

In the ORS 656.260 Managed Care Dispute of

**Charles M. Davis, Claimant**

Contested Case No: 09-134H

**FINAL ORDER**

November 13, 2009

JULIO ORDONEZ MD, Petitioner

SAIF CORPORATION, Respondent

Before John Shilts, Workers' Compensation Division Administrator

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Petitioner SAIF Corporation (SAIF) refused to pay Dr. Julio A. Ordonez for surgery he performed on claimant Charles M. Davis (Claimant). SAIF asserted Dr. Ordonez had not timely requested certification for the surgery as required by the Managed Care Organization (MCO) contract. ORS 656.245(4); 656.260.<sup>1</sup> On review, the Workers' Compensation Division Resolution Team (RT) upheld SAIF's decision in an Administrative Order issued February 11, 2009. At contested case hearing Administrative Law Judge (ALJ) Steve Rissberger found the doctor had complied with the MCO contract by timely submitting a retro-certification request and he therefore reversed the RT order. The ALJ issued his Proposed and Final order on July 9, 2009. I find the RT's order contains an error of law in applying the unambiguous language of the contract and therefore affirm the ALJ's order.

**FACTUAL SUMMARY**

I adopt the facts as found by RT. Claimant compensably injured his back in 2002. SAIF enrolled claimant in Caremark, a managed care organization. The MCO contract itself was never placed into the record in this case by either party. An administrative manual that describes procedures presumably based on the contract was placed into the record as Exhibit A and there is what may be an excerpt from the contract at Exhibit 28, pages 11 and 12. The manual and purported contract excerpts in the record state:

- 1) Participating providers are required to "obtain certification" of medical necessity for inpatient surgery;
- 2) Elective admissions must be certified in advance of the admission;
- 3) The MCO will not review procedures submitted for review more than thirty days after the service was provided;
- 4) Where payment is disallowed because pre-certification was not obtained and the provider fails to seek retrospective certification within thirty days after the service is provided, the provider cannot obtain payment from the worker.

RT found the contract provides:

- 1) Providers must obtain certification of medical necessity for inpatient surgery;

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<sup>1</sup> ORS 656.245(4) provides in part:

[W]hen . . . the insurer of an employer contracts with a managed care organization . . . for medical services required by this chapter to be provided to injured workers:

(a) Those workers who are subject to the contract shall receive medical services in the manner prescribed in the contract.

- 2) Caremark will not review services submitted for review more than thirty days after the services are provided;
- 3) A participating provider who does not obtain pre-certification must request retro-certification within thirty days after the surgery.

The claim was closed in 2003. On September 7, 2008, claimant sought emergency room treatment for back and leg pain. Dr. Ordonez examined claimant on September 8 and recommended surgery. However Dr. Ordonez recommended delaying the surgery for a week. Claimant experienced significant pain on September 10, 2008, and Dr. Ordonez performed surgery that day.

Dr. Ordonez's office billed SAIF for the surgery. On November 3, 2008, SAIF denied payment because certification had not been given for the surgery. SAIF requested administrative review on December 1, 2008. RT's order states Claudia Ordonez, Dr. Ordonez's medical assistant, had requested retro-certification at least twice. Caremark has no record of having ever received a retro-certification request from Dr. Ordonez's office.

On review, RT found the surgery was provided on an emergency basis so that there was not time for Dr. Ordonez to request pre-certification. RT also found the MCO contract required Dr. Ordonez to "request" retro-certification. Caremark did not review a certification request for claimant's surgery within thirty days after the surgery. RT found SAIF was not liable for the costs of the surgery specifically because "Caremark did not retrospectively review the surgery within thirty days of its provision . . . ."

A contested case hearing was requested. The ALJ heard extensive testimony from Ms. Ordonez, Dr. Ordonez's medical assistant. Ms. Ordonez testified she faxed a retro-certification request to Caremark several different times. ALJ Rissberger specifically found Ms. Ordonez credible. The ALJ found substantial evidence did not support the RT's apparent conclusion that Dr. Ordonez was required to do something more than submit his retro-certification request in order to qualify for payment. ALJ Rissberger found that the administrative manual that was placed in the record in lieu of the actual contract only required Dr. Ordonez to "submit" his request and that the manual does not explain what the consequences are if Caremark does not receive a submitted request for certification. The ALJ therefore found there was not sufficient evidence in the record to support RT's conclusion Dr. Ordonez had violated any term of the contract.

## CONCLUSIONS OF LAW

Although at hearing the parties assumed this was an ORS 656.260 dispute which is subject to the substantial evidence standard of review, SAIF points out this matter really is a medical fee payment dispute that should have been brought under ORS 656.248 and reviewed under the de novo standard of review. OAR 436-001-0225.<sup>2</sup> As the dispute here concerns

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<sup>2</sup> ORS 656.260 provides in part:

(6) Any issue concerning the provision of medical services to injured workers subject to a managed care contract . . . shall be subject to review by the director . . . .

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payment for services, not a challenge to an action of the MCO, ORS 656.248 provides the correct standard of review. This does not change the outcome, however, as I find the evidence supports the ALJ's factual findings and my decision is based on an error of law in the RT order.

The RT order contains an error of law because it misconstrues an unambiguous term of the MCO contract. Where the terms of a contract are unambiguous, the terms are construed as a matter of law. *Madson v. W. Or. Conf. Ass'n of Seventh-Day-Adventists*, 209 Or App 380, 383 (2005).

The reason RT stated for finding SAIF not liable for the surgery was that Caremark did not "review" a retro-certification request for the surgery. This is a legally incorrect interpretation of the purported contract.

The MCO manual and contract excerpt do state a medical provider must "obtain" certification of a service. However, neither document provides any explanation of the required procedure or of the consequences concerning the need to "obtain" certification once a medical service has already been provided. Clearly, retro-certification is contemplated because the manual and contract excerpt expressly acknowledge that Caremark will review post-service requests. Beyond requiring a request for certification, however, what evidence we have of the contract's terms does not specify what a provider's obligation is in terms of "obtaining" certification after having already provided services.

RT expressly found a representative of Dr. Ordonez's office said she had asked for retro-certification several times. RT did not make a finding this evidence was not credible or that retro-certification had not been requested. In addition, ALJ Rissberger heard a witness on this issue and found the witness credible. The evidence in the record, therefore, is that certification was requested, although apparently not granted or "obtained."

Based on the limited and incomplete evidence of the contract terms that are contained in the record, the MCO contract cannot be reasonably interpreted to require that providers will not be paid if Caremark fails to review a certification request for reasons beyond the provider's

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(14) If . . . [the] insurer [or]. . . the attending physician . . . is dissatisfied with an action of the managed care organization regarding the provision of medical services . . . that person must first apply to the director for administrative review of the matter before requesting hearing.

ORS 656.248(12) provides in part:

When a dispute exists between . . . an insurer . . . and a medical service provider regarding . . . nonpayment of bills for compensable medical services, notwithstanding any other provision of this chapter, the . . . insurer . . . or medical service provider shall request administrative review by the director.

OAR 436-001-0225 provides in part:

- (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 . . . 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.

control. That would condition payment on acts that the provider has no power to perform. SAIF is correct that the documents in the record here that constitute evidence of the contract's terms do state a provider must "obtain" certification. However, that term must be interpreted in the context of this case where certification was requested after the surgery was performed, as the contract apparently permits. Adopting an interpretation requiring a provider to do more than to "request" certification would allow SAIF to deny payment where a provider performs all actions within their control to comply with the contract but Caremark fails to act, intentionally or unintentionally. This is not a reasonable, logical, or valid interpretation of the contract's terms. If the contract and SAIF's representations about the contract's requirements are adopted literally, the contract would require an impossible act on the part of the provider.<sup>3</sup> No matter what action a provider takes, the provider cannot "obtain" certification because it is up to Caremark to review the request and to grant certification. The most that a provider can do to comply with the contract is to request certification. In the case of non-emergency surgery a provider may have the option of refusing to provide services if Caremark fails to grant certification. But this was not the case here. Given that ALJ Rissberger heard the testimony on this issue and specifically found the witness credible, I will not reject the testimony that Dr. Ordonez's office requested certification several times. By requesting certification Dr. Ordonez complied with the contract's terms to the extent that it is practically possible and he is therefore entitled to payment.

Dr. Ordonez requested attorney fees at the hearing and in this review but cites no authority authorizing awarding attorney fees to a medical provider. There is no basis in statute or rule for ordering attorney fees for a provider's attorney. The request is therefore denied.

**IT IS HEREBY ORDERED** ALJ Rissberger's July 9, 2009, Proposed and Final Order is affirmed. RT's February 11, 2009, Administrative Order is reversed to the extent that it upholds SAIF's refusal to pay for Dr. Ordonez's surgery on claimant and affirmed in all other aspects. Dr. Ordonez's request for attorney fees is denied.

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<sup>3</sup> SAIF's present assertions about the contract's requirements conflict with representations SAIF made in its request for Administrative Review in this matter. Exhibit 22 in the record contains a November 26, 2008 request for administrative review submitted to the division by SAIF. In that document SAIF states: "Regardless of whether Mr. Davis's surgery was or was not emergent, the MCO contract required that Dr. Ordonez timely request for [sic] authorization for the services rendered." The same document further states: ". . . SAIF Corporation contends neither it nor Mr. Davis should be held responsible for the payment of the surgery and related services on September 10, 2008 because Dr. Ordonez did not adhere to the requirements of his Caremark MCO contract and request pre-authorization or retro-authorization for the services rendered." Exhibit 22 in the record also contains a division form titled "Request for Dispute Resolution of Medical Issues and Medical Fees," completed by SAIF. On that form SAIF stated the medical issue in dispute was that "[s]urgeon failed to timely request MCO authorization (pre or post-procedure)." Prior to administrative review SAIF took the position the provider's obligation was to "request" certification, not to "obtain" it, at least where the service has already been provided.