

In the Matter of
GLEN JOHNSTON, Claimant
Contested Case No: H04-116
PROPOSED AND FINAL ORDER
APRIL 22, 2005

CENTRAL OREGON MRI and CENTRAL OREGON RADIOLOGY ASSOCIATION,
Petitioner
GLEN JOHNSTON, Respondent
Before Catherine P. Coburn, Administrative Law Judge, Administrative Hearings

HISTORY OF THE CASE

Two medical providers appeal the Administrative Order issued on June 9, 2004 by the Medical Review Unit (MRU) of the Workers' Compensation Division (WCD), Department of Consumer and Business Services (department or director). On September 1, 2004, the department referred the matter to the Office of Administrative Hearings (OAH). On October 21, 2004, Administrative Law Judge (ALJ) Catherine P. Coburn conducted a hearing and claimant failed to appear. Post-hearing, it came to the ALJ's attention that the Notice of Hearing failed to adequately apprise claimant of the issues. To preserve claimant's constitutional due process rights, the hearing was reset for January 6, 2005. That hearing was postponed because the medical provider had not received the exhibits. The hearing was reset and took place on March 31, 2005 before ALJ Coburn. Petitioners, Central Oregon MRI and Central Oregon Radiology Association requested the hearing as interested parties pursuant to OAR 137-003-0535. Corporate President Traci Clautice-Engle, MD represented the medical providers pursuant to OAR 137-003-0555 and billing supervisor Connie Anderson testified on their behalf. Claimant appeared without benefit of counsel and testified on his own behalf. Attorney Kenneth P. Russell represented respondent SAIF Corporation (insurer) which called no witnesses. Oregon Health Systems Managed Care Organization (MCO) waived appearance and the record closed on the date of hearing.

ISSUES

- (1) Whether insurer is liable for a left upper extremity MRI provided to claimant on April 10, 2002.
- (2) Whether claimant is liable for a left upper extremity MRI provided to claimant on April 10, 2002.

EVIDENTIARY RULINGS

WCD Exhibits 1 through 77 were admitted into the record without objection.

FINDINGS OF FACT

(1) On May 11, 1999, claimant suffered a compensable injury while working as a logger. (Ex. 1). In the same month, insurer accepted left shoulder dislocation and properly enrolled claimant in the MCO. Insurer authorized claimant to continue treating with his family physician, Robert Holland, MD, who was not an MCO panel member. (Ex. 5.) In October 1999, the claim was closed. (Ex. 6.)

(2) In April 2002, claimant sought medical treatment for the left shoulder. Because Dr. Holland was unavailable, claimant saw his associate, Dr. Nichols, who referred him to Michael R. Coe, MD, who is not an MCO panel provider. (Exs. 8, 16 and 17; testimony of claimant.) Dr. Coe recommended an MRI. (Ex. 8-1.)

(3) On April 10, 2002, Central Oregon MRI and Central Oregon Radiology Association provided a left shoulder MRI to claimant. (Exs. 9, 27 and 40.) The medical providers did not inquire of claimant and claimant did not inform the medical providers that the left shoulder had been previously involved in a workers' compensation claim or that he had been enrolled in an MCO. (Testimony of Anderson.)

(4) On April 23, 2002, Dr. Coe performed arthroscopic repair of a left rotator cuff tear. (Ex. 11.) In August 2002, insurer accepted a left rotator cuff tear of the supraspinatus and left anterior labral tear as a result of the original injury. (Ex. 23.)

CONCLUSIONS OF LAW

(1) Insurer is not liable for a left upper extremity MRI provided to claimant on April 10, 2002.

(2) Claimant is liable for a left upper extremity MRI provided to claimant on April 10, 2002.

OPINION

The director exercises sole jurisdiction over MCO disputes. ORS 656.260(6). I review for substantial evidence and error of law. ORS 656.260(16). The burden of proving a fact or position rests with the proponent. ORS 183.450(2); *Harris v. SAIF*, 292 Or 683 (1982). As petitioner, the medical provider 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 contrary legislation, the standard of proof in administrative hearings is preponderance of evidence). 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). I conclude that the medical providers have met their burden.

MRU determined that the disputed medical services, obtained outside the MCO panel, were not reimbursable. Having determined that insurer is not liable for the disputed medical services, MRU construed OAR 436-009-0015(1)(d) and determined that claimant was not liable either. MRU reasoned that claimant was not liable because he did not know that Dr. Coe was not

an MCO panel provider. As petitioners, the medical providers assert that they are entitled to be paid for services rendered in good faith at claimant's request. As respondents, claimant and insurer each contend that the other is liable.

Pursuant to ORS 656.245(1), an insurer is obligated to provide medical services for conditions that are materially related to a compensable injury for so long as the nature of the injury or the process of recovery requires. This obligation continues over the injured workers' lifetime. ORS 656.245(1)(b). Furthermore, ORS 656.245 provides in pertinent part:

(4) Notwithstanding subsection (2)(a)¹ 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.

Pursuant to ORS 656.260, an insurer may provide medical services to injured workers through an MCO. Additionally, OAR 436-009-0015(1)(d) provides:

(1) An injured worker shall not be liable to pay for any medical service related to an accepted compensable injury or illness or any amount reduced by the insurer pursuant to OAR chapter 436. A medical provider shall not attempt to collect payment for any medical service from an injured worker, except as follows:

¹ (2)(a) The worker may choose an attending doctor or physician within the State of Oregon. The worker may choose the initial attending physician and may subsequently change attending physician two times without approval from the director. If the worker thereafter selects another attending physician, the insurer or self-insured employer may require the director's approval of the selection and, if requested, the director shall determine with the advice of one or more physicians, whether the selection by the worker shall be approved. The decision of the director is subject to a contested case review under ORS chapter 183. The worker also may choose an attending doctor or physician in another country or in any state or territory or possession of the United States with the prior approval of the insurer or self-insured employer.

(d) When the injured worker seeks treatment outside the provisions of a governing MCO contract after insurer notification in accordance with OAR 436-010-0275;²

In interpreting the meaning of a rule, I apply the same method of analysis employed in determining the meaning of a statute, that is, 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); *Larry Hemenway*, 5 WCSR 33 (2000). *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).

Here, the record establishes that in 1999, insurer accepted a compensable left shoulder condition and claimant was properly enrolled in the MCO. Three years later, in 2002,

² OAR 436-010-0275(4) provides:

When the insurer is enrolling a worker in an MCO, the insurer shall simultaneously provide written notice to the worker, all medical service providers, and the MCO of enrollment. The notice shall:

- (a) Notify the worker of the eligible attending physicians within the relevant MCO geographic service area and describe how the worker may obtain the names and addresses of the complete panel of MCO medical providers;
- (b) Advise the worker of the manner in which the worker may receive medical services for compensable injuries within the MCO;
- (c) Describe how the worker can receive compensable medical treatment from a primary care physician or authorized nurse practitioner qualified to provide services as described in OAR 436-015-0070, who is not a member of the MCO, including how to request qualification of their primary care physician or authorized nurse practitioner;
- (d) Advise the worker of the right to choose the MCO when more than one MCO contract covers the worker's employer except when the employer provides a coordinated health care program as defined in OAR 436-010-0005(5);
- (e) Provide the worker with the title, address and telephone number of the contact person at the MCO responsible for ensuring the timely resolution of complaints or disputes;
- (f) Advise the worker of the time lines for appealing disputes beginning with the MCO's internal dispute resolution process through administrative review before the director, that disputes to the MCO must be in writing and filed within 30 days of the disputed action and with whom the dispute is to be filed, and that failure to request review to the MCO precludes further appeal; and
- (g) Notify the MCO of any request by the worker for qualification of a primary care physician or authorized nurse practitioner.

claimant sought medical treatment outside the MCO panel for the left shoulder. Pursuant to ORS 656.245(4)(a) and ORS 656.260, the insurer is not liable for medical services that claimant obtained outside the MCO panel.

When claimant sought medical treatment, he failed to inform the radiology and MRI clinics that the left shoulder was the subject of a previously accepted workers compensation claim and MCO enrollment. The director promulgated OAR 436-009-0015(1)(d) in order to protect medical providers from the risk of nonpayment when an injured worker obtains medical services outside the MCO panel. Having adopted OAR 436-009-0015(1)(d) which holds an injured worker financially liable for medical services obtained outside the MCO panel, the department is not free to ignore the rule. *Aetna Casualty & Surety Company v. Sue Blanton*, 139 Or App 283 (1996) (Agency lacks authority to ignore its own rules). The rule assigns financial responsibility for such medical services to the injured worker because he is the only party in possession of the critical facts at the time he seeks medical services, that is, the body part for which he seeks treatment was accepted in a workers' compensation claim and he was enrolled in an MCO. Furthermore, the rule contains no requirement that the injured worker be aware that the medical provider from whom he seeks services is or is not an MCO panel member. On the contrary, the rule places responsibility on the injured worker to ascertain that information. Finally, inasmuch as MRU's decision contravenes the text of OAR 436-009-0015(1)(d), its interpretation is not plausible and constitutes an error of law. Accordingly, I do not defer and reverse the administrative order.

ORDER

IT IS HEREBY ORDERED that:

The Administrative Order dated June 9, 2004 is reversed.