
In the ORS 656.245 Medical Services of

Stacy M. Bodle, Claimant

Contested Case No: 15-030H

Administrative Order No: MS 15-0281

PROPOSED & FINAL ORDER

June 6, 2016

STACY M. BODLE, Petitioner

LIBERTY NORTHWEST INSURANCE CORPORATION, Respondent

Before Nicholas M. Sencer, Administrative Law Judge

Pursuant to notice, the hearing convened on May 11, 2016 in Durham, Oregon before Administrative Law Judge Nicholas M. Sencer. Claimant was present and represented by her attorney, Scott M. Supperstein. Spencer S. Aldrich represented the employer, Holgate Center, and its insurer Liberty NW Insurance Corp. Exhibits 1 through 28, together with interlineated exhibits 15A, 15B, 18A, 19A, 19B, and 20A were admitted into the record. At hearing, proposed exhibit 29 was admitted with no objection. However, in reviewing the record I realized that exhibit 29 was not included in the record below. Accordingly, it is excluded from the record on review. There was no testimony. The record closed on May 11, 2016 following recorded closing arguments.

ISSUES

Claimant appeals from the May 29, 2015 Order of the Medical Resolution Team, Resolution Section, Workers' Compensation Division. The issues include whether Gregory Gullo, M.D. is claimant's attending physician, the insurer's liability for Dr. Gullo's services between April 2014 and April 2015, and the adequacy of the assessed attorney fee.

SCOPE OF REVIEW

The administrative order may be modified at hearing only if it is not supported by substantial evidence in the record or if it reflects an error of law. No new medical evidence or issues shall be admitted. ORS 656.327(2).

SUMMARY OF FACTS

Claimant sustained a compensable injury on March 9, 2009. On August 22, 2014, the Workers' Compensation Board approved a Claim Disposition Agreement (CDA) pursuant to which claimant released all of her benefits, with the exception of medical benefits. (Ex 13). Pursuant to the CDA, the accepted conditions are as follows: "left elbow contusion and left shoulder contusion and strain, including any other diagnosed or undiagnosed conditions now or in the future." (Ex 10, p 2).

Gina Sheedy, M.D. was claimant's initial attending physician and continued to serve as claimant's attending physician until she left her medical practice.

(Ex 26, p 1). On November 11, 2011, Shugang Ge, M.D. became claimant's second attending physician. (Ex 26, p 1). Dr. Ge referred claimant to Gregory Gullo, M.D. for evaluation and treatment of left shoulder pain. (Ex 3). Dr. Gullo first examined claimant on December 31, 2012. (Ex 3).

In a chart note dated March 19, 2014, Dr. Ge wrote,

“Patient wants me to continue to be her attending for her workers comp, however, given the complexity of her case, I strongly recommended patient to see an orthopedics or a physiatrist. I have made a referral to physiatrist for her. . . . The following work restriction is effective until next office visit or until she sees her new attending. . . . Given the complexity of her condition, I will relinquish from her attending and refer her to other specialist such as orthopedics or physiatrist.” (Ex 4).

On April 21, 2014, claimant signed an 827-form indicating that Harold Lee, M.D. was her new attending physician. (Ex 5, p 1). In a report dated April 21, 2014, directed to Dr. Ge, Dr. Lee explained his examination findings. (Ex 5, p 2). Dr. Lee reexamined claimant on May 9, 2014. (Ex 6). Dr. Lee ordered a bone scan that was performed on May 21, 2014. (Ex 7). Dr. Lee next examined claimant on June 4, 2014. (Ex 8). In a chart note dated June 4, 2014, Dr. Lee explained that claimant had a follow up appointment with Dr. Anderson to decide whether she required further orthopedic intervention. (Ex 8). Dr. Lee then asserted that if claimant did not need further surgical treatment, “the only other nonsurgical conservative treatment that she can try at this point is to attempt acupuncture procedure.” (Ex 8).

On July 1, 2014 claimant returned to Dr. Gullo for treatment. (Ex 9). Dr. Gullo wrote in his chart note, “The patient has had considerable difficulty obtaining treatment. She has seen various orthopedic surgeons. She has seen rehabilitation specialists. She was about to engage in acupuncture but it has not occurred.” (Ex 9, p 1). Concerning further treatment, Dr. Gullo wrote,

“Current and past therapies were reviewed with consideration for new or adjusted treatment including medicine, rehab, injections, advanced therapies, psychological support, and specialty referrals. She is advised to schedule a follow up appointment with a provider in 4 weeks.” (Ex 9, p 3).

On August 6, 2014, Kristine Windom, a physician assistant in Dr. Gullo's office, examined claimant with respect to her left shoulder complaints. (Ex 11). Ms. Windom refilled claimant's prescriptions and advised her to schedule a follow up appointment with a physician assistant in 4 weeks. (Ex 11, p 3).

On August 27, 2014, an administrative assistant in Dr. Lee's office wrote to the insurer requesting payment of services performed on May 9, 2014 and June 4, 2014. (Ex 14). The letter includes the statement, “therefore, Harold G. Lee, M.D. is or was the attending physician at that time.” (Ex 14).

On September 3, 2014, Ms. Windom reexamined claimant. (Ex 15). Ms. Windom refilled claimant's prescriptions and ordered a trigger point injection. (Ex 15, p 2). On September 4, 2014, Dr. Gullo's office sent a fax to the insurer requesting authorization of a left shoulder major joint injection. (Ex 15A). On October 29, 2014, Shea DeKlotz, a different physician assistant in Dr. Gullo's office, examined claimant. (Ex 16).

On November 6, 2014, the insurer wrote a letter to claimant in response to her request to have Dr. Gullo become her attending physician. (Ex 17). The insurer asserted that claimant had already selected three attending physicians and that under Oregon Workers' Compensation law, she required the insurer's approval before selecting another attending physician. The letter asserted that Dr. Lee was claimant's current attending physician.

On November 26, 2014, Ms. DeKlotz reexamined claimant. (Ex 18).

On December 16, 2014, the insurer wrote a letter to claimant asserting

“[you have] not received medical treatment for your injury for more than 30 days from your attending physician, Harold Lee, M.D. . . . Referrals not made by your attending physician or treating with the physician who is not your attending physician, does not constitute treatment for the workers' compensation injury of March 9, 2009.” (Ex 18A).

Dr. Gullo reexamined claimant on December 23, 2014. (Ex 19). Ms. DeKlotz reexamined claimant on January 20, 2015, at which time she noted that claimant was going to schedule her shoulder injection even though she would have to pay cash for that procedure. (Ex 19A, p 3).

On March 11, 2015, claimant's attorney wrote to the WCD requesting its intervention concerning the insurer's refusal to accept Dr. Gullo as claimant's attending physician. (Ex 20). Claimant's attorney asserted that since Dr. Sheedy left her practice and Dr. Ge refused to continue to treat her, neither Dr. Sheedy nor Dr. Ge count as choices of attending physician with respect to the three choice limit. (Ex 20).

In a letter to the WCD dated April 9, 2015, the insurer's senior technical claims specialist wrote that because Dr. Ge relinquished as claimant's attending physician, claimant “would have one additional change of attending physician.” (Ex 25). However, the insurer then asserted, “I contacted Dr. Gullo's office and was advised that Dr. Gullo does not take on the role of attending physician. He will only see patients on referral.” (Ex 25).

On May 29, 2015, the Medical Resolution Team issued the Administrative Order that is under review. (Ex 26). The reviewer asserted,

“In this case, the worker changed attending physician to Dr. Lee and then returned to Dr. Gullo for treatment. Dr. Lee confirmed that he did not refer the worker to Dr. Gullo. The director finds that the record supports that Dr. Gullo confirmed that he is not the worker's attending physician and Dr. Lee confirmed that he did

not refer the worker to Dr. Gullo. Therefore, the director concludes that Dr. Gullo is not the attending physician.” (Ex 26, p 3).

CONCLUSIONS OF LAW AND OPINION

Attending Physician

The insurer concedes, and the Medical Reviewer concluded, that at the time claimant sought to change attending physician from Dr. Lee to Dr. Gullo, claimant was entitled to at least one additional change of attending physician without the insurer’s approval. That notwithstanding, the insurer and the Medical Reviewer concluded that Dr. Gullo was not claimant’s attending physician from April 2014 through April 2015.

It is well settled that whether a physician qualifies as an attending physician is a question of fact. *Robert T. Timm*, 56 Van Natta 2127 (2004). Pursuant to statute, an attending physician,

“means a doctor, physician or physician assistant who is primarily responsible for the treatment of a worker’s compensable injury.” ORS 656.005(12)(b).

The statute also defines the role of a “consulting physician.” It provides,

“‘Consulting physician’ means a doctor or physician who examines a worker or the worker’s medical record to advise the attending physician . . . regarding treatment of a worker’s compensable injury.” ORS 656.005(12)(d).

The record establishes that Dr. Lee did not examine claimant after June 4, 2014. On that date, Dr. Lee wrote that the only remaining conservative treatment that he would prescribe was acupuncture. (Ex 8). Thereafter, from July 1, 2014 onward, Dr. Gullo or one of his physician assistants examined claimant on a monthly basis, during which visits treatment was discussed and medications were reviewed and refilled. There is no evidence that Dr. Lee participated to any degree in claimant’s medical treatment after June 4, 2014.

At least as of November 6, 2014, when the insurer erroneously advised claimant that she had exhausted her right to change attending physician without the insurer’s consent, the insurer was aware that claimant considered Dr. Gullo to be her attending physician. (Ex 17). Yet on December 16, 2014, the insurer wrote to claimant alleging that she had not sought medical treatment for 30 days. (Ex 18A). Of note, the insurer sent a copy of this letter to Dr. Gullo. Given the absence of chart notes from Dr. Lee after June 4, 2014, and the monthly notes generated by Dr. Gullo thereafter, the evidence strongly supports that conclusion that Dr. Gullo had become claimant’s attending physician.

The administrative order asserts that the Medical Resolution Team (MRT) contacted Dr. Gullo’s office and that “Dr. Gullo’s referral department responded to MRT that it asked Dr. Gullo if he was the worker’s attending physician and Dr. Gullo responded that he was not.” (Ex 27, p 3).

The status of attending physician is both a legal determination and a question of fact. Whether or not Dr. Gullo's referral department understood what was meant by the term "attending physician" is not relevant. The determinative question is, was Dr. Gullo primarily responsible for claimant's treatment on and after July 1, 2014. The evidence establishes beyond question that he was. Accordingly, I conclude that the administrative order is not supported by substantial evidence and it will be modified to reflect that Dr. Gullo became claimant's attending physician on July 1, 2014.

Liability for Dr. Gullo's Services

Based on my conclusion that Dr. Gullo was claimant's attending physician on and after July 1, 2014, the insurer is liable for payment of his services.

Attorney Fee Below

Pursuant to the statute and rules in effect in 2015, where the time devoted was between 1 and 4 hours and the amount at issue was between \$1 and \$4,000 the attorney fee must be between 5% and 40% of \$3,000. The Medical Reviewer awarded claimant an assessed attorney fee of \$170 based on a value of \$1.00 and one hour of work. I conclude that the award is inadequate and that a reasonable attorney fee is \$750. Accordingly, the administrative order will be further modified.

Attorney Fee on Appeal

Claimant is entitled to an assessed attorney fee pursuant to ORS 656.385(1) and OAR 436-001-0410. Based on the results achieved and the time devoted to the case, I award an assessed fee in the amount of \$3,500.

ORDER

IT IS HEREBY ORDERED that the May 29, 2015 Administrative Order is modified to reflect that Dr. Gullo became claimant's attending physician on July 1, 2014 and that the insurer is liable for payment of his medical services on and after that date. The order is further modified to increase claimant's assessed attorney fee from \$170 to \$750.

IT IS FURTHER ORDERED that pursuant to ORS 656.385(1) and OAR 436-001-0410, the employer and its insurer are assessed an attorney fee in the amount of \$3,500, to be paid directly to claimant's attorney.