

In the ORS 656.260 Managed Care Dispute of

DAVE W. BENTHIN, Claimant

Contested Case No: H04-136

PROPOSED AND FINAL ORDER

JANUARY 19, 2005

DAVE W. BENTHIN, Petitioner

SAIF CORP. AND MANAGED HEALTH CARE NORTHWEST, Respondent
Before Catherine P. Coburn, Administrative Law Judge, Administrative Hearings

HISTORY OF THE CASE

Claimant appeals the Administrative Order issued on July 15, 2004 by the Medical Review Unit (MRU) of the Workers' Compensation Division (WCD), Department of Consumer and Business Services (director or the department). On September 14, 2004, WCD referred the matter to the Office of Administrative Hearings (OAH). On November 15, 2004, Administrative Law Judge Catherine P. Coburn conducted a contested case hearing. Petitioner Dave W. Benthin (claimant) was represented by attorney Philip H. Garrow. SAIF Corporation (insurer) was represented by attorney James D. Booth. Managed Healthcare Northwest, a managed care organization (MHN or MCO), was represented by attorney Jerome P. Keene. Claimant testified on his own behalf and the record closed on the date of hearing.

ISSUE

Whether MRU incorrectly determined that medical services provided to claimant by Scott Jacobson, MD (Orthopedic Surgery) on October 17, 2003 and physical therapy provided by Scott Ruby, MSPT from October 17, 2003 through February 17, 2004 are not reimbursable.

EVIDENTIARY RULINGS

WCD Exhibits 1 through 28 were received into the record without objection. Insurer and the MCO objected to claimant's Supplementary Exhibit A based on ORS 656.260(16).¹ I overruled the objection because Exhibit A is a map which does not constitute medical evidence. Pursuant to ORS 656.260(16), I sustained respondents' objection to claimant's proposed Supplementary Exhibit 29 because it is a medical report dated after the administrative order on appeal and constitutes new medical evidence. Additionally, I overruled respondents' relevance and ORS 656.260(16) objection to claimant's testimony concerning the MHN geographic service area (GSA).

FINDINGS OF FACT

(1) On April 13, 2000, claimant suffered a left shoulder injury while working as a highway electrician and living in Colton, Oregon. (Ex. 1.) On May 24, 2000, insurer accepted

¹ ORS 656.260(16) provides in pertinent part:

At the contested case hearing, 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.

left shoulder rotator cuff tendonitis and enrolled claimant in an MCO. (Exs. 2, 3 and 4.) The notice informed claimant that he must seek treatment from an MCO panel provider in order to obtain reimbursement. (Ex. 3.) Claimant continued treating with Thomas P. McWeeney, MD, a panel provider, in Oregon City. (Exs. 3 and 6; testimony of claimant.)

(2) Claimant sought treatment from Dr. Irvine, a panel provider in Tigard. (Testimony of claimant.)

(3) In 2003, claimant moved approximately 15 miles south of Prineville and continued treating with Dr. Irvine in Tigard. Claimant telephoned insurer and inquired about seeking medical treatment closer to his home near Prineville; insurer informed claimant that he should do so. Insurer did not mention that claimant had been enrolled in an MCO three years earlier and that he should seek treatment from a panel provider. Dr. Irvine referred claimant to Scott R. Jacobson, MD in Bend. (Testimony of claimant.)

(4) On October 17, 2003, claimant sought treatment in Bend from Dr. Jacobson who is not an MHN panel provider. Dr. Jacobson recommended physical therapy. (Exs. 6 and 22.)

(5) From October 21, 2003 through February 17, 2004, Scott Ruby, MSPT, provided physical therapy services to claimant in Bend. (Ex. 7.) Mr. Ruby is not an MHN panel provider. (Ex. 22.)

(6) The southeast boundary of MHN's certified geographic service area (GSA) is an undetermined distance northwest of Prineville. (Ex. A.) Claimant testified that he thought the Clackamas County line was "up on top of the mountain -- Mt. Hood" and that the county line was about 83 or 85 miles from Prineville, "someplace in there, maybe a little bit farther." (Testimony of claimant.)

CONCLUSION OF LAW

MRU incorrectly determined that medical services provided by Scott Jacobson, MD (Orthopedic Surgery) on October 17, 2003 and physical therapy provided by Scott Ruby, from October 17, 2003 through February 17, 2004 are not reimbursable.

OPINION

The director exercises jurisdiction over MCO disputes. 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); *Harris v. SAIF*, 292 Or 683 (1982). As petitioner, claimant bears the burden of proving by a preponderance of evidence that the administrative order is incorrect. *Cook v. Employment Div.*, 47 Or App 437 (1980) (In the absence of contrary legislation, the standard of proof in administrative hearings is preponderance of evidence). Preponderance of evidence means that the factfinder is persuaded that the facts asserted are more likely true than false. *Riley Hill General Contractors v. Tandy Corp.*, 303 Or 390 (1989).

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. This obligation continues for the worker's lifetime. ORS 656.245(1)(b). Additionally, pursuant to ORS 656.245(4), an insurer may provide medical services according to its contract with a managed care organization. However, ORS 656.245 specifies a geographic limitation on the provision of medical services through an MCO. ORS 656.245(4)(a) provides in pertinent part:

A worker shall not be subject to a contract if the worker's primary residence is more than 100 miles outside the managed care organization's certified geographical area.

MRU determined that the disputed medical services, rendered by non-panel providers, were not reimbursable. Claimant cites ORS 656.245(4)(a) and contends that the disputed medical services are reimbursable because he resided near Prineville, more than 100 miles outside the MCO geographic service area (GSA). In contrast, insurer and MCO cite ORS 656.260(16) and contend that claimant is barred from taking this position because MRU did not consider it. However, I find that the geographic limitation is an argument and not a new issue. RRU considered the same issue as the one presented at the contested case hearing, *viz.*, whether certain medical services are reimbursable. Therefore, claimant is not barred from asserting the geographic argument.

Next, insurer and MCO contend that the southeast boundary of the MHN GSA is less than 100 miles from claimant's residence near Prineville, and consequently, claimant is subject to the MCO contract. Respondents further argue that the disputed medical services are not reimbursable because they were rendered by non-panel providers.

At the time of the disputed medical services, claimant lived fifteen miles south of Prineville. Exhibit A shows that the southeast boundary of the MHN GSA is some unidentified distance northwest of Prineville. Insurer and MCO argue that the MHN GSA follows the Clackamas County line. Next, they rely on claimant's testimony to establish that Prineville is 85 miles from the Clackamas County line. Finally, they argue that ORS 656.245(4)(a) does not apply and that the disputed medical services are not reimbursable because claimant lived less than 100 miles from the GSA and he sought medical services outside the MCO panel.

I find several flaws in respondents' argument. First, insurer and MCO offered no evidence that the MHN GSA follows the Clackamas County line. Next, claimant testified that he lived 15 miles south of Prineville, rather than in Prineville. Accordingly, if Prineville is approximately 85 miles southeast of the Clackamas County line, and claimant lived 15 miles south of Prineville, then he lived approximately 100 miles outside the southeast Clackamas County line. Finally, I find claimant's mileage estimates unreliable. In his testimony, claimant indicated that he thought the Clackamas County line was "up on top of the mountain -- Mt. Hood" and when pressed, he guessed, without any factual basis, that the county line was about 83 or 85 miles from Prineville, "someplace in there, maybe a little bit farther." Based on the record, I find it more likely than not that claimant's residence, south of Prineville, was more than

100 miles from the MHN GSA. Therefore, pursuant to ORS 656.245(4)(a), he was not subject to the MCO contract. Accordingly, the medical services provided by Dr. Jacobson, a non-panel member, are reimbursable.

Finally, insurer and MCO contend that even if Dr. Jacobson's services are reimbursable, the physical therapy is not, because the record contains no treatment plan as required by OAR 436-010-0230(4)(a).² RRU did not address this question, and therefore, I remand for further development of the record. OAR 4360001-0170(1).

ATTORNEY FEES

On remand, claimant has not finally prevailed in a contested case hearing, and therefore, is entitled to no attorney fee.

ORDER

IT IS HEREBY ORDERED that:

The Administrative Order dated July 15, 2004 is reversed and remanded.

² OAR 436-010-0230(4)(a) provides:

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).