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In the Matter of the ORS 656.245 Medical Services Dispute of

**Graham, Willie J., Claimant**

Contested Case No: H02-071

**AMMENDED PROPOSED & FINAL ORDER**

March 4, 2004

FRED MEYER STORES INC., Petitioner

WILLIE J. GRAHAM, Respondent

Before Catherine P. Coburn, Administrative Law Judge, Office of Administrative Hearings

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**HISTORY OF THE CASE**

On February 23, 2004, Administrative Law Judge Catherine P. Coburn conducted further hearing pursuant to OAR 137-003-0655(2) following a request by the Workers' Compensation Division (WCD) of the Department of Consumer and Business services (the department or director). Petitioning self-insured employer, Fred Meyer Stores, Inc. and its claims processing agent, Sedgewick Risk Management Services, Inc (formerly Pinnacle), (employer) were represented by attorney Bruce L. Byerly. Respondent Willie J. Graham (claimant) was represented by attorney Margaret F. Weddell.

On February 2, 2002, the Medical Review Unit (MRU) of WCD issued an administrative order determining that a gymnasium membership, including swim therapy, was not reimbursable. Claimant appealed and on May 31, 2002, Administrative Law Judge Ella D. Johnson issued a Proposed and Final Order affirming.

On June 10, 2002, MRU issued an administrative order determining that swim therapy was reimbursable. Insurer appealed and the parties submitted written argument in a contested case hearing. On January 14, 2003, Administrative Law Judge Catherine P. Coburn issued a Proposed and Final Order reversing. WCD and claimant filed exceptions and on June 9, 2003, WCD requested further hearing. On February 23, 2004, ALJ Coburn conducted a further hearing.

**ISSUES**

As defined in the Request for Further Hearing, the issues are:

- (1) Whether the disputed swim therapy is reimbursable pursuant to ORS 656.245(1)(c)(J).
- (2) Whether the disputed swim therapy is reimbursable pursuant to ORS 656.005(20).
- (3) Whether the disputed swim therapy is reimbursable pursuant to OAR 436-010-0290.

**EVIDENTIARY RULINGS**

WCD Exhibits 1 through 183 were received into the record without objection. Pursuant

to OAR 137-003-0615, I take official notice of ICD-9-CM<sup>1</sup> Code 722.8: post-laminectomy syndrome and ICD-9-CM Code 724.4: radiculopathy (ICD Codes).

### FINDINGS OF FACT

In the Request for Further Hearing, WCD adopted the findings of fact contained in the January 14, 2003 Proposed and Final Order. I hereby incorporate those findings of fact with supplementation in bold print.

(1) On August 12, 1997, claimant suffered a low back injury while working as a retail manager in a home improvement department. (Exs. 3, 13 and 20.) On August 29, 1997, claimant became enrolled in a managed care organization. (Ex. 14.) On November 6, 1997, employer accepted “lumbar strain, disc herniation L5-6, right side.” (Exs. 29, 49 and 74.) The compensable conditions became medically stationary on May 11, 1998 and the claim was closed on June 2, 1998. (Ex. 50.)

**(1A) On April 6, 1998, attending physician Jock Pribnow, MD released claimant to modified work. (Ex. 105-1.) Claimant returned to work full time as an assistant records administrator and part time as a retail clerk. (Exs. 20-1, 106, 123, 133, 155.)**

(2) On April 2, 1999, claimant filed an aggravation claim. (Ex. 55.) On June 23, 1999, claimant underwent decompressive laminectomy L4-5 and L5-S1. (Ex. 65.) By stipulation dated November 10, 1999, employer accepted the aggravation claim and claimant was enrolled in an MCO. (Exs. 71 and 72.) The compensable conditions returned to medically stationary status on November 13, 1999 and the claim was closed on December 1, 1999. (Ex. 75.)

(3) On March 30, 2000, claimant underwent surgical reexploration of the previous laminectomy and removal of the L4-5 disk. (Ex. 87.) On July 6, 2000, employer expanded the scope of acceptance to include L5-6, S1 disk herniation. (Exs. 91 and 111.) The compensable conditions again became medically stationary on January 18, 2001 and the claim was closed on February 21, 2001. (Exs. 105, 107, 110.)

(4) On March 23, 2001, employer accepted “L5-6, S-1 disc herniation and consequential post laminectomy syndrome including right S1 radiculopathy and left L5 radiculopathy.” (Exs. 115 and 117.) Based on the medically stationary date of January 18, 2001, the claim was again closed on April 3, 2001. (Ex. 116.)

(5) On April 23, 2001, employer denied Dr. Pribnow’s request for a palliative health club membership. (Ex. 120.) **On May 14, 2001, Dr. Pribnow opined, that gymnasium membership would allow claimant “his best opportunity to continue working without further time loss.” (Ex. 123.)** On June 12, 2001 Dr. Pribnow renewed his request for palliative care in the form of a health club membership. (Ex. 131.) He opined that swimming pool therapy was beneficial to maintain muscle tone and flexibility and would reduce the chance of recurring

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<sup>1</sup> ICDM-9-CM means International Classification of Diseases, Ninth Revision, Clinical Modification, Vol. 1, 2 & 3. OAR 436-009-0005(2)(n).

low back problems. Dr. Pribnow stated “Mr. Graham found independent pool exercise to be very helpful, and on discharge from physical therapy, the therapist suggested continuing pool exercise and use of the hot tub.” (*Id.*) Dr. Pribnow concluded “I hope that Mr. Graham is allowed health club membership under palliative care.” (*Id.*)

(6) MRU reviewed the matter and issued an administrative order dated August 23, 2001 determining that the gymnasium membership, including swimming pool therapy, did not constitute “physical restorative services” and was not reimbursable because it was not performed under the direct control and supervision of the attending physician. (Ex. 142.) Claimant filed a motion for reconsideration and on November 20, 2001, MRU abated its order. (Exs. 146 and 149.)

(7) MRU obtained the opinion of Jack B. Blumberg, MD as physician reviewer. (Exs. 150 and 152.) On December 14, 2001, Dr. Blumberg found Dr. Pribnow’s opinions plausible and rational. (Ex. 154-3). Dr. Blumberg opined that the palliative gymnasium membership including swim therapy was appropriate medical treatment for the lumbar condition. (*Id.*)

(8) MRU reviewed the matter and issued an administrative order dated February 20, 2002 determining that palliative pool therapy in the form of a gymnasium membership prescribed by Dr. Pribnow was not reimbursable because under OAR 436-010-0005(34), physical restorative services are available only for treatment of hemiplegia, a spinal cord injury or a severe head injury and claimant suffered none of these conditions. (Ex. 162-4.) Claimant appealed. (Ex. 171.) Administrative Law Judge Ella D. Johnson conducted a contested case hearing and issued a Proposed and Final Order dated May 31, 2002. (Ex. 174.) ALJ Johnson followed MRU’s reasoning and affirmed the administrative order finding the disputed pool therapy not reimbursable. (*Id.*)

(9) On January 7, 2002, Dr. Pribnow requested approval of twelve sessions in 180 days of pool therapy under the supervision of a physical therapist. (Ex. 155.) **On the Attending Physician’s Palliative Care Request form, Dr. Pribnow noted that claimant was currently working in “county records.” (*Id.*) Under “ICD-9-CM diagnosis for which the palliative care is requested,” he listed “Postlaminectomy syndrome” and “Bilateral lumbar radiculitis” without ICD Code numbers. Under “Objective findings supporting the diagnosis;” he wrote “Same findings.” (*Id.*) Under “Proposed palliative care plan” he listed “up to 12 sessions pool therapy at Kaiser under supervision of P[hysical] T[herapist].” In answer to the question, “How does the requested care relate to the compensable condition?” he wrote, “Has permanent impairment from radiculitis.” In answer to the question “How will the requested care enable the worker to continue current employment or a vocational training program?” Dr. Pribnow wrote, “Same as past – optimize function.” In response to the instruction, “Identify any possible adverse effects on the worker if the requested care is not approved.” He wrote, “Same as past -- increased treatment. Work loss.” (*Id.*)**

(9A) Employer denied the request and claimant requested administrative review. (Exs. 156 and 159.)

(9B) On February 18, 2002, Dr. Pribnow reiterated his opinion that use of a swimming pool and hot tub would benefit claimant. (Ex. 160.) **He noted that pool therapy would be effective for prevention and for function at work. (*Id.*)**

(10) MRU obtained the opinion of Christopher Swan, MD as physician reviewer. (Ex. 172.) On April 23, 2002, Dr. Swan agreed with the opinions of Dr. Pribnow and Dr. Blumberg that claimant would benefit from continued strength and flexibility exercises. (Ex. 173-4.) However, Dr. Swan disagreed that claimant would be adversely affected if the request for pool therapy were not approved. Dr. Swan observed that supervised or home exercise programs are effective alternative methods of maintaining strength and flexibility. Dr. Swan noted that twelve pool exercise periods over 180 days probably is not sufficient to maintain strength and flexibility. (*Id.*)

(11) MRU reviewed the matter and issued an administrative order dated June 10, 2002 determining that the disputed pool therapy was reimbursable because it enabled claimant to continue current employment. (Ex. 175.) On June 24, 2002, insurer requested MRU to abate the administrative order arguing that is inconsistent with ALJ Johnson's Proposed and Final Order in the case. (Ex. 178.) On June 27, 2002, MRU declined to reconsider the matter. (Ex. 179.) Insurer appealed. (Ex. 180.)

### CONCLUSIONS OF LAW

- (1) The disputed swim therapy is reimbursable pursuant to ORS 656.005(20).
- (2) The disputed swim therapy is reimbursable pursuant to ORS 656.245(1)(c)(J).
- (3) The disputed swim therapy is not reimbursable pursuant to OAR 436-010 0290.

### OPINION

Jurisdiction over medical service issues lies with the director. ORS 656.245(6). Inasmuch as claimant was enrolled in an MCO, I review for substantial evidence or error of law. ORS 656.260 (16). The burden of proving a fact or position falls upon the proponent. ORS 183.450(2). *Harris v. SAIF*, 292 Or 683 (1982). As petitioner, insurer bears the burden of proving by a preponderance of evidence that the administrative order is incorrect. *Cook v. Employment Div.*, 47 Or 437 (1982) (In the absence of legislation adopting a different standard, the standard of proof in an administrative hearing is preponderance of evidence). Proof by a preponderance of evidence means that the fact finder is persuaded that the facts asserted are more likely true than false. *Riley Hill General Contractors v. Tandy Corp.*, 303 Or 390 (1989).

In the administrative order dated June 10, 2002, MRU determined that the disputed swim therapy was reimbursable as palliative care under ORS 656.245(1)(c)(J), ORS 656.005(20) and OAR 436-010-0290. Upon further hearing, insurer contends that the treatment plan submitted by Dr. Pribnow fails to meet the requirements specified in OAR 436-010-0290. In contrast, claimant contends that the treatment plan is sufficient and that the disputed swim therapy is

reimbursable. Additionally, claimant preserves the argument challenging the validity of OAR 436-010-0230(11).

**In order to determine whether substantial evidence exists, I am required to:**

**“[L]ook at the whole record with respect to the issue being decided, rather than 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. For instance, and in the context which is likely to occur in workers’ compensation cases, if there are doctors on both sides of a medical issue, whichever way the [director] finds the facts will probably have substantial evidentiary support.\*\*\*The difference between the ‘any evidence’ rule and the substantial evidence test\*\*\*will be decisive only when the credible evidence apparently weighs overwhelmingly in favor of one finding and the [director] finds the other without giving a persuasive explanation.” *Armstrong v. Asten-Hill Co.*, 90 Or App 200, 206 (1988).**

**In assessing whether findings are supported by substantial evidence, my task is not to substitute my judgment for that of MRU, but rather to decide whether the findings are reasonable in light of countervailing as well as supporting evidence. *Reguero v. Teacher Standards and Practices Commission*, 312 Or 402, 417-18 (1991).**

Pursuant to ORS 656.245(1)(a), an insurer is obligated to provide medical services that are materially related to a compensable condition for so long as the nature of the injury or the process of recovery requires. This obligation continues over the worker’s lifetime. ORS 656.245(1)(b). However, pursuant to ORS 656.245(1)(c)(J), after the work-related condition becomes medically stationary, the insurer is no longer liable for payment of medical services with some exceptions.

ORS 656.245(1)(c)(J) provides in part:

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

(J) 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)<sup>2</sup>

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<sup>2</sup> ORS 656.005(12)(B)(a) provides:

Except as otherwise provided for workers subject to a managed care contract, “attending physician” means a doctor or physician who is primarily responsible for the treatment of a worker’s compensable injury and who is:

- (A) A medical doctor or doctor of osteopathy licensed under ORS 677.100 to 677.228 by the Board of Medical Examiners for the State of Oregon or an oral and maxillofacial surgeon licensed by the Oregon Board of

prescribes and that is necessary to enable the worker to continue current employment or a vocational training program.

Palliative care is medical treatment directed toward reducing the intensity of a stable, compensable condition. ORS 656.005(20) defines the term.

'Palliative care' means medical service 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.

Here, claimant's condition became medically stationary in January 2001. Thus, his entitlement to medical services falls under ORS 656.245(1)(c)(J) and ORS 656.005(20). In April 1998, Dr. Pribnow released claimant to work and claimant subsequently returned to work. **In May 2001, Dr. Pribnow opined that gymnasium membership, including swim therapy would "allow claimant his best opportunity to continue working without further time loss." In December 2001, physician reviewer Dr. Blumberg found Dr. Pribnow's opinions plausible and rational. On the other hand, in April 2002, physician reviewer Dr. Swan disagreed that claimant would be adversely affected if the request for pool therapy were not approved. Based on the record, I find that substantial evidence supports MRU's conclusion that the disputed swim therapy satisfies the requirements specified by ORS 656.245(1)(c)(J) and ORS 656.005(20).**

OAR 436-010-0290 specifies the information required of a physician's request for palliative care. The rule provides:

- (1) 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. The request shall:
  - (a) Describe any objective findings;
  - (b) Identify by ICDM-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 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.

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Dentistry or a similarly licensed doctor in any country or in any state, territory or possession of the United States; or

- (B) For a period of 30 days from the date of first visit on the initial claim or for 12 visits, whichever first occurs, a doctor or physician licensed by the State Board of Chiropractic Examiners for the State of Oregon or a similarly licensed doctor or physician in any country or in any state, territory or possession of the United States.

On the January 7, 2002 Dr. Pribnow submitted an Attending Physician's Palliative Care Request form. Insurer contends that the request fails to satisfy the requirements specified in OAR 436-010-0290 and that the disputed swim therapy is not reimbursable. Claimant disagrees.

Subsection (a) requires a description of objective findings. Under "Objective findings supporting the diagnosis;" Dr. Pribnow wrote, "Same findings." The notation does not specify same as what. Insurer argues that the objective findings listed on an Attending Physician's Palliative Care Request form must satisfy the statutory definition of "objective findings" contained in ORS 656.005(19)<sup>3</sup>. Insurer's argument in this regard is well taken. I find that a bare notation, "Same findings" fails to satisfy any definition of the term "objective findings." Thus, I find that the palliative care request fails to satisfy subsection (a).

Subsection (b) requires identification of the medical condition for which palliative care is requested, by ICD code. Dr. Pribnow listed "Postlaminectomy syndrome" and "Bilateral lumbar radiculitis" without code numbers. Insurer argues that the palliative care request is insufficient because it lacks ICD code numbers. However, I took official notice of the ICD code numbers for the two medical diagnoses Dr. Pribnow listed. Thus, I find that the palliative care request satisfies subsection (b).

Subsection (c) requires the attending physician to detail the name of the provider who will render the proposed care. Dr. Pribnow identified "Kaiser" as the medical provider. The term "detail" is defined as "as individual part or item: particular". *Webster's New Riverside University Dictionary*, 1984, p. 368. I find that the term "Kaiser" fails to detail the medical provider who was intended to render the proposed swim therapy. Thus, the palliative care request fails to satisfy this requirement listed in subsection (c).

Subsection (c) also requires specific treatment modalities. The palliative care request specifies pool therapy under supervision of a physical therapist. Thus, I find that the palliative care request satisfies this requirement of subsection (c).

Finally, subsection (c) requires identification of the frequency and duration of the proposed palliative care. Dr. Pribnow listed "up to 12 sessions" within 180 days to begin ASAP. I find that it is reasonable to calculate the frequency of swim sessions within this time frame. Thus, the palliative care request satisfies these requirements of subsection (c).

Subsection (d) requires the attending physician to explain how the requested care will enable the injured worker to continue current employment. Dr. Pribnow wrote, "Same as past. – optimize function." Subsection (d) also requires the attending physician

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<sup>3</sup> ORS 656.005(19) provides:

"Objective findings" in support of medical evidence are verifiable indications of injury or disease that may include, but are not limited to, range of motion, atrophy, muscle strength and muscle spasm. "Objective findings" does not include physical findings or subjective responses to physical examinations that are not reproducible, measurable or observable.

to explain the possible adverse effect if the care is not approved. Dr. Pribnow wrote, "Same as past – increased treatment, work loss." I find that these notations, read as a whole, convey adequate information to satisfy the requirements of subsection (d).

**In conclusion, I find that the disputed swim therapy qualifies as palliative care under ORS 656.245 (1)(c)(J) and ORS 656.005(20). However, the Attending Physician's Palliative request dated January 7, 2002 is insufficient because it fails to satisfy the requirements specified by OAR 436-010-0290 (a) and (c). Therefore, the disputed swim therapy is not reimbursable under OAR 436-010-0290. Finally, inasmuch as substantial evidence does not support MRU's determination, I reverse.**

#### **ATTORNEY FEES**

Claimant has not prevailed in a contested case hearing, and therefore, is entitled to no attorney fee. ORS 656.385(1).

#### **ORDER**

IT IS HEREBY ORDERED that:

The Administrative Order dated June 10, 2002 is reversed.