

In the ORS 656.260 Managed Care Dispute of

BOBBY D. THORNHILL, Claimant

Contested Case No: H05-006

PROPOSED AN FINAL ORDER

APRIL 7, 2005

WESTLEY M. KUNS, D.C., Petitioner

FRED MEYER CORP, Respondent

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

HISTORY OF THE CASE

Medical provider Westley M. Kuns, D.C. 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 25, 2005, the department referred the matter to the Office of Administrative Hearings (OAH). On March 8, 2005, Administrative Law Judge Catherine P. Coburn conducted a hearing in Beaverton, Oregon. Petitioner Westley M. Kuns, D.C. appeared *pro se* pursuant to OAR 137-003-0535(2) and testified on his own behalf. Attorney Bruce L. Byerly represented responding self-insured employer Fred Meyer, Inc and its claims administrator, Sedgwick Claims Management Services (insurer). Claimant, who is represented by attorney Glen J. Lasken, waived appearance. Insurer called no witnesses and the record closed on the date of hearing.

ISSUE

Whether insurer is liable for chiropractic treatment provided to claimant by Dr. Kuns from December 1, 2001, through July 9, 2004.

EVIDENTIARY RULINGS

WCD Exhibits 1 through 64 were admitted into the record without objection.

FINDINGS OF FACT

(1) On April 20, 2001, claimant suffered a compensable injury while handling grocery bags. (Exs. 1 and 14.) Insurer initially accepted a cervical strain and later accepted a trapezius strain. (Exs. 1 and 21.) On July 19, 2001, insurer notified claimant that he was enrolled in Providence Managed Care Organization (MCO). (Ex. 1-2.)

(2) On July 27, 2001, claimant designated Beverly M. De La Bruerre, M.D as his attending physician. (Ex. 56-2.) On August 14, 2001, claimant sought treatment from Dr. Kuns, D.C. (Exs. 2-1 and 5.) On August 22, 2001, Dr. Kuns requested a written referral from Dr. De La Bruerre. (Ex. 4.) On August 30, 2001, Dr. De La Bruerre referred claimant to Dr. Kuns for 18 visits. With the exceptions of ultrasound or EMS, the request does not list chiropractic modalities or objectives. (Ex. 5.) In September and November 2001 and in August 2002, Dr.

Kuns recorded progress reports. The progress notes were not approved by Dr. De La Bruerre. (Ex. 6.)

(3) On September 21, 2001, Dr. Kuns requested pre-certification of extended treatment. (Ex. 7.) On September 25, 2001, Dr. De La Bruerre requested the MCO to authorize 12 additional chiropractic treatments. The request does not specify objectives or modalities. (Ex. 8.)

(4) On November 29, 2001, the MCO denied the request for continued chiropractic treatment. (Ex. 16.)

(5) Dr. Kuns provided treatment to claimant from August 14, 2001 through July 9, 2004. Insurer paid Dr. Kuns for services provided from August 14 through November 30, 2001. The disputed services remaining unpaid are from December 1, 2001 through July 9, 2004. (Exs. 2, 3 and 55.)

CONCLUSION OF LAW

Insurer is not liable for chiropractic treatment provided to claimant by Dr. Kuns from December 1, 2001, through July 9, 2004.

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, Dr. Kuns, 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 Dr. Kuns has failed to meet his burden.

MRU determined that insurer is not liable for the disputed chiropractic treatment. Dr. Kuns contends that the disputed treatment is reimbursable because it benefited claimant. In contrast, insurer contends that the administrative order is correct and should be affirmed.

Pursuant to ORS 656.245(1), an insurer is obligated to provide medical services that are materially related to the compensable injury for such period as the injury or process of recovery requires. Furthermore, the legislature has authorized the department to promulgate administrative rules governing the provision of medical services to injured workers. ORS 656.726(4).

OAR 436-010-0220(2) provides in pertinent part:

Except for emergency services, or otherwise provided for by statute or these rules, all treatments and medical services must be

authorized by the injured worker's attending physician or authorized nurse practitioner to be reimbursable.

Additionally, OAR 436-010-0230(4) provides in pertinent 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 shall 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.

(b) The attending physician, authorized nurse practitioner, or specialist physician shall 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.

(c) Medical services prescribed by an attending physician, specialist physician, or authorized nurse practitioner and provided by a chiropractor, naturopath, acupuncturist, or podiatrist shall be subject to the treatment plan requirements set forth in subsection (4)(a) and (b) of this rule.

(d) Unless otherwise provided for within utilization and treatment standards under an MCO contract, the usual range for therapy visits does not exceed 20 visits in the first 60 days, and 4 visits a month thereafter. This rule does not constitute authority for an arbitrary provision of or limitation of services, but is a guideline for reviewing treatment. The attending physician or authorized nurse practitioner shall document the need for services in excess of these guidelines when submitting a written treatment plan.

Strict compliance with OAR 436-010-0230(4) is required. *Aetna Casualty & Surety Company v. Blanton*, 139 Or App 283 (1996). In order to establish reimbursability under OAR 436-010-0220(2), claimant's attending physician, Dr. De La Bruerre, was required to authorize chiropractic treatment. Dr. De La Bruerre's most recent letter addressing chiropractic treatment is dated September 25, 2001 when she requested 12 additional visits. Consequently, I conclude

that Dr. De La Bruerre did not authorize any chiropractic treatment beyond November 30, 2001, which was the last date paid. Furthermore, Dr. De La Bruerre's requests for authorization fail to specify a treatment plan as required by OAR 436-010-0230(4)(c). Similarly, the record contains no satisfactory treatment plan authored by Dr. Kuns and approved by Dr. De La Bruerre. For these reasons, I agree with MRU's conclusion that insurer is not liable for the disputed chiropractic treatment.

ORDER

IT IS HEREBY ORDERED that:

The Administrative Order dated December 16, 2004 is affirmed.