

In the Matter of the ORS 656.245 Medical Treatment Dispute of

**Little, Dianne, Claimant**

Contested Case No: H03-046

**FINAL ORDER**

April 13, 2004

SAIF CORPORATION, Petitioner

DIANNE LITTLE, Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

---

The petitioner, SAIF Corporation (SAIF), by and through its attorney Mary Goebel Adams, timely filed exceptions to Administrative Law Judge (ALJ) Ray Myers' December 17, 2003 Proposed and Final Contested Case Hearing Order. Claimant, *pro se*, timely submitted a response. SAIF timely replied. This matter comes before the director for issuance of a final order.

The director may adopt the proposed order as the final order or may modify the proposed order. OAR 137-003-0655(6), 436-001-0275(3). If the director modifies the proposed order in any substantial manner, the agency must identify and explain the modifications. OAR 137-003-0665(3). The director may only modify the ALJ's findings of historical fact if the director determines that the finding is not supported by a preponderance of the evidence in the record. OAR 137-003-0665(4).

The issues raised by SAIF are the ALJ's waiver of procedural rules and whether SAIF is liable for claimant's physical therapy treatments from February 28, 2001 through August 22, 2002. The entire record has been reviewed, including the exhibits received into evidence, the audio recording of the hearing, and the parties' written arguments.

**FINDINGS OF FACT**

Claimant, a clinical fellow at the employer's College of Veterinary Medicine, was compensably injured on April 30, 2000 while performing surgery on a horse. (Ex. 1). SAIF accepted trapezius, lumbosacral and cervical muscular strains. (Ex. 2).

Claimant moved to North Carolina and began treating with Dr. Bullard, a neurosurgeon, in August 2000. Dr. Bullard concluded that claimant had sustained a musculoskeletal injury and he prescribed physical therapy. (Exs. 4, 5). Claimant first saw a physical therapist at Rex Healthcare (Rex) on August 30, 2000. (Exs. 6, 8).

On January 16, 2001, SAIF wrote to Dr. Bullard, explaining that, as an attending physician under Oregon law, he would have specific responsibilities. The letter indicated that a summary sheet of applicable regulations was enclosed and informed Dr. Bullard that if he wanted a complete copy of the administrative rules, he could contact the Worker's Compensation Division (WCD). The letter asked Dr. Bullard to contact SAIF immediately if he did not agree to abide by the rules. (Ex. 15). The summary attached to the letter said that physical therapy would require a written treatment plan. (Ex. 15-2). Although the summary discussed the need

for the attending physician to describe residual limitations when the worker became medically stationary, it did not discuss the requirements for prescribing palliative care.

Also on January 16, 2001, SAIF wrote to claimant, 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).

On April 6, 2001, Dr. Bullard explained that claimant was medically stationary, but she would need to continue physical therapy to maintain her current level of functioning. (Ex. 18). An August 31, 2001 Notice of Closure listed the medically stationary date as June 1, 2001. (Ex. 29). On August 31, 2001, SAIF wrote to claimant explaining her medically stationary status. (Ex. R4). The letter described palliative care and stated that her attending physician must first request this care and submit a formal treatment plan to SAIF. (Ex. R4-2). There is no evidence that Dr. Bullard was provided with a copy of the August 31, 2001 letter.

After receiving the August 31, 2001 Notice of Closure, claimant left numerous messages at SAIF, asking for confirmation that the continuing physical therapy was covered as continuing palliative care. (Ex. 53). When she did not receive a response, claimant wrote a letter on September 20, 2001, indicating that she assumed that the physical therapy treatments constituted "palliative care ... necessary to continue current employment or vocational training program." (Ex. 30). Claimant did not receive a response from SAIF and made several more phone calls asking if she needed to complete any paperwork. (Ex. 53). On November 18, 2001, claimant wrote to SAIF and asked for confirmation that her physical therapy program at Rex "continues to be covered by workers' compensation insurance." (Ex. 32). There is no evidence that SAIF responded to claimant's inquiries.

Dr. Kane performed a medical arbiter examination on December 10, 2001. He noted that the palliative physical therapy allowed claimant to tolerate her current academic activities. (Ex. 37-2). A January 25, 2002 Order on Reconsideration increased claimant's unscheduled permanent disability award. (Ex. 41).

On March 7, 2002, SAIF sent Rex a form 827 with instructions for requesting palliative care. (Ex. R8). There is no evidence that SAIF sent a copy of the form to Dr. Bullard at that time.

On March 21, 2002, Dr. Bullard prepared a memo "to whom it may concern," which stated that claimant had been receiving ongoing physical therapy that allowed her to be functional and avoid surgery. (Ex. 44). He recommended continued physical therapy.

On April 9, 2002, Dr. Bullard signed a form 827, requesting palliative care. (Ex. 46). SAIF responded on April 12, 2002 with a Notice of Palliative Care Disapproval. (Ex. 47). The notice to Dr. Bullard said that the request was disapproved, but would be reconsidered if he submitted certain information. SAIF's letter asked Dr. Bullard to submit his rationale of why he believed the treatment was related to the accepted injury, and indicated that it would "reconsider upon receipt." Dr. Bullard did not receive the Notice of Palliative Care Disapproval until June 14, 2002. (Ex. 56).

In the meantime, SAIF wrote to claimant on May 16, 2002, adhering to its decision to disallow the physical therapy bills. (Ex. 49). The letter said that “[a]s for the date the form 827 was sent to your attending physician, we were delayed in making that available. Please accept my apologies.” (*Id.*) On June 1, 2002, claimant requested administrative review. (Ex. 53).

On June 27, 2002, Dr. Bullard responded to SAIF’s disapproval notice with the requested information.<sup>1</sup> (Ex. 56). Dr. Bullard described the various modalities used, included the name of the physical therapy provider, and said that claimant’s need for physical therapy was caused in major part by the compensable injury.

Rex has outstanding billings for claimant’s physical therapy for dates of service from February 28, 2001 through August 22, 2002. (Ex. 59).

### CONCLUSIONS OF LAW AND OPINION

Claimant was found medically stationary on June 1, 2001, and her claim was closed on August 31, 2001. The April 15, 2003 administrative order found that SAIF had not complied with *former* OAR 436-010-0270(4) (WCD Admin. Order No. 00-052, effective 4/21/00), which provided that, immediately following notice or knowledge that worker is medically stationary, insurers “shall notify all injured workers *and the attending physician* in writing which medical services remain compensable under the system and the manner in which they may receive palliative care in accordance with OAR 436-010-0290.” (Emphasis supplied). The order found that, although SAIF provided notice on August 31, 2001 to claimant, SAIF did not send a copy to Dr. Bullard, and the letter did not discuss the manner in which a worker may receive palliative care in accordance with OAR 436-010-0290.

The administrative order also discussed *former* OAR 436-010-0210(7)(b) (WCD Admin. Order No. 00-052), which required a carrier who approved the worker’s choice of an out-of-state attending physician to immediately inform the worker and the physician in writing of three specific items, one of which required SAIF to inform Dr. Bullard of “the manner in which the out-of-state physician may provide compensable medical services to Oregon injured workers.” The order reasoned that it was SAIF’s responsibility to provide Dr. Bullard with adequate written notice to allow him to submit a perfected request for palliative care, but SAIF did not provide such notice. Further, when SAIF provided a copy of the form 827, it sent a copy to the physical therapist’s billing office. The administrative order concluded that, without proper notice from SAIF, including a copy of the required form and information about how to submit a perfected request for approval of palliative care, there was no way for Dr. Bullard to know and comply with the necessary requirements and, therefore, SAIF was liable for the disputed payments.

SAIF requested a hearing. The ALJ explained that SAIF’s only defense to liability was that no palliative care request was perfected. Claimant was found to be medically stationary as of June 1, 2001, and the claim was closed on August 31, 2001. (Ex. 29). The disputed physical

---

<sup>1</sup> The letter was actually signed by T. Scott Binford, PA-C, but was written on Dr. Bullard’s letterhead. (Ex. 56).

therapy treatments were provided to claimant from February 28, 2001 through August 22, 2002. The ALJ pointed out that the physical therapy treatments provided before claimant was found to be medically stationary were not “palliative,” and he noted that SAIF raised no defense to liability for those treatments. SAIF does not challenge the ALJ’s finding that SAIF is liable for all physical therapy treatments before claimant was found medically stationary. Therefore, I affirm the ALJ’s conclusion that SAIF is liable for all physical therapy treatments before June 1, 2001, when claimant was found to be medically stationary.

Regarding the physical therapy treatments after June 1, 2001, the ALJ explained that SAIF argued that the Medical Review Unit (Unit) had exceeded its authority by finding the disputed care reimbursable when Dr. Bullard did not comply with the applicable rules. SAIF argued that strict compliance with OAR 436-010-0230(4) was required, notwithstanding the fact that SAIF failed to inform Dr. Bullard of the requirements. The ALJ concluded that, pursuant to OAR 436-010-0003(2), the Unit had the authority to waive strict compliance with the administrative rules. The ALJ reasoned that both claimant and Dr. Bullard had attempted to comply with the regulatory requirements and he noted that Dr. Bullard had supplied SAIF with information concerning claimant’s need to continue with physical therapy and its causal connection to the accepted claim. In light of the fact that SAIF failed to inform Dr. Bullard of the regulatory requirements and that Dr. Bullard provided SAIF with crucial information concerning the need for palliative care, the ALJ concluded that substantial justice required that SAIF be found liable for the disputed physical therapy treatments.

SAIF argues that it disapproved Dr. Bullard’s palliative care request because it lacked information, *i.e.*, the specific modalities of care, and its frequency and duration, as required by OAR 436-010-0230(4). SAIF contends that the ALJ erred by waiving the procedural rules. SAIF asserts that the statutes and rules do not impose an affirmative duty on insurers to provide attending physicians with a complete copy of the administrative rules and detailed instructions for submitting a palliative care request. SAIF acknowledges that it failed to comply with *former* OAR 436-010-0270(4), which was in effect on the date claimant was found to be medically stationary on June 1, 2001. Nevertheless, SAIF asserts that it “effectively” complied with that requirement by sending Dr. Bullard a medical services “summary” memo, and directing him to the Department of Consumer and Business Services for more information.

The remaining issue is whether SAIF is liable for the physical therapy treatments between June 1, 2001 and August 22, 2002. SAIF does not dispute the fact that the physical therapy treatment was in fact “palliative.” *See* ORS 656.005(20) (defining “palliative care”). SAIF also does not dispute the ALJ’s finding that Dr. Bullard provided SAIF with crucial information concerning claimant’s need to continue with physical therapy and its causal connection to the accepted claim. Rather, SAIF argues that the ALJ erred by waiving the procedural rules, and it contends that strict compliance with OAR 436-010-0230(4)(a) is mandatory.

ORS 656.245(1)(c) provides that medical services after the worker's condition is medically stationary are not compensable except for particular circumstances, including:

“(J) With the approval of the insurer or self-insured employer, palliative care that the worker's attending physician \* \* \* 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. \* \* \* ”

*Former* OAR 436-010-0230(4) (WCD Admin. Order No. 01-065; effective 1/1/02) provided, in part:

“(a) Except as otherwise provided by the MCO, ancillary services including but not limited to physical therapy or occupational therapy, by a medical service provider other than the attending physician or specialist physician shall not be reimbursed unless prescribed by the attending physician or specialist physician and carried out under a treatment plan prepared prior to the commencement of treatment and signed by the attending physician or specialist physician within 30 days of beginning treatment. The medical service provider shall provide an initial copy of the treatment plan to the attending physician or specialist physician and the insurer within seven days of beginning treatment. A copy of the treatment plan signed by the attending physician or specialist physician shall be provided to the insurer by the medical service provider within 30 days of beginning treatment. The treatment plan shall include objectives, modalities, frequency of treatment, and duration. The treatment plan may be recorded in any legible format including, but not limited to, signed chart notes. Treatment plans required under this subsection do not apply to services provided pursuant to ORS 656.245(2)(b)(A).”

SAIF's April 12, 2002 Notice of Palliative Care Disapproval to Dr. Bullard said that SAIF had received a request for approval of palliative care, but it did not “contain the information required by the [DCBS] Administrative Rules.” (Ex. 47). The letter explained that the request was disapproved, but would be reconsidered if the following information was submitted: the specific modalities of treatment proposed, the name of the provider who would perform treatment, the frequency and duration (not to exceed 120 days) of the treatment proposed, and a narrative explanation of how the April 30, 2000 injury remained the major contributing cause of the need for proposed care. (*Id.*) SAIF's letter said that if Dr. Bullard believed the treatment was related to the accepted injury, “please submit your rationale and SAIF will reconsider upon receipt.” Although SAIF's April 12, 2002 Notice of Palliative Care Disapproval was addressed to Dr. Bullard, he did not receive that notice until June 14, 2002. (Exs. 47, 56).

After Dr. Bullard received a copy of the disapproval notice, he responded with the requested information on June 27, 2002. (Ex. 56). Dr. Bullard's letter explained the name of the physical therapy provider, and the specific modalities of treatment, including therapeutic exercise, trunk stabilization exercises, soft tissue mobilization/myofascial release, patient education, home exercise program instruction, and muscle energy techniques. (*Id.*) The letter indicated that a copy of the records from the physical therapy provider were provided. The letter

said that the need for physical therapy was required because of the April 2000 compensable injury, and explained that this had been discussed “exhaustively” in prior notes, which were enclosed. Further, the letter said that the physical therapy that claimant had received was “absolutely crucial” for her to continue to function.

The burden of proving a fact or position rests with the proponent. ORS 183.450(2); *Salem Decorating v. National Council on Comp. Ins.*, 116 Or App 166, 170 (1992), *rev den* 315 Or 643 (1993). As the petitioner, SAIF has to demonstrate how Dr. Bullard failed to comply with OAR 436-010-0230(4). See *Marvin Wood Products v. Callow*, 171 Or App 175, 183-85 (2000) (the party challenging the Appellate Review Unit’s conclusion has the burden of demonstrating that the Unit misapplied the disability standards).

The ALJ explained that SAIF’s only defense to liability was that no palliative care request was perfected. SAIF does not dispute the ALJ’s finding that Dr. Bullard provided SAIF with crucial information concerning claimant’s need to continue with physical therapy and its causal connection to the accepted claim. Although SAIF insists that strict compliance with OAR 436-010-0230(4) is required, SAIF does not explain what part of that rule Dr. Bullard failed to comply with. Under these circumstances, I find that SAIF has failed to sustain its burden of proving that it is not liable for the disputed physical therapy treatments.

Alternatively, I find that SAIF waived its right to challenge Dr. Bullard’s failure to comply with OAR 436-010-0230(4). SAIF said in its April 12, 2002 Notice of Palliative Care Disapproval to Dr. Bullard that “[w]e will reconsider this decision if you submit the following information \* \* \*.” (Ex. 47). The notice also said “[i]f you believe that the treatment is related to the accepted injury, please submit your rationale and SAIF will reconsider upon receipt.” (*Id.*) Dr. Bullard complied with SAIF’s request on June 27, 2002, 13 days after he received SAIF’s Notice of Palliative Care Disapproval. (Ex. 56). Because SAIF does not challenge the ALJ’s finding that Dr. Bullard provided SAIF with crucial information concerning claimant’s need to continue with physical therapy and its causal connection to the accepted claim, and considering the totality of circumstances, I find that SAIF waived its right to challenge Dr. Bullard’s failure to comply with OAR 436-010-0230(4). See *Wright Schuchart Harbor v. Johnson*, 133 Or App 680, 686 (1995) (a waiver may be explicit or implied from a party’s conduct).

In summary, I agree with the ALJ’s conclusion that SAIF is liable for physical therapy treatments provided to claimant from February 28, 2001 through August 22, 2002.<sup>2</sup>

Claimant asserts that she has had no legal representation in this matter, but she has incurred several expenses and she estimates that she has devoted about 12 hours to this case over a 20 month period. Claimant inquires about the possibility of being paid for her time.

ORS 656.385(1) provides for an attorney fee where a claimant finally prevails after a proceeding has commenced before the director, or in such cases where an attorney is

---

<sup>2</sup> In light of this disposition, it is not necessary to address the ALJ’s conclusion that, pursuant to OAR 436-010-0003(2), the Medical Review Unit had the authority to waive strict compliance with the administrative rules.

instrumental in obtaining a settlement of the dispute prior to a decision by the director. However, there is no statutory provision that allows reimbursement for a claimant's services in litigating a case. I therefore decline claimant's request for reimbursement for her services devoted to this case.

**ORDER**

**IT IS HEREBY ORDERED** that the ALJ's December 17, 2003 Proposed and Final Order is affirmed.