
In the ORS 656.245 Medical Services Dispute of

Olsen, Cristine O., Claimant

Contested Case No: H03-002

PROPOSED AND FINAL ORDER

May 8, 2003

SAIF CORPORATION, Petitioner

CRISTINE O. OLSEN, Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

HISTORY OF THE CASE

Insurer appeals an administrative order issued on December 18, 2002 by the Medical Review Unit (MRU) of the Workers' Compensation Division (WCD), Department of Consumer and Business Services (director or department). On May 5, 2003, Administrative Law Judge Catherine P. Coburn conducted a hearing in this matter. Petitioner SAIF Corporation (insurer) was represented by attorney Dennis S. Martin. Respondent Cristine O. Olsen (claimant), *pro se*, failed to appear. No witnesses testified and the record closed on the date of hearing.

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 upon the entire record.

ISSUE

Whether cryotherapy (cold packs), provided by Walton Physical Therapy on May 13, 2002 through May 31, 2002 are reimbursable.

EVIDENTIARY RULINGS

WCD Exhibits 1 through 19 were received into the record without objection. On my own motion, I admitted claimant's Supplementary Exhibit 20 into the record without objection. Also, pursuant to ORS 183.450(4) and OAR 137-003-0615, I take official notice of the Current Procedural Terminology Professional Edition 2003 p. 388).

FINDINGS OF FACT

I adopt and incorporate the findings of fact contained in the administrative order with the following supplementation:

(1) On April 17, 2002, claimant suffered a work injury; insurer accepted a right rotator cuff tear. (Ex. 9).

(2) On June 19, 2002, claimant was enrolled in a managed care organization (MCO). (Ex. 8-1.)

(3) On April 22, 2002 and May 13, 2002, Robert Wilson, MD (Orthopedic Surgery) prescribed physical therapy. The treatment plans prescribed “Evaluate & Treat”, “Cryotherapy”, and “Home Exercise Instructions”. (Ex.1).

(4) On May 13, May 16, May 20, May 28 and May 31, 2002, Walton Physical Therapy provided services to claimant including cryotherapy. (Ex. 5.) The other services consisted of physical therapy evaluation, manual therapy, therapeutic exercises, ultrasound and electrical stimulation. (Exs. 5 and 11.)

(5) On July 16, 2002, insurer denied payment of the medical bills. (Ex. 11-1 through 11-5.)

CONCLUSION OF LAW

Cryotherapy (cold packs) that was provided by Walton Physical Therapy on May 13, 2002 through May 31, 2002 is not reimbursable.

OPINION

Jurisdiction lies with the director and I review for substantial evidence or error of law. ORS 656.245(6) and ORS 656.260(16). The burden of proving a fact or position falls upon the proponent. ORS 183.450(2). 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).

Where respondent failed to appear at hearing after being duly notified of the time of the hearing, and the failure to appear is not due to circumstances beyond her reasonable control, I may issue default order upon a showing of a *prima facie* case made upon the record. OAR 137-003-0670. Here, claimant was notified by mail of the hearing date, failed to appear and offered no explanation of any circumstances that might excuse the failure to appear. Therefore, I find that a default order is appropriate.

MRU determined that insurer was liable for cryotherapy only because the other modalities were not specified in Dr. Wilson’s treatment plan as required by OAR 436-010-0230(4)(a). MRU further construed OAR 435-009-0050(7)(d) and determined that the cryotherapy was reimbursable because it was performed in conjunction with other modalities which requires direct patient contact even though those modalities were not reimbursable. As petitioner, insurer contends that MRU misconstrued OAR 435-009-0050(7)(d) and that supervised modalities are not reimbursable unless they are provided in conjunction with reimbursable direct patient contact modalities.

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. OAR 436-010-0230(4)(a) provides:

Except as otherwise provided by the MCO, ancillary services including but not limited to physical therapy or occupational therapy, by a medical service provider other than the attending physician or specialist physician shall not be reimbursed unless prescribed by the attending physician or specialist physician and carried out under a treatment plan prepared prior to the commencement of treatment and signed by the attending physician or specialist physician within 30 days of beginning treatment. The medical service provider shall provide an initial copy of the treatment plan to the attending physician or specialist physician and the insurer within seven days of beginning treatment. A copy of the treatment plan signed by the attending physician or specialist physician shall be provided to the insurer by the medical service provider within 30 days of beginning treatment. The treatment plan shall include objectives, modalities, frequency of treatment, and duration. The treatment plan may be recorded in any legible format including, but not limited to, signed chart notes. Treatment plans required under this subsection do not apply to services provided pursuant to ORS 656.245(2)(b)(A).

Here, Dr. Wilson signed treatment plans on April 22, 2002 and again on May 13, 2002. The disputed physical therapy services began on May 13, 2002, within 30 days of the initial signed treatment plan. Therefore, the disputed services satisfy the timeliness requirement prescribed by OAR 436-010-0230(4)(a). However, Dr. Wilson's treatment plans list only three modalities, *viz.* "Evaluate & Treat", "Cryotherapy", and "Home Exercise Instructions". Therefore, only these three modalities are reimbursable under OAR 436-010-0230(4)(a). But this determination is not dispositive because these modalities are also subject to OAR 435-009-0050(7)(d).

OAR 435-009-0050(7)(d) provides:

CPT codes 97010 through 97028 shall not be paid unless they are performed in conjunction with the other procedures or modalities which require constant attendance or knowledge and skill of the licensed medical provider.

MRU determined that the cryotherapy was reimbursable under OAR 435-009-0050(7)(d) even though it was provided in conjunction with other procedures and modalities that were not reimbursable because they were not listed in Dr. Wilson's treatment plan. Insurer argues, and I agree, that MRU misconstrued OAR 435-009-0050(7)(d).

In interpreting the meaning of a rule, I apply the same method of analysis employed in determining the meaning of a statute, *viz.*, to determine the meaning of the words used, giving effect to the intent of the enacting body, which in this case is the department. *Abu-Adas v. Employment Dept.*, 325 Or 480, 485 (1997); *see also PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-611 (1993) (court's task in determining legislative intent first is to examine the

text, including context in which statute is found and, if intent is clear, to proceed no further with its analysis). Where an agency's interpretation of its own rule is plausible and not inconsistent with the wording of the rule itself, the rule's context, or with any other source of law, there is no basis for asserting that the rule has been misinterpreted by the agency. *Don't Waste Oregon Com. v. Energy Facility Siting Council*, 320 Or 132, 142 (1994).

In applying the foregoing method to OAR 435-009-0050(7)(d), I find that I may proceed no further than analyzing the text and context of the rule. CPT codes 97-10 through 97028 are physical therapy modalities, including cryotherapy, that do not require direct, one-on-one patient contact by the provider. (Current Procedural Terminology Professional Edition 2003 p. 388.) These adjunct services are reimbursable only if they are provided in conjunction with primary services performed by a physical therapist who is in direct contact with the patient. It is implicit that the primary service must be directed to the compensable condition and must be reimbursable. Inasmuch as MRU's interpretation of OAR 435-009-0050(7)(d) is contrary to the text and context of the rule. Consequently, I do not defer and reverse MRU's decision. Insurer is not liable for the payment for the cryotherapy.

ORDER

IT IS HEREBY ORDERED that:

The Administrative Order dated December 18, 2002 is reversed.

DATED this 8th day of May 2003.

Catherine P. Coburn
Administrative Law Judge
Hearing Officer Panel