
In the ORS 656.245 Medical Services Dispute of

Graham, Willie, Claimant

Contested Case No: H02-071

PROPOSED AND FINAL ORDER

January 14, 2003

FRED MEYER STORES INC., Petitioner

WILLIE GRAHAM, Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

HISTORY OF THE CASE

Employer appeals an administrative order issued on June 10, 2002 by the Medical Review Unit (MRU) of the Workers' Compensation Division (WCD), Department of Consumer and Business Services (director or department). Petitioning self-insured employer, Fred Meyer Stores, Inc. and its claims processing agent Pinnacle Risk Management Services, Inc, (employer) were represented by attorney Bruce L. Byerly. Respondent Willie Graham (claimant) was represented by attorney Margaret F. Weddell. The matter was set for a contested case hearing and the parties submitted the matter written argument.

ISSUE

The issue is whether palliative swim therapy prescribed by Jock Pribnow, MD on January 7, 2002 is a reimbursable medical service for claimant's condition under ORS 656.245(1)(c)(J) and OAR 436-010-0005(34).

EVIDENTIARY RULINGS

WCD Exhibits 1 through 183 are received into the record without objection.

FINDINGS OF FACT

(1) On August 12, 1997, claimant suffered a low back injury while working as a retail manager in a home improvement department. (Exs. 3, 13 and 20.) On August 29, 1997, claimant became enrolled in a managed care organization. (Ex. 14.) On November 6, 1997, employer accepted "lumbar strain, disc herniation L5-6, right side." (Exs. 29, 49 and 74.) The compensable conditions became medically stationary on May 11, 1998 and the claim was closed on June 2, 1998. (Ex. 50.)

(2) On April 2, 1999, claimant filed an aggravation claim. (Ex. 55.) On June 23, 1999, claimant underwent decompressive laminectomy L4-5 and L5-S1. (Ex. 65.) By stipulation dated November 10, 1999, employer accepted the aggravation claim and claimant was enrolled in an MCO. (Exs. 71 and 72.) The compensable conditions returned to medically stationary status on November 13, 1999 and the claim was closed on December 1, 1999. (Ex. 75.)

(3) On March 30, 2000, claimant underwent surgical reexploration of the previous laminectomy and removal of the L4-5 disk. (Ex. 87.) On July 6, 2000, employer expanded the scope of acceptance to include L5-6, S1 disk herniation. (Exs. 91 and 111.) The compensable conditions again became medically stationary on January 18, 2001 and the claim was closed on February 21, 2001. (Exs. 105, 107, 110.)

(4) On March 23, 2001, employer accepted “L5-6, S-1 disc herniation and consequential post laminectomy syndrome including right S1 radiculopathy and left L5 radiculopathy.” (Exs. 115 and 117.) Based on the medically stationary date of January 18, 2001, the claim was again closed on April 3, 2001. (Ex. 116.)

(5) On April 23, 2001, employer denied Dr. Pribnow’s request for a palliative health club membership. (Ex. 120.) On June 12, 2001 Dr. Pribnow renewed his request for palliative care in the form of a health club membership. (Ex. 131.) He opined that swimming pool therapy was beneficial to maintain muscle tone and flexibility and would reduce the chance of recurring low back problems. Dr. Pribnow stated “Mr. Graham found independent pool exercise to be very helpful, and on discharge from physical therapy, the therapist suggested continuing pool exercise and use of the hot tub.” (*Id.*) Dr. Pribnow concluded “I hope that Mr. Graham is allowed health club membership under palliative care.” (*Id.*)

(6) MRU reviewed the matter and issued an administrative order dated August 23, 2001 determining that the gymnasium membership, including swimming pool therapy, did not constitute “physical restorative services” and was not reimbursable because it was not performed under the direct control and supervision of the attending physician. (Ex. 142.) Claimant filed a motion for reconsideration and on November 20, 2001, MRU abated its order. (Exs. 146 and 149.)

(7) MRU obtained the opinion of Jack B. Blumberg, MD as physician reviewer. (Exs. 150 and 152.) On December 14, 2001, Dr. Blumberg found Dr. Pribnow’s opinions plausible and rational. (Ex. 154-3). Dr. Blumberg opined that the palliative gymnasium membership including swim therapy was appropriate medical treatment for the lumbar condition. (*Id.*)

(8) MRU reviewed the matter and issued an administrative order dated February 20, 2002 determining that palliative pool therapy in the form of a gymnasium membership prescribed by Dr. Pribnow was not reimbursable because under OAR 436-010-0005(34), physical restorative services are available only for treatment of hemiplegia, a spinal cord injury or a severe head injury and claimant suffered none of these conditions. (Ex. 162-4.) Claimant appealed. (Ex. 171.) Administrative Law Judge Ella D. Johnson conducted a contested case hearing and issued a Proposed and Final Order dated May 31, 2002. (Ex. 174.) ALJ Johnson followed MRU’s reasoning and affirmed the administrative order finding the disputed pool therapy not reimbursable. (*Id.*)

(9) On January 7, 2002, attending physician Pribnow requested approval of twelve sessions in 180 days of pool therapy under the supervision of a physical therapist; employer

denied the request and claimant requested administrative review. (Exs. 155 and 161.) On February 18, 2002, Dr. Pribnow reiterated his opinion that use of a swimming pool and hot tub would benefit claimant. (Ex. 160.)

(10) MRU obtained the opinion of Christopher Swan, MD as physician reviewer. (Ex. 172.) On April 23, 2002, Dr. Swan agreed with the opinions of Dr. Pribnow and Dr. Blumberg that claimant would benefit from continued strength and flexibility exercises. (Ex. 173-4.) However, Dr. Swan disagreed that claimant would be adversely affected if the request for pool therapy were not approved. Dr. Swan observed that supervised or home exercise programs are effective alternative methods of maintaining strength and flexibility. Dr. Swan noted that twelve pool exercise periods over 180 days probably is not sufficient to maintain strength and flexibility. (*Id.*)

(11) MRU reviewed the matter and issued an administrative order dated June 10, 2002 determining that the disputed pool therapy was reimbursable because it enabled claimant to continue current employment. (Ex. 175.) On June 24, 2002, insurer requested MRU to abate the administrative order arguing that is inconsistent with ALJ Johnson's Proposed and Final Order in the case. (Ex. 178.) On June 27, 2002, MRU declined to reconsider the matter. (Ex. 179.) Insurer appealed. (Ex. 180.)

CONCLUSION OF LAW

Palliative swim therapy prescribed by Jock Pribnow, MD on January 7, 2002 is not a reimbursable medical service for claimant's condition under ORS 656.245(1)(c)(J) and OAR 436-010-0005(34).

OPINION

Jurisdiction lies with the director. ORS 656.245(6). Inasmuch as claimant was enrolled in an MCO, I review for substantial evidence or error of law. ORS 656.260 (16). The burden of proving a fact or position falls upon the proponent. ORS 183.450(2). *Harris v. SAIF*, 292 Or 683 (1982). As petitioner, insurer bears the burden of proving by a preponderance of evidence that the administrative order is incorrect. *Cook v. Employment Div.*, 47 Or 437 (1982) (In the absence of legislation adopting a different standard, 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).

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. This obligation continues over the worker's lifetime. ORS 656.245(1)(b). However, pursuant to ORS 656.245(1)(c)(J)¹, after the work-related condition

¹ ORS 656.245(1)(c)(J) provides in part:

becomes medically stationary, the insurer is no longer liable for payment of medical services with some exceptions. Palliative care is medical treatment directed toward reducing the intensity of a stable, compensable condition. ORS 656.005(2)².

In the administrative order, MRU found that the palliative care request satisfied the requirements specified in OAR 436-010-0290(1)(a), (b), (d), (e) and OAR 436-010-0210(3). MRU approved the disputed swim therapy as palliative care, reasoning that it allows claimant to continue current employment. However, MRU misanalyzed the request for palliative swim therapy and incorrectly ignored OAR 436-010-0230(11) and OAR 436-010-0005(34).

Insurer contends³ that the disputed swim therapy is not reimbursable because it fails to satisfy the requirements specified by OAR 436-010-0005(34). In contrast, claimant contends, and insurer agrees, that the disputed pool therapy meets the requirements specified by OAR 436-010-0230(11). However, claimant further contends that OAR 436-010-0230(11) is invalid because it conflicts with ORS 656.245(1)(a). Claimant contends that the statute requires an insurer to provide medical services for all compensable injuries, while the rule limits reimbursability of palliative physical restorative services to treatment of three categories of medical conditions *viz.* hemiplegia, spinal cord injuries, and severe head injuries.

ORS 656.245(1)(a) provides:

For every compensable injury, the insurer or the self-insured employer shall cause to be provided medical services for conditions caused in material part by the injury for such period as the nature of the injury or the process of the recovery requires.

(Emphasis added.)

ORS 656.245(1)(b) provides in part:

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

(J) With the approval of the insurer or self-insured employer, palliative care that the worker's attending physician referred to in ORS 656.005(12)(b)(A) prescribes and that is necessary to **enable the worker to continue current employment** or a vocational training program. (Emphasis added.)

² ORS 656.005(20) provides:

'Palliative care' means medical service rendered to reduce or moderate temporarily the intensity of an otherwise stable medical condition, but does not include those medical services rendered to diagnose, heal or permanently alleviate or eliminate a medical condition.

³ Insurer cites the Proposed and Final Order in *Jennifer E. McNeill*, 6 WCSR 205 (2001) (Exs. 132, 139, 143 and 182). However, the director reversed in a Final Order dated July 2, 2002, ___ WCSR ___ (2002). The director determined that prescribed, unsupervised gymnasium use for a claimant who is permanently, totally disabled does not constitute "medical treatment" as defined by OAR 436-010-0005(29), and therefore, is not subject to OAR 436-010-0230(11). Accordingly, the director found the gymnasium membership reimbursable.

Compensable medical services shall include medical, surgical, hospital, nursing, ambulances and other related services, and drugs, medicine, crutches, and prosthetic appliances, braces and supports and **where necessary, physical restorative services.** *** The duty to provide such medical services continues for the life of the workers.

(Emphasis added.)

OAR 436-010-0230(11) provides:

Physical restorative services may include but are not limited to a regular exercise program or **swim therapy**. Such services are not compensable unless the nature of the worker's limitations requires specialized services to allow the worker a reasonable level of social and/or functional activity. The attending physician shall justify by report why the worker requires services not usually considered necessary for the majority of injured workers. (Eff. 1-1-02.)

(Emphasis added.)

Additionally, OAR 436-010-0005(34)

'Physical Restorative Services' means those services prescribed by the attending physician to address permanent loss of physical function due to **hemiplegia, a spinal cord injury, or to address residuals of a severe head injury**. Services are designed to restore and maintain the injured worker to the highest functional ability consistent with the worker's condition. Physical restorative services are not services to replace medical services usually prescribed during the course of recovery. (Eff. 11-1-02.)

(Emphasis added.)

Claimant contends that OAR 436-010-0005(34) is invalid because it conflicts with ORS 656.245(1)(a). In interpreting a statute, I must first determine the intent of the legislature. ORS 174.020;⁴ *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610 (1993). The first level of analysis is to examine the text and context of the statute. The text of the statute is the best evidence of intent. If the legislature's intent is clear, no further analysis is appropriate. *Id.*

⁴ ORS 174.020 provides:

(1)(a) In the construction of a statute, a court shall pursue the intention of the legislature if possible.

Claimant correctly points out that ORS 656.245(1)(a) requires an insurer to provide medical services for every compensable injury. However, ORS 656.245(1)(b) contains a limitation on the provision of certain types of medical services. The text of subsection (b) specifies that an insurer is required to provide physical restorative services “where necessary”. The question remains, then, who would determine which physical restorative services are necessary. The legislature answered this question by enacting ORS 656.726(4)(a).

ORS 656.726(4)(a) provides in part:

(4) The director hereby is charged with duties of administration, regulation and enforcement of ORS 654.001 to 654.295, 654.750 to 654.780 and this chapter. To that end the director may:

(a) Make and declare all rules and issue orders which are reasonably required in the performance of its duties.

In fulfilling its rulemaking duty, WCD promulgated OAR 436-010-0230(11). Comparing the text of ORS 656.245(1)(b) and OAR 436-010-0005(34), I conclude that the rule is consistent with the statute, and therefore, is valid. Contrary to claimant’s argument, the statute does not require insurers to provide identical medical services for each compensable injury. Furthermore, the legislature authorized the director to promulgate rules to regulate the delivery of medical services to injured workers, including defining those circumstances where palliative physical restorative services are reimbursable.

OAR 436-010-0230(11) categorizes swim therapy as a physical restorative service. The plain meaning of OAR 436-010-0230(11) includes swim therapy within the definition of “physical restorative service.” Furthermore, the plain meaning of OAR 436-010-0005(34) limits reimbursability of physical restorative services to treatment of three medical conditions *viz.* hemiplegia, spinal cord injury, and severe head injury. Here, claimant suffered a compensable lumbar injury and the disputed palliative care was not directed to any of the three medical conditions specified by OAR 436-010-0005(34). Read together, the two rules specify that palliative swim therapy directed toward a lumbar condition is not reimbursable. Therefore, the disputed swim therapy is not reimbursable.

Finally, having adopted the rule, WCD is not free to ignore it. *AETNA Casualty & Surety Company v. Blanton*, 139 Or App 283 (1996). Inasmuch MRU failed to apply OAR 436-010-0230(11) and OAR 436-010-0005(34), the administrative order reflects an error of law. Accordingly, I reverse.

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 June 10, 2002 is reversed.

DATED this 14th day of January 2003.

Catherine P. Coburn
Administrative Law Judge
Hearing Officer Panel