In the ORS 656.245 Medical Services of

James R. Walters, Claimant

Contested Case No: 13-040H

PROPOSED & FINAL ORDER

September 30, 2013

JAMES R. WALTERS, Petitioner
AMERICOLD CORP. C/O SEDGWICK CMS, Respondent

Before Joy M. Dougherty, Administrative Law Judge

Pursuant to notice, a hearing was scheduled for July 18, 2013, in Coos Bay, Oregon. Prior to the scheduled hearing, the parties agreed to submit this matter on the documentary record. Claimant is represented by his attorney, Allison B. Lesh. The employer, Americold Corp., and its claims administrator, Sedgwick CMS, are represented by their attorney, Katherine M. Caldwell.

Exhibits 1-27 were received and are hereby admitted into evidence. The record closed on August 30, 2013, following completion of written closing arguments.

ISSUES

Medical Services. Claimant appeals an April 18, 2013, Administrative Order determining that the employer was not liable for additional travel reimbursements pursuant to OAR 436-010-0270(7).

FINDINGS OF FACT

Claimant sustained a left shoulder injury on January 18, 2012, while using a pull chain. The claim was initially accepted as a non-disabling injury to the left shoulder. At the time of injury, claimant lived in Ontario, Oregon. (Ex. 1).

In April 2012, claimant sought treatment with Dr. Davis, an Orthopedic surgeon, also located in Ontario, Oregon. (Ex. 2). Dr. Davis diagnosed a rotator cuff tear and recommended surgery. In May 2012, Dr. Davis performed a left shoulder arthroscopic rotator cuff repair, subacromial decompression, and distal clavicle resection. (Ex. 2-4).

On June 19, 2012, the employer modified the Notice of Acceptance to include a disabling left shoulder rotator cuff tear. (Exs. 3, 4).

Dr. Davis followed claimant post-operatively. (Ex. 2-5, -6, -8). In August 2012, Dr. Davis noted claimant had moved to Reedsport, Oregon, and was doing his physical therapy at the Umpqua Hospital, in Reedsport, Oregon. (Exs. 2-7, 5). Claimant was dismissed from physical therapy in December 2012. (Ex. 5-32).

Due to ongoing complaints, however, Dr. Davis ordered a repeat MRI. (Ex. 2-8). The MRI revealed a full-thickness tear through the anterior aspect the distal supraspinatus tendon. (Ex. 2-9). On December 5, 2012, Dr. Davis recommended repeat arthroscopic surgery. (Ex. 2-10). Dr. Davis' office requested authorization for a surgical revision of the rotator cuff. (Ex. 6).

On December 19, 2012, the employer sent claimant a letter indicating that Dr. Davis was now located more than 450 miles from claimant's home. Thus, in accordance with OAR 436-010-0270(7)(c), the employer sent claimant a list of 10 orthopedic surgeons within a "reasonable travel distance" of claimant's home, primarily in Coos Bay and Florence, Oregon. (Ex. 7).

On January 15, 2013, South Coast Orthopedic Associates faxed Dr. Davis indicating that Dr. Bell had declined to accept claimant as a patient due to his pending surgery status. (Ex. 8).

On February 12, 2013, Dr. Davis performed another left shoulder surgery including a left shoulder arthroscopy with revision rotator cuff repair. (Ex. 9-1). On February 22, 2013, two weeks post-surgery, Dr. Davis noted claimant's condition was stable. (Ex. 2-11).

On February 28, 2013, claimant, through counsel requested mileage reimbursement related to travel for the surgery. (Ex. 10). Claimant requested reimbursement for 972 miles, 486 miles each way. (Ex. 10-2). That request was partially denied pursuant to ORS 656.245(1)(e). The employer paid claimant for 26.4 miles each way (52.8 total), or the distance from claimant's home to and from Coos Bay. (Ex. 11).

In response to the denial, claimant requested Administrative Review. Claimant, through counsel, indicated that he had "contacted more than one of [the] orthopedic surgeons [on the employer's list], but the surgeons refused to treat [claimant's] left shoulder because [claimant] had already undergone left shoulder surgery at the hands of another surgeon." (Ex. 12-1; *see also* Ex. 17). Claimant also asserted that the limitation did not apply because the rules allowed claimant to continue treatment with his established attending physician.

On April 18, 2013, the WCD Medical Resolution Team issued an Administrative Order denying claimant's requested reimbursement for additional travel expenses relative to the February 12, 2013, left shoulder surgery. (Ex. 25). Claimant appealed that decision.

CONCLUSIONS OF LAW AND OPINION

The issue here is limited to whether claimant is entitled to additional travel reimbursement for continuing to seek treatment with an established attending physician after he moved from Eastern Oregon to Western Oregon. The dispute centers on claimant's travel to his established attending physician, Dr. Davis, in February 2013, for a left shoulder surgery.

Jurisdiction lies with the director. ORS 656.245(1)(e), ORS 656.704(3)(a). The resolution of this issue requires the application of ORS 656.245(1)(e) as set forth below. The matter is reviewed for substantial evidence or error of law.
ORS 656.245(7). The burden of producing evidence to support a fact or position rests with the proponent. ORS 184.450(2).

In its April 2013 Administrative Order, WCD determined that claimant was not entitled to additional reimbursement because he did not demonstrate that a geographically closer doctor of like specialty was unavailable to provide treatment. (Ex. 25-5). Claimant asserts there is an error of law and argues that it was unnecessary for him to demonstrate that such a provider was unavailable because the plain language of OAR 436-010-0270(7)(b) states, "A worker who relocates within the State of Oregon may continue treating with the established attending physician [sic] and be reimbursed transportation costs." Pursuant to that subsection, claimant asserts entitlement to the additional travel reimbursements.

The employer disagrees. The employer asserts that it is permitted under the rules to limit travel reimbursements when it complies with OAR 436-010-0270(7)(c) regardless of whether the worker relocated after establishing care. Based on the following reasoning, the Administrative Order is adopted with the following supplementation.

Determination of this matter requires interpretation of the rule. To determine the meaning of the rule, the precepts that ordinarily apply to the interpretation of statutes and rules are used. *A.G. v. Guitron*, 351 Or 465, 471 (2011) (applying those principles to ORCP 44 B and C). In accordance with those ordinary principles of construction, the text of the rule in its context are examined, along with any relevant adoption history. *State v. Gaines*, 346 Ore. 160, 171-72, 206 P3d 1042 (2009). In addition, case law existing at the time of the adoption of the rule or its predecessor forms part of the context of the rule. *Guitron*, 351 Or at 471; *SAIF v. Walker*, 330 Or 102, 108-09 (2000).

Subsection (b) must be reviewed in context, because it is its connection, or non-connection, with subsection (a), that will determine whether the limits in subsection (a) apply to subsection (b).

OAR 436-010-0270(7) reads as follows:

> Insurers must reimburse workers for actual and reasonable costs for travel, prescriptions, and other claim related services paid by a worker in accordance with ORS 656.245(1)(e), 656.325, and 656.327.
>
> "(a) Reimbursement by the insurer to the worker for transportation costs to visit his or her attending physician may be limited to the theoretical distance required to realistically seek out and receive care from an appropriate attending physician of the same specialty who is in a geographically closer medical community in relationship to the worker's home. If a worker seeks medical services from an authorized nurse practitioner, reimbursement by the insurer to the worker for transportation costs to visit his or her authorized nurse practitioner may be limited to the theoretical distance required to realistically seek out and receive care from an appropriate nurse practitioner of the same specialty who is in a

> geographically closer medical community in relationship to the worker's home. All medical practitioners within a metropolitan area are considered part of the same medical community and therefore are not considered geographically closer than any other physician in that metropolitan medical community for purposes of travel reimbursement.
>
> "(b) A worker who relocates within the State of Oregon may continue treating with the established attending physician or authorized nurse practitioner and be reimbursed transportation costs.
>
> "(c) Prior to limiting reimbursement under subsection (7)(a) of this rule, the insurer must provide the worker a written explanation and a list of providers who can timely provide similar medical services within a reasonable traveling distance for the worker. The insurer must inform the worker that medical services may continue with the established attending physician or authorized nurse practitioner; however, reimbursement of transportation costs may be limited as described.
>
> "(d) When the director decides travel reimbursement disputes the determination will be based on principles of reasonableness and fairness within the context of the specific case circumstances as well as the spirit and intent of the law."

If subsection (b) were read in isolation, claimant's interpretation seems reasonable. A worker cannot be precluded from obtaining medical treatment, or the costs associated with it, on the basis of relocation. Moreover, if the worker relocates within the state, travel costs are explicitly covered under that subsection.

However, subsection (a) references "transportation costs to visit his or her attending physician[.]" It does not distinguish between a new attending physician or an established attending physician. Although (b) does so distinguish, there is nothing to suggest that the limitation set forth in (a) would not apply, provided the carrier complies with (c). Moreover, the WCD has held that if a worker can establish that the medical providers with similar specialty that cannot provide the required care timely, (b) remains in force in that the worker would continue to receive reimbursement for out-of-pocket costs.

For example, in *Erik A. Dallenbach*, 9 CCHR 317 (2004), the worker lived in Springfield and treated there with a pain management doctor. The worker then relocated to Bend, but continued to treat with the Springfield doctor. In concluding that claimant was entitled to full travel costs, the WCD concluded that claimant had met his burden of proving that he had researched all the doctors on the list and none of them were able to provide timely care in place of the Springfield doctor.

Here, the WCD has concluded that claimant did not meet his burden of proving that the doctors on the list provided by the employer could not provide timely care in the place of Dr. Davis. Indeed, there is only information from one of the ten providers listed. (Ex. 8). Because it does not appear the rule limits application of (a) exclusively of (b), I cannot conclude that WCD's application of OAR 436-010-0270(7)(a) was an error of law.

Further support for this determination comes from the relevant statute, ORS 656.245(1)(e), which states:

> "Except for services provided under a managed care contract, out-of-pocket expense reimbursement to receive care from the attending physician or nurse practitioner authorized to provide compensable medical services under this section shall not exceed the amount required to seek care from an appropriate nurse practitioner or attending physician of the same specialty who is in a medical community geographically closer to the worker's home. For the purposes of this paragraph, all physicians and nurse practitioners within a metropolitan area are considered to be part of the same medical community."

Thus, under the current statutory scheme, a worker can choose any attending physician within the state, but out-of-pocket expense reimbursement shall not exceed the amount required to seek care from an appropriate attending physician of the same specialty who is in a medical community geographically closer to the worker's home. A review of the statute does not contain exceptions whereby a worker can get the full reimbursement when his attending physician is farther away. Thus, under the statutory scheme, claimant's argument fails.

Finally, before the instant versions of the administrative rule and statute were instituted, the court analyzed a workers' entitlement to travel to an attending physician when he had relocated away from his established physician. In *Smith v. Chase Bag Company*, 54 Or App 261 (1981), the Court analyzed whether a worker, who had moved 240 miles round trip away from his attending physician, was entitled to travel reimbursement for maintaining his treatment with that doctor. In *Smith*, the court reasoned that because ORS 656.245 allowed a worker to choose his attending physician, and because the carrier was responsible for paying claimant expenses related to that treatment, claimant was to be reimbursed for his travel to his attending physician for care regardless of the fact that he had moved away. *Id*. at 266.

As noted above, at the time the *Smith* case was decided, the limiting provision in ORS 656.245(1)(e) was not in the statute. It was in 1995 that the statute was changed to include the limitation on reimbursement of out-of-pocket expenses when a worker seeks care from an attending physician that it "not exceed the amount required to seek care from an appropriate attending physician of the same specialty who is in a medical community geographically closer to the workers' home." Or Laws 1995, ch 332, § 25.[1] Other than being renumbered, and adding that care can come from a nurse practitioner, the statue has, in relevant parts, remained the same.

[1] At that time, this subsection was numbered ORS 656.245(1)(d).

The other provision relevant to the Court's determination in *Smith* remains; namely, that a worker can choose any attending physician within the State of Oregon. ORS 656.245(2). Thus, a worker can choose any attending physician. But unlike the time of the *Smith* case, a workers' out-of-pocket reimbursement may be limited consistent with the statutory scheme and administrative rules establishing a geographic limitation. Such is the case here.

ORDER

IT IS THEREFORE ORDERED that the April 18, 2013, Administrative Order is affirmed. Claimant's requested relief is denied.