
In the the ORS 656.245 Treatment Dispute of

Foster, John D., Claimant

Contested Case No: H03-086

PROPOSED & FINAL ORDER

January 14, 2004

AMERICAN MANUFACTURERS MUTUAL INSURANCE CO., Petitioner

JOHN D. FOSTER, Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

HISTORY OF THE CASE

American Manufacturers Mutual Insurance Co. (petitioner) appeals a June 6, 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 it was precluded from challenging a proposed surgery for its failure to comply with OAR 436-010-0250(3). On July 11, 2003, the matter was referred to the Office of Administrative Hearings (OAH) for hearing.

On September 9 2003, Administrative Law Judge (ALJ) Paul Vincent conducted a telephone hearing in this matter in Salem, Oregon. Attorney Jerald Keene represented petitioner. Attorney Scott Supperstein represented Mr. Foster (claimant). Assistant Attorney General Carol Parks represented WCD. 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 tape recordings 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

Did the director exceed her authority in precluding the petitioner from challenging a requested surgery for its failure to comply with the requirements of OAR 436-010-0250(3)?

EVIDENTIARY RULING

The record consists of Exhibits 1 through 26, which were admitted into the record without objection.

FINDINGS OF FACT

I adopt MRU's Findings of Fact with the following supplementation:

1. Claimant compensably injured his low back on October 17, 1996 while working for petitioner's insured. The claim was accepted as a disabling lumbar strain and herniated disc at

L5-S1. (Ex. 5.) Petitioner closed the claim on November 2, 2000 with an award for 19 percent unscheduled disability. (Ex. 7.)

2. On February 4, 2003, Kaiser Permanente notified petitioner that Dr. Adams proposed to perform surgery. (Ex. 14.) On February 25, 2003, petitioner notified claimant that it wished a second opinion and had scheduled an appointment with Dr. Thomas Rosenbaum to do an examination. (Ex. 15.) On May 8, 2003, based on Dr. Rosenbaum's evaluation, petitioner notified claimant that it would not authorize surgery. (Ex. 21.)

CONCLUSIONS OF LAW

The director did not exceed her authority in precluding petitioner from challenging a requested surgery for its failure to comply with the requirements of OAR 436-010-0250(3)?

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). I review MRU's decision for substantial evidence and errors of law. ORS 656.327.

Petitioner concedes that it did not fully comply with OAR 436-010-0250(3). Petitioner contends, however, that WCD exceeded its statutory authority in promulgating and enforcing OAR 436-010-0008(5), under which petitioner was precluded from challenging the proposed surgery. The relevant portions of OAR 436-010-0250 state:

(3) When elective surgery is recommended, the insurer may require an independent consultation with a physician of the insurer's choice. The insurer shall notify the recommending physician, the worker and the worker's representative, within seven days of receipt of the notice of intent to perform surgery, whether or not a consultation is desired by submitting Form 440-3228 (Elective Surgery Notification) to the recommending physician. When requested, the consultation shall be completed within 28 days after notice to the attending physician.

(4)(a) Within seven days of the consultation, the insurer shall notify the recommending physician of the insurer's consultant's findings.

(b) When the insurer's consultant disagrees with the proposed surgery, the recommending physician and insurer shall endeavor to resolve any issues raised by the insurer's consultant's report. Where medically appropriate, the recommending physician, with the insurer's agreement to pay, shall obtain additional diagnostic testing, clarification reports or other information designed to assist them in their attempt to reach an agreement regarding the proposed surgery.

(c) The recommending physician shall provide written notice to the insurer, the worker and the worker's representative when further attempts to resolve the matter would be futile by signing Form 440-3228.

(5) If the insurer believes the proposed surgery is excessive, inappropriate, or ineffectual and cannot resolve the dispute with the recommending physician, the insurer shall request an administrative review by the director within 21 days of the notice provided in subsection(4)(c) of this rule. **Failure of the insurer to timely respond to the physician's elective surgery request or to timely request administrative review pursuant to this rule shall bar the insurer from later disputing whether the surgery was excessive, inappropriate, or ineffectual.** (emphasis added.)

Petitioner contends that WCD has no authority to impose a forfeiture on an insurer for failure to notify a physician of its intent to seek a second opinion. It particularly contends that the time periods in the rule are not reasonable. Further, it contends that it is precluded from an adequate opportunity to develop its case.

On review, I conclude that petitioner has failed to sustain its burden of proving that MRU erred as a matter of law, by relying on the administrative rule to preclude petitioner from challenging a proposed surgery. As the Court of Appeals has recently stated:

We review the interpretation of an agency rule for legal error, ORS 183.482(8)(a), but we defer to an agency's interpretation of its own rule if that interpretation is plausible and is not inconsistent with the rule's wording, its context, or any other source of law. *Don't Waste Oregon Com. v. Energy Facility Siting*, 320 Or 132, 142, 881 P2d 119 (1994). We conclude that the director's interpretation meets that standard; we therefore affirm.

SAIF v. Ross, ___ Or App ___ (December 10, 2003).

Thus, I first examine the rule itself and MRU's interpretation of it. Based on that review, I conclude that MRU's interpretation of the rule is consistent with the language of the rule and is, therefore, plausible. Therefore, I defer to MRU's interpretation. I also conclude that the rule is within the agency's authority.

ORS 656.726(4) provides the director with general authority. It states in relevant part:

(4) The director hereby is charged with duties of administration, regulation and enforcement of ORS 654.001 to 654.295, 654.750 to 654.780 and this chapter.

To that end the director may:

(a) Make and declare all rules and issue orders which are reasonably required in the performance of the director's duties.

In *SAIF v. Ross*, *supra*, the Court of Appeals upheld MRU's interpretation of a regulation requiring a written treatment plan. The court stated:

The director's interpretation is also consistent with the purpose of administrative rules governing the provision of medical services to claimants. OAR 436-010-0002 states that "[t]he purpose of these rules is to establish uniform guidelines for administering the payment for medical services to injured workers within the workers' compensation system." Allowing a claimant's physician to submit the components of a treatment plan in more than one document does not interfere with the uniformity sought in the rules. Claimants are still required to have a treatment plan; the director's interpretation merely allows greater flexibility in meeting the requirements of the rule.

The statutory authority for *former* OAR 436-010-0230(3)(a) is found in chapter 656, the Workers' Compensation Law. ORS 656.012 contains the chapter's policy statement:

"(2) [T]he objectives of the Workers' Compensation Law are declared to be as follows:

"(a) To provide, regardless of fault, sure, prompt and complete medical treatment for injured workers and fair, adequate and reasonable income benefits to injured workers and their dependents;

"(b) To provide a fair and just administrative system for delivery of medical and financial benefits to injured workers that reduces litigation and eliminates the adversary nature of the compensation proceedings, to the greatest extent practicable;

"(c) To restore the injured worker physically and economically to a self-sufficient status in an expeditious manner and to the greatest extent practicable[.]"

Once again, nothing in the director's interpretation of the rule is inconsistent with the goals of compensating and caring for injured workers within a fairly and expeditiously administered system.

I conclude, that the rule in issue here is consistent with the goals of compensating and caring for injured workers within a fairly and expeditiously administered system. Nothing in the rule is inconsistent with this or any policy in the Workers' Compensation Act. Furthermore, nothing in this rule exceeds the director's authority to make rules reasonably required for her to satisfy those goals. Therefore, MRU did not err as a matter of law.

ATTORNEY FEES

In medical services cases, where a claimant finally prevails in a contested case order by the director, the director *shall* require the insurer or self-insured employer to pay a reasonable attorney fee to the claimant's attorney. ORS 656.385(1). A statement of services may be considered as a factor in assessing the award if submitted within seven days of the hearing date. OAR 436-001-0265(1). A statement of services is not a prerequisite to a fee award, however. The ALJ may consider any information deemed relevant and appropriate. OAR 436-001-

0265(1)(j).

Here, claimant has not provided a statement of services. Nonetheless, after reviewing the factors in the administrative rule, particularly the benefit to claimant, I conclude that claimant is entitled to an assessed fee of \$2,500.

ORDER

IT HEREBY ORDERED that MRU's Administrative Order dated June 6, 2003 is affirmed.

Dated this 14th day of January, 2004.

Ray Myers, Administrative Law Judge
Office of Administrative Hearings