
In the ORS 656.327 Medical Treatment Dispute of
Eric S. Sofich, Claimant
Contested Case No: 10-172H
INTERIM ORDER REMANDING TO THE DIRECTOR
February 21, 2012
ERIC S. SOFICH, Petitioner
CITY OF SALEM, Respondent
Before Geoffrey G. Wren, Administrative Law Judge

Pursuant to notice, a hearing was convened on April 18, 2011 in Portland, Oregon, before the undersigned administrative law judge. Claimant was present and represented by Nelson R. Hall. The employer, City of Salem, and its administrator, Tristar Risk Management, were represented by Dennis S. Reese. The hearing was continued. The record closed on January 17, 2012, following receipt of written closing arguments.

On February 2, 2012, an order styled Proposed and Final Order with appeal rights issued in this matter. It has come to the attention of the undersigned that issuance of that order was in error. Although the opinion portion of the order approved actions by the Director, the undersigned concluded that further proceedings by the Director were required. Pending action on that matter, issuance of a proposed and final order would not be appropriate. Accordingly, on *sua sponte* motion, I conclude that the February 2, 2012 Proposed and Final Order must be vacated and replaced by the Interim Order Remanding to the Director.

ISSUE

Medical Services: Claimant challenges the Director's October 18, 2010 Administrative Order. The Director held that claimant did not perfect his palliative care request for physical therapy provided by Pettygrove Physical Therapy Associates from December 21, 2009 through April 7, 2010.

Attorney Fees: Claimant seeks award of assessed attorney fees should he prevail in whole or part.

SUMMARY OF MATERIAL FACTS FOUND BY THE DIRECTOR

Claimant works as a paramedic-firefighter for the City of Salem. He suffered injury at work on September 12, 2003 when he lifted an obese patient. The employer accepted a claim for posterior inferior labrum tear of the left shoulder and chronic distal biceps tendonitis of the left elbow.

Claimant began treating with Dr. Colorito soon after the work injury. The doctor operated on claimant's left shoulder on December 23, 2003 and October 26, 2007. On October 2, 2008, the doctor operated on claimant's left distal biceps tendon and elbow.

Claimant underwent physical therapy for his left shoulder and elbow before and after the surgeries.

Dr. Colorito declared claimant's left shoulder condition medically stationary on April 29, 2009. He said that claimant might experience flare-ups of his shoulder condition in the future and might benefit from physical therapy or other treatment.

Dr. Colorito declared claimant's left elbow condition medically stationary on September 21, 2009. He noted that claimant might require palliative care in the future.

The employer closed the claim on November 19, 2009.¹

On December 21, 2009, after working full duty with overtime, claimant returned to Dr. Colorito. Claimant complained of left elbow stiffness and shoulder pain. The doctor noted that claimant's shoulder motion was unchanged, but claimant experienced pain with elbow extension. The left biceps was smaller than the right. Dr. Colorito assessed recurrent left elbow and shoulder symptoms post surgery. He expected periodic flare-ups of claimant's symptoms. The doctor recommended physical therapy and possibly ultrasound for two to three months as needed. He explained that the physical therapy would be palliative care.

The employer wrote Dr. Colorito on January 13, 2010 to request information regarding continued treatment of claimant. The employer notified the doctor what documentation was necessary to request palliative care.

Dr. Colorito wrote the employer on January 18, 2010. He explained that claimant had increased left shoulder and elbow pain. Claimant had left shoulder muscle atrophy and a painful arc with some crepitus. His elbow had some swelling in the antecubital region. The doctor stated that, based on objective findings, claimant would benefit from palliative therapy, including physical therapy at Pettygrove Physical Therapy Associates ("Pettygrove").

On March 1, 2010, Dr. Colorito noted that claimant continued to experience flare-ups and feelings of weakness. Claimant still had swelling in the antecubital region, and the doctor believed that claimant's shoulder external rotation and deltoid strength was down one grade. He stated that claimant was benefitting from palliative therapy.

The employer stated on March 5, 2010, that it had received Dr. Colorito's January 18, 2010 letter. The employer stated that physical therapy was not approved because the doctor (1) had not requested approval of palliative care before the therapy commenced, (2) did not provide a diagnosis for a work-related condition, (3) did not explain how the physical therapy was necessary to enable claimant to continue working, and (4) did not explain how the need for the therapy was related to an accepted condition.

Dr. Colorito wrote the employer on March 5, 2010. He stated that the physical therapy was to treat left shoulder posterior labral detachment. He explained that claimant experienced swelling around his left elbow and symptoms in his shoulder that compromised his ability to

¹ The Director's Finding of Fact stated that the closure occurred on November 19, 2010. This was a clerical error.

work. The swelling could be treated with physical therapy modalities. The physical therapy gave claimant symptomatic relief. The doctor explained that the treatment frequency was twice a week for six weeks. Noting claimant's accepted conditions, Dr. Colorito stated that physical therapy was indicated for soft tissue mobilization, reduction of swelling, and strengthening to address atrophy and reduced strength in the shoulder and elbow. He stated that the fact he had not requested palliative care approval before claimant commenced therapy did not mean that claimant did not need it.

CONCLUSIONS OF LAW AND OPINION

Claimant appeals the Director's October 18, 2010 Administrative Order, holding that the employer is not liable for physical therapy provided by Pettygrove from December 21, 2009 through April 7, 2010. Under ORS 656.247(3)(a) and OAR 436-001-0225(2), I may set aside or modify a Director's order only if it is not supported by substantial evidence in the record or if it reflects an error of law. No new medical evidence or issues may be admitted or considered. Substantial evidence supports a finding when the record, viewed as a whole, permits a reasonable person to make that finding. ORS 183.482(8)(c); *Garcia v. Boise Cascade Corp.*, 309 Or 292, 295 (1990). To review for substantial evidence, I must be able to know what the Director found as facts and why the Director believed that its findings led to the conclusions that it reached. *See Christman v. SAIF Corp.*, 181 Or App 191, 197 (2002) (describing substantial evidence review).

The Director determined that claimant's accepted conditions were medically stationary by December 21, 2009. Hence, the physical therapy Pettygrove provided claimant from then through April 7, 2010 was palliative care under ORS 656.245(1)(J).² The Director held that the employer was not liable for the physical therapy because OAR 436-010-0290(1) requires a perfected palliative care request before an employer becomes liable for services, and Dr. Colorito did not submit a perfected request.³ Because the Director determined that there was no perfected palliative care request, the Director did not decide whether the physical therapy was reasonable and appropriate.

² That statute 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.

³ OAR 436-010-0290(1) provides in part:

Palliative care means medical services rendered to reduce or moderate temporarily the intensity of an otherwise stable medical condition, but does not include those medical services rendered to diagnose, heal, or permanently alleviate or eliminate a medical condition. Palliative care is compensable when it is prescribed by the attending physician and is necessary to enable the worker to continue current employment or a vocational training program. When the worker's attending physician believes that palliative care is appropriate to enable the worker to continue current employment or a current vocational training program, the attending physician must first submit a written request for approval to the insurer.

Claimant does not challenge the Director's determination that the chiropractic treatment at issue was palliative care. Claimant also does not challenge the Director's construction of OAR 436-010-0290(1) that an employer is not liable for palliative care if an attending physician does not submit a palliative care request that complies with the rule. Rather, claimant contends, in essence, that substantial evidence does not support the Director's finding that documents submitted by Dr. Colorito lacked requisite information. Claimant identifies as documents constituting the putative palliative care request reports from Dr. Colorito to the employer dated August 6, 2009, January 18, 2010, and March 5, 2010, a fax message from the employer to claimant's physical therapist dated December 24, 2009, and a letter from the employer to Dr. Colorito dated January 13, 2010 stating what information a palliative care request required.

OAR 436-010-0290(1) requires that a perfected palliative care request be submitted by the attending physician to the employer. The Director did not err in implicitly determining that documents authored by the employer could not constitute palliative care requests. The only potentially compliant requests could be the documents Dr. Colorito submitted to the employer. Of those documents, the doctor's August 6, 2009 report could not constitute a palliative care request, as the doctor stated therein that claimant was not medically stationary at the time.

As for the remaining documents authored by Dr. Colorito, the Director's order is not entirely clear as to the rationale why Dr. Colorito never perfected a palliative care request. The Director held that the attending physician first must submit a written request for approval to the employer, but the Director identified only a chart note dated December 21, 2009 authored by Dr. Colorito as a prior written request. The Director considered that note with Dr. Colorito's January 18, 2010 and March 5, 2010 reports as the relevant palliative care request, despite the fact that the services at issue already had commenced when the doctor wrote the reports. The Director did not clarify whether it considered the two reports as potentially perfected palliative care requests with respect to all therapy services provided claimant from December 21, 2009 through April 7, 2010 or only with respect to services after the dates of the reports.

Substantial evidence supports the Director's finding that the December 21, 2009 chart note and the January 18, 2010 report did not contain the information OAR 436-010-0290(1) requires for a perfected palliative care request. Such a request must

- (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 the care, specific treatment modalities, and frequency and duration of the care, not to exceed 180 days;
- (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.

OAR 436-010-0290(l)(a). The Director properly reasoned that the December 21, 2009 note and the January 18, 2010 report neither included the requisite explanation how the requested care related to the compensable condition (Element D), nor described how the requested care would enable the worker to continue employment and the possible adverse effect if the care were not approved (Element E).

The matter is otherwise with respect to the March 5, 2010 report. In that report, Dr. Colorito directly addressed the elements required by OAR 436-010-0290(l)(a) for a perfected palliative care request, as he wrote in response to a letter from the employer setting out those elements. With respect to Elements D and E, the doctor stated:

[Claimant] has continued swelling in his elbow and symptoms around the shoulder and it at times compromises his ability to work as a firefighter and the physical therapy is continuing to give him symptomatic relief ...

[Claimant's] accepted condition is posterior labral detachment and left elbow bicipital synovitis and the physical therapy continues to be indicated for soft tissue mobilization, reduction of swelling, strengthening to address the atrophy and reduced strength in both the shoulder and elbow.

The Director did not explain why these explanations fell short of what OAR 436-010-0290(l)(a)(D) and (E) requires.

Because the Director did not discuss the March 5, 2010 report separately from the other documents authored by Dr. Colorito, remand is necessary for the Director to find facts whether that report included all the elements specified by OAR 436-010-0290(l)(a) and, if so, what effect the report would have with respect to the services provided before and after March 5, 2010. If the Director determines that the March 5, 2010 report constituted a perfected palliative care request with respect to any physical therapy services provided claimant, the Director shall address the merits with respect to those services.

ORDER

IT IS HEREBY ORDERED that the February 2, 2012 Proposed and Final Order is vacated, and this case is remanded to the Director for further proceedings consistent with this opinion.