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In the Matter of the ORS 656.260 Managed Care Dispute of

**Leon-Torres, Martin, Claimant**

Contested Case No: H03-108

**PROPOSED AND FINAL ORDER**

October 31, 2003

MARTIN LEON-TORRES, Petitioner

SAIF CORPORATION AND OREGON HEALTH SYSTEMS, Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

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**HISTORY OF THE CASE**

Claimant appeals an administrative order issued on August 8, 2003 by the Medical Review Unit (MRU) of the Workers' Compensation Division (WCD) Department of Consumer and Business Services (director or the department). On October 22, 2003, Administrative Law Judge Catherine P. Coburn conducted a hearing in this matter. Petitioner Martin Leon-Torres (claimant) was represented by attorney Aaron E. Clingerman. Respondent SAIF Corporation (insurer) was represented by attorney Norman Cole. Respondent Oregon Health Systems managed care organization (MCO) was represented by attorney Arden J. Olson. Maria Morrision served as interpreter pursuant to ORS 45.275(1). WCD waived appearance. No witnesses testified and the record closed on the date of hearing.

**ISSUES**

1. Whether MRU incorrectly determined that claimant appealed an MCO disapproval of a medical referral untimely.
2. If so, whether claimant is entitled to an assessed attorney fee.

**EVIDENTIARY RULINGS**

WCD Exhibits 1 through 27 were admitted into the record without objection. Pursuant to ORS 183.450(4) and OAR 137-003-0615, and without objection, I took judicial notice of the March and April 2003 calendar.

**FINDINGS OF FACT**

1. On July 19, 2002, claimant suffered a low back injury while working as a landscaper. (Ex. 1.) Claimant sought treatment from attending physician Oscar Quijano, MD. (Ex. 2.) On September 19, 2002, insurer accepted a lumbar strain and enrolled claimant in the MCO. (Exs. 5, 6, and 7.)
2. On November 11, 2002 and on November 15, 2002, Dr. Quijano requested authorization for a discogram with a neurologist. (Exs. 3-4 and 3-7.) On January 16, 2003, Dr. Quijano referred claimant to Dr. Olson or Dr. Tiley for a neurosurgical evaluation. (Exs. 3-8 and 10.) On May 7, 2003, Dr. Quijano reiterated the

- recommendation for further diagnostic neurological evaluation and stated that he was unable to make a definite conclusion concerning claimant's diagnosis. (Ex. 3-10.)
3. On January 30, 2003, the MCO deferred the referral to a neurosurgeon. (Ex. 13.)
  4. On March 6, 2003, the MCO mailed the neurosurgical referral disapproval. (Exs. 15 and 24.)
  5. On April 7, 2003, claimant mailed the notice of appeal. The MCO received it on April 9, 2003. (Exs. 16 and 25.)

### CONCLUSION OF LAW

1. MRU incorrectly determined that claimant appealed an MCO disapproval of a medical referral untimely.
2. Claimant is not entitled to an assessed attorney fee.

### OPINION

This managed care dispute arises under ORS 656.260, and therefore, jurisdiction lies with the director. ORS 656.260(6). I review for substantial evidence and error of law. ORS 656.260(16). 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 170 (1992), *rev den* 315 Or 643 (1993). As the proponent of his position, claimant bears the burden of proving by a preponderance of evidence that the administrative order is incorrect. *Harris v. SAIF*, 292 Or 683 (1982) (General rule regarding allocation of burden of proof is that burden is on the proponent of the fact or position.); *Cook v. Employment Div.*, 47 Or 437 (1982) (In the absence of legislation adopting a different standard of proof, the standard 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).

MRU calculated the 30-day appeal deadline occurring on Saturday, April 5. MRU next applied ORCP 10 which disregards Saturday and Sunday, establishing Monday April 7 as the appeal deadline. Finally, MRU concluded that the appeal was untimely because the MCO received it on Wednesday, April 9.

As petitioner, claimant contends that he notified the MCO of his appeal timely and that MRU's decision reflects legal error. In support of his position, claimant cites ORS 187.010 for the proposition that Saturday and Sunday do not count in the 30-day calculation. Claimant next argues that notice is determined by the date of mailing and not by the date of receipt.

Respondent MCO contends that the administrative order reached the correct conclusion

but through faulty reasoning. In support of its position, the MCO argues that ORCP does not apply to administrative hearings and that no legal authority extends the 30-day appeal deadline over a weekend. The MCO further argues that the term “notice” means “date of receipt.”

Respondent SAIF takes no position on the timeliness issue but contends that no attorney fee is due to claimant’s attorney.

Pursuant to ORS 656.245(1), an insurer is obligated to provide medical services for compensable conditions for such period as the nature of the injury or the process of recovery requires. ORS 656.260(4)(a) authorizes insurers to provide medical services to injured workers through a contract with a state-certified managed care organization.

ORS 656.260(14) provides:

If a worker, insurer, self-insured employer or the attending physician is dissatisfied with an action of the managed care organization regarding the provision of medical services pursuant to this chapter, peer review, service utilization review or quality assurance activities, that person or entity must first apply to the director for administrative review of the matter before requesting a hearing before the director. Such application must be made not later than the 60<sup>th</sup> day after the date the managed care organization has completed and issued its final decision.

OAR 436-015-0110(4) provides:

Whenever an MCO denies a service, or a party otherwise disputes a decision of the MCO, the MCO shall send written notice<sup>1</sup> of its decision to all parties that can appeal the decision. If the MCO provides a dispute resolution process for the issue, the notice shall include the following paragraph, in bold text:

**NOTICE TO THE WORKER AND ALL OTHER PARTIES:  
If you disagree with this decision and want to appeal it, you must notify us in writing within 30 days of the mailing of this notice. Send a written request for review to {MCO name and address}> If you have question, contact {MCO contact person and phone number}. If you do not notify us in writing within 30 days, you will lose all rights to appeal the decision. If you appeal timely, we will review the disputed decision and notify you of our decision within 60 days of your request. Thereafter, if you continue to disagree with our decision, you may appeal**

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<sup>1</sup> The term “notice” is not defined by OAR Chapter 436 Division 001 or Division 015. OAR 436-001-0004(6) provides: “Filing” means mailed, faxed or physically delivered. OAR 436-001-0004(9) provides: “Mailed” means correctly addressed, with sufficient postage and placed in the custody of the U.S. Postal Service.

**to the director of the Department of Consumer and Business Services (DCBS) for further review. If you fail to seek dispute resolution through us, you will lose your right to appeal to the director of DCBS.**

(Emphasis in the original.)

Although the Oregon Rules of Civil Procedure (ORCP) are not binding in administrative cases, they may provide guidance. In *James Adank*, 3 WCSR 178 (1998), the director applied ORCP 10 in determining a timeliness issue. Here, I agree with MRU's reliance on ORCP 10.

ORCP 10 provides in part:

In computing any period of time prescribed or allowed by these rules, by the local rules of any court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, **unless it is a Saturday or a legal holiday, including Sunday**, in which event the period runs until the end of the next day which is not a Saturday or a legal holiday.

(Emphasis added.)

It is well-established that notification occurs upon *mailing*, not upon a party's *receipt* of notice. *E.g. Norton v. Compensation Department*, 252 Or 75 (1968) ("Notified" means deposited in the mails.). *See also Jeffrey G. Wiseman* 6 WCSR 260 (2001).

Here, the MCO disapproved the neurology referral on March 6, 2003. The thirty-day appeal deadline occurred on Saturday, April 5. However, pursuant to ORCP 10, Saturday and Sunday are not included in the timeliness calculation, and therefore, the deadline was extended to Monday, April 7. Claimant mailed the notice of appeal on April 7. Inasmuch as notification occurs upon mailing, the fact that the MCO received claimant's appeal notice two days later is irrelevant. Moreover, MRU erred by relying on the date of receipt rather than the date of mailing. For these reasons, I conclude that claimant provided timely notice of his appeal and that MRU erred in dismissing the claim. I remand to MRU for its determination concerning the medical appropriateness of the neurology referral.

#### **ATTORNEY FEES**

Claimant's attorney requested a fee in the event claimant prevailed on the timeliness issue. Respondent SAIF contends that no attorney fee is due.

ORS 656.385(1) provides in part:

In all cases involving a dispute over compensation benefits

cases involving a dispute over compensation benefits pursuant to ORS 656.245, 656.260, 656.327, or 656.340, where a claimant finally prevails in a contested case order by the Director of the Department of Consumer and Business Services, the director shall require the insurer or self-insured employer to pay a reasonable attorney fee to the claimant's attorney.

Inasmuch as I remand the case to MRU, claimant has not "finally prevailed" concerning compensation, and therefore, is not entitled to an attorney fee.

**ORDER**

IT IS HEREBY ORDERED:

1. The administrative order dated August 8, 2003 is reversed.
2. The matter is remanded to MRU for its determination whether claimant is entitled to a neurosurgical referral.
3. On remand, claimant's attorney is entitled to no fee.

DATED this 31<sup>st</sup> day of October 2003.

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Catherine P. Coburn  
Administrative Law Judge  
Office of Administrative Hearings