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In the ORS 656.260 Managed Care Dispute of

**Joshua Koser, Claimant**

Contested Case No: 08-360H

**PROPOSED & FINAL ORDER**

May 22, 2009

JOSHUA KOSER, Petitioner

SAIF CORP., Respondent

Before Robert A. Davis, Administrative Law Judge

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This matter has been submitted on the documentary record and written arguments. Claimant has been represented by his attorney, George J. Wall. The employer, Badger Tree Service, Inc., and its insurer, SAIF Corporation, have been represented by their attorney, Roy W. Miller. The record closed on April 23, 2009, upon receipt by the Hearings Division of the final written argument from counsel.

Exhibits: The Hearings Division has received Exhibits 1 through 23 as complied by the Workers' Compensation Division. SAIF Corporation offered Exhibits 1 through 32, but in SAIF's written argument, counsel for the employer/insurer indicated it would be appropriate to rely upon the Division's list (SAIF's Closing Argument, Page 2). Claimant has expressed no preference as between the two lists. In a proceeding of this nature, I am not at liberty to consider evidence that was not before the Director. OAR 436-001-0225(2). Therefore, I shall admit the Workers' Compensation Division submission, Exhibits 1 through 23, into evidence.

**SCOPE OF THE ISSUES**

Claimant has taken the position in his written arguments that compensability of care is at issue in this proceeding. I am unable to agree. Claimant requested that the Workers' Compensation Division review a medical dispute (Exhibit 18-1). The Division does not have jurisdiction over compensability questions. The insurer, in its written commentary to the Division's Medical Section, did not address issues of compensability (Exhibit 20), nor did it do so in its argument to this forum. The present matter has come to me on the Administrative Order of the Medical Section of the Workers' Compensation Division. That order does not address compensability. The order is presented as arising out of a managed-care dispute (Exhibit 22).

At issue is the November 10, 2008 Administrative Order, MMS 08-1464: Is SAIF Corporation liable for a work-hardening program to which Dr. Lorber referred claimant?

**FINDINGS OF FACT**

In making the following findings, I rely upon the above-mentioned exhibits and the uncontested facts referred to in the Workers' Compensation Division Order at issue in this proceeding:

Claimant is a male who was compensably injured on May 2, 2006. He was working as an arborist, and he fell about six to eight feet out of a tree. He landed on his back. He experienced acute back pain.

His initial treatment was with a chiropractor. He was later treated by Dr. Gluckman.

The insurer accepted a lumbar strain and lumbar contusion as disabling.

Claimant had an MRI in April 2007. It was apparently interpreted as showing a shallow canal in the mid-lumbar region and a minor bulge at L4-5, but the scan was otherwise unremarkable.

Claimant saw Dr. Leadbetter in IME, apparently on June 6, 2007. The doctor declared claimant medically stationary. Dr. Gluckman concurred with the medically stationary date. Dr. Schultz, apparently responding for Dr. Gluckman, indicated that claimant had no permanent impairment resulting from his work injury.

Claimant saw Dr. Lorber on August 1, 2007. Claimant expressed the desire to change his attending physician and to eliminate his use of pain medication. Dr. Lorber agreed to become claimant's physician for the injury. Claimant indicated that his most difficult problem was with the right lower back. He had worsened discomfort with such movements as lifting, loading, and twisting. With the increased pain, claimant also had pain radiating along the right gluteus and along the right lumbar paraspinals. Claimant was also having bilateral knee soreness (apparently unrelated to the industrial injury). The doctor noted that claimant gave "excellent effort" on physical examination. Dr. Lorber mentioned the possibility of a work-hardening program. The doctor was aware that authorization for the program might be a problem, as claimant was not receiving time loss and an insurer-requested medical examination indicated that there was no need for work restrictions or further treatment.

Dr. Lorber learned later that Dr. Gluckman had declared claimant medically stationary.

Dr. Lorber wanted claimant to have a bone scan, which the doctor planned to request under palliative care.

The request for a bone scan was denied by the insurer, apparently based on the medically stationary report by Dr. Gluckman.

Dr. Lorber wanted claimant to have three to five physical-therapy sessions to work on lumbar stabilization and body mechanics.

The insurer had closed the claim at some point, but the closure was set aside on reconsideration.

In November of 2007, Dr. Lorber, in response to questions from the insurer, indicated that claimant had a preexisting low-back condition. The doctor did not agree that the preexisting condition was the major cause of claimant's current condition and need for treatment. The doctor did agree that the lumbar strain and contusion were medically stationary without impairment and without work restrictions.

The insurer issued a December 5, 2007 Notice of Closure that provided for temporary disability compensation, but no award for permanent partial disability. The medically stationary date was established as June 6, 2007.

When Dr. Lorber saw claimant on January 15, 2008, the doctor noted that claimant had been attending physical therapy. Claimant had been working at a gas station, but took a job with a friend doing contractor work. At some point, claimant was placed in “layoff” status and “they” had been taking “odds and ends job.” Dr. Lorber indicated that he would continue claimant on physical therapy “as long as [claimant] continues to benefit.” The doctor indicated that claimant’s care was palliative.

A physical-therapy chart note of February 19, 2008, indicated that claimant had been admitted into a work-hardening program “pro bono” while authorization was being processed.

Claimant continued in therapy to March 28, 2008.

The managed health-care organization had advised Dr. Lorber on March 11, 2008 that the group was not able to process a precertification request for a work-hardening program. The coordinator indicated that the claim was closed and the worker had been declared medically stationary and therefore the program was not subject to precertification by the managed-care organization.

Claimant sought reconsideration of the closure. He was seen by a panel of arbiters on March 11, 2008. Claimant indicated that he was unemployed. Claimant indicated that he was doing much better since beginning the work-hardening program. He did report occasional back pain in the lumbar region. The arbiters found claimant to be without impairment and with excellent strength, sensation, and motion.

A March 20, 2008 Order on Reconsideration affirmed the Notice of Closure.

On April 29, 2008, Dr. Lorber noted that he had not seen claimant since January 15, 2008. The doctor indicated that claimant went to physical therapy thereafter and had done so well that the therapist felt he would be an appropriate candidate for work-hardening. The doctor enrolled him in the program. Dr. Lorber advised claimant that if it was not covered by workers’ compensation, it would be provided to claimant “on a gratis basis.” The doctor felt claimant did “phenomenally well” in the program, which ended March 28, 2008. The doctor noted that since that time, claimant had been very busy with work. He had infrequent pain, resolved with “pelvic tilts.” The doctor took that position that despite his previously declaring claimant medically stationary, he was not really medically stationary until he completed the work-hardening program. Dr. Lorber released claimant to unrestricted work.

On October 13, 2008, claimant’s attorney wrote to the Medical Review Unit of the Workers’ Compensation Division, advising that if a bill for services by Dr. Lorber’s clinic was not paid under ORS 656.245 as part of services in an open claim, then the bill should be paid as palliative care.

Claimant requested the hearing on the reconsideration order that affirmed the Notice of Closure. An administrative law judge affirmed the Order on Reconsideration.

The insurer responded to claimant's letter to the Medical Review Unit. The insurer took the position that a work-hardening program requires pre-certification from the managed-care organization. The MCO declined to pre-certify the service, taking the position that the claim had been closed, the worker was medically stationary, and he had a release to regular work. Further, the insurer noted that the goal of work-hardening is to increase a worker's capacity and claimant already had a release to regular work at the time of claim closure.

Further, the insurer argued that a worker must be in the workforce to qualify for palliative care, and claimant had not been in the workforce since April of 2007. In addition, the insurer pointed to certain chart-note comments by Dr. Lorber to the effect that the program was offered to claimant gratis. The insurer took the position that the doctor's office had not sought authorization from the insurer prior to admitting claimant into the program.

The Workers' Compensation Division issued an Administrative Order on November 10, 2008, finding that the insurer was not liable for the work-hardening program. The reviewer found no evidence to support the notion that claimant was working or engaged in vocational training during the dates of the medical services in dispute. Consequently, the reviewer concluded that claimant did not qualify for palliative care.

### **OPINION AND ORDER**

Pursuant to OAR 436-001-0225(2), I 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.

For the following reasons, I conclude that the decision made by the Director is supported by substantial evidence and does not reflect an error of law:

OAR 436-010-0005(39) provides in relevant part that the goal of a work-hardening program is to return claimant to a specific job. Prior to the time claimant was referred to the work-hardening program, he had been declared medically stationary by his prior attending physician (Exhibit 2-1). Further, a physician apparently in the office of the attending physician agreed that claimant was without permanent impairment (Exhibit 3).

The new attending physician, Dr. Lorber, agreed in November 2007, that claimant was medically stationary without impairment and without work restrictions (Exhibit 7-1).

The claim was closed December 5, 2007, with no award for permanent partial disability. The medically stationary date was established as June 6, 2007, well before the date claimant was referred to work-hardening (Exhibit 8-1).

ORS 656.245(1)(c)(J) provides for palliative care with the approval of the insurer. It appears from this record that Dr. Lorber referred claimant for the work-hardening program prior to obtaining approval. A physical-therapy chart note for February 19, 2008, indicates that

claimant was admitted into the work-hardening program “pro bono” while authorization was being processed (Exhibit 11-1). I must infer from the note that neither the managed-care organization (MCO) nor the insurer had authorized the program before claimant actually began participating.

On March 11, 2008, the MCO declined to process the request for a work-hardening program because the claim was closed and claimant had been declared medically stationary and consequently, the service was not subject to precertification by the MCO (Exhibit 12).

There is no indication that Dr. Lorber’s clinic asked the insurer directly to authorize claimant’s participation in the program at issue. In fact, the indication in the record is to the contrary (Exhibit 20-2, -3).

ORS 656.245(1)(c)(J) provides in relevant part that palliative care is appropriate to enable the worker to continue current employment or vocational training. There is no indication that claimant was in vocational training. Further, it is unclear whether claimant was in the workforce at the time he was referred to the program. When Dr. Lorber saw claimant on January 15, 2008 (Exhibit 10), claimant indicated that he had left a position with what was apparently a gas station and had taken a job doing “contractor work.” He also indicated, however, that he was in a “layoff” mode until the winter months passed. (He was taking “odds and ends jobs.”) The medical arbiters in March of 2008 understood that claimant was unemployed (Exhibit 13-2).

Because claimant was medically stationary without impairment when he began the work-hardening program, because claimant began the program without approval for palliative care, and because it appears claimant was not in the workforce when he undertook the program, I must conclude that substantial evidence supports the Administrative Order.

### **ORDER**

IT IS HEREBY ORDERED:

The November 10, 2008 Administrative Order is approved.