

In the Matter of the ORS 656.245 Medical Services Dispute of

**Angel B. Mora, Claimant**

Contested Case No: H04-085

**PROPOSED & FINAL ORDER**

August 27, 2004

ANGEL B. MORA, Petitioner

SAIF CORPORATION, Respondent

Before Catherine P. Coburn, Administrative Law Judge, Office of Administrative Hearings

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**HISTORY OF THE CASE**

Claimant appeals the Administrative Order issued on April 15, 2004, by the Medical Review Unit (MRU) of the Workers' Compensation Division (WCD), Department of Consumer and Business Services (department or Director). On July 19, 2004, WCD referred the matter to the Office of Administrative Hearings (OAH). On August 19, 2004, Administrative Law Judge Catherine P. Coburn conducted a contested case hearing. Attorney Gail M. Gage represented petitioner Angel B. Mora (claimant). Attorney David L. Runner represented respondent SAIF Corporation (insurer). No witnesses testified and the record closed on the date of hearing.

**ISSUE**

Whether MRU incorrectly determined that intradiscal electrothermal therapy (IDET) is not a compensable medical service pursuant to OAR 436-009-00156(6)(b).

**EVIDENTIARY RULINGS**

WCD Exhibits 1 through 28 were admitted into the record without objection.

**FINDINGS OF FACT**

(1) On November 30, 2002, claimant suffered a back injury while working as a janitor. (Ex. 1.) On December 19, 2002, insurer accepted a lumbar strain and enrolled claimant in Oregon Health Systems managed care organization (MCO). (Exs. 5 and 6.)

(2) On December 15, 2003, Frederick W. Tiley, MD requested pre-authorization for an IDET procedure. (Ex. 12.) On December 23, 2003, the MCO declined to review the request, citing OAR 436-009-0015. (Ex. 13.)

**CONCLUSION OF LAW**

MRU correctly determined that intradiscal electrothermal therapy (IDET) is not a compensable medical service pursuant to OAR 436-009-00156(6)(b).

**OPINION**

Jurisdiction over this medical service dispute lies with the Director. ORS 656.245(6); OAR 436-010-0008(1). Since claimant was enrolled in an MCO, 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 rests with the proponent. ORS 184.450(2). As petitioner, claimant bears the burden of proving by a preponderance of the evidence that the administrative order is incorrect. *See Cook v. Employment Div.*, 47 Or App 437 (1980) (In the absence of contrary legislation, the standard of proof in an administrative hearing is preponderance of evidence). Proof by a preponderance of evidence means that the factfinder is persuaded that the facts asserted are more likely true than false. *Riley Hill General Contractors v. Tandy Corp.*, 303 Or 390 (1989).

MRU determined that the IDET procedure proposed by Dr. Tiley is not compensable under OAR 436-009-0015(6)(b). Claimant does not challenge the validity or applicability of the rule, but objects to the noncompensability of IDET procedures. Insurer contends that it is not liable for the IDET procedure under the rule. I agree.

Pursuant to ORS 656.245(1), an insurer is required to provide medical services that are materially related to the compensable injury for such period as the nature of the injury or process of recovery requires. However, by enacting ORS 656.245(3), the legislature authorized the Director to exclude unscientific, unproven, outmoded or experimental medical procedures from compensability. Exercising this authority, the Director promulgated OAR 436-009-0015 which provides in pertinent part:

(6) 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.

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(b) Intradiscal electrothermal therapy (IDET),

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Based on the plain meaning of the rule, I find that MRU correctly determined that the IDET procedure requested by Dr. Tiley is not compensable. Accordingly, I affirm.

**ATTORNEY FEES**

Claimant has not prevailed in a contested case hearing and is entitled to no attorney fee. ORS 656.385(1).

**ORDER**

IT IS HEREBY ORDERED that:

**The Directors Review and Order dated April 15, 2004 is affirmed.**