

In the ORS 656.245 Medical Services Dispute of

AARON MCCABE, Claimant

Contested Case No: H04-203

PROPOSED AND FINAL ORDER

APRIL 11, 2005

AARON MCCABE, Petitioner

LIBERTY NORTHWEST INSURANCE CORP, Respondent

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

HISTORY OF THE CASE

Claimant appeals the Administrative Order issued on December 16, 2004 by the Medical Review Unit (MRU) of the Workers' Compensation Division (WCD), Department of Consumer and Business Services (department or director). On January 13, 2005, the department referred the matter to the Office of Administrative Hearings (OAH). On March 11, 2005, Administrative Law Judge Catherine P. Coburn conducted a hearing in Beaverton, Oregon. Attorney Gloria Yates represented petitioner Aaron McCabe (claimant). Attorney Raymond T. Smitke represented respondent Liberty Northwest Insurance Corporation and its insured, Columbia Helicopters, Inc. (insurer). Claimant testified on his own behalf and called Donald L. McCabe and Cheryl L. McCabe as witnesses. Insurer called no witnesses and the record closed on the date of hearing.

ISSUE

Whether child care services are compensable under ORS 656.245.

EVIDENTIARY RULINGS

WCD Exhibits 1 through 38, as well as claimant's Supplementary Exhibits A through G were admitted without objection.

FINDINGS OF FACT

(1) On August 23, 2002, claimant suffered a compensable injury while working as a logger. (Ex. 1.) Insurer accepted T4-5 compression fracture, T4 paralysis, C7-T1 and T3 spinous process fracture, pneumonia and bilateral optic posterior ischemic neuropathy. (Exs. 2 and 5.) Claimant is paralyzed from the chest down and is blind. (Ex. 9; testimony of claimant.)

(2) On June 18, 2004, claimant was awarded custody of his three daughters, aged three, six and nine. Claimant's former wife was allowed child visitation subject to drug testing. (Ex. 14.)

(3) Since June, 2004, claimant's three daughters have lived with his father and stepmother. Claimant's father works full time outside the home. In 2004, claimant's stepmother

was diagnosed and treated for breast cancer. (Testimony of Donald McCabe and Cheryl McCabe.) Claimant's father and stepmother have incurred child care expenses for the three girls. (Ex. 10.) Claimant lives alone with nursing assistance and his daughters visit him two or three times per week. (Testimony of claimant, Donald McCabe and Cheryl McCabe.)

CONCLUSION OF LAW

Child care services are not compensable under ORS 656.245.

OPINION

Jurisdiction lies with the director. ORS 656.245(6). I review for substantial evidence or error of law. ORS 656.245(6). The burden of proving a fact or position falls upon the proponent. ORS 183.450(2). *Harris v. SAIF*, 292 Or 683 (1982). As petitioner, claimant 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 legislation adopting a different standard, 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).

Citing *Lorenzen v. SAIF*, 79 Or App 751, *rev den*, 301 Or 667 (1986), MRU determined that child care services are not compensable. Claimant, who is a disabled custodial parent, seeks compensability of long term child care for three daughters, aged three, six and nine. Claimant first contends that this case is distinguishable from *Lorenzen* because his medical condition and need for child care services are more extreme than the circumstances presented in *Lorenzen*. Claimant next contends that child care services constitute "physical restorative services" as defined by OAR 436-010-0005(35). In contrast, insurer contends that the administrative order is correct and should be affirmed.

Pursuant to ORS 656.245(1)(a), an insurer is obligated to provide medical services that are materially related to a compensable condition for so long as the nature of the injury or the process of recovery requires. This obligation continues over the worker's lifetime. ORS 656.245(1)(b).

ORS 656.245(1) provides:

- (a) For every compensable injury, the insurer or the self-insured employer shall cause to be provided medical services for conditions caused in material part by the injury for such period as the nature of the injury or the process of the recovery requires, subject to the limitations in ORS 656.225, including such medical services as may be required after a determination of permanent disability. In addition, for consequential and combined conditions described in ORS 656.005 (7), the insurer or the self-insured

employer shall cause to be provided only those medical services directed to medical conditions caused in major part by the injury.

(b) Compensable medical services shall include medical, surgical, hospital, nursing, ambulances and **other related services**, and drugs, medicine, crutches and prosthetic appliances, braces and supports and where necessary, **physical restorative services**. A pharmacist or dispensing physician shall dispense generic drugs to the worker in accordance with ORS 689.515. The duty to provide such medical services continues for the life of the worker.

(Emphasis added.)

Other Related Services

In *Lorenzen*, the court held that child care services, incurred while an injured worker was hospitalized for treatment for her compensable condition, were not reimbursable as “other related services” within the meaning of ORS 656.245(1)(b). The court reasoned,

“We are not persuaded that child care services are “other related services” within the meaning of the statute. The rule of statutory construction known as *ejusdem generis* leads us to the conclusion that the legislature did not intend to include those services, because they are not of the same kind or class as those services specifically enumerated in the statute. See *Skinner v. Keeley*, 47 Or App 751, 757 (1980).” *Lorenzen v. SAIF*, 79 Or App 751 (1986).

In *Springer v. Liberty Northwest Insurance*, 151 Or App 200 (1997), the court revisited the question of child care services as a workers’ compensation benefit. In *Springer*, the injured worker contended that the case was distinguishable from *Lorenzen* because child care services were necessary to allow the healing process following a compensable surgery. However, the court reasoned that it did not interpret ORS 656.245 narrowly in light of the facts presented in *Lorenzen*. Rather, the court held that child care services are generically not compensable under ORS 656.245.

Here, claimant contends that *Lorenzen* is distinguishable because his circumstances are more egregious. However, the law does not allow an exception based on severity of need. Consequently, claimant’s child care services are not compensable under ORS 656.245(1)(b) as construed in *Lorenzen*.

Physical Restorative Services

Claimant contends that child care services are compensable as a “physical restorative service” within the meaning of ORS 656.245(1)(b). OAR 436-010-0005(35) provides:

"Physical Restorative Services" means those services prescribed by the attending physician or authorized nurse practitioner to address

permanent loss of physical function due to hemiplegia, a spinal cord injury, or to address residuals of a severe head injury. Services are designed to restore and maintain the injured worker to the highest functional ability consistent with the worker's condition. Physical restorative services are not services to replace medical services usually prescribed during the course of recovery.

In interpreting a statute the court's task, and thus, my charge is to determine the legislative intent. ORS 174.020¹ *PGE v. Bureau of Labor and Industries*, 317 Or 606 (1993). In order to discern the legislative intent, the first level of analysis is to examine both the text and context of the statute. 317 Or at 610-611. The text of the statute is the best evidence of the legislature's intent. If the legislature's intent is unclear, I consider legislative history, and if still unclear, I apply the general maxims of statutory construction. *Id.* Similarly, in interpreting the meaning of a rule, I apply the same method of analysis employed in determining the meaning of a statute, *viz.*, to determine the meaning of the words used, giving effect to the intent of the enacting body, which is the department. *Abu-Adas v. Employment Dept.*, 325 Or 480, 485 (1997).

ORS 656.245(1)(b) includes "physical restorative services" in a list of compensable medical services. The term is defined in OAR 436-010-0005(35). Finding the text and context of the statute and rule unclear, I apply the rule of statutory construction *ejusdem generis*. When the legislature enacted ORS 656.245(1), it listed compensable medical services that are all directed to the injured worker and not to another person such as the injured worker's child. Similarly, OAR 436-010-0005(35) must be interpreted to mean "services" that are directed to the injured worker and not to another person. Therefore, child care services are not compensable under ORS 656.245(1)(b).

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 Administrative Order dated December 16, 2004 is affirmed.

¹ ORS 174.020(1)(a) provides:

In the construction of a statute, a court shall pursue the intention of the legislature if possible.