

ORIGINAL

OFFICIAL TRANSCRIPT OF PROCEEDINGS

Agency: Nuclear Regulatory Commission

Title: Oncology Services Corporation
(Order Suspending Byproduct
Material License No. 37-28540-01)

Docket No. 030-31765-EA, EA93-006, ASLBP No. 93-674-03-EA

LOCATION: Bethesda, Maryland

DATE: Tuesday, April 12, 1994

PAGES: 145 - 159

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

- - - - - x
In the matter of: :
ONCOLOGY SERVICES CORPORATION : Docket No. 030-31765-EA
(Order Suspending Byproduct : EA 93-006
Material License :
No. 37-28540-01) : ASLBP No. 93-674-03-EA

- - - - - x
Tuesday, April 12, 1994
4350 East-West Highway
Room 426
Bethesda, Maryland

A PREHEARING TELEPHONE CONFERENCE in the above
entitled matter commenced at 2:00 p.m., pursuant to
notice.

BEFORE:
G. Paul Bollwerk, III, Judge
Dr. Peter S. Lam

ANN RILEY & ASSOCIATES, LTD.
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1 APPEARANCES:

2

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ON BEHALF OF ONCOLOGY SERVICES CORPORATION:

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JOSEPH KLEIN, ESQUIRE

5

JOE RODKEY, ESQUIRE

6

Reed, Smith, Shaw, McClay

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ON BEHALF OF THE NUCLEAR REGULATORY

10 COMMISSION:

11

MARIAN ZOBLER, ESQUIRE

12

CATHERINE L. MARCO, ESQUIRE

13

Office of the General Counsel

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U.S. Nuclear Regulatory Commission

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Washington D.C. 20555

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P R O C E E D I N G S

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2 JUDGE BOLLWERK: I called this conference, or I
3 tried to set it up last week given that some discovery
4 matters seem to have come to a head, at least in part.
5 First, let's have counsel go ahead and identify themselves
6 for the record.

7 MS. ZOBLER: This is Marian Zobler with O.G.C.,
8 for the staff, as well as Catherine Marco, from J.G.C.

9 MR. KLEIN: This is Joe Klein, from Reed, Smith,
10 Shaw, and McClay, for licensee O.S.C. With me is Joe Rodkey
11 of Reed Smith, also representing O.S.C.

12 JUDGE BOLLWERK: All right. I would ask counsel,
13 both of you before you speak, please to identify yourselves.
14 Although given we have only have one woman and one man, it's
15 probably going to be apparent who is who. But it would help
16 the court reporter, just so the record is clear.

17 As I mentioned, it seemed we've had in the last
18 several weeks some developments in the discovery with the
19 release of the transcripts, and the interviews, and some
20 other documentation as a result of the FOIA case, and some
21 matters that were in dispute in discovery here. And, also,
22 what I now understand are the declination of any criminal
23 referrals by the Justice Department relating to matters that
24 were involved in this case.

25 And I just wanted to sort of touch base with both

1 of you and see where we were in terms of discovery. I know,
2 as you are aware, we've issued an order setting August 1st
3 as the date for the deadline on discovery. One of the
4 things, also, were when I first set this telephone
5 conference, I had a number of questions. But I've gotten
6 some filings in the last day or so, which I suspect will
7 make this conference somewhat shorter.

8 One of the things I'm concerned about though is,
9 given the declination of the criminal referral and the
10 release of the documents, there may be some matters that
11 once were in dispute that are no longer in dispute between
12 the parties. And it's of concern to me that I not be ruling
13 on things that are no longer something the parties are
14 concerned about.

15 And I saw a letter, I guess, that Ms. Colkitt sent
16 yesterday, indicating that there may be some objections that
17 O.S.C. would now be waiving. Can you address yourself to
18 that at all, Mr. Klein?

19 MR. KLEIN: It would be helpful, your Honor, if I
20 knew exactly which letter you were referring to. I'm not
21 sure.

22 JUDGE BOLLWERK: It's a letter dated April 11th.
23 It was sent to Ms. Zabler, and copies to the members of the
24 Board -- just one second. And the letter indicates that --
25 and this is Ms. Colkitt speaking -- "It's my understanding

1 that all referrals made by the NRC to the Department of
2 Justice regarding the Indiana accident and the complete
3 investigation of O.S.C. have been declined and that no other
4 referrals exist or are currently anticipated. Please
5 confirm this in writing and I will withdraw certain pending
6 discovery objections."

7 And I take it, Ms. Zobler, you received a copy of
8 that, is that correct?

9 MS. ZOBLER: That's correct. I did.

10 MR. KLEIN: Can you confirm that, Marian?

11 MS. ZOBLER: I spoke to the Office of
12 Investigations, and what they said is that everything that
13 was referred to the Department of Justice has been declined.
14 And that based on the information that they currently have,
15 there are no further referrals currently anticipated.

16 MR. KLEIN: Marian, and again, your Honor, I
17 wouldn't want to represent this as absolute certainty, but
18 my understanding was there was at least some degree of
19 investigation ongoing from the Western District here, that
20 one of the U.S. attorneys had contacted Ms. Colkitt and
21 wanted to take a statement from I forget who. Do you know
22 anything about that, Marian?

23 MS. ZOBLER: It is my understanding that what you
24 are referring to correctly, that involves separate
25 proceedings and has nothing to do with the Oncology Services

1 Corporation proceedings.

2 MR. KLEIN: Oh, okay. Then, your Honor, I guess
3 what I would have to represent is we definitely will, in
4 accordance with what Ms. Colkitt said, withdraw those
5 objections in the Strontium-90 proceeding, which depended on
6 the ongoing internal investigation. And if it would
7 facilitate things, I would be happy to review with Ms.
8 Zobler those objections which can be withdrawn.

9 JUDGE BOLLWERK: This conference doesn't involve
10 the Strontium-90, the Indiana Regional Cancer Center
11 proceeding. This is only the Oncology Services, the staff's
12 enforcement order in that case. So I don't want to get
13 these two things mixed up. If I am misunderstanding, let me
14 know.

15 MR. KLEIN: Right. I misspoke, your Honor. I
16 meant Iridium-192.

17 JUDGE BOLLWERK: Okay.

18 MR. KLEIN: In other words, the extent of the
19 criminal investigations that are being withdrawn regarding
20 the Iridium-192, we would be happy to withdraw any
21 objections that are dependent on the pendency of those
22 investigations.

23 JUDGE BOLLWERK: I take it that in withdrawing
24 your objections that means that you may have some responses
25 that you have to give which may or may not be adequate for

1 the staff, which may result in more motions to compel. I
2 guess one thing I would like to see is some kind of an
3 indication from, I guess, you all since they were your
4 objections, of what is being withdrawn. How quickly do you
5 think you can do that?

6 MR. KLEIN: By the beginning of next week, your
7 Honor?

8 JUDGE BOLLWERK: That would be good. Do you think
9 Monday?

10 MR. KLEIN: We could try for -- yes.

11 JUDGE BOLLWERK: All right. If that's a problem,
12 let me know. But if not, I'll expect to hear something from
13 you on Monday.

14 MR. KLEIN: Okay.

15 JUDGE BOLLWERK: At this point, Ms. Zabler, do you
16 see anything else on your side that's going to be withdrawn?
17 Any objections or any change in any of the documents that
18 you have pending?

19 MS. ZABLER: Do you mean staff objections?

20 JUDGE BOLLWERK: Yes, or motions that you have
21 pending. Anything like that?

22 MS. ZABLER: I think as the staff pointed out in
23 the joint status report on discovery, any objection to our
24 producing documents on the basis of the criminal referrals
25 is now moot, and we did provide certain of the transcripts

1 from the IIT.

2 Our other pending Motion for Protective Order as
3 well our Motion to Compel, filed on March 14th, is still
4 pending and really is not dependent on the provision of the
5 IIT documents or the declination of the criminal referrals
6 in this proceeding.

7 JUDGE BOLLWERK: All right. So I guess what I'm
8 hearing, Mr. Klein, and that is sort of my impression as
9 well, is that given all the information that you have been
10 given, there may be some change in the status of some of
11 your objections, and I guess we need to know about that, is
12 the bottom line.

13 MR. KLEIN: Right. And that is the items which
14 we'll respond by Monday, your Honor.

15 JUDGE BOLLWERK: Okay. Very good. There are a
16 number of pending motions which the Board is aware of, and
17 we're going to be moving forward on those. I noticed in Ms.
18 Colkitt's letter, and do you have a copy of that, Mr. Klein?

19 MR. KLEIN: I did, your Honor. I just didn't know
20 which one you were referring to.

21 JUDGE BOLLWERK: There is a mention in the first
22 paragraph about the possibility of settlement discussions
23 between the parties, and you know we've discussed this
24 before in the prehearing conference, and the only thing I
25 wanted to point out is we're sort of at a point here where i

1 guess there is some deposition requests that are pending?

2 MR. KLEIN: That's right.

3 JUDGE BOLLWERK: Ms. Zobler, are you going to be
4 asking for any additional depositions?

5 MS. ZOBLER: I anticipate the staff will be filing
6 notices of depositions.

7 JUDGE BOLLWERK: All right. We're probably at a
8 point here where in the next several weeks things are going
9 to begin to move forward pretty rapidly, in terms of
10 discovery with the intended expense and time involved. And
11 there may be something, as Ms. Colkitt's letter indicates,
12 that the parties want to sit down and talk about.

13 MR. KLEIN: I think Marian will agree, the parties
14 have begun a new advance on settlement. And I was a
15 participant in the initial conversation in that new advance.

16 Your Honor, what we would suggest again, or put
17 before the Court and the NRC, is whether a settlement
18 magistrate might not be helpful in this instance. We
19 certainly would be willing to participate in a procedure
20 involving a settlement magistrate.

21 JUDGE BOLLWERK: Ms. Zobler, do you have any
22 thoughts on that?

23 MS. ZOBLER: Your Honor, I'd have to check with
24 the staff to see if they'd be amenable to also sitting down
25 with the -- excuse me, a settlement magistrate. So I can't

1 give you a definitive answer of yes or no, but I will
2 certainly bring that up to the staff.

3 JUDGE BOLLWERK: Right. Again, as I indicated at
4 the prehearing conference, I prefer something like that to
5 be a joint request. I think if you all are serious about
6 settling the case, hopefully, you'll recognize that and,
7 hopefully, you'll sit down together and make some decisions
8 about what needs to go on. And that's why I'd like to see
9 that as a joint request.

10 So if you could, Ms. Zobler, check back and maybe
11 you and Mr. Klein could talk. And if it looks like that's
12 something you are interested in, you can get back to us and
13 we'll move forward on that basis.

14 MS. ZOBLER: I will, your Honor.

15 JUDGE BOLLWERK: All right. One other thing I'd
16 like to mention, and maybe you could relay this to Ms.
17 Colkitt, Mr. Klein. Her letter yesterday, the 4/11 letter
18 that I guess you have in front of you, it indicates that it
19 was sent to Ms. Zobler with copies to the Board by fax.

20 And I know we've talked -- I know I've issued an
21 order at least once before about making sure that anything
22 that is sent to us is served on the Office of the Secretary.

23 MR. KLEIN: I will communicate that. I apologize
24 on behalf of Ms. Colkitt, and we'll try and insure that it
25 doesn't happen again, your Honor.

1 JUDGE BOLLWERK: Okay. I think, in this instance,
2 the best way to take care of the problem would be for her to
3 simply put a cover letter on that letter, and send it out to
4 the service list, if she would.

5 MR. KLEIN: Okay. I will take care of that, your
6 Honor.

7 JUDGE BOLLWERK: All right. Thank you very much.
8 Is there anything either of the parties would like to
9 discuss with us at this point? I'm not hearing anything
10 from either party. As I said, this probably would be rather
11 brief, given some of the filings I got the other day.

12 As I said, we're aware of all the motions that
13 have been filed. And it may well be within the next several
14 weeks we'll begin to issue some rulings, which may give you
15 another reason to sit down and think about settlement.
16 Because once we begin to do that, things move forward and
17 there is generally some expense on the part of one party or
18 the other. So I wanted to apprise you of that fact.

19 MS. ZOBLER: Excuse me, your Honor, there was one
20 matter that the staff wants to raise?

21 JUDGE BOLLWERK: Okay.

22 MS. ZOBLER: I received yesterday, and I assume
23 that the Board received it as well, a response of O.S.C. to
24 staff's Motion to Compel and Motion for Protective Order,
25 dated April 11th?

1 JUDGE BOLLWERK: Yes, we've received that.

2 MS. ZOBLER: If you would entertain an oral motion
3 from the staff to strike this response as untimely, the
4 staff would request that you do so.

5 JUDGE BOLLWERK: Well, if it's untimely, I think
6 the best thing for you to do is to go ahead and just file a
7 response to it or file a motion, whichever is appropriate,
8 and let us know your reasons why you think it ought to be
9 dismissed.

10 MS. ZOBLER: Okay. I will, your Honor.

11 JUDGE BOLLWERK: I'd appreciate that. And, Mr.
12 Klein, obviously, you all will have an opportunity to
13 respond to that.

14 MR. KLEIN: All right. Your Honor, in that
15 regard, we may be filing I'm not sure what exactly yet, but
16 to put further information before the Board on the problems
17 of clarification that have riddled this proceeding.

18 We've just received some notice that NRC's Office
19 of General Counsel has concluded that the requirements of 10
20 C.F.R. 35, specifically the provisions of Subpart G of 35,
21 apply to HDR remote afterloader brachytherapy devices
22 utilizing Iridium-192.

23 This is one of the relevant problems that we've
24 been dealing with, to use a Pittsburgh expression, from the
25 get-go on this proceeding. And it seems the sands are

1 shifting. And I'm not sure exactly how we'll put that
2 before the Board, but we may likely do so in an additional
3 filing of some sort.

4 JUDGE BOLLWERK: All right. I think I made this
5 clear in the last order that we issued, or one of the last
6 orders. If you want us to do something, there is a
7 difference between informing us to do something, or asking
8 us to do something. Make sure you label it as a motion.
9 I'd appreciate that because that lets us know you are asking
10 for some kind of relief from us.

11 MR. KLEIN: I understood that. And we may, if we
12 can get on the record, simply supply something informational
13 as a demonstration and an illustration of the problems we've
14 been having and the basis for the arguments that we have
15 been making.

16 MS. ZOBLER: Your Honor, I would have to object to
17 any kind of filing like that. Staff, in its order --
18 suspension order, didn't cite to a violation of Subpart G of
19 Part 35. And I believe the Board in its January ruling did
20 dismiss two issues proposed by O.S.C. which related to the
21 applicability of Subpart G.

22 MR. KLEIN: The basis for that ruling, your Honor,
23 if I recall correctly, was staff's assertion that 35 Subpart
24 G did not govern. Now we're getting -- and, again, what I
25 have is the March 1994 "Isotopics," which appears to be an

1 industry publication. And it references cited violations by
2 St. Vincent Charity Hospital in Pittsburgh to which the
3 hospital argued Part 35 Subpart G did not apply.

4 And the response from Region III was that the NRC
5 Office of General Counsel has concluded that the
6 requirements of 10 C.F.R. 35, specifically the provisions of
7 Subpart G of 35, apply to HDR remote afterloader
8 brachytherapy devices utilizing Iridium-192. So we may want
9 to move for reconsideration once we firm up the record in
10 this regard.

11 JUDGE BOLLWERK: Well, again, you can file
12 whatever you think is appropriate, and, Ms. Zabler, you will
13 have an opportunity to respond to it. I haven't seen it, so
14 I don't know --

15 MR. KLEIN: I wasn't asking for a ruling right
16 now, your Honor. I was just sort of pointing out one of the
17 problems.

18 JUDGE BOLLWERK: Okay. Let me raise one other
19 issue. We got a Notice of Deposition in, I guess, yesterday
20 or the day before. Ms. Zabler, do you see any problems with
21 that in terms of making those individuals available?

22 MS. ZABLER: There is some problem with the Notice
23 of Deposition, your Honor. The staff is willing to make the
24 named individual available. The problem has to do with the
25 actual date, I think it said May 2nd, and the location of

1 the deposition.

2 JUDGE BOLLWERK: That is something, I take it, you
3 are going to talk with counsel for Oncology Services about
4 that?

5 MS. ZOBLER: That's my intent, yes, your Honor.

6 JUDGE BOLLWERK: All right, very good then.
7 Anything else from either of the parties?

8 MS. ZOBLER: Nothing from the staff, your Honor.

9 MR. KLEIN: Nothing from O.S.C., your Honor.

10 JUDGE BOLLWERK: All right. I thank both of you
11 for making yourselves available this afternoon. As I said,
12 this wasn't going to last too long, and I don't think it
13 did. And we'll be waiting to hear from you, Mr. Klein, I
14 guess the beginning of next about what has changed in terms
15 of your objections?

16 MR. KLEIN: Yes, Sir.

17 JUDGE BOLLWERK: Thank you both very much.

18 [Whereupon, at 2:21 p.m., the telephonic
19 prehearing was concluded.]

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REPORTER'S CERTIFICATE

This is to certify that the attached proceedings before the United States Nuclear Regulatory Commission in the matter of:

NAME OF PROCEEDING: Oncology Services

DOCKET NUMBER: 030-31765-EA

PLACE OF PROCEEDING: Bethesda, MD

were held as herein appears, and that this is the original transcript thereof for the file of the United States Nuclear Regulatory Commission taken by me and thereafter reduced to typewriting by me or under the direction of the court reporting company, and that the transcript is a true and accurate record of the foregoing proceedings.

Shelton Beese
Official Reporter
Ann Riley & Associates, Ltd.