

In the Medical Services Dispute of
JINDRISKA STA VENIKOVA, Claimant

Contested Case No: H05-162

PROPOSED AND FINAL ORDER

January 17, 2006

JINDRISKA STA VENIKOVA, Petitioner
LIBERTY NORTHWEST INSURANCE CORP., Respondent
Before Catherine P. Coburn, Administrative Law Judge, Administrative Hearings

HISTORY OF THE CASE

Claimant appeals the Administrative Order issued on October 12, 2005 by the Medical Review Unit (MRU) of the Workers' Compensation Division (WCD), Department of Consumer and Business Services (department or director). On November 1, 2005, the department referred the matter to the Office of Administrative Hearings (OAH). On December 15, 2005, Administrative Law Judge Catherine P. Coburn conducted a hearing in Beaverton, Oregon. Attorney Michael A. Gilbertson represented petitioner Jindriska Stavenikova (claimant). Attorney David O. Wilson represented respondent Liberty Northwest Insurance Corporation (LNW or insurer). Claimant's daughter, Jindra Kukla, testified on claimant's behalf and case manager Tracey Young testified on insurer's behalf. The record closed on the date of hearing.

ISSUES

1. Whether MRU incorrectly dismissed the matter as moot.
2. Whether home health services prescribed by Valerie Nipper, Physician's Assistant (P.A.) are compensable

EVIDENTIARY RULINGS

WCD Exhibits 1 through 21, as well as claimant's Supplementary Exhibit 22, were admitted into the record without objection.

FINDINGS OF FACT

1. On June 10, 2005, claimant suffered a compensable injury when she slipped on a wet floor while working in a restaurant where she communicated in broken English. (Exs. 1 and 13.) Insurer accepted a left distal fibular fracture, non-displaced, and a right buttock contusion. (Ex. 16.) Claimant was 64 years old, overweight and lived alone. (Ex. 3; testimony of Kukla.)

2. On June 16, 2004, Valerie Nipper, P.A. applied a cast and released claimant with a nonweightbearing restriction. (Ex. 3-1.) Nipper noted, "She was also dispensed with a prescription today due to her living activities that she may need some help with her daily activities as she is at home alone. She was dispensed with thought for help with bathing, shopping, etc." (Ex. 3-2.) The treatment plan, including home health services was approved by Robert Orfaly, M.D. (*Id.*) Claimant's daughter, Jindra Kukla, asked Nipper to backdate the

prescription for home health services to the date of injury and Nipper declined. (Ex. 4.)

3. On June 21, 2005, claimant's attorney informed LNW case manager Tracey Young by telephone that claimant's physician had ordered home health care services. (Testimony of Young.) Young requested written home health care authorization from the attending physician. (*Id.*) On June 22, 2005, Young authorized services for payment and contacted Medical Services Company (MSC), which in turn referred the request to Kelly Home Care employment agency to arrange service for claimant. (Ex. 6; testimony of Young.)

4. On June 25, 2005, Karen Eckardt, R. N., of Kelly Home Care telephoned claimant and spoke with Kukla, claimant's daughter, who spoke English. (Ex. 6.) Kukla requested a caregiver who spoke Czech and Eckardt informed her that no such caregiver was available. Eckardt offered the use of cue cards to help with a communication barrier. Kukla stated that claimant would not continue with the request for home health services because she required a Czech-speaking caregiver. (Ex. 6.) Kelly Home Care informed Medical Services Company of claimant's decision. (*Id.*)

5. On June 29, 2005, Kukla telephoned Young and left a message inquiring about home health care services for claimant. (Testimony of Kukla.) On July 1, 2005, Kukla left another message for Young, requesting a Czech interpreter in conjunction with home health services because claimant's physician had provided an interpreter. (Testimony of Kukla.) Kukla telephoned claimant's attorney. (*Id.*)

6. On July 1, 2005, Jovie Valenzuela, L.P.N. of Medical Services Company e-mailed Yvonne Carson, R.N., LNW Senior Medical Disability Case Manager, informing her that claimant's daughter had refused to accept any home health aide who did not speak Czech and that MSC was unable to staff a Czech-speaking home health aide. (Ex. 7-1.) MSC notified insurer that it did not admit claimant into their care. (*Id.*)

7. On July 1, 2005, Kim Ferm-Bunkley, R.N. of Medical Services Company telephoned all 12 home care companies within a 50-mile radius of claimant's home and ascertained that no Czech-speaking home health aide was available. (Ex. 7-3.) Ferm-Bunkley telephoned claimant's daughter, Kukla, and informed her that no Czech-speaking home health caregiver was available. (*Id.*) Ferm-Bunkley stated that MSC would send an English-speaking caregiver and Kukla could translate and Kukla replied that she would not translate without payment. (*Id.*) Within a few minutes, Kukla telephoned Ferm-Bunkley again and stated that claimant had not refused home health services, claimant would not accept an English-speaking aide without an interpreter at insurer's expense, and Kukla would not act as interpreter for her mother without payment. (Ex. 73; testimony of Kukla.) Kukla told Ferm-Bunkley not to send an English-speaking caregiver. (Ex. 7-3.)

8. On July 13, 2005, Kenna Larsen, M.D.¹ examined claimant. (Ex. 9.) Claimant was fitted with a fracture walker and was instructed to increase weightbearing. Dr. Larsen did not prescribe continued home health care. (*Id.*)

¹ Dr. Larsen is an associate of Dr. Orfaly. (Ex. 18-2.)

9. On July 25, 2005, claimant telephoned case manager Tracey Young and carried on a conversation in English. (Ex. 13.) They discussed time loss benefits, claimant's recent medical appointment and work status, and they understood one another in English. (Ex. 13; testimony of Young.)

CONCLUSIONS OF LAW

1. MRU incorrectly dismissed the matter as moot.
2. Home health services prescribed by Valerie Nipper, Physician's Assistant (P.A.) are 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 Contractors v. Tandy Corp.*, 303 Or 390 (1989). Having reviewed the record, I find that claimant has failed to carry her burden of proof.

In the Administrative Order dated October 2005, MRU dismissed the matter as moot because any authorization for home health services was no longer in effect. Claimant first contends that the dismissal constitutes error of law. Claimant next contends that insurer is liable to provide either a Czech-speaking home health aide or an English speaking home health aide plus a Czech interpreter. In support of her position, claimant argues that she did not refuse to receive home health services. Rather, claimant asserts that she attempted to arrange services and because no services were delivered, claimant's daughter provided care and now seeks reimbursement. Specifically, claimant seeks reimbursement for her daughter's services for 2½ hours per day from June 16, 2005 through July 13, 2005. In contrast, insurer contends that home health services were not reimbursable because it offered services as required by law and claimant refused to receive them.

Pursuant to ORS 656.245(1)(a), an insurer is obligated to provide medical services that are materially related to a compensable work injury for so long as the nature of the injury or the process of recovery requires. Under ORS 656.245(1)(b), compensable medical services may include home health care.

Additionally, OAR 436-010-0210(3) provides:

Attending physicians and authorized nurse practitioners may prescribe treatment or services to be carried out by persons licensed to provide a medical service. Attending physicians may prescribe treatment or services to be carried out by persons not

licensed to provide a medical service or treat independently only when such services or treatment is rendered under the physician's direct control and supervision. Reimbursement to a worker for home health care provided by a worker's family member is not required to be provided under the direct control and supervision of the attending physician if the family member demonstrates competency to the satisfaction of the attending physician.

Dismissal

I agree with claimant's assertion concerning the dismissal. In the event that claimant established insurer's liability for the disputed home health services during a specified time period, the provider would be entitled to reimbursement. Therefore, MRU erred by dismissing the matter as moot.

Interpreter

Claimant cites no legal authority to support her contention that insurer was liable to provide an interpreter in addition to a home health aide. Similarly, I find no provision in either statute or administrative rule that requires an insurer to provide an interpreter in conjunction with home health services. Moreover, I find the Medical Services Company and Kelly Home Care business notes more reliable than Kukla's testimony concerning her refusal of services. Kelly Home Care's motivation was to provide services in order to obtain payment from insurer; it is logical to infer that Kelly would have provided services unless claimant, through her daughter, refused. On the other hand, Kukla testified that she did not refuse services and that she agreed to allow an English speaking home health aide to use cue cards to communicate with her mother, the claimant. However, I find Kukla's testimony on this point unreliable. If claimant, through her daughter, had agreed to the use of cue cards, then there would have been no need for Kukla to offer her services as a paid interpreter. Based upon the record, I find that claimant, through her daughter, refused home health services in the absence of an interpreter provided at insurer's expense.

Under ORS 656.245 and OAR 436-010-0210(3), insurer is not legally required to provide an interpreter in conjunction with home health care services. Thus, the record establishes that claimant refused to receive home health services as they are defined by statute and administrative rule. Therefore, insurer is not liable to provide home health services.

Statement of Competence

Claimant seeks reimbursement for home health care that was provided by her daughter. Pursuant to OAR 436-010-0210(3), home health care provided by an injured worker's family member may be reimbursable but only if the attending physician attests to the family member's competency. Here, the record contains no such statement from any medical provider. Therefore, claimant is not entitled to reimbursement for home health care that was provided by a family member.

Conclusion

Based upon the record, I find that the disputed home health services are not compensable for several reasons. First, the record establishes that claimant refused services that insurer offered because insurer correctly declined to provide an interpreter. Next, claimant is not entitled to reimbursement for home health care provided by her daughter because the record contains no statement from the attending physician attesting to the family member's competency. Finally, the record neither identifies the attending physician nor contains written authorization for home health services signed by the attending physician or nurse practitioner as required by OAR 436-010-0210(3). For these reasons, I conclude that insurer is not liable for the disputed home health care services.

ATTORNEY FEES

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

ORDER

IT IS HEREBY ORDERED that:

1. The Administrative Order dated October 12, 2005 is modified.
2. The disputed home health services are not compensable.