In the ORS 656.260 Managed Care Dispute of

Leroy M. Marshall, Claimant

Contested Case No: 05-186H

PROPOSED & FINAL ORDER

May 1, 2006

LEROY MARSHALL, Petitioner
SAIF CORPORATION, Respondent

Before G Duff Bloom, Administrative Law Judge, Workers' Compensation Board

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Hearing convened from claimant's request for hearing and the record closed on April 3, 2006 in Medford, Oregon before Administrative Law Judge Bloom. The claimant was present and he is unrepresented by counsel.[1] The employer, Unified Western Grocers, and its insurer, SAIF Corporation (SAIF) were represented by Attorney Michael G Fetrow. The record consists of Exhibits 1 through 15, excluding Exhibit 16.[2],[3] ALJ Bloom of WCB recorded the hearing.

ISSUE

Payment for medical services outside of a Managed Care Organization (MCO).

EVIDENTIARY ISSUES

At hearing, I erred in two respects regarding evidence I admitted. I describe and/or correct those errors with the rulings in this order.

(1) Exhibit List. At hearing, I selected the Department's March 7, 2006 Exhibit List over SAIF's March 2, 2006 submission, relying on my understanding of OAR 436-001-0225(2),[4] the

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[1] Because claimant is unrepresented, he may wish to consult the Workers' Compensation Ombudsman, whose job it is to assist injured workers in such matters. He may contact the Workers' Compensation Ombudsman, free of charge, at 1-800-927-1271, or write to:

WORKERS' COMPENSATION OMBUDSMAN
DEPT OF CONSUMER & BUSINESS SERVICES
PO BOX 14480
SALEM, OR 97309-0405

[2] The exhibits that constitute this record are those submitted by the WCD on March 7, 2006, in accordance with OAR 436-001-0225(2), notwithstanding OAR 436-001-0240. *See* "Evidentiary Issues" discussion.

[3] *See* "Evidentiary Issues" discussion.

[4] OAR 436-001-0225 provides:

> "(1) Except for the matters listed in sections (2) and (3), the administrative law judge reviews all matters within the director's jurisdiction de novo, unless otherwise provided by statute or administrative rule.
> "(2) In medical service and medical treatment disputes under ORS 656.245, 656.247(3)(a), and 656.327, and managed care disputes under ORS 656.260(16), the administrative law judge may modify the director's order only if it is not supported by substantial evidence in the record or if it reflects an error of law. New medical evidence or issues may not be admitted or considered.
> "(3) In vocational assistance disputes under ORS 656.340, new evidence may be admitted and considered. Under ORS 656.283(2), the administrative law judge may modify the director's order only if it:

Director's rule regarding the scope of review and limitations on the hearing record. I had not yet compared OAR 436-001-0240,[5] which allows the parties to submit (appropriately limited) evidence of their designation. Neither party objected to my using the WCD submission, and there is nothing in SAIF's March 2, 2006 submission (otherwise admissible under OAR 436-001-0225(2)) that is not in the record I designated, thus the error was harmless, and I rely on those exhibits submitted by WCD on March 7, 2006.

(2) Admissibility of non-WCD evidence. Relying on the OAR 436-001-0225(2) prohibition against new issues or "new medical evidence" being relied on at an MCO MRU-dispute hearing, I admitted Exhibits 14, 15, 16, and claimant's lay testimony, and I allowed stipulations regarding anticipated non-medical testimony from physical therapist Stacy Thetford. Pursuant to a Court of Appeals case that issued two days after I so ruled, I hold I erred in admitting any extra-WCD evidence.

In *Liberty Northwest v Kraft and DCBS*, 205 Or App 59 (2006); the claimant contended that, under OAR 436-001-0225(2) the (WCD) ALJ erred in applying a "*de novo*" standard of review in a "substantial evidence" appeal from an MRU order. The insurer and WCD argued that the ALJ may have referred to a "*de novo*" review, but actually performed a properly limited "substantial evidence" review. The court agreed with claimant, and reversed the Director's order, holding:

> "'substantial evidence'" review 'is not what has been referred to as the "any evidence" rule * * * but it is also *not de novo review*.' [citations omitted] (emphasis in original); *see also United States Bakery v. Shaw*, 199 Or App 286, 288-89 (2005). Here, the ALJ

"(a) Violates a statute or rule;
"(b) Exceeds the director's statutory authority;
"(c) Was made upon unlawful procedure; or
"(d) Was characterized by abuse of discretion or clearly unwarranted exercise of discretion."

[5] OAR 436-001-0240 provides:

"(1) Within 21 days after referral of the request for hearing to the board, the division will provide the parties and the administrative law judge legible copies of all exhibits that were relied upon in the underlying action or order, together with an index.

"(2) Not less than 28 days before the hearing, or within seven days of receipt of the division's document index and documents, whichever is later, the petitioner(s) must provide legible copies of any additional exhibits that they will offer at hearing to the other parties, the director's representative, and the administrative law judge. The additional exhibits must be marked and accompanied by a supplemental exhibit index, numbered to coincide in chronological order with the division's exhibits and exhibit list. For example, an exhibit which is chronologically between the division's exhibits 5 and 6 would be marked as "Exhibit 5a" or "Ex. 5a."

"(3) Not less than 14 days before the hearing, the respondent(s)/cross-petitioner(s) must provide legible copes of any additional exhibits that they will offer at hearing to the other parties, the director's representative, and the administrative law judge. The exhibits must be marked and indexed in the same manner as provided in section (2).

"(4) Unless withdrawn, all exhibits offered will be part of the record in the case, whether or not admitted into evidence.

"(5) At the discretion of the administrative law judge, an accurate description or photograph of an object or real evidence may be substituted for the object or real evidence. The party offering the evidence is responsible for providing the description or photograph, and for retaining custody of the object until the case is closed."

rendered 'supplemental' findings of fact. Nothing in our understanding of 'substantial evidence' review comports with an adjudicator rendering findings of fact. Rather, the rendition of findings of fact is associated with *de novo* review. * * * We thus conclude that the ALJ not only purported to apply, but actually applied, the erroneous *de novo* standard of review." 205 Or App at 62-63.

I cannot read that case and find it appropriate to allow *any* new evidence at hearing -- medical, lay, documentary or testimonial. Consequently, I do not consider the parties' proposed stipulations as to Ms Thetford's anticipated testimony, nor Exhibit 16, which was (a) outside of the MRU record and (b) redundant in any case. Exhibits 14 and 15, are already part of the record as claimant's request for hearing; so I allow them, but only as evidence of the timing and substance of the pleadings, and not as substantive evidence of any issues in dispute.

I recognize there is tension between OAR 436-001-0225(2), which strictly limits the WCB ALJ review of an MCO MRU order to "substantial evidence" review and the OAR 436-001-0240(4) provision that, "[u]nless withdrawn, all exhibits offered will be part of the record in the case, whether or not admitted into evidence." To the extent the WCD's rules of procedure are incompatible with my rulings, I hold the Court of Appeals a better source on which to rely. Additionally, relying on the general rules of statutory/administrative rule construction, I choose not to try to apply the plain language of the Director's procedural rules when they are inconsistent with each other, with court and Board precedent, and with statute. *See* ORS 174.010 (providing a general rule for statutory construction that "where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all"); *PGE v. Bureau of Labor and Industries*, 317 Or at 611 (context of statute includes other provisions of the same statute, as well as other related statutes); *Davis v. Wasco IED*, 286 Or 261, 272 (1979) (different statutory sections on the same subject must be interpreted as consistent with and in harmony with each other).

FINDINGS OF FACT

I adopt the "Findings of Fact" as set forth in the November 16, 2005 Administrative Order, as briefly supplemented below. (Ex 12-1 through 12-2). *See Liberty Northwest v Kraft and DCBS*, *supra* ("Nothing in our understanding of 'substantial evidence' review comports with an adjudicator rendering findings of fact.").

The MRU of WCD ordered that SAIF was not liable for physical therapy services provided by Ms Thetford between February 28, 2005 and April 8, 2005. (Ex 12).

Claimant timely requested a hearing on December 13, 2005. (Exs 13, 14, 15).

The Director referred the hearing to the Board on December 22, 2005.

CONCLUSIONS AND OPINION

This managed care dispute arises under ORS 656.245 and 656.260. I review for substantial evidence and error of law. ORS 656.260(16); *Kraft, supra.*

This hearing convened April 3, 2006, and the medical services in dispute were provided from February through April 2005; accordingly I decide the parties' dispute using the Director's rules set forth in WCD Administrative Orders 06-050 (hearing rules), 05-071 (medical service rules), and 05-072 (MCO rules). OAR 436-001-0003; OAR 436-010-0003; OAR 436-015-0003.

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). I find that claimant has failed to meet his burden.

Pursuant to ORS 656.245(1), an insurer is required 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 and 656.245(4) authorize insurers to provide medical services to injured workers through a contract with a state-certified managed care organization.

A worker becomes subject to an MCO contract upon the worker's actual notice of enrollment in the MCO, or upon the third day after notice was mailed, whichever is earlier. ORS 656.245(4)(a). Here, the notice of enrollment is dated February 17, 2005. (Ex 3-3 through 3-4). Claimant therefore became subject to the MCO contract no later than February 20, 2005.

There is no evidence Ms Thetford was a member of either the MCO claimant was enrolled in or the alternate MCO he was notified about on February 17, 2005. I hold SAIF is not responsible for Ms Thetford's services.

Finally, claimant argues that SAIF should be ordered to reimburse Ms Thetford because SAIF did not *deny* services either to him or to Ms Thetford. Even if there were sufficient evidence that were the case, the argument is still unpersuasive, for the following reasons.

436-010-0275(4) provides, in pertinent part:

> "When the insurer is enrolling a worker in an MCO, the insurer must simultaneously provide written notice to the worker, the worker's representative, all medical service providers, and the MCO of enrollment. The notice must:
>
> "(a) Notify the worker of the eligible attending physicians within the relevant MCO geographic service area and describe how the worker may obtain the names and addresses of the complete panel of MCO medical providers;

"(b) Advise the worker of the manner in which the worker may receive medical services for compensable injuries within the MCO;

"(c) Describe how the worker can receive compensable medical treatment from a primary care physician or authorized nurse practitioner qualified to provide services as described in OAR 436-015-0070, who is not a member of the MCO, including how to request qualification of their primary care physician or authorized nurse practitioner;

"(d) Advise the worker of the right to choose the MCO when more than one MCO contract covers the worker's employer except when the employer provides a coordinated health care program as defined in OAR 436-010-0005(6);

"(e) Provide the worker with the title, address and telephone number of the contact person at the MCO responsible for ensuring the timely resolution of complaints or disputes;

"(f) Advise the worker of the time lines for appealing disputes beginning with the MCO's internal dispute resolution process through administrative review before the director, that disputes to the MCO must be in writing and filed within 30 days of the disputed action and with whom the dispute is to be filed, and that failure to request review to the MCO precludes further appeal* * *"

SAIF's February 17, 2005 letter complied in all respects with its obligations under OAR 436-010-0275(4). (Exs 3-3 through 3-4). Claimant was enrolled in the MCO and notified of all its important policies, rules and procedures *before* he commenced treatment with Ms Thetford. (*Compare* Exs 3-4 through 3-4, Exs 4-2 through 4-7, 5, 6). Moreover, in compliance with 436-010-0275(4), claimant's attending physician, Richard E James, MD, was simultaneously sent a copy of the February 17, 2005 MCO enrollment notice. Thus both claimant and his physician knew he was limited to MCO providers *before* Dr James prescribed treatment with Ms Thetford's clinic on February 23, 2005. (Exs 3-4, 4-1).

I find no persuasive basis on which to modify MRU's order, and therefore affirm it.

ORDER

IT IS THEREFORE ORDERED that MRU's November 16, 2005 Administrative Order is affirmed.