

In the Medical Services of
Agnes K. Foster, Claimant
Contested Case No: 07-070H
PROPOSED & FINAL ORDER

June 4, 2008

AGNES K. FOSTER, Petitioner
LIBERTY NORTHWEST INSURANCE CORPORATION, Respondent
Before Douglas Crummé, Administrative Law Judge

Pursuant to stipulation, this matter was heard through the submission of written materials in lieu of an in-person hearing. Christine Jensen, attorney at law, represented claimant, Agnes K. Foster. Meg Carman, attorney at law, represented the employer, Good Samaritan Hospital, and the insurer, Liberty Northwest Insurance Corporation. The Administrative Law Judge (ALJ) is Douglas Crummé. The Workers' Compensation Division's (WCD's) evidentiary record includes Exhibits 1 through 22. The hearing record closed when the Workers' Compensation Board received claimant's reply argument on May 5, 2008.

Claimant challenges a May 18, 2007, WCD Administrative Order which held that claimant is not entitled to reimbursement for the purchase of a recliner chair. She asks that insurer pay an attorney fee of \$2,000 if she prevails on the recliner issue. Insurer argues that the Administrative Order should be affirmed.

The standard of review here is whether the Administrative Order on Remand "is not supported by substantial evidence in the record or if it reflects an error of law." ORS 656.327(2); OAR 436-001-0225(2); *Liberty Northwest Insurance Corporation v. Mundell*, 219 Or App 358 (2008); *Liberty Northwest Insurance Corporation v. Kraft*, 205 Or App 59 (2006).

The parties do not challenge the WCD's Findings of Fact. The WCD found that claimant sustained a compensable neck injury on April 19, 1971, and that insurer has accepted the claim for C3-4, C4-5, and C6-7 disc herniations and C4-5 disc degeneration. Claimant underwent multiple surgical procedures that did not provide lasting pain relief. In 2000, Dr. Bert performed surgery at C3-4. The procedures included anterior cervical discectomy and fusion with iliac bone graft. In 2006, Dr. Bert found that the C3-4 level had failed to fuse. He recommended further surgery.

The WCD found that, in July 2006, claimant stated to Dr. Bert that she needed a recliner chair to support her head, neck, and shoulders. She stated to Dr. Bert that she did not have any comfortable chairs and that her arms were too weak for a regular chair, as she could not pull up. Dr. Bert explained in writing that claimant had very weak musculature about her neck and that Dr. Bert believed that a chair which would support her neck would be very medically useful in terms of providing her comfort and rest. Insurer asked Dr. Bert to provide additional information pursuant to OAR 436-010-0230(10) regarding claimant's request that insurer pay for a recliner. However, Dr. Bert did not, so far as the WCD found, provide any further information. Claimant purchased a recliner and requested that insurer reimburse her. When insurer did not, she requested WCD review.

In its May 18, 2007, Administrative Order, WCD concluded that the recliner was not compensable under OAR 436-010-0230(10) because insurer had not received a report that specifically set forth why claimant required an item not usually considered necessary in the great majority of workers with similar impairments. As a result, WCD denied claimant's request that insurer reimburse her.

Claimant requested this hearing to challenge the Administrative Order She argues that Dr. Bert and she provided a medical opinion that sufficiently supported her need for the recliner.

Claimant's position is not persuasive. The WCD's Administrative Order is supported by substantial evidence in the record and does not reflect an error of law.

OAR 436-010-0230(10) provides,

“Articles including but not limited to beds, hot tubs, chairs, Jacuzzis, and gravity traction devices are not compensable unless a need is clearly justified by a report which establishes that the ‘nature of the injury or the process of recovery requires’ the item be furnished. The report must specifically set forth why the worker requires an item not usually considered necessary in the great majority of workers with similar impairments. Trips to spas, to resorts or retreats, whether prescribed or in association with a holistic medicine regimen, are not reimbursable unless special medial circumstances are shown to exist.”

When an agency has authority to adopt rules and does so, it must follow them. *Aetna Casualty & Sur. Co.*, 139 Or App 283 (1996). Claimant does not argue that WCD lacked authority to adopt OAR 436-010-0230(10).

The WCD reasonably concluded that Dr. Bert and claimant did not provide a report that specifically set forth why claimant required an item not usually considered necessary in the great majority of workers with similar impairments. In their July 2006 written remarks about the need for the recliner, Dr. Bert and claimant did not address whether such recliners were usually considered necessary in the great majority of workers with similar impairments. If such recliners were not usually considered necessary among such workers, Dr. Bert and claimant did not specifically set forth why claimant nevertheless required one.

Accordingly, the Administrative Order should be affirmed.

ORDER

IT IS THEREFORE ORDERED that the WCD's May 18, 2007, Administrative Order is affirmed.