

In the ORS 656.260 Managed Care Dispute of

**ADRIAN GUZMAN, Claimant**

Contested Case No: H04-170

**PROPOSED AND FINAL ORDER**

June 24, 2005

ADRIAN GUZMAN, Petitioner

OREGON CONTRACTORS WC TRUST, c/o EMPIRE PACIFIC RISK  
MANAGEMENT, Respondent

Before Daina Upite, Administrative Law Judge, Administrative Hearings

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**HISTORY OF THE CASE**

Claimant appeals the Administrative Order issued on September 23, 2004 by the Medical Review Unit (MRU) of the Workers' Compensation Division (WCD), Department of Consumer and Business Services (department or director). On March 22, 2005, Administrative Law Judge Daina Upite conducted a hearing in Salem, Oregon. Petitioner Adrian Guzman (Claimant) was present and represented by his attorney, Lourdes Sanchez. Attorney Ray Myers represented Oregon Contractors WC Trust, Respondent. Attorney Allen Lyons represented the Providence Managed Care Organization (MCO). No witnesses were called to testify. Christopher Dimmick, a qualified Spanish interpreter, provided interpretation.

The record remained open after the hearing to receive rebuttal evidence from Mr. Myers and/or Mr. Lyons. Respondent submitted the affidavit of Catherine Henry, which is marked as Exhibit 32. Ms. Lourdes submitted a letter objecting to the exhibit, and Mr. Myers submitted a letter in response. Mr. Myers' letter was received April 6, 2005, whereupon the record closed.

**ISSUE**

Whether the insurer is liable to pay for physical therapy provided to claimant by Bodywise Physical Therapy during the period January 28, 2003 through June 12, 2003.<sup>1</sup>

**EVIDENTIARY RULINGS**

Workers' Compensation Division (WCD) Exhibits 1 through 30 were received without objection.

Claimant offered Supplemental Exhibits 2A, 2B, 2C, 3A, 4A, 4B, 4C, 6B, 9A, 10A, 12A, All the supplemental exhibits are excluded. At the hearing, the supplemental exhibits were admitted without objection. However, upon further review, I have determined that they must be excluded, pursuant to OAR 436-001-0225(1), which provides that medical service disputes under ORS 656.245 and 656.260 are reviewed for substantial evidence and error of law, and "[n]ew medical evidence may not be considered at the contested case hearing."

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<sup>1</sup> The Administrative Order addressed treatment dates of February 10, 13, and 28; March 20 and 25; April 1 and 17; May 20; and June 12, all in 2003.

Exhibit 31, offered by Claimant, was received over Mr. Myers' and Mr. Lyons' objections. Exhibit 32, offered by Respondent in rebuttal to Exhibit 31, was received over Ms. Lourdes' objection. These documents are not new medical evidence.

### **FINDINGS OF FACT**

(1) Claimant sustained a back injury at work on December 18, 2002, which the insurer accepted as a disabling claim for an acute lumbar muscle strain. (Exs.1, 9, 10, 11.) Claimant began treating with Philip Dean, M.D. on December 20, 2002, and designated him as the attending physician on the same date. (Ex. 2.)

(2) On January 23, 2003, Glenn Keiper, M.D., of Oregon Neurosurgery Specialists, prescribed physical therapy for claimant. (Ex. 3.) On January 28, 2003, claimant was evaluated at Bodywise Physical Therapy. Claimant continued treatment at Bodywise through June 12, 2003. (Ex. 4.) On February 12, 2003, Dr. Dean referred claimant to Dr. Keiper. (Ex. 6.)

(3) The physical therapist provided a progress report to Dr. Dean on March 10, 2003 and recommended that claimant continue with therapy once per week for six weeks, and thereafter that claimant continue rehabilitation at the club for three months. The report indicated that treatment consisted of manual therapy, postural instruction, and a home exercise program (HEP). The progress report described claimant's progress to date, as well the need for further therapy, due to claimant's deconditioning, before he is physically ready to return to full time work. Both Dr. Dean and the therapist signed the report, and the box marked "implement recommendations" was checked. (Ex. 4 at 3.)

(4) By letter dated February 14, 2003, Empire Pacific Risk Management notified claimant, Dr. Dean, and Providence MCO that claimant was now enrolled in the Providence MCO. The letter was not sent to Bodywise Physical Therapy. The letter acknowledged that claimant was currently treating with Dr. Dean, who is an authorized member of the MCO panel, so claimant did not have to change physicians. A Providence MCO Provider Directory was enclosed with the letter. Among other things, the letter stated, "Your attending physician must coordinate all referrals to all specialists and allied health care providers." (Ex. 7.)

(5) Empire Pacific received claim forms from Bodywise Physical Therapy for treatment provided to claimant. (Exs. 5, 8.) The insurer received a claim form for treatment dates January 28 and 30, 2003 on February 10, 2003. On February 14, 2003, the insurer received a claim form for treatment dates February 3 and 5, 2003. (Ex. 5.) Empire Pacific paid for treatment on February 3 and 5, 2003, by check issued March 3, 2003. By check issued March 10, 2003, Empire Pacific paid for treatment rendered on January 28 and 30, 2003. (Ex. 12 at 1-2.) On March 10, 2003, Empire Pacific received a claim form from Bodywise Physical Therapy for treatment provided on February 28, 2003. A handwritten note on the claim form states, "Not allowed as an attending physician." (Ex. 8 at 3.) Respondent continued to pay for physical therapy as follows: by check issued March 26, 2003, Empire Pacific paid for treatment on February 18 and 21, 2003; by check issued March 28, 2003, Empire Pacific paid for treatment on March 4 and 6, 2003; and by check issued April 18, 2003, Empire Pacific paid for treatment on March 20, 2003. (Ex. 12 at 3-5.)

(6) Dr. Keiper is not a Providence MCO physician. Bodywise Physical Therapy also is not a member of Providence MCO. (Ex. 25 at 1.)

### CONCLUSIONS OF LAW

The Administrative Order correctly determined that the insurer is not required to pay for physical therapy services provided by Bodywise Physical Therapy on February 10, 13, and 28, 2003.

The insurer is required to pay for physical therapy services provided on March 20 and 25; April 1 and 17; May 20; and June 12, all in 2003.

### OPINION

This dispute involves both medical services under ORS 656.245 and managed care under ORS 656.260. Therefore, jurisdiction lies with the director. ORS 656.260(6). I review for substantial evidence and error of law. ORS 656.246(6); ORS 656.260(16); OAR 436-001-0225(1). The burden of proving a fact or position rests with the proponent. ORS 183.450(2); *Salem Decorating v. National Council on Comp. Ins.*, 116 Or App 170 (1992), *rev den* 315 Or 643 (1993). As the proponent of his position, claimant bears the burden of proving by a preponderance of evidence that the administrative order is incorrect. *Harris v. SAIF*, 292 Or 683 (1982) (General rule regarding allocation of burden of proof is that burden is on the proponent of the fact or position.); *Cook v. Employment Div.*, 47 Or 437 (1982) (In the absence of legislation adopting a different standard of proof, the standard 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).

MRU determined that the insurer was not liable to pay for physical therapy provided on February 10, 13, and 28; March 20 and 25; April 1 and 17; May 20; and June 12, all in 2003. Because it found that claimant was enrolled in Providence MCO effective no later than February 17, 2003, MRU analyzed liability for treatment on February 10 and 13 separately from the remaining treatment dates. MRU concluded that the insurer is not liable to pay for physical therapy services on February 10 and 13, 2003 because there was no treatment plan prepared prior to commencement of treatment and signed by the attending physician or specialist physician within 30 days of beginning treatment, as required by OAR 436-010-0230(4)(a). With respect to the remaining dates of treatment, MRU found that the services are not reimbursable because they were not provided by MCO participating providers and were not approved by Providence MCO.

Claimant contends that the insurer should be required to pay for all the physical therapy services provided by Bodywise because treatment was ordered by a specialist to whom claimant was referred by his attending physician, and because Dr. Dean, the attending physician, effectively approved the physical therapy ordered by Dr. Keiper, the specialist. The insurer contends that MRU's order should be affirmed.

Pursuant to ORS 656.245(1)(a), an insurer is obligated to provide medical services for compensable conditions for such period as the nature of the injury or the process of recovery

requires. Compensable medical services include, where necessary, physical restorative services. *Id.* (1)(b).

The director has adopted administrative rules to provide uniform guidelines for administering payment for medical services to injured workers. OAR 436-010-0002. With respect to the provision of ancillary services, such as physical therapy, OAR 436-010-0230(4) provides in material part:

(a) Except as otherwise provided by an MCO, ancillary services including but not limited to physical therapy or occupational therapy, by a medical service provider other than the attending physician, authorized nurse practitioner, or specialist physician will not be reimbursed unless prescribed by the attending physician, authorized nurse practitioner, or specialist physician and **carried out under a treatment plan prepared prior to the commencement of treatment** and sent by the ancillary medical service provider to the attending physician, authorized nurse practitioner, or specialist physician, and the insurer within seven 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 under ORS 656.245(2)(b)(A).

(b) **The attending physician, authorized nurse practitioner, or specialist physician must sign a copy of the treatment plan within 30 days of the commencement of treatment and send it to the insurer.** Failure of the physician or nurse practitioner to sign or mail the treatment plan may subject the attending physician or authorized nurse practitioner to sanctions under OAR 436-010-0340, but shall not affect payment to the ancillary medical service provider. (Emphasis added.)

Dr. Dean was claimant's attending physician, but Dr. Keiper, a neurosurgery specialist, ordered physical therapy to be provided by Bodywise Physical Therapy. A physical therapist evaluated claimant on January 28, 2003, but there is no evidence of a treatment plan that includes the elements set forth in OAR 436-010-0230(4)(a), even though physical therapy continued after January 28, 2003. There is no evidence that Dr. Keiper signed a treatment plan. A "progress report" dated March 10, 2003 contains elements of a treatment plan, and it is signed by Dr. Dean, but this document was not provided to the insurer within 30 days after the commencement of treatment on January 28, 2003.

Therefore, MRU correctly determined that the insurer is not liable to pay for the physical therapy provided on February 10 and 13, 2003 because the requirements for reimbursement were not met.

By letter dated February 14, 2003, the insurer notified claimant that he was enrolled in Providence MCO. ORS 656.245(4) provides in material part:

Notwithstanding subsection (2)(a) of this section, when a self-insured employer or the insurer of an employer contracts with a managed care organization certified pursuant to ORS 656.260 for medical services required by this chapter to be provided to injured workers:

(a) Those **workers who are subject to the contract shall receive medical services in the manner prescribed in the contract.** Workers subject to the contract include those who are receiving medical treatment for an accepted compensable injury or occupational disease, regardless of the date of injury or medically stationary status, on or after the effective date of the contract. \*\*\* **A worker becomes subject to the contract upon the worker's receipt of actual notice of the worker's enrollment in the managed care organization, or upon the third day after the notice was sent by regular mail by the insurer or self-insured employer, whichever event first occurs.** \*\*\* Each such contract must comply with the certification standards provided in ORS 656.260. However, a worker may receive immediate emergency medical treatment that is compensable from a medical service provider who is not a member of the managed care organization. **Insurers or self-insured employers who contract with a managed care organization for medical services shall give notice to the workers of eligible medical service providers and such other information regarding the contract and manner of receiving medical services as the director may prescribe.** (Emphasis added.)

OAR 436-010-0275, titled "**Insurer's Duties Under MCO Contracts,**" provides in material part:

(4) When the insurer is enrolling a worker in an MCO, the insurer must simultaneously provide written notice to the worker, the worker's representative, **all medical service providers**, and the MCO of enrollment. (Emphasis added.)

The letter advising claimant of his enrollment in the MCO was also sent to Dr. Dean and Providence MCO. It was not sent to Bodywise Physical Therapy, although claimant was receiving treatment at Bodywise on and before February 14, 2003. By February 14, 2003, the insurer had already received two claim forms from Bodywise for treatment provided on January 28, January 30, February 3, and February 5, 2003. Thus, the insurer knew that Bodywise was providing medical services to claimant, and, therefore, the insurer was required to simultaneously notify Bodywise of claimant's enrollment in the MCO. Because the insurer failed to do so, the enrollment notice was defective, and thus, claimant did not become subject to

the MCO contract. Consequently, claimant was not required to receive treatment as provided in the MCO contract.

Therefore, whether the insurer was required to pay for physical therapy services provided on and after February 28, 2003 must be evaluated under OAR 436-010-0230(4) as if claimant were not enrolled in an MCO. On March 10, 2003, Dr. Dean, the attending physician, signed a Bodywise Progress Report, authorizing continued physical therapy as set forth in the progress note. The progress note contains the elements of a treatment plan and was signed by the attending physician. By signing the progress note, Dr. Dean authorized six more treatments as set forth in the progress note. Therefore, the insurer is required to pay for the treatments rendered after March 10, 2003.

Because the administrative order reflects an error of law with respect to the compensability of physical therapy services on and after February 28, 2003, the administrative order is modified. The insurer is not required to pay for physical therapy services rendered February 10, 13, and 28, 2003, but is required to pay for all physical therapy services rendered after March 10, 2003.

#### ***ATTORNEY FEES***

Claimant has prevailed, partially, in a contested case hearing and is entitled to a reasonable attorney fee. ORS 656.385(1). Considering the factors listed in OAR 436-001-0265, \$650 (\$200 x 5 hours x 2/3) is a reasonable fee for claimant's attorney's services in this matter.

#### **ORDER**

IT IS HEREBY ORDERED that:

(1) The Director's Administrative Order dated September 23, 2004, is affirmed in part and reversed in part. The insurer is not required to pay for physical therapy services rendered on February 10, 13, and 28, 2003. The insurer is required to pay for all physical therapy services provided after March 10, 2003.

(2) Insurer shall pay claimant's attorney a fee of \$650.