

In the ORS 656.245 Medical Services Disptue of

Jeff Goodwin, Claimant

Contested Case No: 11-024H

PROPOSED & FINAL ORDER

July 22, 2011

JEFF GOODWIN, Petitioner

LIBERTY NORTHWEST INSURANCE CORPORATION, Respondent

Before Gregory J. Naugle, Administrative Law Judge

Pursuant to notice, a hearing was scheduled in this matter on May 23, 2011, in Salem, Oregon, before Administrative Law Judge Naugle. Claimant is represented by attorney Aaron Clingerman. The employer, American Property Management Corporation, and its insurer, Liberty Northwest Insurance Corporation, are represented by attorney Sally A. Curey.

Prior to the hearing date, the parties advised the forum that the matter could be determined on the documentary record and written closing arguments. Therefore, no hearing was held.

Exhibits 1 through 14 were submitted and admitted into evidence without objection. The record closed on June 22, 2011, upon receipt of claimant's reply argument.

ISSUES

1. Propriety of the WCD's February 9, 2011 Administrative Order MS 11-0096 which concluded that Liberty Northwest was not liable for payment of physical therapy from June 23, 2010 through September 3, 2010; and
2. Claimant's entitlement to an attorney fee.

FINDINGS OF FACT

I adopt the Findings of Fact in the Administrative Order.¹

CONCLUSIONS OF LAW AND OPINION

The WCD, acting as the Director's designate, concluded that the insurer correctly disapproved payment for physical therapy from June 23, 2010 through September 3, 2010. Claimant contends that WCD erred in its determination. As follows, I affirm the WCD's order.

¹ See *Liberty Northwest Ins. Corp v. Kraft*, 205 Or App 59, 62-63 (2006) (a substantial evidence review does not contemplate an ALJ making supplemental findings of fact); *Mundell*, 219 Or App at 362 (in reviewing the MRU's order for substantial evidence, an ALJ is limited to evaluating the evidence in the record to determine whether, based on that evidence, a reasonable factfinder in the MRU's position could have made the findings that the MRU actually made.)

The burden of proving a fact or position rests with the proponent. *Salem Decorating v. National Council on Comp. Ins.*, 116 Or App 170 (1992), *rev den* 315 Or 643 (1993). As the proponent of his position, claimant bears the burden of proving by a preponderance of evidence that the WCD's February 9, 2011 Administrative Order is incorrect. *Harris v. SAIF*, 292 Or 683 (1982) (general rule regarding allocation of burden of proof is that burden is on the proponent of the fact or position.)

The standard for reviewing the Director/WCD's Administrative Order is set forth in ORS 656.327(2), which provides that "[t]he 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." *See* OAR 436-001-0225(2); *Liberty Northwest Ins. Corp v. Mundell*, 219 Or App 358, 362 (2008).

Here, the issue is whether the physical therapy claimant received from June 23, 2010 through September 3, 2010 is a compensable medical service.

Pursuant to ORS 656.245(1)(a), an insurer is required to provide medical services for compensable conditions for such period as the nature of the injury or the process of recovery. ORS 656.245(1)(c)(A-L) identifies compensable medical services after the worker's condition is medically stationary.

Claimant argued that the Administrative Order reflected an error of law regarding entitlement to palliative care. Specifically, claimant contended that the WCD too narrowly construed the phrase "current employment or a vocational training program" in ORS 656.245(1)(c)(J) and that the case must be remanded to determine whether his attendance at school is a vocational training program.²

OAR 436-010-0290(1)(a)(A-E) sets forth the requirements for a palliative care request. The rule provides that 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 care, specific treatment modalities, and frequency and duration of the care, not to exceed 180 days;

² ORS 656.245(1)(c)(J) provides:

"With the approval of the insurer or self-insured employer, palliative care that the worker's attending physician referred to in ORS 656.005 (12)(b)(A) prescribes and that is necessary to enable the worker to continue current employment or a vocational training program. If the insurer or self-insured employer does not approve, the attending physician or the worker may request approval from the Director of the Department of Consumer and Business Services for such treatment. The director may order a medical review by a physician or panel of physicians pursuant to ORS 656.327 (3) to aid in the review of such treatment. The decision of the director is subject to review under ORS 656.704."

“(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.”

Here, claimant’s palliative care request was a June 23, 2010 prescription from Dr. Rampton stating “[r]eferral to PT Northwest for treatment and evaluation DX: LBP [illegible] DDD, no sciatica.” (Ex. 2.)

Dr. Rampton's palliative care request fails to meet the requirements of OAR 436-010-0290(1)(a). Although it contains diagnoses, it fails to describe objective findings. Additionally, the request does not explain how the requested care is related to the compensable condition or 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.

Accordingly, as claimant did not submit a palliative care request satisfying the requirements of OAR 436-010-0290(1)(a), the physical therapy claimant received from June 23, 2010 through September 3, 2010 is not a compensable medical service under ORS 656.245(1)(c)(J).

Consequently, I do not conclude that the February 9, 2011 Administrative Order which determined that Liberty Northwest was not liable for payment of physical therapy from June 23, 2010 through September 3, 2010 reflected an error of law.

As claimant did not prevail, he is not entitled to an attorney fee under ORS 656.385(1) and OAR 436-010-0008(12).

IT IS THEREFORE ORDERED that

1. The February 9, 2011 Administrative Order MS 11-0096 is affirmed; and
2. Claimant’s request for an attorney fee is denied.