

1 **FINDINGS OF FACT**

2 On November 6, 1998, claimant fell from a ladder on the job and suffered a right jaw
3 injury. (Ex. 1). Insurer initially accepted “nondisabling mandibular condyle subluxation.”
4 (Ex. 3). On March 14, 2001, insurer issued a Modified Notice of Acceptance adding “bilateral
5 temporal mandibular joint disorder” as an accepted condition. (Ex. 24).

6 Claimant initially treated with another dentist and began treating with Dr. Parker in June,
7 1999 for temporomandibular joint disorder . (Exs. 2, 9, 14-2 and 17). Dr. Parker is not a board
8 certified oral surgeon licensed by the Oregon Board of Dentistry. (Exs. 9 and 23).

9 Insurer reimbursed Dr. Parker for his services through August 10, 1999. (Ex. 14-2;
10 testimony of Fix, Dr. Parker’s office manager). On October 14, 1999, insurer notified Dr. Parker
11 that OAR 436-010-0005 limits the class of persons who qualify as an attending physician and
12 requested him to advise whether he is a board certified oral surgeon. (Ex. 8). On October 25,
13 1999, Dr. Parker advised insurer that he is not a board certified oral surgeon and that he treated
14 claimant’s temporomandibular joint condition. (Ex. 9). On February 16, 2000, insurer provided
15 Dr. Parker with a copy of OAR 436-010-0005 and declined payment. (Ex. 10). Dr. Parker last
16 treated claimant on March 9, 2000. (Ex. 6; testimony of Fix).

17 **CONCLUSIONS OF LAW AND REASONING**

18 Jurisdiction lies with the director. ORS 656.245(6); OAR 436-010-0008(1). Since ORS
19 656.245 prescribes no standard of review, I review *de novo*. *Archie M. Ulrich*, 2 WCSR 152,
20 153 (1997); OAR 436-010-0225(1). The burden of proving a fact or position rests with the
21 proponent. ORS 184.450(2). As petitioner, claimant bears the burden of proving by a
22 preponderance of the evidence that the administrative order is incorrect. See *Cook v.*
23 *Employment Div.*, 47 Or 437 (1982) (In the absence of contrary legislation, the standard of proof
24

1 in an administrative hearing is preponderance of evidence).

2 The Workers' Compensation Division's Medical Review Unit (MRU) determined that
3 Dr. Parker is not a board certified oral surgeon, and therefore is not qualified to serve as an
4 attending physician under OAR 436-010-0005(2). MRU concluded that insurer is not liable for
5 Dr. Parker's services.

6 Claimant first contends that because insurer reimbursed some of Dr. Parker's treatment, it
7 is obligated by the doctrine of equitable estoppel to continue reimbursing all of Dr. Parker's
8 services. Claimant also contends that insurer is liable for Dr. Parker's services because he
9 treated bilateral temporal mandibular disorder which insurer subsequently accepted. In support
10 of his position, claimant cites *SAIF v. Reid*, 160 Or App 383 (1999). Finally, claimant does not
11 contend that any other medical provider served as claimant's attending physician during the
12 relevant period. In contrast, insurer contends that it is not liable for Dr. Parker's services
13 because he does not qualify as an attending physician under OAR 436-010-0005(2).

14 The doctrine of equitable estoppel provides that "a person may be precluded by ***
15 silence when it was his duty to speak, from asserting a right which he otherwise would have
16 had." *Meier & Frank v. Smith-Sanders*, 115 Or App 159, 163 (1992) *rev den* 316 Or 142 (1993),
17 quoting *Marshall v. Wilson*, 175 Or 506, 518 (1994). See *John B. Reid*, 2 WCSR 64 (1997).

18 The elements of equitable estoppel are "(1) a false representation, (2) made with knowledge of
19 the facts, (3) where the other party is ignorant of the truth, (4) made with the intention that the
20 other party will rely on it, and (5) the other party must be induced to act upon the false
21 representation." *Swift & McCormick Metal Processors Ass'n, Inc. v. Durbin*, 117 Or App 605,
22 608 (1993). In order to establish equitable estoppel, claimant must prove that he justifiably and
23 detrimentally relied on misleading conduct by the insurer. *Employment Division v. Western*

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1 *Graphics Corporation*, 76 Or App 608 (1985). Here, claimant identifies no false representation
2 on the part of insurer. On October 14, 1999, insurer provided notice to Dr. Parker that OAR 436-
3 010-0005 limits the class of persons who may serve as an attending physician. Also, Fix testified
4 that she was unaware whether Dr. Parker had relied on insurer’s reimbursement. Moreover, Dr.
5 Parker was not justified in relying on insurer’s reimbursement after he received notice of the
6 limitations imposed by OAR 436-010-0005. Based on the evidence, claimant has failed to
7 establish the false representation and detrimental reliance elements of equitable estoppel.

8 Claimant cites *SAIF v. Reid*, 160 Or App 383 (1999) to support his contention that insurer
9 is liable for reimbursement. In *Reid*, the court held that an insurer is liable for medical services
10 directed to a medical condition that it subsequently accepts. Here, Dr. Parker treated claimant’s
11 temporomandibular joint condition from June, 1999 through March 9, 2000. One year after the
12 last treatment, in March 2001, insurer issued a modified Notice of Acceptance expanding the
13 scope of acceptance to include temporomandibular joint disorder. Therefore, claimant’s
14 argument concerning the subsequent acceptance is well taken. However, this determination is
15 not dispositive.

16 Pursuant to ORS 656.245, an insurer is obligated to provide medical services for
17 compensable conditions for such period as the nature of the injury or the process of recovery
18 requires. Pursuant to OAR 436-010-0210(1), only attending physicians may prescribe medical
19 services to injured workers. OAR 435-010-0005(2)(a) provides:

20 “(2) Attending Physician” means a doctor or physician who is
21 primarily responsible for the treatment of a worker’s compensable
injury or illness and who is:

22 “(a) A medical doctor or doctor of osteopathy licensed under ORS
23 677.100 to 677.228 by the Board of Medical Examiners for the
State of Oregon or a board certified oral surgeon licensed by the
24 Oregon Board of Dentistry;”

1 Dr. Parker is a Doctor of Medical Dentistry, but is not a board certified oral surgeon
2 licensed by the Oregon Board of Dentistry. Because Dr. Parker does not qualify as an attending
3 physician under OAR 436-010-0005(2), insurer is not liable for reimbursement of his services.
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5 OAR 436-009-0015(1)(b) provides:

6 “An injured worker not shall be liable to pay for any medical
7 service related to an accepted compensable injury or illness. A
8 medical provider shall not attempt to collect payment for any
9 medical service from an injured worker, except as follows:

10 (b) When the injured worker seeks treatment that has not been
11 prescribed by the worker’s attending physician.”

12 Since claimant sought treatment that was not prescribed by an attending physician, Dr.
13 Parker may attempt to collect payment from him.

14 ATTORNEY FEES

15 Claimant has not prevailed in a contested case hearing, and therefore, is not entitled to an
16 attorney fee. ORS 656.385(1).

17 ORDER

18 IT IS HEREBY ORDERED that:

19 The Amended Administrative Order dated January 5, 2001 is affirmed.

20 DATED this _____ day of _____, 2001.

21 _____
22 Catherine P. Coburn,
23 Administrative Law Judge
24 Hearing Officer Panel

1 **NOTICE OF REVIEW AND APPEAL RIGHTS**

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

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

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

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

14 **Technical Coordinator, Policy Section**
15 **Workers' Compensation Division**
16 **Department of Consumer and Business Services**
17 **350 Winter Street NE, Rm. 27**
18 **Salem, OR 97301-3879**