
In the ORS 656.327 Medical Treatment Dispute of

Lisa Rawlins, Claimant

Contested Case No: 08-139H

PROPOSED & FINAL ORDER

December 12, 2008

TRISTAR RISK MANAGEMENT, Petitioner

LISA RAWLINS, Respondent

Before John P. McCullough, Administrative Law Judge

The above-captioned case involves claimant's July 9, 2008 injury claim with the City of Salem and its workers' compensation claims administrator, Tristar Risk Management. On June 4, 2008, claimant requested that the Workers' Compensation Division (WCD) of the Department of Consumer and Business Services conduct an administrative review of a medical treatment dispute: whether Tristar is liable for right knee surgery proposed by Dr. Thorsett. Pursuant to WCD's August 7, 2008 Administrative Order on Reconsideration (TX 08-0976), Tristar was ordered liable for all costs associated with the right knee surgery proposed by Dr. Thorsett. On August 8, WCD received a request for hearing from Tristar, appealing the Administrative Order on Reconsideration. On August 12, 2008, WCD referred the matter to the Workers' Compensation Board, Hearings Division, to conduct a hearing and issue a Proposed and Final Order pursuant to OAR 436-001-0019(6) and OAR 436-001-0170(2). Thereafter, a hearing was scheduled for November 6, 2008 in Salem, Oregon before the undersigned Administrative Law Judge.

On September 30, 2008, the parties' attorneys, Dennis Reese for Tristar and Aaron Clingerman for claimant, advised the undersigned ALJ that they had agreed that the case could be submitted for decision based on documentary evidence and written closing arguments, and that a hearing would not be necessary. Accordingly, the November 6, 2008 hearing was cancelled.

Tristar's initial written closing argument was submitted on November 4, 2008. Claimant's written response argument was submitted on November 18, 2008. Tristar's November 21, 2008 reply argument was received on November 24, 2008. The record was closed on that date.

On September 4, 2008, WCD submitted Exhibits 1-41 to the Hearings Division. Those exhibits constitute the documentary record on which the August 7, 2008 Administrative Order on Reconsideration was based. Pursuant to OAR 436-001-0225(2), no additional medical evidence can be considered in this proceeding. No other evidence has been offered by either party. Neither party has objected to the admission of Exhibits 1-41. Accordingly, those exhibits are admitted as numbered. They are identified in the exhibit list submitted by WCD, which has been marked as the "ALJ's Master Exhibit List" and is contained in WCB File No. 08-00139H.

FINDINGS OF FACT

On July 9, 2005, claimant injured her right knee as a result of her employment as a police officer with the City of Salem. The injury occurred when she twisted the knee while exiting the driver's side of a patrol car. She filed a workers' compensation claim for the injury on the same

date.

On July 13, 2005, claimant was seen by Dr. Roberts for her knee injury. Dr. Roberts' assessment was internal derangement of the right knee, with a possible medial meniscus tear. He referred claimant to Dr. Thorsett, an orthopedic surgeon.

On August 2, 2005, claimant was seen by Dr. Thorsett. His diagnosis was right knee medial meniscal tear, and he recommended arthroscopic surgery.

On August 12, 2005, the City of Salem's workers' compensation claims administrator accepted claimant's July 9, 2005 injury claim for a right knee strain.

On September 7, 2005, Dr. Thorsett performed right knee surgery: right knee arthroscopy with microfracture chondroplasty of the medial femoral condyle; and partial lateral meniscectomy, right knee.

On September 20, 2005, the claims administrator amended its claim acceptance to include "anterior horn lateral meniscus tear."

On March 8, 2006, Dr. Thorsett performed a second surgical procedure on claimant's right knee: right knee arthroscopy with debridement of the medial femoral condyle.

On November 22, 2006, claimant underwent another right knee surgery, performed by Dr. Sewell: right knee arthroscopy with limited chondroplasty of the medial femoral condyle defect; and diagnostic arthroscopy with autologous cartilage cell harvest.

On February 28, 2007, Dr. Thorsett performed another surgical procedure on claimant's right knee: right knee autologous chondrocyte implantation, medial femoral condyle.

On May 6, 2008, Dr. Thorsett examined claimant's right knee and reviewed a recent MRI scan. He advised diagnostic arthroscopy, and reported that he would request authorization from claimant's workers' compensation carrier. Dr. Thorsett's May 6, 2008 chart note was received by Tristar, the City of Salem's workers' compensation claims administrator, on May 21, 2008.

On May 21, 2008, Dr. Thorsett faxed a surgery request to Tristar. The faxed request was received by Tristar on May 21, 2008.

On May 28, 2008, Tristar sent Dr. Thorsett a Department of Consumer and Business Services' Form 440-3228 (Elective Surgery Notification), denying the surgery request. Copies of the form were sent to claimant and her attorney.

On June 3, 2008, claimant's attorney requested that the Workers' Compensation Division (WCD) of the Department of Consumer and Business Services conduct an administrative review of Tristar's May 28, 2008 denial.

On July 22, 2008, WCD issued an Administrative Order (TX 08-0753) that ordered the

City of Salem and Tristar liable for the arthroscopic knee surgery proposed by Dr. Thorsett. The Order was based on WCD's conclusion that Tristar did not timely send the Form 440-3228 to Dr. Thorsett pursuant to OAR 436-010-0250, and, consequently, was barred from disputing whether the proposed surgery was excessive, inappropriate, or ineffectual.

On July 23, 2008, Tristar requested that WCD reconsider the July 22, 2008 Administrative Order.

On July 30, 2008, WCD abated the July 23, 2008 Administrative Order.

On August 7, 2008, WCD issued an Administrative Order on Reconsideration (TX 08-0976) that ordered the City of Salem and Tristar liable for the arthroscopic knee surgery proposed by Dr. Thorsett. Again, the basis for the Order was WCD's conclusion that Tristar did not timely submit the Form 440-3228 to Dr. Thorsett pursuant to OAR 436-010-0250, and, consequently, was barred from disputing whether the proposed surgery was excessive, inappropriate, or ineffectual.

On August 8, 2008, Tristar requested a hearing, appealing the August 7, 2008 Administrative Order on Reconsideration.

OPINION AND CONCLUSIONS

Tristar contends that WCD erred in concluding that Tristar's denial of Dr. Thorsett's surgery request was not timely sent. Claimant contends that WCD's conclusion was correct.

WCD's Administrative Order on Reconsideration may be modified "only if it is not supported by substantial evidence in the record or if it reflects an error of law." OAR 436-001-0225(2). Based on my review of the record and for the following reasons, I conclude that WCD's conclusion that Tristar's surgery denial was untimely reflects an error of law.

On May 6, 2008, Dr. Thorsett examined claimant's right knee and reviewed a recent MRI scan, and then recommended diagnostic arthroscopy. He indicated in his May 6, 2008 chart note that he would request authorization for such surgery from claimant's workers' compensation carrier. The record establishes that said chart note was received by Tristar on May 21, 2008 (Exhibit 8, p. 26). On May 21, 2008, Dr. Thorsett faxed a surgery request to Tristar. The faxed document was received by Tristar on May 21, 2008 (Exhibit 28).

OAR 436-010-0250(3) provides that when elective surgery has been recommended and the insurer denies approval of the recommended surgery, the insurer must notify the recommending physician, the worker, and the worker's representative within seven days of receipt of the notice of intent to perform surgery. The denial of the surgery request must be communicated to the physician through a completed Form 440-3228 (Elective Surgery Notification). The record establishes that Tristar sent Dr. Thorsett the required Form 440-3228, with copies to claimant and claimant's attorney, on May 28, 2008 (Exhibit 29).

In the August 7, 2008 Administrative Order on Reconsideration, WCD concluded that

Tristar should have notified Dr. Thorsett of the surgery denial by May 12, 2008. In so concluding, WCD apparently calculated the seven-day time limit in OAR 436-010-0250(3) as beginning as of May 6, 2008, the date of Dr. Thorsett's chart note requesting surgery (Exhibit 35, p. 3). WCD further concluded that even if the May 6, 2008 chart note could be found to not meet the requirements of a request for surgery, the May 21, 2008 fax from Dr. Thorsett to Tristar did constitute a proper surgery request. WCD then concluded that Tristar's May 28, 2008 surgery denial -- the Form 440-3228 sent to Dr. Thorsett -- was sent on the eighth day, one day outside the seven-day period allowed by the rule (Exhibit 35, p. 3).

I conclude that WCD misapplied OAR 436-010-0250(3) in this case. Said rule clearly provides that the seven-day notification period for a surgery denial is from the date of receipt by the insurer of the recommending physician's notice of intent to perform surgery. Roseburg Forest Products v. Castillo, 212 Or App 709, 710 (2007); and Roseburg Forest Products v. Humbert, 212 Or App 285, 290 (2007). The record establishes that Tristar did not receive Dr. Thorsett's notice of intent to perform surgery -- either in the form of the May 6, 2008 chart note or the May 21, 2008 fax -- until May 21, 2008 (Exhibit 8, p. 26 and Exhibit 28). The record further establishes that Tristar sent the required Form 440-3228 (Elective Surgery Notification) to Dr. Thorsett on May 28, 2008 (Exhibit 29). As noted above, WCD treated May 28 as the eighth day after Tristar's receipt of Dr. Thorsett's notice of intent to perform surgery. Apparently, WCD included May 21, the date Tristar received the surgery request from Dr. Thorsett, as part of the seven-day period under the rule. I conclude that WCD erroneously applied OAR 436-010-0250(3) in that regard. The rule itself does not provide that the seven-day period includes the date of the insurer's receipt of the surgery request. Further, ORS 174.120 provides:

"the time within which an act is to be done, as provided in the civil and criminal procedures statutes, is computed by excluding the first day and including the last unless the last day falls on any legal holiday or on a Saturday, in which case the last day is also excluded." (Emphasis added.)

OAR Chapter 436, Division 010, contains no provision in any of its sections, including 436-010-0250, that sets forth a calendar counting method that differs from that provided in ORS 174.120. Further, I note that ORS 174.120 has been applied in previous decisions regarding WCD administrative orders. See James J. Huisman, 1 WCSR 70 (1996); and Natasha Rea, 1 WCSR 546 (1996). Claimant has cited no authority, and I have found none, that indicates that ORS 174.120 is not applicable in this kind of case.

Based on the evidence presented and the applicable law, and for the foregoing reasons, I conclude that Tristar's May 28, 2008 surgery denial was issued within the seven-day period provided in OAR 436-010-0250(3) and, therefore, was timely.

Tristar has requested, if it prevails on the timeliness issue, that I review the record and issue a decision on the merits of the surgery dispute. I conclude that it would be inappropriate for me to do so in this case. The Hearings Division does not have *de novo* review of WCD administrative orders in medical service/treatment disputes. Rather, my review is limited to modifying WCD's order only if it is not supported by substantial evidence in the record or if it

reflects an error of law. OAR 436-001-0225(1) and (2). I cannot perform such a limited review where WCD has not yet addressed and decided an issue: here, the propriety of the surgery denial.

ORDER

IT IS THEREFORE ORDERED that the Workers' Compensation Division's August 7, 2008 Administrative Order on Reconsideration is set aside, and this matter is remanded to the Workers' Compensation Division for a determination on the merits of the medical services dispute between claimant and Tristar.