
In the Matter of the ORS 656.327 Medical Treatment Dispute of

Lusby, Judy M., Claimant

Contested Case No: H03-065

FINAL ORDER

March 8, 2004

LIBERTY NORTHWEST INSURANCE CORPORATION, Petitioner

JUDY M. LUSBY, Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

HISTORY OF THE CASE

Liberty Northwest Insurance Corporation (Liberty) appealed an Administrative Order issued on May 7, 2003 by the Medical Review Unit (MRU) of the Workers' Compensation Division (WCD), Department of Consumer and Business Services (director or the department). On June 17, 2003, the matter was referred to the Office of Administrative Hearings. On October 30, 2003, Administrative Law Judge (ALJ) Catherine P. Coburn conducted a hearing in this matter. Petitioner Liberty was represented by attorney Darren Lee. Respondent Judy M. Lusby (Claimant) was represented by attorney Joe DiBartolomeo. No witnesses testified and the record closed on the date of hearing.

On November 7, 2003, the ALJ issued a Proposed and Final Contested Case Hearing Order (Order), which determined that Liberty could challenge whether treatment was experimental without following the procedures established by ORS 656.245(3) and OAR 436-010-0300(1). Thus, the ALJ ordered the remand of this case to MRU to determine whether the Claimant's treatment was experimental.

On December 5, 2003, the respondent filed exceptions to the Order. Before the Director, the issues are whether Liberty followed the correct procedures to challenge whether the medical treatment was experimental and the appropriateness of the treatment. The entire record, Order, consisting of a tape recording of the hearing, all evidence received, and all documents filed, has been considered.

ISSUES

1. Did Liberty follow the correct procedures in raising the issue of whether the RS-4 Sequential Stimulator constituted experimental treatment?
2. Was the use of an RS-4 Sequential Stimulator appropriate medical treatment for claimant's accepted condition?

FINDINGS OF FACT

On April 12, 1986, claimant was compensably injured while working as a waitress. (Ex. 1.) Insurer accepted a low back strain and disc herniation at L3-4 and L4-5. (Ex. 2.) Claimant has undergone eight spinal surgeries including L3-4, L4-5 and L5-S1 fusions. (Exs. 4-1 and 19.)

The most recent surgery took place on September 17, 2002 when John Misko, MD, attending physician, re-fused L4-5 bilaterally. (Ex. 19.)

On September 24, 2002, Dr. Misko requested authorization for an RS-4 Sequential Stimulator for a minimum of three months. Dr. Misko prescribed the device for pain and spasm control prior to surgery and to help restore muscle function following surgery. Dr. Misko advised that no substitutions for the RS-4 should be allowed. (Ex. 20.)

Insurer denied authorization and claimant appealed. (Exs. 21 and 23.) On November 12, insurer submitted a Specification of Disputed Medical issues listing two grounds for the disapproval. "The service is excessive, inappropriate, ineffectual, or in violation of the medical service rules." "The service is experimental and/or not scientifically proven to be effective treatment." (Ex. 24.)

On November 20, 2002, Gary Rischitelli, MD, Liberty's Medical Director, reviewed the request and opined that no evidence supported the medical necessity of the request. (Ex. 25.) Subsequently, he reviewed an article in the *Journal of Clinical Physiology and Functional Imaging* and opined that the RS-4 Sequential Stimulator provided no proven clinical benefit. (Exs. 30 & 31).

On January 3, 2003, Claimant was reexamined by Dr. Misko. Her x-rays, at that time, showed early bone formation on both sides at the transverse process of L4-5. Dr. Misko stated that the growth was "not extremely impressive yet."

Both Claimant and Liberty submitted literature regarding the use of the RS-4. The RS-4 uses two different but concurrent electrical impulses, which are intended to allow greater penetration to deeper tissues, without impedance or noxious sensation at the skin level, which is an objection some patients have to a TENS unit. The technology behind the RS-4 is called interferential stimulation (IFC). (Ex. 36).

On January 31, 2003, MRU requested Patrick E. Golden, MD, to serve as physician reviewer. (Ex. 33.) Dr. Golden stated that on a "theoretical basis" this treatment might be helpful to Claimant. However, Dr. Golden concluded that there was no proof that the IFC would have greater efficacy than a TENS unit. Dr. Golden also questioned whether there might be psychogenic factors in this case and he believed it was doubtful that the IFC could relieve pain where there was "multifactorial etiologies."¹ Thus, Dr. Golden, MD concluded that the disputed medical treatment² is unproven and inappropriate. (Ex. 36.)

Dr. Misko's chart notes indicate there was a maturing of the fusion. The examination revealed that Claimant could "come up on her heels and toes." Claimant continued to experience muscle spasms.

¹ There are no reports in the file that demonstrate the presence of psychogenic factors and Dr. Golden does not appear to be a psychiatrist or psychologist.

² The parties stipulate that "RS-4 Sequential Stimulator" and "Interferential Stimulation Devices (IF)" are synonymous medical terms. (Exs. 25-3 and 36-5.)

OPINION

Jurisdiction lies with the Director. ORS 656.704(3)(a). The burden of proving a fact or position rests with 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) (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), an insurer is obligated to provide medical services for a compensable condition for so long as the nature of the injury or the process of recovery requires. However, pursuant to ORS 656.327(1)(a), an insurer is not obligated to provide medical services that are excessive, inappropriate, ineffectual or in violation of administrative rules.

Experimental

Liberty contends that the RS-4 Sequential Stimulator is experimental and therefore is inappropriate treatment under ORS 656.327; however, Liberty failed to follow the administrative process prescribed by OAR 436-010-0300, which implements ORS 656.245(3). The ALJ determined that Liberty was not required to follow the provisions of OAR 436-010-0300. The ALJ's analysis is flawed.

ORS 656.245(3) provides:

Notwithstanding any other provision of this chapter, the director, by rule, upon the advice of the committee created by ORS 656.794 and upon the advice of the professional licensing boards of practitioners affected by the rule, may **exclude from compensability** any medical treatment the director finds to be unscientific, unproven, outmoded or experimental. The decision of the director is subject to a contested case review under ORS 183.310 to 183.550.

(Emphasis added.)

In construing a statute, the task is to discern the intent of the legislature. The first level of analysis is to examine the text and context of the statute. If the legislature intent is clear, no further inquiry is necessary. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-11 (1993). Here, the text reads that WCD may “exclude from compensability” any medical treatment it deems experimental. The statutory text reflects the legislature’s intent to authorize the department to designate certain forms of unproven medical treatment noncompensable uniformly in every workers’ compensation claim. The department has fulfilled this task by promulgating OAR 436-009-0015(6)³ which lists certain types of medical treatment that are noncompensable in every workers’ compensation claim.

³ OAR 436-009-0015(6) provides:

WCD also adopted OAR 436-010-0300(1), which provides an administrative process for either the insurer or injured worker to challenge medical treatment on the basis that the treatment is experimental. It provides:

If an injured worker or insurer believes that any medical treatment is unscientific, unproven as to its effectiveness, outmoded, or experimental, either party **may** initiate a request for exclusion of the medical treatment from compensability pursuant to ORS 656.245(3). The request shall include documentation on why the medical treatment should be excluded from compensability for workers' compensation claims. Request for administrative review of an individual worker's treatment under ORS 656.327 does not initiate review under this process.

(Emphasis added.)

The purpose of adopting an administrative rule is to implement, interpret or prescribe law or policy or describe the agency's procedure or practice requirements. In interpreting the meaning of an administrative rule, the same method of analysis is employed as is used in determining the meaning of a statute *viz.*, to ascertain 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, 610-11 (1993) (court's task in determining legislative intent first is to examine the statute including context in which the 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 is 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).

After citing the authority to defer to an agency on rule interpretations, unless the interpretation is implausible, the ALJ chose to do otherwise. The crux of the ALJ's decision was that she found that OAR 436-010-0300(1) did not apply to this case because the administrative rule uses the term "may."

Both ORS 656.245(3) and OAR 436-010-0300(1) use the permissive word "may." Under ORS 656.245(3) the director "may exclude from compensability any medical treatment the director finds to be unscientific, unproven, outmoded or experimental." Within that context, the

Pursuant to ORS 656.245(3), the director has excluded from compensability the following medical treatment. While these services may be provided, medical providers shall not be paid for the services or for treatment of side effects.

- (a) DMSO, except for treatment of compensable interstitial cystitis.
- (b) Intradiscal electrothermal therapy (IDET)
- (c) Surface EMG tests,
- (d) Rolfing,
- (e) Prolotherapy, and
- (f) Thermography.

statute provides the director with the authority to exclude certain treatments but does not require the Director to do so. In other words, the choice is left up to the discretion of the director, although the director's decision is appealable.

OAR 436-010-0300(1) also uses the permissive verb "may." It states that "either party **may** initiate a request for exclusion of the medical treatment from compensability pursuant to ORS 656.245(3)." (Emphasis added). The parties have the right to challenge medical treatment for various reasons. If the parties wish to challenge medical treatment based on whether it constitutes experimental treatment, then the procedures set out in ORS 656.245(3) and OAR 436-010-0300 must be followed. A situation could arise where an insurer believed that treatment was experimental, but chose not to challenge the treatment on that basis. Instead, the challenge might be regarding the appropriateness of that treatment. Later in the life of the claim, if that injured worker receives more of the same type of treatment, at that time, the insurer could raise the issue of whether the treatment is experimental. If on the other hand, the rule said "shall," the insurer would probably be collaterally estopped from future challenges, if the issue was not raised at the first opportunity.

WCD interprets OAR 436-010-0300(1) to mean that if a party wishes to raise the issue of whether treatment is unscientific, unproven as to its effectiveness, outmoded, or experimental, then the procedure to be used is provided through this rule. Contrary to the assertion of the ALJ, WCD's interpretation is not inconsistent with the language of the statute or text and context of the rule. That application of the rule provides the process for implementing ORS 656.245(3). Because Liberty failed to comply with OAR 436-010-0300(1), it cannot challenge this medical treatment on the basis that the treatment is experimental.

Appropriateness

The issue of appropriateness of treatment is controlled by ORS 656.327. Pursuant to subsection (2), the administrative order may only be modified if the order is not supported by substantial evidence. Here the Medical Review Unit (MRU) relied upon the opinion of the treating physician, instead of the opinions of Dr. Rischitelli and Golden. Dr. Misco's intent in prescribing the RS-4 unit was to allow the patient to heal quickly and without complications. Dr. Rischitelli opined that there was no proven benefit from the RS-4. (Exs. 25 & 31). Dr. Golden opined that the RS-4 was no more effective than a TENS unit. (Ex. 36). While two doctors found that the treatment was inappropriate, and one found it appropriate, all of the opinions were slightly different. Ordinarily deference is given to the opinion of the attending physician unless there are persuasive reasons not to do so. *Weiland v. SAIF*, 64 Or App 810, 814 (1983). Deference is accorded because the attending physicians generally have had a better opportunity to observe and evaluate a claimant's condition over an extended period of time. *Id.*

Having reviewed the record in its entirety, I conclude that MRU's reliance on the attending physician, instead of Drs. Rischitelli and Golden is reasonable. Therefore, MRU's determination that Liberty is liable for the cost of the RS-4 stimulator from September 3, 2002 through March 3, 2003 is supported by substantial evidence. Accordingly, I affirm.

ATTORNEY FEES

Claimant has “finally prevailed,” and therefore, is entitled to a reasonable attorney fee. ORS 656.385(1). Factors that may be considered include the time spent, complexity of the legal issue, value of the interest involved, nature of the proceedings, and risk that an attorney’s efforts may go uncompensated. Claimant’s attorney filed a statement showing that he spent 6.6 hours. The legal issue was of medium complexity. The cost of the RS-4 stimulator was \$1,215. The proceeding included a hearing and the exceptions process. If claimant had not prevailed his attorney would not have been compensated. Based on these factors, claimant’s attorney is hereby awarded an attorney fee in the amount of \$1,500.

ORDER

IT IS HEREBY ORDERED that:

1. The November 7, 2003 Proposed and Final Order is reversed.
2. MRU’s order finding the RS-4 treatment appropriate, and Liberty liable for the cost of the treatment is affirmed.
3. Claimant’s attorney is awarded an attorney fee of \$1,500.