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In the ORS 656.260 Managed Care Dispute of

**DIRK TERHAAR, Claimant**

Contested Case No: H04-153

**PROPOSED AND FINAL ORDER**

December 6, 2004

DIRK TERHAAR, Petitioner

SAIF CORP., Respondent

Before Allison Greene Webster, Administrative Law Judge, Administrative Hearings

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**HISTORY OF THE CASE**

Claimant Dirk Terhaar appeals an administrative order issued September 3, 2004 by the Medical Review Unit (MRU) of the Workers' Compensation Division (WCD) of the Department of Consumer and Business Services (director or department). On December 1, 2004, Administrative Law Judge Alison Greene Webster of the Office of Administrative Hearings conducted a telephone hearing in this matter. Petitioner Dick Terhaar (Claimant) was represented by attorney R. Adian Martin. Respondent SAIF Corporation was represented by attorney Jerome Larkin. Managed Care Northwest/Caremark waived appearance. The record closed on the date of hearing.

**ISSUE**

The issue is whether MRU correctly determined that the bilateral C4-5 facet injections requested by John Kafrouni, MD, were not compensable as part of claimant's accepted claim.

**RULING ON MOTION TO POSTPONE**

At the outset of the hearing, Claimant's counsel moved to continue, postpone or defer the hearing until the Workers' Compensation Board decides the compensability of claimant's C5-6 disc protrusion. Claimant's counsel asserted that because the compensability of claimant's C5-6 disc condition is unresolved at this point, it would be premature to decide whether the requested facet injections are directed to a condition caused in material part by the compensable injury.

SAIF objected to the postponement. SAIF noted that the MRU Administrative Order addresses the relationship between the requested facet injections and the accepted C6-7 disc condition only. SAIF argued that this medical services dispute is separate and independent from the compensability issue before Board.

Claimant's motion to postpone was denied on the record. I agree with SAIF that the managed care dispute that gave rise to MRU's Administrative Order is limited to the reasonableness of treatment for the current accepted condition and is therefore distinct from the compensability matter pending before the Board. The issue, whether the disputed facet injections are compensably related to claimant's accepted C6-7 condition, remains ripe for

review. I further note that, because under ORS 656.260(16) "no new medical evidence or issues shall be admitted" at this contested case hearing, I would be prohibited from considering any medical evidence or issues generated in connection with the C5-6 disc condition litigation before the Board, even if that condition is subsequently found to be compensable. Consequently, continuance or postponement of the hearing is not appropriate.

### **EVIDENTIARY RULINGS**

WCD Exhibits 1 through 103 were received and admitted without objection.

### **FINDINGS OF FACT**

I adopt the Findings of Fact set forth in the September 3, 2004 Administrative Order, with the following summary and supplementation:

- (1) Claimant, a dry wall hanger, was injured on the job on November 15, 2001. Following litigation, SAIF accepted the claim for a C6-7 left-sided disc protrusion on April 17, 2002. SAIF also enrolled Claimant in Caremark, a Managed Care Organization (MCO). (Ex. 13.)
- (2) Claimant received surgical and non-surgical treatment without lasting relief. In June 2002, he underwent fusion surgery at C5-6 and C6-7. Claimant continued to experience neck, left shoulder and arm pain. In February 2003, following a referral from Kent Grewe, MD, claimant came under the care of John Kafrouni, MD. Dr. Kafrouni recommended trigger point injections to the left trapezius and obtained MCO precertification for the procedure. (Exs. 48, 52.)
- (3) Claimant made an occupational disease claim for his C5-6 disc condition. On May 5, 2003, SAIF issued a partial denial, denying compensability of claimant's C5-6 disc protrusion. (Exs. 50, 57.)
- (4) On June 10, 2003, claimant returned to Dr. Kafrouni complaining that his left trapezius pain had returned. Dr. Kafrouni recommended anti-inflammatory medication, physical therapy and work conditioning. (Ex. 48.)
- (5) Claimant's cervical pain persisted. On July 16, 2003, Dr. Kafrouni recommended diagnostic facet blocks with Dr. Slack to help identify the recurrent predominant pain generator that was likely referring pain to claimant's shoulder. (Exs. 48, 65.)
- (6) Dr. Slack requested MCO precertification. On July 29, 2003, Caremark denied certification, asserting that the condition for which the treatment was proposed was not a claimed condition and/or part of the compensable claim. (Ex. 66.)
- (7) In August 2003, Charles P. Moore, MD, performed a Disability Prevention Consultation (DPC) in connection with claimant's case. Dr. Moore discussed claimant's case with Dr. Kafrouni. During the case review, Dr. Kafrouni agreed that claimant's C4-5 facet

pathology was not related to his C6-7 disc protrusion. Dr. Kafrouni also acknowledged that the accepted C6-7 disc condition was medically stationary. (Ex. 72.) Dr. Kafrouni was provided with a copy of Dr. Moore's DPC report, and did not challenge it. (Ex. 73.)

(8) Claimant's condition became medically stationary as of October 1, 2003. Pursuant to a November 10, 2003 Notice of Closure, SAIF closed the claim for the accepted C6-7 left sided disc protrusion. (Exs. 75 and 77.) Claimant requested reconsideration of the claim closure. On March 15, 2004, an Order on Reconsideration affirmed the November 10, 2003 closure. (Ex. 95.)

(9) Meanwhile, on February 17, 2004, claimant requested Administrative Review of SAIF's refusal to authorize the pain management treatment by Dr. Slack on referral from Dr. Kafrouni. (Ex. 88.)

(10) Claimant returned to Dr. Kafrouni for a follow-up examination on February 25, 2004. He complained of persistent left posterior cervical and left lateral shoulder pain with radiation into the left arm and hand. Dr. Kafrouni recommended facet injections on a diagnostic/therapeutic basis. (Ex. 48 at 21-22.) By letter dated March 1, 2004, Dr. Kafrouni requested that SAIF reevaluate the necessity for facet injections above and below the level of claimant's fusion, which was performed at C5-6 and C6-7. (Ex. 92.)

(11) In response to Claimant's request for Administrative Review, SAIF asserted that the requested medical services were not causally related to the accepted condition. SAIF noted that the C4-5 facet injection is two levels above the accepted level, and that SAIF did not pay for the fusion at the C5-6 level. (Ex. 94.)

(12) Settlement efforts with regard to the compensability of claimant's C5-6 disc protrusion were unsuccessful. (Ex. 96.) The matter was set for hearing and is currently pending before the Workers' Compensation Board hearings section.

## CONCLUSIONS OF LAW AND REASONING

### Jurisdiction

This case presents a medical treatment dispute arising under ORS 656.260. At hearing, following denial of the motion to postpone, claimant's counsel argued that the director lacks jurisdiction to address the compensability of the disputed injections because the "compensable condition" was still being litigated. SAIF, on the other hand, contended that under ORS 656.260 and 656.704(3), jurisdiction over the medical treatment dispute lies with the director. As explained below, I agree with SAIF. The director has the authority to resolve this dispute.

Pursuant to ORS 656.246(6), if a claim for medical services is disapproved, the injured worker may request administrative review by the director pursuant to ORS 656.260 or 656.327, subject to the provisions of ORS 656.704. ORS 656.260(6) provides

in pertinent part as follows: "Any issue concerning the provision of medical services to injured workers subject to a managed care contact \* \* \* shall be subject solely to review by the director or the directors designated representatives, or as otherwise provided in this section."

ORS 656.704(3) addresses the respective authority of the director and the board to conduct hearings. It provides, in pertinent part, as follows:

(a) For the purpose of determining the respective authority of the director and the board to conduct hearings, investigations and other proceedings under this chapter, and for determining the procedure for the conduct and review thereof, matters concerning a claim under this chapter are those matters in which a worker's right to receive compensation, or the amount thereof, are directly in issue. *However, subject to paragraph (b) of this subsection, such matters do not include any disputes arising under ORS [656.245](#), [656.248](#), [656.260](#), [656.327](#), any other provisions directly relating to the provision of medical services to workers or any disputes arising under ORS [656.340](#) except as those provisions may otherwise provide.*

(b) The respective authority of the board and the director to resolve medical service disputes, *other than disputes arising under ORS 656.260*, shall be determined according to the following principles:

\* \* \* \* \*

In this case, as noted above, the dispute arises under ORS 656.260<sup>1</sup> because claimant is enrolled in Caremark, a MCO. SAIF enrolled claimant in the MCO for treatment of his accepted C6-7 disc condition. Because medical services disputes arising under ORS 656.260 are expressly exempted from the "matters concerning a claim" principles of ORS 656.704(3)(b), jurisdiction remains with the director.<sup>2</sup>

### **Standard of Review**

An administrative order may only be modified on review if it is "not supported by substantial evidence in the record or reflects an error of law." ORS 656.260(16); OAR 436-010-0008(14)(d). The burden on proving a fact or position falls upon the proponent.

<sup>1</sup> ORS 656.260(14) requires a worker to apply to the director for administrative review if he or she is dissatisfied with an action of the managed care organization regarding the provision of medical services. Under ORS 656.260(16), the administrative order may be modified only if it is not supported by substantial evidence in the record or reflects an error of law. No new medical evidence or issues shall be admitted.

<sup>2</sup> The compensability of claimant's C5-6 disc protrusion is a matter concerning a claim, and jurisdiction over that matter properly lies with the Workers' Compensation Board under ORS 656.704(3)(b). I have no authority to address the compensability of that condition in the context of this managed care dispute.

ORS 183.450(2). Here, as the petitioner, Claimant bears the burden of proving that the administrative order is incorrect. *See Cook v. Employment Div.*, 47 Or App 437 (1980).

Substantial evidence exists to support a finding of fact "when the record, viewed as a whole, would permit a reasonable person to make that finding." ORS 183.482(8)(c). The "substantial evidence" standard of review can be overcome "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). A finding is supported by substantial evidence if it is reasonable in light of the countervailing as well as supporting evidence. *Garcia v. Boise Cascade Corp.*, 309 Or 292 (1990).

### **Managed Care Dispute/Compensability**

In the Administrative Order, MRU concluded that the facet injections requested by Dr. Kafrouni were not compensable because the injections were not requested to address symptoms of the accepted condition. Substantial evidence supports this determination. Dr. Kafrouni acknowledged that claimant's C4-5 facet pathology was not related to his C6-7 disc protrusion. Nothing in the medical evidence links the requested injections to claimant's accepted C6-7 disc protrusion. Furthermore, because claimant's C5-6 disc condition is not an accepted condition, MRU was correct in excluding that condition from the compensability analysis. I therefore affirm the Administrative Order.

### **ATTORNEY FEES**

Claimant has not prevailed at this contested case hearing and is therefore not entitled to an attorney fee. ORS 656.385(1).

### **ORDER**

IT IS HEREBY ORDERED that:

The Administrative Order dated September 3, 2004 is affirmed.