

became medically stationary on May 10, 1999. (Ex. 8A) By Order on Reconsideration dated October 22, 1999, claimant was awarded 3 percent scheduled permanent partial disability (SPPD) for loss of use of the right arm and 1 percent SPPD for loss of use of the left wrist. (Ex. 14A).

On November 18, 1996, claimant signed an 801 claim form listing as attending physician Jeff Pierson, MD who practices at the Providence Tanasbourne Clinic. (Ex 1). On November 19, 1996, the day after claimant filed the claim, he sought treatment with Samuel Gill, MD. (Ex. 1A). On July 27, 1998, claimant filed an 829 Change of Attending Physician form listing Rolf Sohlberg, MD. (Ex. 2). Drs. Gill and Sohlberg practice in the same clinic in Portland, Oregon. (Ex. 3).

In May 1999, claimant indicated that he had relocated to Seattle, Washington and preferred to treat with a physician there. (Exs. 4 and 9). On June 25, 1999, claimant sought treatment from Elmo Newton, MD in Seattle. (Ex. 8B). Claimant designated Dr. Newton as his attending physician. (Exs. 9, 13, 15, 15A and 17). Dr. Newton agreed to act as claimant's attending physician. (Ex. 21). Insurer did not approve Dr. Newton as attending physician. (Exs. 10, 14 and 16). Insurer provided claimant with a list of pre-approved physicians in the Seattle area. (Ex. 16). On October 11, 2000, Dr. Newton declined to serve as claimant's attending physician. (Ex. 28). Insurer paid Dr. Newton's medical bills with the exception of the October 11, 2000 appointment. (Testimony of claimant).

Dr. Newton diagnosed "Probable reflex sympathetic dystrophy and Overuse tendinitis, right arm." (Ex. 8B). Dr. Newton has not provided or recommended any medical treatment. (Exs. 15A, 18 and 28). Insurer denied compensability of reflex sympathetic dystrophy (RSD) and claimant appealed. (Exs. 12 and 12B). On July 7, 2000, claimant's appeal was dismissed and the RSD denial became final. (Exs. 26-1 and 27).

CONCLUSIONS OF LAW AND REASONING

This case presents a dispute as to whether a change of attending physician is proper under ORS 656.245(2)(a). Because the statute does not specify a standard of review, I review *de novo*. *Archie M. Ulbrich*, 2 WCSR 152, 153 (1997). OAR 436-001-0225(1). The burden of proving a fact or position rests with its proponent. ORS 183.450(2). As petitioner, insurer bears the burden of proving by a preponderance of evidence that the administrative order is incorrect. *See Cook v. Employment Div.*, 47 Or 437 (1982) (In the absence of contrary legislation, the standard of proof in an administrative hearing is preponderance of evidence).

In the administrative order, the Benefits Section of the Workers' Compensation Division approved Dr. Newton as claimant's attending physician. The agency first found that claimant had not exhausted his three statutory choices of attending physician. The agency next found that ORS 656.245(2)(a) accords the insurer only a limited right to disapprove an out-of-state attending physician. The agency based its decision on

Safeway v. Dupape, 106 Or App 126 (1991). In *Dupape*, the court construed *former* ORS 656.245(3)(a)¹ and held that an insurer may disapprove an out-of state attending physician only if the evidence shows that the physician will not follow Oregon workers' compensation rules. Since the insurer produced no such evidence, the agency found no grounds for disapproval of Dr. Newton as attending physician.

Insurer first contends that claimant's choice of Dr. Newton is moot because Dr. Newton has declined to serve as attending physician. Insurer also requests a finding of fact that claimant chose Dr. Newton as his third attending physician and, therefore, any subsequent choice would require approval. In the alternative, insurer also contends that Dr. Newton should be disapproved because he plans to treat claimant for medical conditions that are outside the scope of acceptance.

In contrast, claimant argues that he is free to choose any attending physician in the state where he resides. Claimant requests that the administrative order be affirmed.

Issue Moot

Insurer asserts that the issue whether claimant may choose Dr. Newton as attending physician is moot because Dr. Newton is no longer willing to serve in that capacity. Dr. Newton began treating claimant in June 1999 and terminated his relationship with claimant in October, 2000. Insurer has not paid Dr. Newton's bill for the October 11, 2000 appointment. Insofar as Dr. Newton's bill remains unpaid, the issue presented is not moot. Also, inasmuch as Dr. Newton's status bears on the number of attending physician changes, the issue is not moot.

Count of Attending Physician Choices

Insurer requests a finding of fact that claimant's choice of Dr. Newton constituted his third statutory choice and, therefore, claimant is prohibited from making any subsequent change without approval.

ORS 656.005(12)(b) defines an attending physician as, "****a doctor or physician who is primarily responsible for the treatment of a workers' compensation injury***." Whether a doctor qualifies as an attending physician is a question of fact. *Rosemarie Guerra*, 3 WCSR 1 (1998).

ORS 656.245(2)(a) allows an injured worker to choose three attending physicians without approval over the life of a claim; any subsequent change of approval requires the approval of the insurer or the director. OAR 436-010-0220(3) lists changes that are excluded from this calculation. Under OAR 436-010-220(3)(a), emergency services do not count as a choice of attending physician. Here, claimant initially sought treatment from Dr. Pierson at the Tanasbourne Providence Clinic. The very next day, claimant was treated by Dr. Gill in the Orthopedic and Fracture Clinic. Because Dr. Pierson provided

¹ *Former* ORS 656.245(3)(a) was amended in 1995 and renumbered ORS 656.245(2)(a).

emergency treatment only, I find that he does not count as an attending physician. Accordingly, claimant's first choice of attending physician was Dr. Gill.

The next question is whether claimant's change from Dr. Gill to Dr. Sohlberg counts as his second choice even though they practice in the same office. In *Anita L. Bartkus*, 1 WCSR 523 (1996), the director held that treatment with several medical providers in the same clinic due to coverage or on-call routines does not count as a change of attending physician. Here, no evidence is presented to establish that claimant sought treatment from Dr. Sohlberg in order to accommodate the clinic routine. Moreover, claimant submitted an 829 Change of Attending Physician form in July 1998, nearly two years after he began treating with Dr. Gill. Based on these facts, I find that claimant chose Dr. Sohlberg as his second attending physician.

The final question is whether claimant chose Dr. Newton as his third attending physician. The record is replete with claimant's statements that he chose to treat with Dr. Newton. However, because I find below that the insurer properly disapproved Dr. Newton as an out-of-state attending physician, he does not qualify and does not count in the calculation. Claimant has therefore made the initial choice and one change of attending physician. He is entitled to exercise one additional change of attending physician subject to ORS 656.245(3)(a).

Pre-Approval of Out-of-state Attending Physician

Former ORS 656.245(3)(a)(since amended by Or Laws 1995, ch 332) provides in part:

“The worker may choose an attending doctor or physician within the State of Oregon.***”

The former statute does not contemplate an injured worker's choice of an out-of-state attending physician. However, in *Dupape*, the court held that a worker may choose an out-of-state attending physician and the insurer may subsequently disapprove the choice if the out-of-state physician failed to comply with Oregon workers' compensation regulations. *Id.* This rule proved impractical because it required a worker to change attending physicians after establishing a doctor-patient relationship and encountering compliance problems.

In 1995, the legislature adopted ORS 656.245(2)(a) which provides in part:

“***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.” (Emphasis added.)

ORS 656.245(2)(a) *as amended* allows an injured worker to choose an out-of-state attending physician with prior approval of the insurer.² In construing a statute, the first task is to discern the intent of the legislature. The first level of analysis is to examine both the text and context of the statute, including other provisions of the same statute. If the legislature's intent is clear, no further inquiry is necessary. *PGE v. Bureau of Labor and Industries*, 317 Or. 606, 610-611, (1993).

In adopting ORS 656.245(2)(a), the legislature overruled *Dupape*. By inserting the term "prior approval", the legislature negated the *Dupape* standard for disapproval of an out-of-state attending physician. The plain meaning of the amended statute establishes that the insurer may disapprove an out-of-state attending physician before treatment begins and without accruing evidence that he is unlikely to comply with Oregon workers' compensation regulations. The statute distinguishes in-state and out-of-state attending physicians. While an injured worker is free to choose any qualified medical provider within Oregon as his attending physician, the statute limits an injured worker's choice of out-of-state attending physician to those who have been pre-approved by the insurer. The statutory scheme protects injured workers from out-of-state physicians who have no interest in learning or complying with Oregon workers' compensation laws and rules. Also, the statutory scheme serves the needs of injured workers and reduces litigation because it obviates the necessity of changing attending physicians after treatment begins and compliance problems develop. Since amended ORS 656.245(2)(a) overruled *Dupape*, the agency erred in relying on that case law.

Change of Attending Physician

OAR 436-010-0220 prescribes the circumstances under which an injured worker may choose or change attending physicians. The rule applies to out-of-state as well as in-state attending physicians. OAR 436-010-0220(7) provides:

"(7) After receipt and review, the director will issue an order advising whether the change is approved. On a case by case basis consideration may be given, but is not limited, to the following:

"(a) Whether there is medical justification for a change, including whether the attending physician can provide the type of treatment that is appropriate for the worker's condition.

"(b) Whether the worker has moved to a new area and wants to establish an attending physician closer to the worker's residence.

² ORS 656.005(12)(a)(A) was also amended in 1995 and defines "attending physician" to include a physician who is licensed in another state.

“(c) Whether such a change will cause unnecessary travel costs and/or lost time from work.

“(d) Whether a worker has an attending physician that works in a group setting/facility and the worker sees another group member due to team practice, coverage, or on-call routines.

Claimant relies on subsection (b) because he has moved to Seattle, Washington and would like to treat with a physician there. While the administrative rule lists relocation as one factor to be considered, it is not dispositive. ORS 656.245(2)(a) limits an injured worker’s choice of an out-of-state attending physician by requiring the insurer’s pre-approval.

On the other hand, insurer relies on subsection (a) contending that the change of attending physician is not medically justified because Dr. Newton proposed treatment for noncompensable conditions only.

Upon review, I find that the change of attending physician is not justified for the following reasons. First, claimant failed to seek prior approval as required by ORS 656.245(2). Second, Dr. Newton diagnosed only RSD and right arm tendinitis; neither of these conditions is within the scope of acceptance of this claim. Third, Dr. Newton has neither provided nor recommended any medical treatment for claimant. Fourth, Dr. Newton is no longer willing to serve as claimant’s attending physician. Under these circumstances, I conclude that insurer properly disapproved Dr. Newton as an out-of-state attending physician.

ORDER

IT IS HEREBY ORDERED that:

The February 24, 2000 Administrative Order, AP00-001, is reversed.

DATED this ____ day of February, 2001.

Catherine P. Coburn
Administrative Law Judge
Hearing Officer Panel

NOTICE OF REVIEW AND APPEAL RIGHTS

As provided in ORS 183.460, the parties are entitled to file written exceptions, including argument, to this Proposed and Final Contested Case Hearing Order. The exceptions must be served on the parties and filed with the Administrator of the Workers' Compensation Division at the address set forth below within 30 days following the date of service of this order. Written responses to exceptions must be filed within 20 days of service of the exceptions. Replies, if desired, must be filed within 10 days of service of the response.

If no exceptions are filed, this order shall become final upon expiration of 30 days following the date of service on the parties.

After this order becomes final, you are entitled to judicial review pursuant to the provisions of ORS 183.480. Judicial review may be obtained by filing a petition with the Court of Appeals within 60 days from the date that this order becomes final.

Mail any exceptions and a copy of any petition for judicial review to:

Hearings Coordinator
Hearing Officer Panel
Labor and Industries Building
350 Winter Street NE, Rm. 27
Salem, OR 97301-3878