
In the Compensation of
Mark S. Neufeldt, Claimant
Contested Case No: 08-105H
PROPOSED & FINAL ORDER

August 22, 2008

MARK S. NEUFELDT, Petitioner
LIBERTY NW INSURANCE CORP., Respondent
Before Nicholas M. Sencer, Administrative Law Judge

Pursuant to notice, the hearing was scheduled to convene on September 9, 2008, in Bend, Oregon before Administrative Law Judge Nicholas M. Sencer. By agreement of the parties, the case was submitted for decision based on the exhibits and written closing arguments. James E. Bailey, III represents claimant. Brad G. Garber represents the employer, United Parcel Service, and its insurer, Liberty Northwest. Exhibits 1 through 14 are admitted into the record. The record closed on October 8, 2008, upon my receipt of claimant's reply argument.

ISSUES

Claimant requested a hearing to challenge the May 23, 2008 Administrative Order and May 30, 2008 Amended Administrative Order on Reconsideration in MS 08-0595, a medical services dispute. The issue concerns whether the insurer is liable for palliative physical therapy services rendered from September 18, 2007 through October 3, 2007.

STANDARD 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).

FINDINGS OF FACT

Claimant is a 57-year old man who was compensably injured on November 22, 2005 in a motor vehicle accident. On January 3, 2006, the insurer issued an initial Notice of Acceptance of a non-disabling cervical and thoracic strain, left shoulder and elbow contusion. (Ex 1). On May 10, 2007, claimant's attending physician, Timothy A. Hill, M.D., determined that he was medically stationary with regard to his cervical strain, that he was capable of performing regular work activities, but was going to need palliative care and ongoing medication management. (Ex 2).

Dr. Hill reexamined claimant on September 11, 2007, at which time he noted that claimant was working and remaining functional despite his pain. Dr. Hill diagnosed the following conditions: cervical strain, mild to moderate demyelinating left ulnar neuropathy and moderate right and severe left carpal tunnel syndrome. (Ex 2, p 3). Dr. Hill noted that claimant was experiencing waxing and waning symptom flares with respect to his cervical strain for which he recommended palliative treatment. (Ex 2, p 4). The insurer received Dr. Hill's

September 11, 2007 chart note on October 19, 2007. (Ex 2, p 3).

On September 12, 2007, Dr. Hill completed an 827-form palliative care request. (Ex 3). In the middle of a long paragraph on the back of the 827-form are instructions to the physician as to the required contents of the palliative care plan that must accompany the 827-form. (Ex 3, p 2). Dr. Hill indicated that his chart note was attached to the form. The insurer's date stamp reflects that it received the palliative care request on October 1, 2007. Also on September 12, 2007, Dr. Hill signed a physical therapy prescription in which he prescribed six to eight visits including stretching, massage and other modalities. (Ex 4, p 1). The insurer's date stamp indicates that it received a copy of this prescription on October 4, 2007.

In a letter to the Workers' Compensation Division dated May 22, 2008, the insurer explained that it believed there was some confusion as to whether Dr. Hill had described the palliative care for claimant's cervical strain or a preexisting spondylosis condition. (Ex 9). The insurer also asserted that Dr. Hill's chart notes did not satisfy the specific requirements set forth at OAR 436-010-0290(1)(a). (Ex 9). The insurer asserted that is should not be responsible for the physical therapy visits from September 18, 2007 through October 3, 2007.

On May 23, 2008, the Workers' Compensation Division issued its initial Administrative Order in which it concluded that the insurer was not responsible for payment of the subject physical therapy sessions. (Ex 11). The Order explains that the decision was based on the conclusion that Dr. Hill did not properly document, "how the requested care is related to the compensable condition, or how the requested care will enable Mr. Neufeldt to continue current employment, and the possible adverse effect if the care is not approved." (Ex 11, p 2).

Claimant requested reconsideration of the Administrative Order and on May 30, 2008, the Workers' Compensation Division issued an Amended Administrative Order on Reconsideration. (Ex 13). This Order addressed claimant's contention that because the insurer had paid for some of the early physical therapy treatments, it was precluded from denying the remaining treatments. In its amended order, the WCD cited ORS 656.262(10) in support of its assertion that the insurer's mere payment of compensation shall not be considered acceptance of a claim or an admission of liability.

CONCLUSIONS OF LAW AND OPINION

To prevail, claimant must establish that the challenged order either reflects an error of law or that it is not supported by substantial evidence. ORS 656.327(2). Claimant argues that the doctrines of waiver and/or equitable estoppel bar the insurer from denying responsibility for the subject medical treatment. In other words, since the insurer paid for some of the therapy visits, it must pay for all of them. For the following reasons, I conclude that neither waiver nor estoppel bar the insurer from denying the palliative care. However, I also conclude that the orders reflect an error of law and are not supported by substantial evidence. Accordingly, they will be reversed.

Pursuant to ORS 656.262(10):

“Merely paying or providing compensation shall not be considered acceptance of a claim or an admission of liability, nor shall mere acceptance of such compensation be considered a waiver of the right to question the amount thereof.”

Therefore, pursuant to ORS 656.262(10), the insurer’s mere payment for some of the therapy visits cannot be construed as an admission of liability for the palliative care.

The procedure for obtaining insurer approval of palliative care is set forth at length at OAR 436-010-0290(WCD Order No. 06-054, effective 7/1/06). Pursuant to that rule:

“(1) Palliative care means medical services 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. Palliative care is compensable when it is prescribed by the attending physician and is necessary to enable the worker to continue current employment or a vocational training program. 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 physician must first submit a written request for approval to the insurer.

(a) The request must:

(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.

(b) Insurers must date stamp all palliative care requests upon receipt. Within 30 days of receipt, the insurer must send written notification to the attending physician, worker, and worker’s attorney approving or disapproving the request as prescribed.

(A) Palliative care may begin following submission of the request to the insurer. If approved, services are payable from the date the approved medical

service begins. If the requested care is ultimately disapproved, the insurer is not liable for payment of the medical service.

(B) If the insurer disapproves the requested care, the insurer must explain, in writing:

(i) Any disagreement with the medical condition for which the care is requested;

(ii) Why the requested care is not acceptable; and/or

(iii) Why the requested care will not enable the worker to continue current employment or a current vocational training program.

(c) If the insurer fails to respond in writing within 30 days, the attending physician or injured worker may request approval from the director within 120 days from the date the request was first submitted to the insurer. If the request is from a physician, it must include a copy of the original request and may include any other supporting information.”

In this case, the insurer asserts, and the WCD concluded, that Dr. Hill did not fully comply with OAR 436-010-0290(1)(a). Specifically, the WCD concluded that Dr. Hill “did not document in the chart notes at the time of the palliative care request, how the requested care is related to the compensable condition, or how the requested care will enable Mr. Neufeldt to continue current employment, and the possible adverse effect if the care is not approved.” (Ex 11, p 2).

Pursuant to ORS 656.245(1)(c)(J), workers are entitled to palliative care that enables them to continue current employment. I conclude that the information requested from attending physicians at OAR 436-010-0290(1)(a) amounts to suggested indicia of what constitutes compensable palliative care; it does not constitute a mandatory list the omission of any element of which would render the request for palliative care insufficient.

In this case, Dr. Hill described the objective findings (trigger points and limited range of motion, (Ex 2, p 3)), he identified the condition for which care was requested (cervical strain), he detailed the treatment plan (Ex 2, p 4; Ex 4, p 1), and he explained that the care was related to symptom flares of the cervical strain (Ex 2, p 4).

The only information listed in the rule that Dr. Hill did not provide concerns how the proposed care will enable claimant to continue his current employment and the possible adverse effects if the care is not approved. However, the answer to both inquiries is obvious from the record. How will the proposed care enable the worker to work? If successful, it will reduce his pain from the current 4 or 6/10 to the usual 2/10. (Ex 2, p 3). What are the adverse effects if the care is not approved? Claimant’s pain will continue unabated.

To deny the requested palliative care based on the attending physician's failure to explain the obvious would elevate form over substance and, more significantly, would violate the following objectives of the Workers' Compensation Law:

“(a) To provide, regardless of fault, sure, prompt and complete medical treatment for injured workers and fair, adequate and reasonable income benefits to injured workers and their beneficiaries.

(c) To restore the injured worker physically and economically to a self-sufficient status in an expeditious manner and to the greatest extent practicable.” ORS 656.012(2)

I conclude that Dr. Hill substantially complied with the requirements for requesting palliative care and that the record establishes that the request should have been approved. To the extent the challenged orders conclude otherwise, they are not supported by substantial evidence and reflect an error of law. Accordingly, they will be reversed.

ATTORNEY FEE

Claimant is entitled to a reasonable assessed attorney fee pursuant to ORS 656.385. The amount of the fee is determined by the matrix set forth at OAR 436-010-0008(12). In determining a reasonable fee, I have considered the estimated benefit achieved, less than \$2,000, and the professional hours devoted to the case, between 1 and 2 hours based on the absence of a statement from claimant's attorney detailing the actual hours devoted to the case. Based on these factors, I award an assessed attorney fee in the amount of \$400.

ORDER

IT IS HEREBY ORDERED that the May 23, 2008 Administrative Order and the May 30, 2008 Amended Administrative Order on Reconsideration in MS 08-0595 are reversed. The palliative care request is approved and the insurer is directed to process the subject physical therapy bills for payment.

IT IS FURTHER ORDERED that the insurer is assessed an attorney fee in the amount of \$400 to be paid directly to claimant's attorney.