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IN THE MATTER OF THE ORS 656.245 TREATMENT DISPUTE OF  
**LITTLE, DIANNE, CLAIMANT**  
CONTESTED CASE NO: H03-046  
**PROPOSED & FINAL ORDER**

December 17, 2003

SAIF CORPORATION, Petitioner  
DIANNE LITTLE, Respondent

Before Ray Myers, Administrative Law Judge, Office of Administrative Hearings

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### **HISTORY OF THE CASE**

SAIF Corporation (SAIF or the insurer) appeals an April 15, 2003 Administrative Order issued by the Medical Review Unit (MRU) of the Workers' Compensation Division (WCD), Department of Consumer and Business Services (the director or the department) which determined that SAIF is liable for physical therapy treatments to Dianne Little (claimant) because SAIF had failed to inform an out-of-state physician how to comply with requirements for palliative care requests. On May 13, 2003, the matter was referred to the Office of Administrative Hearings (OAH) for hearing

On June 24 2003, Administrative Law Judge (ALJ) Paul Vincent conducted a telephone hearing in this matter in Salem, Oregon. Ms. Little represented herself. Attorney Mary Goebel Adams represented SAIF. WCD waived appearance. No witnesses testified. The record closed following the hearing.

After the hearing, the OAH assigned the matter to Administrative Law Judge Ray Myers to review the record and to write this order. The record of this proceeding, consisting of a tape recording of the hearing, all evidence received and all hearing papers filed, has been considered. The findings of fact and conclusions of law are based upon the entire record.

### **ISSUES**

Is SAIF liable for physical therapy provided to Ms. Little by Rex Healthcare (Rex) from February 28, 2001 through August 22, 2002?<sup>1</sup>

### **EVIDENTIARY RULING**

The record consists of Exhibits 1 through 64, plus SAIF's Supplementary Exhibits R1 through R13, which were admitted into the record without objection.

### **FINDINGS OF FACT**

1. Ms. Little compensably injured her back on April 30, 2000 while performing a surgery on a horse as part of her work as a clinical fellow in the College of Veterinary Medicine at

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<sup>1</sup> Also at issue before MRU was SAIF's liability for epidural steroids. At hearing, SAIF waived that issue.

Oregon State University (OSU). (Ex. 1.) SAIF, OSU's insurer, accepted the claim as a trapezius muscular strain, lumbosacral muscular strain and cervical muscular strain. (Ex. 2.)

2. Ms. Little moved to North Carolina and began treating with Dennis Bullard, a neurosurgeon, on August 10, 2000. Dr. Bullard concluded that Ms. Little had suffered a musculoskeletal injury. He prescribed physical therapy with strengthening exercises. (Ex. 4 and ex. 5.) On September 11, 2000, Dr. Bullard noted that Ms. Little had not been attending physical therapy due to "bureaucratic problems" and that her pain had worsened. (Ex. 5-3.) Ms. Little first saw a physical therapist at Rex Healthcare (Rex) on September 1, 2000. (Ex. 8.)

3. On January 16, 2001, a SAIF claims adjuster wrote to Dr. Bullard. The letter stated that as an attending physician under Oregon law, Dr. Bullard would have specific responsibilities. The letter stated that enclosed was a summary sheet of applicable regulations. It also informed Dr. Bullard that if he wanted copies of the regulations, he could contact WCD. It then gave WCD's contact information. Finally, the letter asked that Dr. Bullard contact the adjuster immediately if he did not agree to abide by the rules. (Ex. 15.) The adjuster wrote to Ms. Little the same date informing her that if Dr. Bullard did not agree to follow Oregon workers' compensation law, SAIF could object to Dr. Bullard as attending physician and request a new attending physician. (Ex. 14.)

4. The summary attached to the January 16, 2001 letter to Dr. Bullard stated that "physical therapy...will require a written treatment plan." Although the summary discusse[s]d the need for the attending physician to describe residual limitations when the injured worker becomes medically stationary, it never discussed **the** requirements in prescribing palliative care. (Ex. 15-2 to 15-4.)

5. On April 6, 2001, Dr. Bullard wrote to SAIF stating that Ms. Little was medically stationary. He stated that Ms. Little would need continuing physical therapy to maintain her current level of functioning. (Ex. 18.) SAIF closed the claim on August 31, 2001 with a medically stationary date of June 1, 2001. (Ex. 29.) A letter from a claims adjuster to Ms. Little dated August 31, 2001, describes palliative care. It states that the attending physician must request the care and submit a formal treatment plan for prior approval. There is no indication that Dr. Bullard was sent a copy of the letter. (Ex. R4.)

6. On November 18, 2001, Ms. Little wrote to SAIF. She asked that the claims adjuster confirm that the physical therapy program at Rex qualified as palliative care. (Ex. 32.) Dr. Kane performed an arbiter's examination on December 10, 2001. He noted that the palliative physical therapy allowed Ms. Little to tolerate her current academic activities. (Ex. 37.) On reconsideration of the Notice of Closure, WCD affirmed the medically stationary date and increased the award for permanent disability. (Ex. 41.)

7. On March 7, 2002, SAIF sent Rex a form 827 plus instructions on requesting palliative care. (Ex. R8.) There is no indication the form or explanation was sent to Dr. Bullard. On March 21, 2002, Dr. Bullard wrote a "to whom it may concern" letter stating that physical therapy had been very beneficial and had allowed Ms. Little to be functional. (Ex. 44.) On April 2, 2002, Dr. Bullard filed a form 827 as a palliative care request. SAIF responded on April 12,

2002, stating that Dr. Bullard's palliative care request did not contain sufficient information. The response stated that Dr. Bullard's request needed to include the specific modalities of treatment proposed, the name of the provider, the frequency and duration of the treatment proposed and a detailed explanation of how the compensable injury remains the major cause of the need for treatment. (Ex. 47.) Dr. Bullard did not receive the response until June 14, 2002. (Ex. 56.) On May 16, a SAIF claims supervisor wrote to Ms. Little confirming that SAIF continued to disallow physical therapy treatments that occurred after June 1, 2001 when Ms. Little became medically stationary. On June 1, 2002, Ms. Little requested administrative review. (Ex. 53.)

8. On June 27, 2002, Dr. Bullard responded to SAIF's April 12, 2002 disallowance of the palliative care request and requested administrative review. In his response, Dr. Bullard described the various modalities used in Ms. Little's physical therapy. He also stated the name of the provider and his opinion that the need for physical therapy is caused in major part by the compensable injury and that it is crucial for Ms. Little's continued functioning. (Ex. 56.)

9. Rex has outstanding billings for physical therapy to Ms. Little that amount to \$7,968.44. The dates of service for this therapy are February 28, 2001 through February 23, 2002. (Ex. R13.)

### CONCLUSIONS OF LAW

SAIF is liable for physical therapy provided to Ms. Little by Rex from February 28, 2001 through August 22, 2002.

### OPINION

The Director has jurisdiction over medical disputes arising under ORS 656.245(1) in cases where compensability of the condition to which medical services are directed is not at issue. OAR 436-010-0008(3), (4). Jurisdiction over this medical services dispute lies with the director. ORS 656.245(1)(c)(J). Since ORS 656.245(1)(c)(J) prescribes no standard of review, I review *de novo*. *Archie M. Ulrich*, 2 WCSR 152, 153 (1997); OAR 436-010-0225(1). The burden of proving a fact or position rests with the proponent. ORS 183.450(2). SAIF, as the petitioner in this hearing bears the burden of proof by a preponderance of the evidence that it is not liable for the disputed services. See *Cook v. Employment Div.*, 47 Or 437 (1982) (In the absence of contrary legislation, the standard of proof in an administrative hearing is preponderance of evidence).

I note at the outset that many of the disputed physical therapy treatments occurred before Ms. Little became medically stationary. SAIF's only defense to liability in this case is that no palliative care request was perfected. Palliative care is defined in ORS 656.005(20) as care of "an otherwise stable condition." Because Ms. Little's condition was not medically stationary (i.e. not stable) before June 1, 2000, physical therapy treatments before that date are not palliative and SAIF raises no defense to its liability for them. Therefore, SAIF is liable for all physical therapy treatments before June 1, 2000.

MRU found that Dr. Bullard could not have known or complied with Oregon's regulatory requirements for requesting palliative care because SAIF had failed to provide him with adequate notice of how to submit a perfected request for authorization of palliative care. SAIF concedes that it failed to send Dr. Bullard a copy of the Notice of Closure and accompanying information concerning requesting palliative care that was required under *former* OAR 436-010-0270(4) and *former* OAR 436-010-0210(7)(b), which were in effect at the time of these treatments. SAIF contends that the information SAIF provided to Dr. Bullard when he became the attending physician was adequate. I disagree. The information SAIF provided to Dr. Bullard made no reference to palliative care. It is not reasonable for SAIF to expect that an out-of-state physician would understand that palliative care would be treated differently than other type of care. It is also not reasonable to expect that an out-of-state physician would take the initiative to request copies of the administrative rules from WCD when SAIF had provided him with what appears to be a full summary of those rules.

SAIF argues that MRU exceeded its authority by finding this care reimbursable when Dr. Bullard did not comply with the applicable rules. SAIF contends that strict compliance with 436-010-0230(4) is required, notwithstanding the fact that SAIF failed to inform Dr. Bullard of the requirements. It argues that MRU may have authority to sanction it for not providing Dr. Bullard with the information required concerning palliative care, but that finding it reimbursable is not the appropriate sanction. I conclude, however, that it is within MRU's authority to waive strict compliance with these requirements. OAR 436-010-0003(2) states:

Applicable to this chapter, the director may, unless otherwise obligated by statute, in the director's discretion waive any procedural rules as justice so requires.

In this case, both Ms. Little and Dr. Bullard attempted to comply with the regulatory requirements. Dr. Bullard, in fact, supplied SAIF with information concerning Ms. Little's need to continue with physical therapy and its causal connection to the accepted claim. Considering the fact that SAIF failed to fully inform Dr. Bullard of the regulatory requirements and that Dr. Bullard provided SAIF with crucial information concerning the need for palliative care, I conclude that substantial justice requires that SAIF be found liable for the disputed physical therapy treatments.

### **ORDER**

*IT HEREBY ORDERED* that SAIF Corporation shall reimburse Rex Healthcare for physical therapy treatments provided to Ms. Little from February 28, 2001 through August 22, 2002.