
In the ORS 656.260 Managed Care Dispute of

Jeremy Rice, Claimant

Contested Case No: 09-151H

PROPOSED & FINAL ORDER

March 31, 2010

JEREMY RICE, Petitioner

SAIF CORPORATION, Respondent

Before Gregory J. Naugle, Administrative Law Judge

Pursuant to notice, a hearing convened on the record in this matter on February 2, 2010 in Portland, Oregon, before Administrative Law Judge Naugle. Claimant appeared and was represented by attorney Ernest M. Jenks. The employer, Farwest Steel Corporation, and its insurer, SAIF Corporation, were represented by attorney Elaine Goeders. The Workers' Compensation Division (WCD), through a January 6, 2010 letter from the Department of Justice, waived its appearance.

Exhibits 1-222, as identified in SAIF's June 4, 2009 exhibit list, and exhibits 223-237 as identified in claimant's renumbered January 5, 2010 exhibit list, were submitted and admitted into evidence without objection. The record closed on March 1, 2010 following recorded telephonic rebuttal arguments.

ISSUES:

1. Propriety of WCD's September 14, 2009 Administrative Order on Remand MTX 09-1174 that declined to appoint a medical service provider to provide a psychological evaluation; and
2. Claimant's entitlement to an attorney fee.

PROCEDURAL HISTORY:

On April 1, 2009, WCD issued Administrative Order No. MTX 09-0287.

On April 7, 2009, WCD received a request for hearing from claimant's attorney.

On April 28, 2009, WCD issued a referral to the Workers' Compensation Board. The matter was given WCB Case No. 09-00055H, and assigned to the undersigned for disposition.

On May 18, 2009, WCB issued a Notice of Hearing setting the hearing for July 29, 2009.

On July 22, 2009, the undersigned held telephone conferences with Mr. Jenks and Ms. Goeders. Mr. Jenks moved for a postponement of the July 29, 2009 hearing to allow claimant an opportunity to request that the Director appoint a medical service provider to perform a psychological evaluation under OAR 436-010-0008(9). Over SAIF's objection, the motion was granted.

Claimant's counsel, in July 23, 2009 correspondence to WCD, requested that a physician be appointed by the Department to conduct a psychological exam of claimant.

SAIF, in July 28, 2009 correspondence to WCD, objected to the requested psychological evaluation.

WCD, in August 5, 2009 correspondence to the undersigned, indicated that in order for the Director to have jurisdiction to consider claimant's request, the matter would need to be remanded back to the Director.

On August 17, 2009, the undersigned issued an Interim Order, which provided, in part, that "Administrative Order MTX 09-0287 is remanded to the Director to allow for consideration of claimant's counsel's request."

SAIF, in August 20, 2009 correspondence to WCD, objected to the Interim Order.

Claimant's counsel, in August 24, 2009 correspondence to WCD, responded to SAIF's August 20, 2009 letter.

On September 14, 2009, WCD issued Administrative Order on Remand MTX 09-1174, where the Director declined to appoint a medical service provider to provide a psychological evaluation.

Claimant's counsel, in September 24, 2009 correspondence to WCD, requested a hearing on Administrative Order on Remand MTX 09-1174 and that it be consolidated for hearing with WCB Case No. 09-00055H.

On September 28, 2009, WCD issued a referral to the Workers' Compensation Board. The matter was given WCB Case No. 09-00151H, and subsequently assigned to the undersigned for disposition.

On December 10, 2009, WCB issued a Notice of Hearing, setting the hearing in WCB Case No. 09-00055H and WCB Case No. 09-00151H, for February 2, 2010.

On February 2, 2010, a consolidated hearing in WCB Case No. 09-00055H and WCB Case No. 09-00151H was held.¹

FINDINGS OF FACT:

I adopt the findings of fact in the Administrative Order.²

CONCLUSIONS OF LAW AND OPINION:

Pursuant to ORS 656.704, hearings regarding Department orders addressing medical

¹ A separate order in WCB Case No. 09-00055H has been issued.

² See *Liberty Northwest Ins. Corp v. Kraft*, 205 Or App 59, 62-63 (2006)(a substantial evidence review does not contemplate an ALJ making supplemental findings of fact); *Liberty Northwest Ins. Corp v. Mundell*, 219 Or App 358, 363 (2008)(in reviewing the MRU's order for substantial evidence, an ALJ is limited to evaluating the evidence in the record to determine whether, based on that evidence, a reasonable factfinder in the MRU's position could have made the findings that the MRU actually made.)

services disputes are conducted by an Administrative Law Judge of the Workers' Compensation Board. In managed treatment disputes, an ALJ may modify the Department'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. ORS 656.327(2); OAR 436-001-0225(2).

Claimant argued that the Order, which declined to appoint a medical service provider to provide a psychological evaluation, reflected an error of law. Specifically, claimant contended that the Department failed to heed the ALJ's request for a psychological evaluation. As follows, claimant is not persuasive.

OAR 436-001-0170(4) allows, where appropriate, for an ALJ to remand a dispute to the director for further administrative action. Here, claimant's counsel moved for a postponement of the July 29, 2009 hearing to allow claimant an opportunity to request that the Director appoint a medical service provider to perform a psychological evaluation under OAR 436-010-0008(9).³ Over SAIF's objection, the motion was granted. Contrary to claimant's position, the Interim Order remanding the matter did not order the Department to have a psychological evaluation performed, but rather, provided that "Administrative Order MTX 09-0287 is remanded to the Director *to allow for consideration* of claimant's counsel's request (emphasis supplied)." Moreover, under OAR 436-010-0008(9), the director's decision to appoint a medical service provider is discretionary and must be predicated upon a determination that review by a physician is necessary to resolve the dispute. Here, as indicated in the Order on Remand, the director made findings that claimant's attending physician, Dr. Makker, and the Caremark Joint Medical Committee, did not believe a psychological evaluation was necessary.⁴ Thus, I am not persuaded that the director found that physician review was necessary to resolve the dispute, and even if it were, I would not conclude that the director's exercise of discretion in declining to appoint a medical service provider to provide a psychological evaluation reflected an error of law under the rule.

Accordingly, I do not conclude that the order reflected an error of law. Therefore, as claimant did not prevail, he is not entitled to an attorney fee under ORS 656.385(1) and OAR 436-010-0008(12).

IT IS THEREFORE ORDERED that

1. The September 14, 2009 Administrative Order on Remand MTX 09-1174 is affirmed; and
2. Claimant's request for an attorney fee is denied.

³ OAR 436-010-008(9) provides:

"If the director determines a review by a physician is indicated to resolve the dispute, the director, in accordance with OAR 436-010-0330, may appoint an appropriate medical service provider or panel of providers to review the medical records and, if necessary, examine the worker and perform any necessary and reasonable medical tests, other than invasive tests."

⁴ To the extent claimant's argument involves a substantial evidence review of the supporting findings, I conclude that when looking at the record as a whole, the findings were reasonable, and therefore, supported by substantial evidence. *Armstrong v. Asten-Hill Co.*, 90 Or App 200, 206 (1988).