
In the ORS 656.245 Medical Services Dispute of

ROBERT D. JUDKINS, Claimant

Contested Case No: H05-146

PROPOSED AND FINAL ORDER

December 21, 2005

ROBERT D. JUDKINS, Petitioner

LIBERTY NORTHWEST INSURANCE CORP., Respondent

Before Lawrence S. Smith, Administrative Law Judge, Administrative Hearings

HISTORY OF THE CASE

Claimant appeals the Administrative Order issued on August 26, 2005 by the Medical Review Unit (MRU) of the Workers' Compensation Division (WCD), Department of Consumer and Business Services (department or director). On October 10, 2005, WCD referred the matter to the Office of Administrative Hearings (OAH).

On November 21, 2005, Administrative Law Judge Lawrence S. Smith of OAH conducted a hearing by telephone. Petitioner Robert D. Judkins (Claimant) appeared. He was represented by his attorney, Jodie Phillips Polich, and testified. Attorney Leah Sideras represented respondent Liberty Northwest Insurance Corporation (Insurer). The record closed on the date of hearing.

ISSUE

Whether MRU correctly determined that palliative care recommended by John Shonerd, DO, on April 2, 2005, was not reimbursable pursuant to ORS 656.245(1)(c)(L).

EVIDENTIARY RULINGS

WCD Exhibits 1 through 29 were admitted into the record without objection.

FINDINGS OF FACT

The findings of fact contained in the administrative order dated August 26, 2005, are adopted and incorporated with the following supplementation:

(1) Claimant was off work from October 8, 2004, until returning to local mill job on March 17, 2005. He quit this job the next day because his work caused back pain. (Test. of Claimant.)

(2) On April 2, 2005, Dr. Shonerd, Claimant's treating physician for many years, requested palliative care for Claimant. Claimant was not currently employed at the time, but was looking for suitable work. (Test. of Claimant.)

CONCLUSION OF LAW

MRU correctly determined that palliative care recommended by John Shoner, DO, on April 2, 2005, was not reimbursable.

OPINION

WCD has jurisdiction over this medical service dispute. ORS 656.245 and ORS 656.260. The standard of review is for substantial evidence and error of law. ORS 656.245(6), ORS 656.260(16) and OAR 436-001-0225(1). The burden of proving a fact or position rests with the proponent. ORS 183.450(2).

Pursuant to ORS 656.245(1), 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. This obligation continues over the injured worker's lifetime. ORS 656.245(1)(b).

The parties agree that the issue is whether Dr. Shonard's palliative care recommendation on April 2, 2005, was made to enable Claimant to continue current employment. Claimant admits that he was not working at the time of the recommendation, having quit a job two weeks earlier because of pain after working only a couple days.

ORS 656.245(1)(c) provides:

Notwithstanding any other provision of this chapter, medical services after the worker's condition is medically stationary are not compensable except for the following:

* * * *

(J) With the approval of the insurer or self-insured employer, palliative care that the worker's attending physician referred to in ORS 656.005 (12)(b)(A) prescribes and that is necessary to enable the worker to continue current employment or a vocational training program. * * *

Additionally, OAR 436-010-0290 provides:

- (1) When the worker's attending physician believes that palliative care is appropriate to enable the worker to continue current employment or a current vocational training program, the attending physician must first submit a written request for approval to the insurer. The request shall:
- (a) Describe any objective findings;
 - (b) Identify by ICD-9-CM diagnosis, the medical condition for which palliative care is requested;
 - (c) Detail a treatment plan which includes the name of the provider who will render the care, specific treatment modalities, and frequency and duration of the care, not to exceed 180 days;
 - (d) Explain how the requested care is related to the compensable condition; and

(e) Describe how the requested care will enable the worker to continue current employment, or a current vocational training program, and the possible adverse effect if the care is not approved.

Claimant relies on *Dawkins v. Pacific Motor Trucking*, 308 Or 254, 258 (1989) to support his allegation that he needed palliative care for current employment. *Dawkins* deals with whether a claimant was deemed to be in the work force in order to be eligible for temporary total disability benefits. For those benefits, a claimant can be considered to be in the work force even if unemployed if the claimant is willing to work and makes reasonable efforts to find work or is willing to work, but does not make reasonable efforts to find work because to do so would be futile due to a work-related injury. ORS 656.245(1)(c) and OAR 436-010-0290(1) refer not to being in the work force, but to “current employment” without reference to willingness or job search. Therefore, *Dawkins* is not applicable, even by analogy.

PGE v. Bureau of Labor and Industries, 317 Or 606, 610-611 (1993) states that a 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. *Abu-Adas v. Employment Dept.*, 325 Or 480, 485 (1997) applied that analysis to administrative rules. 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, MRU interpreted ORS 656.245(1)(c) and OAR 436-010-0290(1) and concluded that Dr. Shonard’s palliative care request failed to meet the requirements that it was appropriate “to enable the worker to continue current employment requirements.” MRU’s interpretation of “current employment” is reasonable, based on the plain meaning of “current employment”. Therefore, Claimant has failed to establish that the administrative order reflects an error of law or lacks substantial evidence.

ATTORNEY FEE

In medical services cases, where a claimant finally prevails in a contested case order by the director, the director shall require the insurer or self-insured employer to pay a reasonable attorney fee to the claimant’s attorney. ORS 656.385(1). Claimant did not prevail, so he is not entitled to an attorney fee.

ORDER

The Administrative Order dated August 26, 2005, is affirmed. Claimant is not entitled to an attorney fee.