

In the Medical Services Dispute of  
**WILLIAM D. SEAMAN, Claimant**  
Contested Case No: H05-120  
**PROPOSED AND FINAL ORDER**  
February 7, 2006

WILLIAM D. SEAMAN, Petitioner  
LIBERTY NORTHWEST INSURANCE CORP., Respondent  
Before Daina Upite, Administrative Law Judge, Administrative Hearings

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**HISTORY OF THE CASE**

Claimant appeals the Administrative Order issued on July 14, 2005 by the Medical Review Unit (MRU) of the Workers' Compensation Division (WCD), Department of Consumer and Business Services (department or director). On August 11, 2005, the department referred the matter to the Office of Administrative Hearings (OAH). On September 26, 2005, Administrative Law Judge Daina Upite conducted a hearing in Salem, Oregon. Attorney Nyla L. Jebousek represented petitioner William D. Seaman (claimant). Attorney Judy L. Johnson represented respondent Liberty Northwest Insurance Corporation (insurer). No witnesses testified and the record closed on September 28, 2005, following submission of written argument by both parties.

**ISSUE**

Whether MRU incorrectly determined that chiropractic treatment provided by Terry K. Hovey, D.C. from June 4, 2004 through May 9, 2005 is not compensable.

**EVIDENTIARY RULINGS**

WCD Exhibits 1 through 50 were admitted into the record without objection.

**FINDINGS OF FACT**

1. On January 26, 2002, claimant developed chest and back pain while working as a youth mental health counselor. (Exs. 1 and 14.)
2. On December 16, 2002, claimant sought treatment from Dr. Hovey. (Ex. 15-1.) On January 24, 2003, Dr. Hovey wrote that chiropractic treatment benefited claimant. (Ex. 17.)
3. On February 11, 2003, insurer accepted a right thoracic strain. (Exs. 18-1, 19-2 and 20.)
4. On September 5, 2003, claimant sought treatment from Lee A. Vogelmann, D.O., who prescribed "Continued chiropractic care." (Exs. 25 and 26.) On September 18, 2003, Dr. Vogelmann wrote, "May see chiropractor for back pain as needed." (Ex. 26-2.)
5. On January 26, 2004, insurer requested information from Dr. Vogelmann and denied

additional chiropractic treatment pending receipt of supporting information. (Ex. 28-2.)

6. On May 5, 2004, Dan Winslow, D.C. and Jon C. Vessely, M.D. (Orthopedic Surgeon) examined claimant at insurer's request. (Ex. 28.) They found that claimant's condition was medically stationary and that any continuing treatment was palliative and not medically necessary. (Ex. 28.)

7. On May 19, 2004, Dr. Vogelman did not concur with the independent medical examination report and opined that claimant's condition may be medically stationary with continued pain medication and chiropractic treatment. (Ex. 30.) On May 19, 2004, Dr. Vogelman stated that continued chiropractic treatment enabled claimant to maintain job activities. (Ex. 31.)

8. On May 29, 2004, insurer denied payment of continued chiropractic services and requested a statement from claimant's attending physician concerning chiropractic treatment. (Ex. 32.) On June 10, 2004, insurer wrote to Dr. Vogelman, requesting additional information about the chiropractic treatment and providing a copy of an administrative rule concerning palliative care. (Ex. 33.) On June 17, 2004, Dr. Vogelman wrote to insurer listing objective findings, and recommended palliative chiropractic treatment to allow claimant to continue working. (Ex. 34.) On August 27, 2004, Dr. Vogeman examined claimant and recommended continuing chiropractic treatment. (Ex. 35.) On December 29, 2004, Dr. Vogelman noted that claimant was receiving chiropractic treatment 2-3 times per week and recommended that he continue "probably for the rest of his life." (Ex. 37-1.)

9. On January 17, 2005, Dr. Hovey wrote that claimant's chiropractic treatment was curative rather than palliative. (Ex. 38.)

10. On February 8, 2005, insurer wrote to Dr. Vogelman indicating that chiropractic treatment 2-3 times per week "for the rest of his life" was excessive and denying payment. (Ex. 39.)

11. On March 25, 2005, claimant requested administrative review of insurer's refusal to pay for treatment requested by Dr. Vogelman. (Ex. 40-1.)

12. On April 4, 2005, Dr. Vogelman recommended that claimant continue palliative chiropractic treatment approximately three days per week for six months, followed by reevaluation. Dr. Vogelman wrote that palliative care enabled claimant to participate as a member of a sheriff's posse and rescue team, as well as coach and referee. (Ex. 41.)

13. On May 3, 2005, insurer denied payment for continuing chiropractic treatment, noting that claimant's participation in posse, rescue, coaching and refereeing was voluntary rather than employment activity. (Ex. 42.)

#### **CONCLUSION OF LAW**

MRU correctly determined that chiropractic treatment provided by Terry K. Hovey, D.C.

from June 4, 2004 through May 9, 2005 is not compensable.

### OPINION

The director exercises jurisdiction over medical service disputes. ORS 656.245(6) and ORS 656.704(3). I review for substantial evidence and error of law. ORS 656.245(6) and OAR 436-001-0225(2). The burden of presenting evidence to support a fact or position rests with 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 App 437 (1980) (In the absence of contrary legislation, the standard of proof in administrative hearings is preponderance of evidence). Proof by a preponderance of evidence means that the factfinder is persuaded that the facts asserted are more likely true than false. *Riley Hill General Contactors v. Tandy Corp.*, 303 Or 390 (1989).

*An insurer is obligated to provide medical services for conditions that are materially caused by the work injury for such period as the nature of the injury or the process of recovery requires. ORS 656.245(1). This obligation continues over the injured worker's lifetime. ORS 656.245(1)(b). However, medical treatment that is excessive, inappropriate, ineffectual or violates administrative rules is not reimbursable. ORS 656.327. Furthermore, medical services after the medically stationary date are generally not compensable with certain exceptions. ORS 656.245(1)(c).*

MRU first determined that claimant's compensable medical services are not limited to the exceptions listed in ORS 656.245(1)(c) because insurer failed to notify claimant as required by OAR 436-010-0270(5).<sup>1</sup> MRU next determined that the disputed chiropractic treatment is not compensable because the record contains no treatment plan, as required by OAR 436-010-0230(4)(a). Claimant contends that MRU improperly addressed the treatment plan issue because insurer denied payment for different reasons. Claimant further contends that this was an *ultra vires* action constituting error of law. Claimant next contends that the medical record contains a treatment plan. In contrast, insurer first contends that MRU is authorized apply administrative rules on its own motion in the course of administrative review. Insurer further contends that the medical record fails to establish a treatment plan. Having reviewed the record, I find that claimant has failed to carry his burden of proof.

To begin, the claim remains in open status, and therefore, the range of medical services available to claimant is not limited to the exceptions listed in ORS 656.245 (1)(c). For example, curative as well as palliative care may be compensable in the event that the statutory and administrative requirements are met.

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<sup>1</sup> OAR 436-010-0270(5) provides:

In disabling and non-disabling claims, immediately following notice or knowledge that the worker is medically stationary, insurers must notify the injured worker and the attending physician or authorized nurse practitioner in writing which medical services remain compensable under the system. This notice must list all benefits the worker is entitled to receive under ORS 656.245(1)(c).

Next, by enacting ORS 656.726(4),<sup>2</sup> the legislature delegated authority to WCD to promulgate administrative rules governing the provision of medical services to injured workers. Here, claimant requested administrative review of a chiropractic treatment denial. Therefore, MRU acted within its statutory authority when it applied OAR 436-010-0230(4)(a).

OAR 436-010-0230(4)(a) provides:

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 will 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. Treatment plans required under this subsection do not apply to services provided under ORS 656.245(2)(b)(A).

Having adopted OAR 436-010-0230(4), MRU is required to apply it. *See AETNA Casualty & Surety v. Blanton*, 139 Or App 283 (1996). Here, the record contains no evidence that the ancillary medical service provider, Dr. Hovey, sent any treatment plan to Dr. Vogelmann, the attending physician, as required by OAR 436-010-0230(4)(a). Therefore, the disputed chiropractic treatment is not compensable.

### **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 July 14, 2005 is affirmed.

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<sup>2</sup> ORS 656.726(4)(a) provides in pertinent part:

The director hereby is charged with duties of administration, regulation and enforcement of ORS 654.001 to 654.295, 654.750 to 654.780 and this chapter. To that end the director may: Make and declare all rules and issue orders which are reasonably required in the performance of the director's duties.