was the final supplemental allowance payment. From that date forward, claimant was on notice that insurer declined to reimburse additional home health care. Inasmuch as claimant did not change his position in reliance on any representation made by insurer, the doctrine of equitable estoppel does not apply. Therefore, insurer is not precluded from denying payment of continued home health care reimbursement.

In conclusion, I find that MRU's determinations are supported by substantial evidence in the record. Additionally, I find that insurer is not estopped from denying reimbursement. For these reasons, I affirm the administrative order.

ATTORNEY FEES

Claimant has not prevailed in a contested case hearing, and therefore, is entitled to no attorney fee. ORS 656.385(1).

ORDER

IT IS HEREBY ORDERED that:

The Administrative Order dated March 12, 2003 is affirmed.

Dated this 19th day of June 2003.

Catherine P. Coburn
Administrative Law Judge
Office of Administrative Hearings