

In the ORS 656.245 Medical Services of

**Nichele Bergmanis, Claimant**

Contested Case No: 08-154H

**PROPOSED & FINAL ORDER**

October 6, 2009

NICHELE BERGMANIS, Petitioner

CRAWFORD & COMPANY, Respondent

Before Kathryn A. Poland, Administrative Law Judge

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This matter is before the undersigned Administrative Law Judge (ALJ) pursuant to the Director's referral under ORS 656.704(2)(a). Hearing convened and concluded in Salem, Oregon on September 9, 2009. Claimant appeared at hearing with her attorney, Scott McNutt, Jr. Attorney Gordon Clark appeared at hearing on behalf of the employer and Crawford & Company (Crawford), the third party administrator for the employer's former workers' compensation carrier. Attorney Robert Radler appeared by phone on behalf of OIGA/Public Risk Consultants to explain the scope of his client's coverage in this matter. Mr. Radler then waived appearance on the merits of the issue before the forum. The following documentary evidence was admitted into the record at hearing: Exhibits 1 thru 13, as identified in the Department's September 15, 2008 exhibit list. The record closed on September 9, 2009.

**ISSUES**

Medical Services/Jurisdiction. Claimant challenges the Department's ruling that she did not file a timely request for administrative review of a dispute regarding palliative medical treatment. Claimant asserts that her request for review was timely, and that the Department should not have addressed the timely filing issue because it was not raised by Crawford.

**FINDINGS OF FACT**

Claimant has an accepted claim for a lumbosacral sprain/strain sustained in an injury with the employer on May 20, 1997. The employer closed the injury claim in September 1997. Over the following years, claimant received intermittent palliative care from Dr. Verzosa, M.D., the attending physician, and Dr. Stellflug, D.C., the treating chiropractor.

In particular, on October 3, 2007, Dr. Verzosa saw claimant in follow-up and authorized palliative care from Dr. Stellflug until April 3, 2008. Dr. Stellflug provided palliative chiropractic care to claimant on January 23, February 11, March 3 and March 19, 2008.

On April 14, 2008, Dr. Verzosa saw claimant in follow-up and authorized further palliative care from Dr. Stellflug until October 14, 2008. Dr. Stellflug provided palliative chiropractic care to claimant on April 16 and May 5, 2008.

On June 12, 2008, Crawford issued a written denial of Dr. Stellflug's billing for the January 23, 2008 treatment. Sometime prior to July 8, 2008, Dr. Stellflug informed claimant that Crawford had not paid the billings for any of claimant's chiropractic treatment in 2008. On July

8, 2008, claimant wrote the Department and requested administrative review of Crawford's nonpayment of these billings.

By letter to the Department dated August 1, 2008, Crawford asserted that "[t]he current issue with the payment of ongoing palliative treatment is that I have no verification that [claimant] is working and is eligible for palliative care."

On August 12, 2008, the Department issued an Administrative Order (MS 08-995) concluding that claimant's request for administrative review was untimely.

### **STIPULATED FINDING OF FACT**

Counsel for Crawford stipulated that claimant was in the work force when the palliative care at issue in this matter was authorized by Dr. Verzosa and provided by Dr. Stellflug.

### **ULTIMATE FINDINGS OF FACT, CONCLUSIONS OF LAW AND REASONING**

Administrative Review of palliative care disputes is addressed in OAR 436-010-0290, which provides in pertinent part:

"(1) \*\*\* When the worker's attending physician believes that palliative care is appropriate[,] the attending physician must first submit a written request for approval to the insurer.

\* \* \*

"(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[.]

(d) When the attending physician or the injured worker disagrees with the insurer’s disapproval, the attending physician or the injured worker may request administrative review by the director in accordance with OAR 436-010-0008, within 90 days from the date of insurer’s notice of disapproval[.]

\* \* \*

“(f) Subsequent requests for palliative care are subject to the same process as the initial request; however, the insurer may waive the requirement that the attending physician submit a supplemental palliative care request.

Claimant asserts that the Department did not have jurisdiction to address the timeliness of her request for administrative review because that issue was not raised by Crawford. I am not persuaded by that argument. The filing deadlines in OAR 436-010-0290 are a reasonable exercise of the Department’s discretion to promulgate rules for the resolution of medical services disputes within its jurisdiction. I find no statute or rule limiting the Department’s authority to enforce these filing deadlines only when that issue is raised by a party. Absent such a statute or rule, the Department did not abuse its discretion or exceed its jurisdiction/ authority in medical services disputes by unilaterally enforcing its own filing deadlines.

I turn to the merits of the timely filing issue. The Department reasoned that claimant’s request for review was untimely because it was filed more than 120 days after Dr. Verzosa first submitted the October 3, 2007 request for palliative care to Crawford. The 120-day filing deadline referenced in OAR 436-010-0290(1)(c) runs from the date the request for palliative care is first submitted to the insurer.

Dr. Verzosa’s October 3, 2007 chart note states that “[w]e will submit another palliative care request for [chiropractic treatment] until 04/03/08.” Crawford’s August 1, 2008 letter to the Department indicates that Crawford received Dr. Verzosa’s October 3, 2007 palliative care request in October 2007. There is no evidence in the record that Dr. Verzosa first submitted that request to the insurer at any later date. Consequently, the 120-day filing deadline referenced in OAR 436-010-0290(1)(c) ran some time in April 2008. Claimant did not request director approval of the October 3, 2007 palliative care request until July 8, 2008. Thus, claimant’s request was untimely under OAR 436-010-0290(1)(c).

Nevertheless, Dr. Verzosa’s October 3, 2007 palliative care request only encompassed treatment until April 3, 2008. Dr. Stellflug’s April 16 and May 5, 2008 treatments were authorized in Dr. Verzosa’s subsequent April 14, 2008 palliative care request for treatment until

October 14, 2008. Consequently, claimant's July 8, 2008 request for director approval of Dr. Stellflug's April 16 and May 5, 2008 treatments was timely under OAR 436-010-0290(1)(c).

Moreover, OAR 436-010-0290(1)(d) creates an alternative procedure for requesting administrative review of nonpayment of palliative medical services. Pursuant to that provision, a worker has 90-days from the date of the insurer's "disapproval" of palliative treatment to request administrative review of the disapproval. There is no requirement that the worker request director approval under OAR 436-010-0290(1)(c) as a prerequisite for challenging an insurer's disapproval under OAR 436-010-0290(1)(d).

Furthermore, I am persuaded that the 90-day filing deadline in OAR 436-010-0290(1)(d) does not begin to run until the insurer issues the *written* notification of disapproval required under OAR 436-010-0290(1)(b). Any other interpretation would conflict with OAR 436-010-0008(5)(b). Pursuant to that provision, the 90-day period for requesting administrative review of nonpayment of medical billings runs from the date the party knew, or should have known, there was a dispute over the provision of medical services, and this time frame only applies if the aggrieved party is given written notice that they have 90 days in which to request administrative review by the director.

Here, the record includes Crawford's June 12, 2008 written denial of Dr. Stellflug's billing for the January 23, 2008 treatment. This is the only written disapproval of Dr. Stellflug's palliative chiropractic care, other than Crawford's August 1, 2008 letter to the Department. Claimant's July 8, 2008 letter to the Department suggests that Crawford also issued written denials of some or all of the remaining treatments from Dr. Stellflug in 2008. However, there is no evidence that these other written denials were issued prior to June 12, 2008.

Given this record, I find that Crawford provided the requisite written disapproval of Dr. Stellflug's palliative treatment no earlier than June 12, 2008. Consequently, the 90-day filing period referenced in OAR 436-010-0290(1)(d) began, at the earliest, on June 12, 2008; and claimant's July 8, 2008 request for administrative review was timely under OAR 436-010-0290(1)(d).

In summary, for the reasons set forth above, I am persuaded that claimant filed a timely request under OAR 436-010-0290(1)(c) for director approval of Dr. Stellflug's April 16 and May 5, 2008 treatment, and a timely request under OAR 436-010-0290(1)(c) for administrative review of the insurer's disapproval of Dr. Stellflug's treatment on January 23, February 11, March 3, March 19, April 16 and May 5, 2008. Consequently, I conclude that the Department erred in not processing claimant's request for administrative review regarding Dr. Stellflug's palliative treatment.

### **ORDER**

The Department's August 12, 2008 Administrative Order (MS 08-995) is reversed.