
In the Matter of the ORS 656.245 Medical Services Dispute of

White, Richard L., Claimant

Contested Case No: H02-118

PROPOSED AND FINAL ORDER

April 2, 2003

RICHARD L. WHITE, Petitioner
SAIF CORPORATION, Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

HISTORY OF THE CASE

Petitioner appeals an October 22, 2002 Administrative Order issued by the Department of Consumer and Business Services, Workers' Compensation Division (the department or WCD), Medical Review Unit (MRU). On January 16, 2003, Administrative Law Judge (ALJ) Paul Vincent conducted a hearing by telephone in this matter. Attorney Philip Garrow represented petitioner Richard L. White (claimant). Attorney Janelle Irving represented respondent SAIF Corporation (SAIF or insurer) WCD waived appearance at hearing. Claimant called his wife, Monica White, to testify. SAIF called no witnesses. The record closed following the hearing on January 16, 2003.

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 that claimant was not entitled to additional payment for companion care provided by his wife, Monica White, from June 7, 2000 through October 3, 2000 is supported by substantial evidence or reflects an error of law.

EVIDENTIARY RULING

The documentary record consists of insurer's Exhibits 55A, 60A, 61A and 61B and WCD's Exhibits 1 through 102, which were admitted into evidence without objection. Claimant's Exhibits P1 and P2 were admitted into the record over insurer's objections.

FINDINGS OF FACT

I affirm, adopt and incorporate the Findings of Fact set forth MRU's October 22, 2002 Administrative Order with the following supplementation.

(1) On May 24, 2000, Mr. White suffered a compensable closed head injury after being hit in the head with a log and was admitted to St. Charles Medical Center (SCMC) in Bend, Oregon for treatment. (Exs. 1-4, 23.) On May 30, 2000, Mr. White was admitted for intensive inpatient rehabilitation and David C. Stewart, MD (Rehabilitation) became his attending

physician. (Ex. 11.) Dr. Stewart noted decreased mobility, problems with balance and memory, decreased ability to perform activities of daily living (ADLs), and persistent and variable orientation and confusion. Dr. Stewart discharged Mr. White on June 6, 2000 to care and supervision to be provided by his wife. (Exs. 20-22.)

(2) Upon discharge, Dr. Stewart instructed Ms. White on how to walk with claimant using a “gate belt,” how to get him in and out of the shower and toilet, and how to administer his medication, but did not execute a written treatment plan for her care. Dr. Stewart had ongoing conversations with Mrs. White about her husband’s care in the course of his subsequent treatment, but Dr. Stewart was not with her on site while she assisted her husband and did not provide direct control and supervision of her activities in caring for her husband. (Test. of Mrs. White.)

(3) Thereafter, Mrs. White transported her husband from their home in La Pine, Oregon to Bend, Oregon three to five times a week for physical therapy, speech therapy, treatment, and doctor’s appointments. (Exs. 24 – 28, 38; test. of Mrs. White.)

(4) On October 2, 2000, Mr. White passed the driving skills assessment test and had his driving privileges restored. (Ex. 48.) On October 3, 2000, Dr. Stewart opined that Mr. White was now medically safe to be at home without supervision. (Ex. 47.)

(5) Mrs. White is not a professional licensed home health care provider and has had no medical training. Prior to her husband’s release from the hospital, Mrs. White was not employed outside the home. After her husband no longer needed assistance, Mrs. White held only temporary jobs with friends performing housekeeping and delivery services for four or five months. (Test. of Mrs. White.)

(6) SAIF paid Mrs. White a supplemental allowance of \$5,184.96 for the “companion care” she provided to Mr. White for the period of June 7, 2000 through October 1, 2000 following his release from the hospital at the rate for Senior and Disabled Services Division (SDSD) non-medical home care provided by family members. (Exs. 55A, 81, 84, 85.) The SDSD rate per hour for companion care is \$2.73 per hour. The rate as of July 1, 2000 was increased to \$2.78 per hour for a live-in provider. (Ex. 58A.) Mr. White requested that SAIF increase the amount to \$12,507.52. (Ex. 60A.)

(7) On February 27, 2001, SAIF offered an additional \$527.65. This included companion care at an increased hourly rate of \$7.99 per hour for 1.5 hours per day in June 2000 based on Mr. White’s assistance with bathing and shaving and transfers and 1.5 hours per day for one week from July 1 to July 8, 2000 at \$8.12 per hour for assistance with ambulating and 15 minutes per day for 7.25 hours for the month of July 2000 for assistance with shaving. (Ex. 61A.) On March 12, 2001, Mr. White’s attorney, Bruce Smith, accepted SAIF’s offer. (Ex. 61B.)

(8) Mr. White subsequently requested director review of his dispute with SAIF over the amount paid to his wife. On October 5, 2001, Mr. White’s attorney Glen Lasken withdrew the request for director review and MRU issued an Administrative Order of Dismissal on October

12, 2001. Mr. White requested a contested case hearing on the dismissal. An April 10, 2002 Interim Order issued by ALJ Johnson of the Hearing Officer Panel remanded the matter to MRU for processing, finding that the request for director review was improperly withdrawn. (Exs. 91-96)

Private licensed professional providers charge between \$13.75 and \$19.00 per hour for the types of services Mrs. White provided to her husband during the disputed period. (Exs. P1, 60 A.)

CONCLUSIONS OF LAW

MRU's order finding that claimant was not entitled to additional payment for companion care provided by his wife, Monica White, from June 7, 2000 through October 3, 2000 is supported by substantial evidence or reflects 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 656.704¹, 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

¹ 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.

charge, is to determine the legislative intent. ORS 174.020;² *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.*

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).³ 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 claimant is entitled to additional payment for companion care provided by his wife, Monica White, from June 7, 2000 through October 3, 2000. 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, claimant bears the burden of proving that MRU's decision is not supported by

² 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.

³ 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.

substantial evidence or reflects and error of law. I find that claimant has failed to meet his 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).

MRU found that Mrs. White was not a licensed care provider and that the services rendered were not provided under the direct control and supervision of Dr. Stewart. Consequently, MRU concluded that *former* OAR 436-010-0210(3) (Order 00-052, eff. 4/4/00) which was in effect during the relevant period, Mrs. White's services were not compensable medical services because they were not provided under the direct control and supervision of the attending physician. I find that MRU's decision is supported by substantial evidence and is consistent with rules in effect during the period of time that she provided the services.

Former OAR 436-010-0210(3) states:

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

The department has previously interpreted the phrase "under the physician's direct control and supervision" to mean that the physician must be on the same premises, at the same time, as the unlicensed person providing the service. *Robert Crawford*, 1 WCSR 758 (1996). 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.

Furthermore, the record establishes, and Mrs. White concedes, that she is not a licensed provider. Therefore, in order for Mrs. White's services to be reimbursable pursuant to OAR 436-010-0210(3), Dr. Stewart would have needed to be at the White's home at the same time that Mrs. White provided the service. There is no question that he was not.

At hearing, claimant first points to the current version of OAR 456-010-210(3)⁴ (Admin. Order 01-065, eff. 1-1-020), which revised the former rule to allow for payment to family members who provide home care without the direct control and supervision of the attending physician, as proof that such services were reimbursable under the rule in effect at the time Mrs. White provided the services. I do not find claimant's argument persuasive because unfortunately that was not the rule in effect during the disputed period nor did the department interpret the former rule to allow for unsupervised services. *See Ivan Redman*, 2 WCSR 218 (1997) (gym fees not reimbursable because program was not conducted under the direct control and supervision of attending physician)

Claimant next argued that insurer was precluded from denying the additional payment by equitably estopped because insurer allowed Mrs. White to provide the services and she relied on insurer's failure to object. I likewise find claimant's argument in this regard to be unpersuasive.

In support

Consequently, I conclude that MRU's order does not reflect an error of law and Mrs. White's services are not reimbursable beyond the gratuitous payment made pursuant to ORS 656.018(6).⁵

ATTORNEY FEES

Claimant has not prevailed in overturning MRU's order and is therefore not entitled to attorney fees. ORS 656.385(1).

⁴ Current OAR 436-010-0210(3) 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.

⁵ ORS 656.018(6) states:

Nothing in this chapter shall prohibit payment, voluntarily or otherwise, to injured workers or their beneficiaries in excess of the compensation required to be paid under this chapter.

ORDER

IT IS HEREBY ORDERED that:

The Medical Review Unit's October 22, 2002 Administrative Order is affirmed.

DATED this 4th day of April 2003.

Administrative Law Judge
Hearing Officer Panel