

In the ORS 656.245 Medical Services of  
**Leticia M. Valenzuela, Claimant**

Contested Case No: 13-013H & 13-012H

**PROPOSED & FINAL ORDER**

May 22, 2013

LETICIA M. VALENZUELA, Petitioner  
HILTON WORLDWIDE C/O SEDGWICK CLAIMS MANAGEMENT SERVICES,  
Respondent

Before Keith Kekauoha, Administrative Law Judge

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Hearing was scheduled for May 8, 2013 before the undersigned Administrative Law Judge. The hearing was canceled when the parties agreed to submit this matter on the documentary record in lieu of personal appearing at hearing. Claimant is represented by attorney Peter Straumfjord. The employer Hilton Worldwide and the claims administrator Sedgwick Claims Management Services (Sedgwick) are represented by attorney Bradley Scheminske. Exhibits 1-13 were admitted into evidence. After receipt of written closing arguments, the record closed on April 22, 2013.

**ISSUE**

Medical Services. In WCB Case Nos. 13-00012H and 13-00013H, claimant requested a hearing on the Director's Administrative Order dated January 16, 2013, as amended on January 25, 2013, which upheld the employer's disapproval of Dr. Verzosa's May 4, 2012 palliative care request.<sup>1</sup>

**SUMMARY OF FACTS**

The following summary of relevant facts is taken from the "Findings of Fact" section of the Amended Administrative Order.<sup>2</sup>

Claimant sustained a compensable injury on May 26, 2006. The employer ultimately accepted the claim for a right shoulder contusion, a traumatic anterior subluxation of the right glenohumeral joints including tears of the middle and superior glenohumeral ligaments, and right shoulder adhesive capsulitis.

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<sup>1</sup> The Workers' Compensation Division assigned two separate WCB case numbers to claimant's hearing request: WCB Case No. 13-00012H was assigned for the January 16, 2013 Administrative Order and WCB Case No. 13-00013H was assigned for the January 25, 2013 Amended Administrative Order.

<sup>2</sup> My review of the Director's order is for "substantial evidence." ORS 656.327(2). Therefore, I may not render supplemental findings of fact. *Liberty Northwest Ins. Corp. v. Kraft*, 205 Or App 59, 62-63 (2006). Rather, in reviewing the order, I am limited to evaluating the evidence in the record to determine whether, based on that evidence, a reasonable factfinder in the Director's position could have made the findings that the Director actually made. *Liberty Northwest Ins. Corp. v. Mundell*, 219 Or App 358, 363 (2008). I do not have authority to determine whether the record could support findings different from those reached by the Director or to reweigh the evidence and substitute my view of the evidence for that of the Director. *Id.*

The employer denied a claim for a right scapular fracture, small full-thickness tear of the insertion of the rotator cuff, tear of the anterior-superior labrum and a SLAP lesion of the right shoulder.

In July 2010, the employer issued a Notice of Closure which closed the claim. The closure notice was affirmed on reconsideration by the Workers' Compensation Division.

Claimant experienced continued right shoulder pain and weakness. She received conservative treatment and underwent physical therapy, chiropractic care and home exercises.

In November 2011, claimant changed her attending physician to Dr. Verzosa. Dr. Verzosa prescribed palliative care, which was approved by the employer, and continued to direct claimant's care through May 4, 2012.

On May 4, 2012, claimant returned to Dr. Verzosa and reported persistent, though less frequent, intermittent pain and inflammation in the right shoulder and increased mobility. Claimant believed that her current therapy was beneficial and allowed her to work. She reported experiencing pain after performing work involving repetitive elevation of her right arm and shoulder. Dr. Verzosa indicated that she would submit another palliative care request. She listed ICD-9 codes 726.0 and 726.10 and stated:

“This is still related to her accepted claim because it is directed to her right shoulder, to decrease inflammation and pain. Mobilization, manual therapy, ultrasound, myofascial release, 2x a week from 05/04/12 to 11/04/12. Our goal will be to decrease inflammation, pain and increase work tolerance. Adverse effect without palliative care increasing inflammation, pain, decreased mobility and difficulty doing her work.” (Ex. 2-1).

Dr. Verzosa's palliative care request was submitted to Sedgwick, the claims administrator for the employer.

On June 5, 2012, Sedgwick notified Dr. Verzosa that her palliative care request was disapproved for the reasons that it did not conform to the palliative care rules and that the care claimant was receiving was excessive and unreasonable.

Claimant, through her attorney, requested Administrative Review of Sedgwick's disapproval of Dr. Verzosa's palliative care request.

In response to claimant's administrative review request, Sedgwick contended that the palliative care request failed to comply with all of the requirements in the administrative rule OAR 436-010-0290(1)(a) and that the requested palliative care is excessive and inappropriate.

On January 16, 2013, the Workers' Compensation Division's Medical Section's Resolution Team (MRT), acting on the Director's behalf, issued an Administrative Order which upheld Sedgwick's disapproval of the palliative care request on the basis that the request did not

satisfy the procedural requirements in the administrative rule OAR 436-010-0290(1)(a). Given its determination that a palliative care request was not perfected under the rule, the MRT did not address the issue of whether the requested palliative care is appropriate. (Ex. 10). On January 25, 2013, the MRT issued an Amended Administrative Order which republished the original order without change except for a correction of a mailing address error. (Ex. 11).

### CONCLUSIONS OF LAW AND OPINION

Claimant requested a hearing on the Amended Administrative Order, contending that Dr. Verzosa's palliative care request fulfilled all of the requirements in OAR 436-010-0290(1)(a). The employer responds that the MRT's order is correct and should be affirmed. Alternatively, if it is determined that the order is incorrect, the employer asserts that this matter must be remanded to the MRT for review of the appropriateness of the proposed palliative care. For the reasons explained below, I affirm the MRT's order.

As the party challenging the administrative order, claimant bears the burden of proving error in the MRT's determination. ORS 183.450(2); *Sagai Phady*, 17 CCHR 74 (2012). Because the order resolves a medical treatment dispute under ORS 656.245, the order may be modified only if it is not supported by substantial evidence or reflects an error of law. OAR 436-001-0225(2).

Claimant does not assert any error of law; rather, she argues that the MRT's determination is not supported by substantial evidence.

I begin my analysis by explaining the limited scope of a "substantial evidence" review. In reviewing an order for substantial evidence, the reviewing tribunal "looks at the whole record with respect to the issue being decided, rather than at one piece of evidence in isolation. If an agency's finding is reasonable, keeping in mind the evidence against the finding as well as the evidence supporting it, there is substantial evidence." *Armstrong v. Asten-Hill Co.*, 90 Or App 200, 206 (1988). The reviewing tribunal may not reweigh the evidence and make its own factual findings, nor may the tribunal substitute its judgment for that of the agency as to which of two or more permissible inferences should be drawn from the evidence. *A.F. v. Oregon Dep't of Human Services*, 251 Or App 576, 580 (2012). Rather, the question before the tribunal is whether the evidence would permit a reasonable person to make the determination that the agency made in a particular case. *Id.*

The applicable administrative rule in this case is OAR 436-010-0290(1), which provides that "[w]hen 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." (Italics supplied.) Subparagraph (a) further provides that "[t]he 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.” (Italics supplied.)

By its terms, the rule requires that all of these requirements “must” be satisfied to perfect a palliative care request. See *Aetna Casualty & Surety Co. v. Sue A. Blanton, D.C.*, 139 Or App 283, 287 (1996) (the medical services rules are mandatory and require strict compliance).

The MRT found that Dr. Verzosa’s May 4, 2012 palliative care request (and accompanying chart note) fulfilled the requirements set forth in subparagraphs (A) and (B), but did not meet the requirement in subparagraph (D) and only partially fulfilled the requirements in subparagraphs (C) and (E). In particular, the MRT found that the doctor’s palliative care request: (1) did not identify the provider(s) who will render the requested care, as required in subparagraph (C); (2) did not explain how the requested care is related to the compensable conditions, as required in subparagraph (D); and (3) did not describe how the requested care will enable claimant to continue working in her current employment, as required in subparagraph (E). (Ex. 11-7).

Claimant argues that the above-enumerated findings by the MRT are not supported by substantial evidence. Claimant asserts that Exhibit 2, Dr. Verzosa’s May 4, 2012 chart note, provided all of the information required under the rule. In the chart note, the doctor indicated that claimant’s then-current therapy had been helpful and had allowed her to continue working and that claimant should continue therapy with Dr. Yu and Ivan Abarzua, LMT, and the chart note itself showed that it was copied to Dr. Yu. Dr. Verzosa also indicated in the chart note that repetitive elevation of claimant’s right arm and shoulder at work (when hanging employees’ uniforms) was causing pain and that the requested palliative care would be directed to the right shoulder to decrease inflammation and pain and to increase her work tolerance. The information in this chart note, claimant argues, was sufficient to: (1) identify the provider (Dr. Yu) who will render the requested palliative care; (2) explain how the requested care is related to the compensable conditions; and (3) describe how the requested care would enable claimant to continue working.

The employer responds that claimant has not carried her burden of proving a lack of substantial evidence supporting the MRT’s findings. The employer argues that strict compliance with the rule is mandatory and that, although Dr. Verzosa’s chart note indicated that current therapy had been successful and that claimant should continue therapy with Dr. Yu and Mr. Abarzua, substantial evidence nevertheless supports the MRT’s finding that the chart note failed to name the provider(s) who actually will provide the requested palliative care. The employer also argues that substantial evidence supports the MRT’s finding that Dr. Verzosa did not

explain how the requested care is related to the compensable conditions. The employer reasons that, because Dr. Verzosa's diagnoses of right shoulder conditions in her chart note included conditions which have not been accepted (*i.e.*, right shoulder supraspinatus partial tear, right shoulder tendinopathy, and ICD-9 726.10/bursal and tendon disorder), her statement that the requested care "is still related to [claimant's] accepted claim because it is directed to her right shoulder" does not explain how the requested care relates to the accepted conditions (*i.e.*, right shoulder contusion, a traumatic anterior subluxation of the right glenohumeral joints including tears of the middle and superior glenohumeral ligaments, and right shoulder adhesive capsulitis), as opposed to the noncompensable supraspinatus tear, tendinopathy, or bursal/tendon disorder conditions. Finally, the employer argues that substantial evidence supports the MRT's finding that, although Dr. Verzosa noted that repetitive elevation of claimant's right arm and shoulder produced pain and that the requested care was to decrease swelling and pain, she did not describe how the requested care would enable her to continue working. The employer states that Dr. Verzosa identified a "goal" to "increase work tolerance" but did not describe how the requested care would achieve that goal or otherwise explain how the care would enable claimant to continue working.

Based on my review of the record, I am not persuaded that claimant has met her burden of proving error in the MRT's determination. As previously explained, in my "substantial evidence" review of the MRT's order, the question is whether the evidence in this record would permit a reasonable person to make the findings that the MRT made. Furthermore, because *all* of the requirements listed in OAR 436-010-0290(1)(a) "must" be satisfied to perfect a palliative care request, if I conclude that only one of the above-enumerated findings made by the MRT is supported by substantial evidence, the MRT's order must be affirmed.

Based on my review, I conclude that this record would permit a reasonable person to find that Dr. Verzosa did not explain how the requested palliative care is related to the compensable conditions. The employer's arguments on this point are persuasive. As the employer notes, if all of the conditions involving claimant's right shoulder were accepted compensable conditions, Dr. Verzosa's statement that the requested care is "directed to her right shoulder, to decrease inflammation and pain" might arguably be a sufficient explanation of "how the requested care is related to the compensable condition[s]." That is not the case, however; some of the right shoulder conditions diagnosed by Dr. Verzosa in the same chart note have not been accepted as compensable conditions. Given the presence of noncompensable right shoulder conditions, the MRT could reasonably find that the doctor's reference to the right shoulder in general did not explain *how* the requested care is related to the accepted compensable conditions. The MRT's finding is therefore supported by substantial evidence.

Based on my conclusion that claimant has not proved error in the MRT's finding that Dr. Verzosa did not fulfill the requirement in subparagraph (D) of the rule, it is unnecessary to address the MRT's remaining findings that the doctor did not identify the provider(s) who will render the requested care, as required in subparagraph (C), and did not describe how the requested care will enable claimant to continue her current employment, as required in subparagraph (E). Dr. Verzosa's palliative care request did not fulfill all of the requirements under the rule, and the MRT's order will be affirmed accordingly.

**ORDER**

In WCB Case Nos. 13-00012H and 13-00013H, claimant's request for relief is denied, and the Director's Administrative Order dated January 16, 2013, as amended on January 25, 2013, is affirmed.