

In the ORS 656.245 Medical Services of

**Guy A. Landis, Claimant**

Contested Case No: 10-190H

**ORDER REMANDING**

January 20, 2012

GUY A. LANDIS, Petitioner

LIBERTY NORTHWEST INSURANCE CORPORATION, Respondent

Before John Shilts, Workers' Compensation Division Administrator

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Liberty Northwest Insurance Corporation (insurer) denied Guy A. Landis' (claimant's) request for care on the grounds the care was palliative and claimant was not employed. Following a hearing, Administrative Law Judge (ALJ) Gregory J. Naugle found the care was curative and compensable. Insurer filed exceptions. I remand to the Workers' Compensation Division's Resolution Team (RT) for further consideration of evidence offered at the hearing.

**FACTUAL SUMMARY**

I adopt the facts as found in the administrative order and restate them here in part for clarity. Claimant has an accepted claim for disabling arachnoiditis, thoracic and lumbar strains combined with underlying unrelated L5-S1 disc bulge, facet arthrosis and stenosis. In 2008, claimant's condition was found to be medically stationary and claimant settled his claim through a Claims Disposition Agreement.

Claimant used multiple pain medications and a TENS<sup>1</sup> unit to address chronic pain. In 2010, claimant reduced his use of prescription medications for pain. He particularly tried to eliminate his use of Methadone because of the side effects. In May 2010 claimant's physician, Dr. McKellar, submitted a request to insurer for physical therapy and continued use of the TENS unit. Insurer responded in June 2010 by letter, stating insurer would not pay for the requested care because the doctor had not submitted a formal palliative care request. Insurer also said it did not have current information on whether claimant was working. Dr. McKellar responded with a letter in July 2010 stating claimant's medical condition was stationary and that he had been using physical therapy and the TENS unit to address chronic pain. Dr. McKellar stated claimant's condition would deteriorate without therapy and that the physical therapy improved claimant's pain tolerance and allowed him to reduce his narcotics usage. The doctor stated that, without the proposed treatment, claimant would become bedridden and his health would deteriorate.

Claimant requested administrative review of insurer's refusal to pay for treatment. RT issued an Administrative Order on November 18, 2010. The reviewer made factual findings that claimant's physician had stated claimant's pain was chronic and his condition was stable. Finding that claimant was not experiencing a temporary and acute waxing and waning of symptoms, the reviewer concluded the requested treatment was palliative. Since claimant was not working, the reviewer held claimant was not entitled to palliative care.

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<sup>1</sup> Transcutaneous Electrical Nerve Stimulation

At the hearing, claimant's attorney offered to have claimant testify about his circumstances. ALJ Naugle ruled the evidence was not admissible because the substantial evidence review standard applied and new medical evidence and issues may not be introduced at the hearing. ORS 656.327(2); OAR 436-001-0225(2). Claimant testified out of the ALJ's presence. He said that while using the TENS unit he had taken training for and started a taxidermy business. Claimant testified he had completed a number of projects for clients for which he had been paid. After insurer disapproved his request for continued use of the TENS unit his pain and discomfort prevented him from continuing to work at the same level.

ALJ Naugle issued a Proposed and Final Order on August 10, 2011. The ALJ concluded that, because Dr. McKellar stated claimant's condition would worsen without the requested treatment, the treatment was intended to stabilize acute waxing and waning of pain symptoms. ALJ Naugle therefore found the treatment was curative and that the administrative order erred in finding the insurer was not liable for the treatment.

### CONCLUSIONS OF LAW

An administrative order in a medical services dispute may only be modified if it is not supported by substantial evidence or reflects an error of law. OAR 436-001-0225(2). The reviewing entity may not make original fact findings. *Liberty Northwest Insurance Corp. v. Kraft*, 205 Or App 59, 62-63 (2006). The reviewing body may not reweigh or assess the credibility of the evidence. *Golliher v. DMV*, 173 Or App 586, 590 (2001).

Some types of care may be compensable for a post-medically stationary worker with an accepted compensable condition. ORS 656.245(1) provides:

“(c) [M]edical services after the worker's condition is medically stationary are not compensable except for the following:

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(J) With the approval of the insurer . . . palliative care that the worker's attending physician . . . prescribes and that is necessary to enable the worker to continue current employment or a vocational training program.

\* \* \* \* \*

(L) Curative care provided to a worker to stabilize a temporary and acute waxing and waning of symptoms of the worker's condition.”

Palliative care includes:

“[M]edical services rendered to reduce or moderate temporarily the intensity of an otherwise stable medical condition, but does not those include services rendered to diagnose, heal, or permanently alleviate or eliminate a medical condition. “

ORS 656.005(20).

As explained above, claimant offered evidence at the hearing that he had been engaged in employment when he requested the care that is in dispute here. ALJ Naugle did not admit or

consider that evidence, under the controlling standard of review. I have the authority to remand the matter for further consideration of evidence. OAR 436-001-0246(3); *See John K. Flewellin*, 14 CCHR 178 (2009); *Carlos Diaz*, 10 CCHR 389 (2009). As the proffered evidence could be determinative on the issue of whether the requested care is curative or palliative, I will remand for consideration of that evidence.

**IT IS HEREBY ORDERED** this matter is remanded to the Workers' Compensation Division's Medical Section Resolution Team. The Resolution Team shall consider evidence of whether claimant was engaged in employment when he made the request that is in dispute here and shall make a determination, in light of that evidence, as to whether the requested care is palliative or curative. The Resolution Team shall then issue an administrative order on remand determining whether the requested care is compensable.