

In the ORS 656.245 Medical Services Disputes of  
**Melvin R. Hatton, Claimant**

Contested Case No: 07-004H, 07-033H

**PROPOSED & FINAL ORDER**

July 30, 2007

MELVIN R. HATTON, Petitioner  
LIBERTY NW INSURANCE CORPORATION, Respondent  
Before Douglas C. Crummé, Administrative Law Judge

Pursuant to stipulation, this matter has been submitted based upon written evidence and argument in lieu of an in-person hearing. Phillip H. Garrow, attorney at law, represents claimant, Melvin R. Hatton. Brad G. Garber, attorney at law, represents the employer, United Parcel Service, and its insurer, Liberty Northwest Insurance Corporation. The Administrative Law Judge is Douglas Crummé. In WCB Case No. 07-00033H, Exhibits 1 through 27 are admitted. In WCB Case No. 07-00041, Exhibits 1 through 48, including 10-3A and 14A, are admitted.<sup>1</sup> The record closed with the Board's receipt of claimant's reply argument on June 28, 2007.

**ISSUES**

**I. WCB Case No. 07-00041H.** Claimant challenges WCD's March 1, 2007, Administrative Order holding insurer not liable for Dr. Hiskey's palliative chiropractic care from October 3, 2005, to July 7, 2006.

**II. WCB Case No. 07-00033H.** Claimant challenges WCD's February 9, 2007, Administrative Order that disapproved Dr. Maloney's July 11, 2006, request for palliative chiropractic care and that held insurer not liable for that care.

**FINDINGS OF FACT**

Claimant is 55 years old. In 1986, he began working for employer's parcel delivery business as a deliverer.

Insurer accepted claimant's workers' compensation claim for a disabling lumbar strain in 1988. (Ex. 2.) In 1989, a Determination Order found claimant medically stationary and closed the claim with an award of permanent partial disability. (Ex. 3.)

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<sup>1</sup> In his written closing argument, claimant offered Exhibits 10-3A and 14A. Those were not in the Workers' Compensation Division's (WCD's) records in these matters. Insurer has not objected to Exhibits 10-3A and 14A. "Medical evidence" that was not in the WCD's record is not admissible here. ORS 656.327(2); OAR 436-001-0225(2). Exhibits 10-3A and 14A are admissible because they are claims processing documents rather than medical evidence.

In 1998, Dr. Maloney became claimant's attending physician for his low back condition. Claimant complained of left buttock and left leg symptoms "over the past several years." Dr. Maloney's impression was left L5 radiculopathy. Since then, Dr. Maloney has regularly prescribed palliative chiropractic care, commonly with Drs. Willems or Hiskey. (Ex. 5.)

On August 17, 2005, Dr. Maloney submitted a form "827" palliative care request for chiropractic treatment of claimant for a diagnosis of "back pain." In that request, Dr. Maloney stated, "Treatment enables patient to maintain full-time employment." With the request, Dr. Maloney included a "Treatment Plan" that authorized treatment with Drs. Hiskey/Willems twice a month for six months beginning on August 16, 2005.

Insurer approved Dr. Maloney's August 17, 2005, request for palliative chiropractic care. (Ex. 39-1.)

As of October 3, 2005, insurer stopped paying for claimant's palliative chiropractic care. On various dates from then until July 7, 2006, Dr. Hiskey provided additional palliative chiropractic care to claimant. That care included seven treatments from October 3, 2005 through February 17, 2006, with total charges of \$350. (Ex. 34.)

On January 11, 2006, Dr. Maloney completed two "827" forms requesting palliative chiropractic care with Dr. Hiskey. On the forms, Dr. Maloney stated that the treatment helped claimant maintain full-time employment. (Exs. 15 and 23.) In a chart note that date, Dr. Maloney authorized an unspecified number of treatments for six months (Ex. 5-25.)

Insurer did not respond to claimant or to Dr. Maloney within 30 days after January 11, 2006, about whether insurer approved Dr. Maloney's January 11, 2006, palliative chiropractic care request.

On July 11, 2006, Dr. Maloney submitted another "Treatment Plan" to insurer for 12 palliative chiropractic treatments over six months. Dr. Maloney stated in a chart note that date that claimant had chronic, intractable low back pain and left L5 radiculopathy. In that chart note, Dr. Maloney also requested chiropractic coverage for the past 12 months. Dr. Maloney stated that claimant's past and proposed chiropractic care was "medically necessary to allow claimant ongoing gainful and successful employment." She described the heavy, physical nature of claimant's job duties.

October 30, 2006, was the first date that Dr. Maloney or claimant requested that the WCD review insurer's failure to pay for his palliative care since October 3, 2005.<sup>2</sup>

On February 9, 2007, the WCD issued an Administrative Order concerning insurer's denial of the palliative chiropractic care that Dr. Maloney requested on July 11, 2006. That Administrative Order concluded: that, in violation of OAR 436-010-0290(1)(a)(C), Dr. Maloney's request did not describe the frequency and duration of the requested palliative care; that, in violation of OAR 436-010-0290(1)(a)(D), Dr. Maloney's request did not describe how

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<sup>2</sup> On September 19, 2006, Dr. Hiskey's office, as opposed to Dr. Maloney, submitted a request to WCD for approval of Dr. Maloney's request of July 11, 2006.

the requested palliative care related to claimant's compensable condition; and that, in violation of OAR 436-010-0290(1)(a)(E), Dr. Maloney's request did not describe how the requested palliative care would enable claimant to continue his current employment or what the adverse effect would be if the palliative care were not provided.

On March 1, 2006, the WCD issued an Administrative Order that addressed insurer's liability for Dr. Hiskey's palliative chiropractic treatments from October 3, 2005, to July 7, 2006. That Administrative Order concluded: that insurer did not timely respond to Dr. Maloney's August 17, 2005, and January 11, 2006, requests for palliative chiropractic care; that neither claimant nor Dr. Maloney asked within 120 days of those requests that WCD approve the requests; and that insurer was not liable for Dr. Hiskey's palliative chiropractic treatment from October 3, 2005, through July 7, 2006, because Dr. Maloney's requests for that care had not been approved.

### CONCLUSIONS OF LAW AND OPINION

The present matters are medical treatment disputes because they concern insurer's liability for medical treatment. As a result, a substantial-evidence/error-of-law standard of review applies. ORS 656.327(2); OAR 436-001-0225(2); *Liberty Northwest Ins. Corp. v. Kraft*, 205 Or App 59 (2006).

#### I. WCB Case No. 07-00041H

Claimant challenges WCD's March 1, 2007, Administrative Order holding insurer not liable for Dr. Hiskey's palliative chiropractic care from October 3, 2005, to July 7, 2006.

The Administrative Order should be set aside for Dr. Hiskey's care from October 3, 2005, to February 17, 2006, but should be affirmed for Dr. Hiskey's care from February 18, 2006, to July 7, 2006.

The March 1, 2007, Administrative Order concluded that insurer was not liable for Dr. Hiskey's disputed care because neither claimant nor Dr. Maloney timely requested WCD administrative review regarding that issue.

OAR 436-010-0290(1)(c) provides that, if an insurer does not respond in writing within 30 days to a palliative care request, then the claimant or the attending physician may, within 120 days from the date that the request was submitted to the insurer, request the WCD to approve the palliative care.

Claimant argues that the Administrative Order erred in finding that insurer did not respond to the requests on August 17, 2005, and January 11, 2006. Claimant argues, as a result, that the Administrative Order erred in applying the 120-day deadline under OAR 436-010-0290(1)(c). Claimant argues, therefore, that the Administrative Order should be reversed to find insurer liable for the disputed care.

There is not substantial evidence that insurer failed to respond to Dr. Maloney's request of August 17, 2006, because insurer has conceded to WCD in this matter that it approved that request. (Ex. 39.) As a result, the Administrative Order's conclusion that the 120-day deadline under OAR 436-010-0290(1)(c) applied to that request was legal error. Insurer's approval of Dr. Maloney's August 17, 2005, palliative chiropractic care request makes insurer liable for the duration of the period that Dr. Maloney requested. *Joann L. Goodsell*, 12 CCHR 125 (2007). The Administrative Order should be reversed to hold insurer liable for the seven Dr. Hiskey treatments that occurred from October 3, 2005, through February 17, 2006, under Dr. Maloney's approved, six-month August 17, 2005, palliative chiropractic care request.

Substantial evidence does support the Administrative Order's conclusion that insurer did not respond to Dr. Maloney's palliative chiropractic care request of January 11, 2006. There is not evidence that insurer ever approved or disapproved that request. Therefore, under OAR 436-010-0290(1)(c), within 120 days of January 11, 2006, either claimant or Dr. Maloney was required to request that the WCD approve the care in the January 11, 2006, request. The record does not prove that they did so. As a result, the Administrative Order correctly concludes that, from February 18, 2006, to July 7, 2006, Dr. Hiskey's palliative chiropractic care for claimant has remained unapproved. The Administrative Order's conclusion should be affirmed that insurer is not liable for Dr. Hiskey's palliative chiropractic care of claimant from February 18, 2006, to July 7, 2006.

Claimant's attorney, Mr. Garrow, is entitled to the award of an assessed attorney fee under ORS 656.385(1) by virtue of prevailing on the disputed care from October 3, 2005, to February 17, 2006. In light of the factors that that section and OAR 436-001-0265 specify for determining an appropriate fee, including the \$350 value of Dr. Hiskey's seven treatments between those dates and the time that Mr. Garrow likely devoted to insurer's liability on those treatments as reflected by the record, a reasonable attorney fee is \$1,000.

## **II. WCB Case No. 07-00033H**

Claimant challenges WCD's February 2007 Administrative Order that disapproved Dr. Maloney's July 11, 2006, request for palliative chiropractic care and that held insurer not liable for that care.

When a worker's attending physician believes that palliative care is appropriate to enable the worker to continue current employment, the attending physician "must first" submit a written request for approval to the insurer. The request "must," among other things: detail the frequency and duration of the care, not to exceed 180 days (OAR 436-010-290(1)(a)(C)); explain how the care is related to the compensable condition (OAR 436-010-0290(1)(a)(D)); and describe how the care will enable the worker to continue current employment and the possible adverse effect if the care is not approved. OAR 436-010-0290(1)(a)(E).

The Board should affirm WCD's February 2007 Administrative Order because substantial evidence supports WCD's conclusion that Dr. Maloney's July 11, 2006, request for approval of the palliative chiropractic care does not explain how the care is related to the compensable condition as OAR 436-010-0290(1)(a)(D) requires. Insurer accepted the 1988

claim for a lumbar strain. In her July 11, 2006, request for approval of palliative care, Dr. Maloney does not diagnose the 1988 lumbar strain. Instead, she diagnoses other back conditions. She relates the requested chiropractic care to claimant's current low back conditions without explaining how those conditions or the requested care are related to the compensable lumbar strain condition.

Claimant argues that the entire record should be reviewed to determine if the condition that Dr. Hiskey was to treat under the July 11, 2006, request was the "same condition incurred at injury." Claimant cites *Armstrong v. Asten-Hill Co.*, 90 Or App 200 (1988), for the proposition that the whole WCD record must be reviewed with respect to the issue to be decided. Citing *Quina F. Tucker*, 52 Van Natta 1507 (2000), claimant argues that a review of the whole record does not indicate any other cause of Dr. Hiskey's current treatment than the 1988 compensable condition.

Claimant's argument is not persuasive. Under OAR 436-010-0290(1)(a)(D), the issue here is whether Dr. Maloney's request for palliative chiropractic care 'explained' how the care was related to the compensable condition. The issue is not whether the entire record, including information that is outside of Dr. Maloney's explanation, proves that the requested chiropractic care is related to the compensable condition. The substance and context of a doctor's request for palliative care must be taken into consideration. Thus, if a doctor's palliative care request refers to prior findings, conclusions, or explanations, logical and reasonable inferences may be drawn from those references to determine if the doctor's request satisfies the requirements of OAR 436-010-0290(1). *Willie J. Graham*, 9 CCHR 215, 217 (2004). Here, though, Dr. Maloney's July 11, 2006, request does not refer to any prior information in the record that explains how the requested palliative chiropractic care with Dr. Hiskey is related to the compensable condition.

Claimant argues that Dr. Maloney's July 11, 2006, palliative chiropractic care request should be held to have adequately explained how the requested care was related to the compensable condition because that request was no different than the August 17, 2005, request that insurer approved. This argument is not persuasive. Insurer's approval and payment of compensation under Dr. Maloney's August 17, 2005, request was not an admission that it would be liable for future similar requests. Even if the August 17, 2005, and the July 11, 2006, requests were no different with respect to any explanation under OAR 436-010-0290(1)(a)(D), merely paying or providing compensation is not an admission of liability. ORS 656.262(10).

Since Dr. Maloney's July 11, 2006, request does not meet the requirements under OAR 436-010-0290(1)(a)(D), it is not necessary to also address the WCD's additional conclusions that Dr. Maloney's requests did not meet the care frequency requirement under and the other requirements under OAR 436-010-0290(1)(a)(C) and (E). The Administrative Order should be affirmed pursuant to OAR 436-0290(1)(a)(D).

## ORDER

**IT IS THEREFORE ORDERED** in WCB Case No. 07-00041H that the WCD's March 1, 2007, Administrative Order is reversed to the extent that insurer shall pay Dr. Hiskey's bills for palliative chiropractic care from October 3, 2005, to February 17, 2006. Insurer shall pay

claimant's attorney, Mr. Garrow, an attorney fee of \$1,000 on that issue. That Administrative Order is affirmed with respect to the conclusion that insurer is not liable for Dr. Hiskey's treatment from February 18, 2006, to July 7, 2006.

**IT IS FURTHER ORDERED** in WCB Case No. 07-00033H that the WCD's February 9, 2007, Administrative Order is affirmed.