
In the Matter of the ORS 656.245 Medical Services Dispute of

Hernandez, Abraham T., Claimant

Contested Case No: H02-095

PROPOSED AND FINAL ORDER

March 21, 2003

FRERES LUMBER COMPANY & SAMIS, Petitioner

ABRAHAM HERNANDEZ, Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

HISTORY OF THE CASE

Petitioner appeals an August 7, 2002 Administrative Order issued by the Department of Consumer and Business Services, Workers' Compensation Division (the department or WCD), Medical Review Unit (MRU). On November 13, 2002, Administrative Law Judge (ALJ) Paul Vincent conducted a hearing by telephone in this matter. Petitioning self-insured employer Freres Lumber Company and its claims processing agent Samis, Inc. (Freres or employer) were represented by Attorney George Goodman. Responding claimant Abraham T. Hernandez was represented by Attorney Lourdes Sanchez. Qualified interpreter Luis Armstrong provided translation services after being qualified by the ALJ. No witnesses testified. I left the record open for one week after the close of the hearing to allow claimant's counsel to submit a statement of services. The record closed one week later on November 20, 2002.

The record of this proceeding, consisting of all evidence received, and all hearing papers filed, has been considered. The findings of fact set out below are based on the entire record.

ISSUE

Whether MRU's order finding employer liable for payment of the medical services provided by F. Douglas Day, MD (Family Practice) from January 10 through March 30, 2001 is supported by substantial evidence or reflects an error of law.¹

EVIDENTIARY RULING

The documentary record consists of WCD's Exhibits 1 through 65, which are admitted into evidence without objection.

FINDINGS OF FACT

I affirm, adopt and incorporate the Findings of Fact set forth MRU's August 7, 2002 Administrative Order with the following supplementation.

¹ MRU also found that the employer was not liable for payment of Dr. Day's July 23, 2001 telephone conference with claimant's attorney prior to a hearing before a Workers' Compensation Board's ALJ concerning claimant's aggravation claim. Claimant did not cross-appeal that issue. Therefore, it is not before me.

(1) On August 29, 2000, Mr. Hernandez compensably injured his upper back and left knee while working for Freres. (Ex. 1.) Mr. Hernandez received initial treatment from Oscar M. Quijano, MD (Family Practice). (Ex. 2.) Dr. Quijano referred claimant to Craig B. Johnson, DC for chiropractic care. On September 27, 2000, Mr. Hernandez received chiropractic care for his back from Dr. Johnson and designed him as attending physician. (Exs. 5, 8.)

(2) On November 28, 2000, Freres accepted claimant's claim for non-disabling thoracic strain and left knee contusion. (Ex. 14.) On December 11, 2000, Dr. Johnson noted that Mr. Hernandez continued to improve but that his back also continued to be fatigued. Dr. Johnson further noted that Mr. Hernandez's back spasms had completely abated and that he had a full range of motion, except for flexion. (Ex. 7 at page 10.) Interpreting Dr. Johnson's December 11, 2000 chart note to indicate that Mr. Hernandez was medically stationary, Freres notified Mr. Hernandez on December 20, 2000 that his condition was now medically stationary and that any additional care would be palliative care which was only reimbursable under specified circumstances. (Ex. 16.) On December 28, 2000, Dr. Quijano and Mr. Hernandez filed an aggravation claim and requested authorization for palliative care. (Ex. 17.)

(3) On January 10, 2001, Mr. Hernandez treated with Dr. Day and designated him as his attending physician. (Ex. 19.) Dr. Day treated Mr. Hernandez from January 10 through March 30, 2001, providing trigger-point injections and physical therapy. (Ex. 19-22.)

(4) By letter dated March 28, 2001, Freres denied Mr. Hernandez's aggravation claim. Freres copied Dr. Day on its denial letter. (Ex. 25.) Neither Dr. Day nor Mr. Hernandez received Freres's letter prior to Mr. Hernandez's last treatment on March 30, 2001. On April 16, 2001, Freres returned Dr. Day's billings to him because the claim was in denied status. (Ex. 26.)

(5) Mr. Hernandez subsequently requested that the claim be reclassified as disabling. Freres declined to reclassify the claim. (Exs. 32, 33.) Mr. Hernandez requested review by WCD, which affirmed the non-disabling status on February 15, 2002. (Ex. 49.)

(6) Finding no closure documents in evidence, an Opinion and Order ALJ Bruce Black with the Workers' Compensation Board (WCB) dated August 31, 2001, set aside, Freres's denial of Mr. Hernandez's aggravation claim as a nullity. (Ex. 34.)

CONCLUSIONS OF LAW

MRU's order finding the employer liable for payment of the medical services provided by Dr. Day from January 10 through March 30, 2001 is supported by substantial evidence and does not reflect an error of law.

OPINION

Standard of Review

In hearings before the director, "the scope of review shall be *de novo* unless otherwise

prescribed by statute or administrative rule.” OAR 436-001-0225(1). In previous cases concerning matters heard pursuant to ORS 656.245, the ALJ has applied the *de novo* standard of review, citing OAR 436-001-0225(1) and *Archie M. Ulbrich*, 2 WCSR 152, 153 (1997). However, in 1999 ORS 656.245 was amended to state:

(6) Subject to the provisions of ORS 656.704², if a claim for medical services is disapproved, the injured worker, insurer, or self-insured employer may request administrative review by the director pursuant to ORS 656.260 or 656.327.

Although not raised by the parties, it is germane to my inquiry here inasmuch as the case was reviewed below as an ORS 656.245 dispute, and therefore, I must determine the impact of this provision on my standard of review. In interpreting a statute, the court’s, and thus my charge, is to determine the legislative intent. ORS 174.020; ³*PGE v. Bureau of Labor and*

Industries, 317 Or 606, 610 (1993). In order to discern the legislative intent, the first level of analysis is to examine both the text and context of the statute. 317 Or at 610-611. The text of the statute is the best evidence of the legislature’s intent. If the legislature’s intent is unclear after that inquiry, I consider the legislative history, and if still unclear, I apply the general maxims of statutory construction. *Id.*

² ORS 656.704 provides in relevant part:

(2) Notwithstanding ORS 183.315 (1), actions and orders of the director and the conduct of hearings and other proceedings pursuant to this chapter, and judicial review thereof, regarding all matters other than those concerning a claim under this chapter, are subject to ORS 183.310 to 183.550. Except as provided in subsections (4) and (5) of this section, contested case hearings under this subsection shall be conducted by a hearing officer assigned from the Hearing Officer Panel established under section 3, chapter 849, Oregon Laws 1999. The director by rule shall prescribe the classes of orders issued by hearing officers and other personnel that are final, appealable orders and those orders that are preliminary orders subject to revision by the director.

³ ORS 174.020 states:

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

(b) To assist a court in its construction of a statute, a party may offer the legislative history of the statute.

(2) When a general and particular provision are inconsistent, the latter is paramount to the former so that a particular intent controls a general intent that is inconsistent with the particular intent.

(3) A court may limit its consideration of legislative history to the information that the parties provide to the court. A court shall give the weight to the legislative history that the court considers to be appropriate.

In applying the foregoing method to ORS 656.245(6), I find that I need go no further than the plain language of the statute. Moreover, I also find that the 1999 amendment to ORS 656.245 changed the standard of review for contested case hearings on medical services denied under ORS 656.245 from *de novo* review to review for substantial evidence and errors of law as provided in ORS 656.260 or 656.327. Consequently, inasmuch as this matter concerns a medical service denied under ORS 656.245 and the worker is not enrolled in a managed care organization (MCO) pursuant to ORS 656.260, I conclude that my standard of review for this matter is substantial evidence and errors of law as provided in ORS 656.327(2).⁴ See *Warren D. Amrein*, 8 WCSR _____ (WCD Contested Case No. H02-010)(standard for review under for medical services provided pursuant to ORS 656.245 is now substantial evidence and errors of law).

MRU's Decision

This case involves a dispute as to whether employer is liable for medical services provided by Dr. Day after the period that employer notified claimant that his claim had been declared medically stationary. The resolution of this issue requires the application of ORS 656.245(1). Inasmuch as this is a review of a decision not involving an MCO under ORS 656.245, my review as noted above is pursuant to ORS 656.327 for substantial evidence and errors of law. ORS 656.245(6); ORS 656.327. The burden of proving any fact or position falls upon the proponent. ORS 183.450(2). As petitioner, employer bears the burden of proving that MRU's decision is not supported by substantial evidence or reflects and error of law. I find that employer has failed to meet its burden.

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 frequently 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).

ORS 656.245(1) (a) and (b) require insurers and self-insured employers to provide medical services for condition caused in material part by the injury for such a period as the

⁴ In reaching this conclusion, I note that WCD's response to the transmitted question in the case of *Warren D. Amrein* (WCD Contested Case No. H02-010) failed to properly analyze the language of the statute pursuant to the method set forth by the Oregon Supreme Court in *PGE v. Bureau of Labor and Industries*. Therefore, I decline to follow its interpretation of ORS 656.245. A copy of WCD's response to the transmitted question is attached to this order.

nature of injury or the process of recovery requires. This obligation continues for the life of the worker until the worker's accepted condition is declared medically stationary by the attending physician. Once a worker's condition is found to be medically stationary by the attending physician, medical services, including palliative care, are not compensable except under certain specified circumstances. ORS 656.245(1)(c).⁵ In determining that claimant was medically stationary, employer relied on a chart note authored by Dr. Johnson, a chiropractor that became claimant's attending physician on September 11, 2000.

MRU found that there was no medical evidence to support employer's allegation that Dr. Johnson found claimant to be medically stationary on December 11, 2000. Additionally, even if Dr. Johnson's chart note did indicate that claimant was medically stationary on that date, MRU further determined that Dr. Johnson's authority to act as claimant's attending physician and declare claimant medically stationary ended on October 26, 2000 due to his status as a chiropractor attending physician. MRU reasoned that, inasmuch as Dr. Johnson lacked authority to determine whether claimant was medically stationary, the restrictions on medical services set forth in ORS 656.245(1)(c) were inapplicable to the services provided by Dr. Day for the period in question. Consequently, MRU concluded that because the medical services provided by Dr. Day during the period in question were directed to claimant's accepted, non-medically stationary condition, employer was liable for payment. I agree.

ORS 656.005(12)(b) states in relevant part:

Except as otherwise provided for workers subject to a managed care contract, "attending physician" means a doctor or physician who is primarily responsible for the treatment of a worker's compensable injury and who is:

⁵ ORS 656.245(1)(c) provides in relevant 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:

* * * * *

(F) Services provided pursuant to an accepted claim for aggravation under ORS 656.273.

* * * * *

(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. If the insurer or self-insured employer does not approve, the attending physician or the worker may request approval from the Director of the Department of Consumer and Business Services for such treatment. The director may order a medical review by a physician or panel of physicians pursuant to ORS 656.327 (3) to aid in the review of such treatment. The decision of the director is subject to the contested case and review provisions of ORS 183.310 to 183.550.

* * * * *

(B) For a period of 30 days from the date of first visit on the initial claim or for 12 visits, whichever first occurs, a doctor or physician licensed by the State Board of Chiropractic Examiners for the State of Oregon or a similarly licensed doctor or physician in any country or in any state, territory or possession of the United States.

Additionally, OAR 436-030-0035(1) provides in pertinent part:

(1) A worker's compensable condition shall be determined to be medically stationary when the attending physician **or a preponderance of medical opinion declares the worker either "medically stationary," "medically stable," or uses other language meaning the same thing.**

(Emphasis added.)

At hearing, employer argued that MRU's decision reflects an error of law because it is contrary to OAR 436-030-00359(1) and the preponderance of the medical opinion indicates that claimant was medically stationary on December 11, 2001. In support of its argument, employer first contends that, even though Dr. Johnson's status as attending physician had expired prior to the date he found claimant to be medically stationary, the "controlling" Workers' Compensation Board (WCB) case, *Timothy Kruchitz*, 45 Van Natta 158 (1993), holds that the 30-day limitation on a chiropractor's status as an attending physician does not restrict the chiropractor's ability to render an opinion concerning a worker's medically stationary status. I do not find employer's contention to be well taken. Although WCD sometimes finds WCB's decisions to be persuasive, WCB's decisions do not control WCD's cases, particularly where WCD is interpreting its own rules. *See* ORS 656.726 (director and Workers' Compensation Board have separate and coequal jurisdiction and roles in managing workers' compensation system).

MRU has interpreted OAR 436-030-00359(1) to exclude chiropractors whose authority to act as attending physician has expired. Where an agency's plausible interpretation of its own rule cannot be shown either to be inconsistent with the wording of the rule itself, or with the rule's context, or with any other source of law, the agency's interpretation will be upheld. *Don't Waste Oregon Committee v. Energy Facility*, 320 Or 132, 141 (1994). Here, I do not find MRU's interpretation to be inconsistent with the rule or its context or any other source of law. Consequently, I conclude that Dr. Johnson was without authority to declare claimant medically stationary on December 11, 2001.

Furthermore, I also agree with MRU's conclusion that the medical evidence does not support employer's allegation that Dr. Johnson found claimant to be medically stationary on December 11, 2000. Dr. Johnson's chart note stated that claimant continued to improve but that he continued to experience fatigue in his back. Dr. Johnson further noted that claimant's back spasms had completely abated and that he had a full range of motion, except for flexion. Dr.

Johnson's chart note did not state that claimant was medically stationary or address other symptoms, except for spasm, that claimant had been experiencing. The only part of the chart note which could have been reasonably interpreted by the employer to indicate that claimant was medically stationary was Dr. Johnson's comment that claimant's back spasms had abated. OAR 436-030-0035(1) requires the medical opinion to state that claimant is "either 'medically stationary,' 'medically stable,' or [use] other language meaning the same thing." It is clear that Dr. Johnson's chart note does not use the words either "medically stationary" or "medically stable." Moreover, I do not find that Dr. Johnson's chart note uses other language meaning the same thing. Consequently, I conclude find that MRU correctly concluded that the medical evidence does not support that claimant was medically stationary on December 11, 2001. Accordingly, MRU's decision is affirmed.

ATTORNEY FEES

Claimant has prevailed in defending MRU's order and is therefore entitled to attorney fees. ORS 656.385(1). I left the record open for one week after the close of the hearing to allow claimant's counsel to submit a statement of services. Claimant's counsel failed to submit a statement of services within that period of time. Prior to issuance of this order, she was again asked to provide a statement of services but failed to do so. Consequently, in the absence of a statement of services, I find that there is no basis upon which to assess an attorney fee and decline to do so.

ORDER

IT IS HEREBY ORDERED that:

The Medical Review Unit's August 7, 2002 Administrative Order is affirmed.

DATED this 21st day of March 2003.

Paul Vincent, Administrative Law Judge
Hearing Officer Panel