
In the ORS 656.245(1)(c)(j) Medical Services Dispute of

LOWELL E. PAULI Claimant

Contested Case No: H04-123

PROPOSED AND FINAL ORDER

November 10, 2004

LOWELL E. PAULI, Petitioner

SAIF CORP., Respondent

Before Catherine P. Coburn, Administrative Law Judge, Administrative Hearings

HISTORY OF THE CASE

Claimant appeals the Administrative Order issued on July 6, 2004 by the Medical Review Unit (MRU) of the Workers' Compensation Division (WCD), Department of Consumer and Business Services (department or director). On August 31, 2004, the department referred the matter to the Office of Administrative Hearings (OAH). On October 21, 2004, Administrative Law Judge (ALJ) Catherine P. Coburn conducted a contested case hearing. Petitioner Lowell E. Pauli (claimant) was represented by attorney James T. Guinn. Respondent SAIF Corporation (insurer) was represented by attorney Kenneth P. Russell. Caremark Comp Managed Care Organization (MCO) waived appearance. Claimant testified on his own behalf and the record closed on the date of hearing.

ISSUE

Whether MRU incorrectly determined that insurer is not liable for palliative chiropractic care requested by Gary Jansen, DC on January 15, 2004.

EVIDENTIARY RULINGS

WCD Exhibits 1 through 32 were admitted into the record without objection. Claimant's proposed Supplementary Exhibit 33, a July 22, 2004 letter from Dr. Jansen, was not admitted into the record pursuant to OAR 436-001-0225(1).¹

¹ OAR 436-001-0225(1) provides:

Review of medical service (ORS 656.245 and 656.247(3)(a)) and treatment (ORS 656.327 and 656.260) disputes is for substantial evidence or error of law. New medical evidence or issues may not be considered at the contested-case hearing.

FINDINGS OF FACT

(1) On January 16, 2002, claimant fell off of a ladder while working as a plumbing welder. (Ex. 1.) On January 30, 2002, insurer accepted a minimally displaced anterior fracture of C5 and enrolled claimant in an MCO. (Exs. 2, 3 and 9.) On June 13, 2002, attending physician Bradley J. Bergquist, MD declared claimant's condition medically stationary and released him to regular work. (Exs. 6 and 9.)

(2) On January 9, 2003, claimant sought treatment from Jansen Chiropractic Clinic. (Ex. 11.) On April 28, 2003, Dr. Jansen requested palliative treatment stating "Is directly and materially related—No other causation noted" and "Will allow full time unrestricted work." He also noted that work restrictions and/or material worsening could result if the palliative treatment were not approved. (Ex. 12.)

(3) On May 6, 2003, insurer denied the request because Dr. Jansen was not the attending physician and because the requested treatment was not directed to an accepted condition. (Ex. 16.)

(4) On May 12, 2003, claimant designated Dr. Jansen as his attending physician. Dr. Jansen requested palliative treatment noting that it was directly related to the work injury and would enable claimant to continue full time employment. Dr. Jansen noted, "Non approved could result in worsening and work [decrease]." (Ex. 17.)

(5) On June 12, 2003, Dr. Jansen indicated, "Palliative care will be requested to enable [claimant] to continue working at his current place of employment as a welder." (Ex. 18.)

(6) On January 15, 2004, Dr. Jansen requested palliative treatment to improve cervical range of motion, noting that claimant was employed full time as a welder and "Non approved could result in worsening". (Ex. 19.)

CONCLUSION OF LAW

MRU correctly determined that insurer is not liable for palliative chiropractic care requested by Gary Jansen, DC on January 15, 2004.

OPINION

This dispute arises under ORS 656.245, and therefore, jurisdiction lies with the director. ORS 656.245(6). Claimant was enrolled in a managed care organization, and therefore, I review the administrative order for substantial evidence or error of law. ORS 656.260(16) and OAR 436-001-0225(4). The burden of proving a fact or position falls upon the proponent. ORS 183.450(2). 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 legislation adopting a different standard, the standard of proof in an administrative hearing 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).

Pursuant to ORS 656.245(1)(a), an insurer is obligated to provide medical services that are materially related to a compensable condition for so long as the nature of the injury or the process of recovery requires. This obligation continues over the worker's lifetime. ORS 656.245(1)(b). However, pursuant to ORS 656.245(1)(c), after the work-related condition becomes medically stationary, the insurer is no longer liable for payment of medical services with some exceptions, including palliative treatment. Here, claimant's condition became medically stationary in June 2002.

ORS 656.245(1) provides in pertinent part:

- (c) Notwithstanding any other provision of this chapter, medical services after the medically stationary² date are not compensable except for the following:

- (J) With the approval of the insurer or self-insured employer, palliative care³ that the worker's attending physician referred to in ORS 656.005(12)(b)(A)⁴ prescribes and that is necessary to enable the worker to continue current employment or a vocational training program.

OAR 436-010-0290 provides:

- (1) When the worker's attending physician believes that palliative care is appropriate to enable the worker to continue current employment or a current vocational training program, the attending

² ORS 656.0005(17) provides:

'Medically stationary' means that no further material improvement would reasonably be expected from medical treatment or the passage of time.

³ ORS 656.005(2) provides:

'Palliative care' means medical service rendered to reduce or moderate temporarily the intensity of an otherwise stable medical condition, but does not include those medical services rendered to diagnose, heal or permanently alleviate or eliminate a medical condition.

⁴ ORS 656.005(12)(b)(A) provides:

"(b) Except as otherwise provided for workers subject to a managed care contract, 'attending physician' means a doctor or physician who is primarily responsible for the treatment of a worker's compensable injury and who is:
 "(A) A medical doctor or doctor of osteopathy licensed under ORS 677.100 to 677.228 by the Board of Medical Examiners for the State of Oregon or an oral and maxillofacial surgeon licensed by the Oregon Board of Dentistry or a similarly licensed doctor in any country or in any state, territory or possession of the United States;"

physician must first submit a written request for approval to the insurer. The request shall:

- (a) Describe any objective findings;
- (b) Identify by ICD-9-CM diagnosis, the medical condition for which palliative care is requested;
- (c) Detail a treatment plan which includes the name of the provider who will render the care, specific treatment modalities, and frequency and duration of the care, not to exceed 180 days;
- (d) Explain how the requested care is related to the compensable condition; and
- (e) Describe how the requested care will enable the worker to continue current employment, or a current vocational training program, and the possible adverse effect if the care is not approved.

Interpreting a statute, the court's, and thus my task, is to determine the legislative intent. ORS 174.020.⁵ In order to discern the legislative intent, the first level of analysis is to examine both the text and context of the statute. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610 (1993). The text of the statute is the best evidence of the legislature's intent. *Hadley v. Cody Hindman Logging*, 144 Or App 157 (1996). In interpreting the meaning of an administrative rule, I apply the same method of analysis employed in determining the meaning of a statute. *Abu-Adas v. Employment Dept.*, 325 Or 480 (1997); *Larry Hemenway*, 5 WCSR 33 (2000). In applying the foregoing method of analysis to ORS 656.245(1)(c)(J) and OAR 436-010-0290(1)(e), I find that I need go no further than to examine the plain meaning. Both the statute and the administrative rule specify that palliative care is reimbursable only when it enables an injured worker to continue current employment. The statute and administrative rule do not require an insurer to provide palliative care to an injured worker who is unemployed at the time of the request.

Substantial evidence exists to support a finding "when the record, viewed as a whole, would permit a reasonable person to make that finding." ORS 183.482(8)(c). To determine whether substantial evidence exists, an ALJ is required to:

"look at the whole record with respect to the issue being decided, rather than one piece of evidence in isolation. If an agency's finding is reasonable, keeping in mind the evidence against the findings as well as the evidence supporting it, there is substantial evidence. *** For instance, and in the context which is likely frequently to occur in workers' compensation cases, if there are doctors on both sides of a medical issue, whichever way the (director) finds the facts will probably have substantial evidentiary support. (The ALJ would not need to choose sides.

⁵ ORS 174.020 provides in pertinent part:

(1)(a) In the construction of a statute, a court shall pursue the intention of the legislature if possible.

The difference between the “any evidence rule” and the substantial evidence test *** will be decisive only when the credible evidence apparently weighs overwhelmingly in favor of the finding and the (director) finds the other without giving a persuasive explanation.” *Armstrong v. Asten-Hill Co.*, 90 Or App 200, 206 (1998).

MRU determined that Dr. Jansen’s requests for palliative treatment failed to comply with subsections (d) and (e) of the rule. I agree. Under subsection (d), the attending physician is required to explain how the requested care is related to the compensable condition. In several reports, Dr. Jansen requested palliative treatment directed toward a cervical condition, but without explaining specifically how the requested treatment relates to the accepted C5 fracture. MRU found Dr. Jansen’s explanation inadequate and I defer to the agency’s interpretation of its rule.

Under subsection (e), the attending physician is required to describe *inter alia* how the requested care will enable the worker to continue current employment and the possible adverse effect if the care is not approved. In several reports, Dr. Jansen noted that claimant was employed full time as a welder and that work restrictions and a worsening might result if the palliative treatment were not approved. However, the reports fail to describe how the requested palliative treatment would enable claimant to continue performing specific job duties as a welder. MRU found Dr. Jansen’s description inadequate and I defer to the agency’s interpretation of its rule.

Based on the record, I find that a reasonable person could reach MRU’s conclusion, and therefore, the administrative order is supported by substantial evidence. Furthermore, since I defer to the agency’s interpretation of its rules, I find that the administrative order reflects no error of law. Accordingly, finding no basis for modifying the administrative order, I affirm.

ATTORNEY FEES

Claimant has not prevailed in a contested case hearing, and therefore, is entitled to no attorney fee. ORS 656.385(1).

ORDER

IT IS HEREBY ORDERED that:

The Administrative Order dated July 6, 2004 is affirmed.