

FINDINGS OF FACT

I affirm and adopt the Findings of Fact contained in WCD’s Medical Review Unit’s (MRU’s) January 12, 2001 Administrative Order with the following supplementation.

An evaluation performed on December 14, 1995 by Ronald L. Henderson, MD (orthopedic surgery) concluded that claimant suffered from chronic mechanical back pain, and that because of his multilevel degenerative changes, claimant was not a candidate for surgery. (Exs. 29, 46).

In 1997, claimant’s low back pain increased and he began to experience numbness and heaviness in his left leg. He was referred by his treating physician, Michael T. Robinson, DO, to Dr. Henderson for an orthopedic evaluation. Dr. Henderson recommended epidural steroid injections, physical therapy and an MRI to further evaluate nerve root impingement. (Ex. 38).

In November 1998, claimant experienced pain in his cervical spine and ongoing back low pain. Dr. Robinson provided manipulation therapy. In February 1999, Dr. Robinson noted no acute distress and provided manipulation therapy. Throughout 1999, Dr. Robinson characterized claimant’s back complaints as with moderate to severe pain. In an August 17, 1999, claimant reported tingling in both legs and numbness down the back to the knees. On September 15, 1999, Dr. Robinson noted that claimant was experiencing radiating pain into his hips and both legs with occasional parathesias in the legs. (Ex. 41).

The epidural steroid injections subsequently became ineffective and Dr. Robinson began providing manipulation therapy twice a month to reduce claimant’s pain. (Ex. 46)

An insurer’s evaluation conducted on September 21, 1999 by John A. Melson, MD (neurology) and Holm W. Neuman, MD, PhD (orthopedic surgery) characterized the manipulation therapy as palliative and recommended one to three treatments per month to control claimant’s pain. (Ex. 46).

1 On January 7, 2000, Dr. Robinson filed a Palliative Care Request with SAIF for approval
2 of continued manipulation therapy, opining that claimant's pain and disability would increase if
3 left untreated. (Ex. 50). SAIF denied Dr. Robinson's request because claimant was not
4 employed. (Ex. 51).

5 An insurer's record review conducted by Daniel Mangum, DO on August 29, 2000
6 opined that the treatment provided by Dr. Robinson was not curative and was not beneficial to
7 claimant except for providing some temporary decrease of pain immediately following the
8 manipulation therapy. Dr. Mangum noted that there is no evidence that the manipulation therapy
9 would maintain claimant's medically stationary status. (Ex. 56).

10 Thereafter, claimant requested administrative review by MRU of SAIF's denial. (Ex. 58).
11 MRU concluded that the manipulation therapy was noncompensable palliative care because
12 claimant was not employed and affirmed SAIF's denial. (Ex. 63).

13 **FINDING OF ULTIMATE FACT**

14 The manipulation therapy requested by Dr. Robinson is palliative care and is not
15 compensable because claimant is not employed.

16 **CONCLUSIONS OF LAW AND REASONING**

17 This case involves a dispute as to whether medical services to be provided after a worker
18 is medically stationary are compensable within the meaning of ORS 656.245(1)(c). The issue is
19 whether insurer improperly disapproved claimant's palliative care request. The issue requires the
20 application of ORS 656.245(1)(c), which does not specify any standard of review, and therefore
21 my review is *de novo*. *Archie M. Ulbrich*, 2 WCSR 152, 153 (1997). The burden of proving any
22 fact or position rests with its proponent. ORS 183.450(2). As petitioner, claimant bears the
23 burden of proving by a preponderance of evidence that the administrative order is incorrect. *See*
24 *Cook v. Employment Div.*, 47 Or 437 (1982). I conclude that claimant has failed to meet his
25 burden.

1 Following a determination that an injured worker is medically stationary, medical
2 treatment ceases to be compensable under a workers' compensation claim with the exception of
3 services specified at ORS 656.245(1)(c). Palliative care is compensable following approval by
4 the insurer or director but only if it is "necessary to enable the worker to continue current
5 employment." ORS 656.245(1)(c)(J). In contrast, "curative care" continues to be fully
6 reimbursable without prior approval, under ORS 656.245(1)(c)(L), when it is " provided to a
7 worker to stabilize a temporary and acute waxing and waning of symptoms of the worker's
8 condition."

9 Claimant argued at hearing that because the purpose of the manipulation therapy was to
10 maintain his medically stationary status. He contended that MRU incorrectly applied ORS
11 656.245(1)(c)(J) in determining that the treatment was noncompensable palliative care. Instead,
12 claimant argues, MRU should have applied ORS 656.245(1)(c)(L). The relevant statute, ORS
13 656.245(1), provides in part:

14 " (c) Notwithstanding any other provision of this chapter, medical
15 services after the worker's condition is medically stationary are not
16 compensable except for the following:

17 "*****

18 "(J) With the approval of the insurer or self-insured employer,
19 palliative care that the worker's attending physician *** prescribes and
20 that is necessary **to enable the worker to continue current
21 employment**

22 "* * * * *

23 "(L) Curative care provided to a worker to stabilize a temporary and
24 **acute waxing and waning of symptoms** of the workers' condition."
25 (Emphasis added).

1 Although the Workers' Compensation Law does not specifically define "curative care,"
2 the definition of palliative care indicates the contrast between the two. ORS 656.005(20) defines
3 palliative care as:

4 "[M]edical services rendered to **reduce or moderate temporarily** the
5 intensity of an otherwise stable medical condition, **but does not**
6 **include those medical services rendered to diagnose, heal or**
7 **permanently alleviate or eliminate a medical condition.**" (Emphasis
8 added).

9 Palliative care, therefore, would be care rendered to reduce or temporarily moderate claimant's
10 pain whereas curative care would be care rendered to diagnose, heal, permanently alleviate or
11 eliminate the pain. Additionally, ORS 656.245(1) requires, as a precursor to curative care, an
12 acute waxing and waning of symptoms

13 Although claimant argued that the manipulation therapy is curative and not palliative
14 care, the record establishes that it is palliative care. There is no question that claimant's pain is
15 chronic. Dr. Robinson himself repeatedly noted the chronicity of claimant's pain despite
16 treatment by drugs, steroid injection, physical therapy, and other modalities. Moreover, claimant
17 did not have an acute waxing and waning of his symptoms prior to Dr. Robinson's request. He is
18 unfortunately always in pain. Dr. Robinson's manipulation therapy may lessen the pain
19 immediately thereafter but the pain always returns. The therapy does not heal, permanently
20 alleviate, or eliminate claimant's pain. This regrettably leaves claimant with few choices. Dr.
21 Robinson testified at hearing that, without ongoing manipulation therapy, claimant will no longer
22 maintain medically stationary status and will no longer be able to delay surgery.

23 MRU aptly discussed why the manipulation therapy was noncompensable palliative care.
24 I concur. The care is palliative and claimant is not employed. Consequently, I conclude that the
25 care is noncompensable and affirm MRU's decision:

1 **ATTORNEY FEES**

2 Claimant has not prevailed in a contested case before the director involving compensation
3 benefits pursuant to ORS 656.245. Consequently, claimant's attorney is not entitled to an
4 attorney fee for services at hearing and in preparation therefore. ORS 656.385(1).

5 **ORDER**

6 IT IS HEREBY ORDERED that the January 12, 2001 Administrative Order PC 00-003 is
7 affirmed.

8
9 DATED this _____ day of May 2001.

10
11 By: _____
12 Ella D. Johnson
13 Administrative Law Judge
14 Hearing Officer Panel

14 **NOTICE OF REVIEW AND APPEAL RIGHTS**

15 **As provided in ORS 183.460, the parties are entitled to file written exceptions,**
16 **including argument, to this Proposed and Final Contested Case Hearing Order. The**
17 **exceptions must be served on the parties and filed with the Administrator of the Workers'**
18 **Compensation Division at the address set forth below within 30 days following the date of**
19 **service of this order. Written responses to exceptions must be filed within 20 days of service**
20 **of the exceptions. Replies, if desired, must be filed within 10 days of service of the response.**

21 **If no exceptions are filed, this order shall become final upon expiration of 30 days following**
22 **the date of service on the parties.**

23 **After this order becomes final, you are entitled to judicial review pursuant to the**
24 **provisions of ORS 183.480. Judicial review may be obtained by filing a petition with the**
25 **Court of Appeals within 60 days from the date that this order becomes final.**

Mail any exceptions and a copy of any petition for judicial review to:

23 **Technical Coordinator, Policy Section**
24 **Workers' Compensation Division**
25 **Department of Consumer and Business Services**
350 Winter Street NE, Rm. 27
Salem, OR 97301-3879