



1 **EVIDENTIARY RULINGS**

2 The following exhibits were offered without objection and accordingly admitted into evidence:  
3 WCD Exhibits 1-25; Petitioner’s 2A.

4 **FINDINGS OF FACT**

5 On January 9, 1992, claimant compensably injured her back. (Ex. 1). On April 6, 1994,  
6 the claim was accepted for nondisabling dysthymic disorder. (Ex. 22) On March 19, 1999, the  
7 District modified the acceptance to include an L4-5 disc herniation. (Ex. 22)

8 In 1995, claimant began treating at the Northwest Center for Environmental Medicine.  
9 Treatment was provided by Dr. Heitsch Ms. Campbell. (Ex. 8). Between August 2, 1997 and  
10 August 1, 2000, claimant received treatments including dietary supplements, vitamin infusions  
11 and injections, oral medications, chiropractic adjustments, acupuncture and massage. (Ex. 2).  
12 The only treatment plan prepared by Dr. Heitsch during this time period was signed on October  
13 13, 1999, with a stated duration of 180 days and a beginning date of July 1, 1999. (Ex. 3).

14 **CONCLUSIONS OF LAW**

15 This is a medical services dispute arising under ORS 656.245. The scope of my review is  
16 *de novo*. OAR 436-001-0225(1). The burden of proof is on the petitioner. ORS 183.450(2).

17 **Treatment Plan**

18 OAR 436-010-0230(3)(b) subjects “[m]edical services prescribed by an attending  
19 physician and provided by a chiropractor, naturopath, acupuncturist, or podiatrist” to the  
20 treatment plan requirements set forth in OAR 436-010-0230(3)(a). The latter rule provides:

21 “(3)(a) Except as otherwise provided by the MCO, ancillary services including  
22 but not limited to physical therapy or occupational therapy, by a medical service  
23 provider other than the attending physician shall not be reimbursed unless  
24 prescribed by the attending physician and carried out under a treatment plan  
25 prepared prior to the commencement of treatment and signed by the attending  
physician within 30 days of beginning treatment. The medical service provider  
shall provide an initial copy of the treatment plan to the attending physician and  
the insurer within seven days of beginning treatment. A copy of the treatment plan  
signed by the attending physician shall be provided to the insurer by the medical  
service provider within 30 days of beginning treatment. The treatment plan shall

1 include objectives, modalities, and frequency of treatment and duration. The  
2 treatment plan may be recorded in any legible format including, but not limited to,  
3 signed chart notes. Treatment plans required under this subsection do not apply to  
4 services provided pursuant to ORS 656.245(2)(b)(A).

5 The Court of Appeals has determined that the treatment plan requirements of OAR 436-  
6 010-0230(3)(a) are not merely guidelines to providers, but instead require strict compliance.  
7 *Aetna Casualty & Surety Company v. Blanton*, 139 Or App 283 (1996). I agree with the agency  
8 and insurer that Dr. Heitsch did not prepare a treatment plan for the majority of the disputed  
9 treatments. The treatments in dispute were administered from August 26, 1997 through August  
10 1, 2000. (Ex. 22 at 3). The only treatment plan in the record was prepared by Dr. Heitsch on  
11 October 13, 1999, with a stated duration of 180 days and a beginning date of July 1, 1999.  
12 Because the rule requires that a treatment plan be signed within 30 days of the date that treatment  
13 begins, the plans actual effective date is September 13, 1999 (30 days prior to the date it was  
14 signed and provided to insurer) not the stated July 1, 1999. And, further, since the document is  
15 limited in duration to 180 days from July 1, 1999, it cannot provide for treatment delivered after  
16 January 9, 2000. Thus, the treatment plan can only cover treatment delivered between  
17 September 13, 1999 through January 9, 2000. Of the treatment in dispute, only those treatments  
18 delivered on December 12, 1999; January 3, 2000; and January 5, 2000 fall within the time  
19 periods authorized by the treatment plan. All other treatments were appropriately found non-  
20 reimbursable due to non-compliance with OAR 436-010-0230(a).

### 21 **Palliative Care**

22 The director found that payment for services delivered on January 3 and 5, 2000 was  
23 properly withheld on the grounds that the services billed were dietary supplements and not  
24 reimbursable unless a specific compensable dietary deficiency has been established. OAR 436-  
25 101-0230(6). In *Ivan Redman*, WCSR (1997) the director examined the application of this rule  
and determined that while vitamins and minerals are prohibited from reimbursement when  
prescribed as dietary supplements and a compensable dietary deficiency has not been clinically  
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1 established, vitamins and minerals are reimbursable when prescribed for therapeutic purposes.

2 The director described the application of OAR 436-101-0230(6) as follows:

3 “[T]he claimant’s surgeon directed the claimant to purchase and use Milk of  
4 Magnesia, Senokot, Citrucel, vitamin E oil, aspirin and senna tea. The treatments  
5 were to limit the irritation to the claimant’s stomach caused by prescriptive pain  
6 medications and to aid in returning the claimant’s bowel functions to normal after  
7 surgery. ORS 656.245(1)(b) states, “[c]ompensable medical services shall include  
8 \* \* \* drugs [and] medicine \* \* \*.” The law does not require that drugs and  
9 medications be dispensed by a pharmacy in order to be compensable. It simply  
10 requires that the medical service be provided for conditions caused in material  
11 part by the injury for such period as the nature of the injury or the process of the  
12 recovery requires. ORS 656.245(1)(a). The claimant underwent surgery to address  
13 an accepted condition. The surgeon’s directions to take over-the-counter  
14 medications was part of the process of the recovery for the surgery addressing an  
15 accepted condition. Accordingly, the over-the-counter medications are both  
16 compensable and reimbursable. The limiting language of OAR 436-010-0230(6)  
17 stating, “[d]ietary supplements including, but not limited to, minerals, vitamins  
18 and amino acids are not reimbursable \* \* \*”, does not apply to the claimant’s  
19 situation. The claimant used the vitamin E oil as a topical to help his incision heal  
20 properly, not as a dietary supplement. Therefore, the vitamin E oil purchased and  
21 used by the claimant is also reimbursable.”

22 Here, as in *Redman*, the preponderance of evidence presented at hearing indicates that the  
23 treatments in dispute were not delivered as dietary supplements. Instead, both in their testimony  
24 before me and in their chartnotes presented to MRU, Drs. Campbell and Heitsch explained that  
25 vitamins in dispute were being delivered in “therapeutic doses” for the treatment of depression  
and back pain secondary to the accepted injury, and not as “dietary supplements”. There is no  
medical evidence in the record to contradict Dr. Campbell’s assertion that the vitamin treatments  
were therapeutic for the accepted condition. As Dr. Campbell explained in his chart note of July  
20, 1998:

26 “[Claimant] has conditions (depression and back pain) that are aggravated by  
27 stress. The literature supports the fact that B-vitamins are useful in moderating  
28 the effects of stress on the body. In general all the studies show some positive  
29 effects for everyone in what may be generally or loosely termed “nerve function”  
30 this includes mental illness, neuralgias, pain, headaches, if it has to do with the  
31 nervous system it will be helped by B-vitamins. Oral helps sometimes - it is  
32 therapeutic - iv allows the patient to get 4-5 times the amount as a shot

1 intermuscularly at once and it gets a therapeutic level quicker. This saves in  
2 office visits and the effects of the stress related illness.” (Ex. P2A at 19-20).

3 Because the disputed treatments were delivered for their therapeutic effect on the  
4 accepted injury and not as dietary supplements, it was error to deny payment for the services  
5 delivered on January 3 and 5, 2000.

6 **Attorney Fees**

7 Claimant’s counsel has submitted a Statement of Services requesting a fee of \$2,500 for  
8 9.25 hours of work. Counsel is a skilled attorney with almost seven years of experience in the  
9 field of workers’ compensation law. Although in the past the majority of his case load was  
10 Workers’ Compensation work, by reason of economic necessity he now devotes approximately  
11 40% of his time to workers’ compensation cases and 60% to other areas of law. As a claimant’s  
12 attorney, he has no hourly fee and works strictly on a contingency basis, and he notes that the  
13 area of workers’ compensation law has become one that is increasingly complex and risky, with  
14 very few cases before the department resulting in the award of an attorney fee.

15 Claimant’s attorney devoted 9.25 hours to this case, and while he did not prevail in  
16 regard to the majority of the treatment at issue, much of time devoted would have been required  
17 had he only gone to hearing on the issues on which he prevailed. The issues involved were of  
18 moderate factual and legal complexity, and claimant’s attorney possesses a familiarity and  
19 knowledge of the law, rules and procedures of practice before the director that is greater than that  
20 held by many other workers’ compensation practitioners. The value of the interest involved,  
21 provision of medical service to alleviate pain and depression, while not monetarily high, is  
22 nonetheless of great value to the health and well-being of the injured worker and has  
23 consequence for future treatment. Finally, I note that attorneys in this area of law face great risk  
24 that in any particular case they will go uncompensated. Taking into account all of the factors set  
25 out in OAR 436-001-0265 in establishing an appropriate fee, I award attorney’s fees in this case  
of \$1500.

1 **ORDER**

2 IT IS HEREBY ORDERED that MRU's order of November 24, 2000 is reversed in part;  
3 insurer shall pay claimant's attorney a fee of \$1,500.

4 DATED this 10th day of July, 2001.

5 By: \_\_\_\_\_  
6 Paul Vincent, Administrative Law Judge  
7 Hearing Officer Panel  
8

9 **NOTICE OF REVIEW AND APPEAL RIGHTS**

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

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

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

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

22 **Technical Coordinator, Policy Section**  
23 **Workers' Compensation Division**  
24 **Department of Consumer and Business Services**  
25 **350 Winter Street NE, Rm. 27**  
**Salem, OR 97301-3879**