

In the ORS 656.260 Managed Care Dispute of

Bill E. Texeria, Claimant

Contested Case No: 10-060H

PROPOSED & FINAL ORDER

August 5, 2010

INTRACTABLE PAIN CENTERS, Petitioner

SAIF CORPORATION, Respondent

Before G Duff Bloom, Administrative Law Judge

Hearing convened from Intractable Pain Center's (IPC) request for hearing and the record closed on July 12, 2010 in Medford, Oregon before Administrative Law Judge Bloom. The claimant was not present and he is unrepresented by counsel; IPC was present in the person of Regina Purtzer and similarly unrepresented by counsel. Providence MCO, the Managed Care Organization (MCO), and insurer SAIF Corporation (SAIF) were represented by Attorney Mary Goebel Adams. WCD waived appearance. The record consists of Exhibits 1 through 14, excluding Exhibit J, P and Q.^{1, 2} ALJ Bloom of WCB recorded the hearing.

ISSUE

SAIF's responsibility to pay for services billed by IPC on August 31, 2009.

EVIDENTIARY ISSUES

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

At the July 12, 2010 hearing, I admitted IPC's Exhibits J, P and Q. Pursuant to a Court of Appeals precedent and administrative rule, 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 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 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

¹ The exhibits that constitute this record are those submitted by the WCD on April 7, 2010, in accordance with OAR 436-001-0225(2), under OAR 436-001-0240(4) (*ie*, the excluded exhibits though inadmissible, are in the hearings file).. *See* "Evidentiary Issues" discussion.

² *See* "Evidentiary Issues" discussion.

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 those cases and OAR 436-001-0225(2)³ and find it appropriate to allow *any* new evidence at hearing -- medical, lay, documentary or testimonial. Consequently, I hold I erred at hearing and now rule that IPC’s supplemental exhibits, which were (a) outside of the WCD record, are not admitted.

FINDINGS OF FACT

I adopt the “Findings of Fact” as set forth in the March 10, 2010 Administrative Order, as briefly supplemented below. (Ex Exs 13-1 through 13-2). See *Liberty Northwest v Kraft and DCBS*, *supra* (“Nothing in our understanding of ‘substantial evidence’ review comports with an adjudicator rendering findings of fact.”); *Liberty Northwest and DCBS v Mundell* 219 Or App 358, 363 (2008), (“in reviewing the MRU’s order for substantial evidence, the ALJ was 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. The ALJ does not have authority to determine whether the record could support findings different from those reached by the MRU, nor does the ALJ have authority to reweigh the evidence and substitute its view of the evidence for that of the MRU”).

The WCD ordered that SAIF was not liable for IPC’s August, 2009 billed services. (Ex 13).

IPC timely requested a hearing on April 7, 2010. (Ex 14).

The Director referred the hearing to the Board on April 20, 2010. (Rec).

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 July 12, 2010, and the medical service in dispute was provided in August, 2009; accordingly I decide the parties’ dispute using the Director’s rules set forth in WCD Administrative Orders 09-053 (hearing rules), 09-050 (medical service rules), and 10-054 (MCO rules). OAR 436-001-0003; OAR 436-009-0003; OAR 436-015-0003.

³ OAR 436-001-0225 provides, in pertinent 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 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 statute mimics in all substantive particulars the OAR 436-001-0225(2) evidentiary restrictions], 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.

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 its position, IPC bears the burden of proving by a preponderance of evidence that the WCD's March 10, 2010 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 IPC has failed to meet its 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 July 2, 2009. (Ex 4-1 through 4-2). Claimant therefore became subject to the MCO contract no later than July 6, 2009 (July 5, 2009 was a Sunday).

There is no evidence IPC or its primary physician, Thomas Purtzer, MD, was a member of either the MCO claimant was enrolled. I hold SAIF is not responsible for IPC's services (regardless of the "proper" CPT® code that the parties focused on and the WCD dutifully addressed⁴).

Finally, IPC also argued at hearing that SAIF should be ordered to reimburse the disputed service/s because SAIF did not notify Dr Purtzer or IPC that claimant was enrolled in an MCO. There is insufficient evidence in the record to aid IPC in carrying its burden of proving that fact—let alone a WCD lack of substantial evidence; even if there were sufficient evidence that were the case, the argument is still unpersuasive, for the following reason.

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) Provide the worker a written list of the eligible attending physicians within the relevant MCO geographic service area or provide a Web address to access the list of eligible attending physicians. If the notice does not include a written list, then the notice must also:

“(A) Provide a telephone number the worker may call to ask for a written list; and

⁴ WCD also addressed the dispositive issue of IPC's MCO non-enrollment. (Exs 13-3 through 13-4).

“(B) Tell the worker that he or she has seven days from the mailing date of the notice to request the list;

“(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 July 2, 2010 notice complied in all respects with its obligations under OAR 436-010-0275(4). (Exs 4-1 through 4-2). Claimant was enrolled in the MCO and notified of all its important policies, rules and procedures *before* he commenced treatment with Dr Purtzer at IPC. Claimant’s then-attending physician, Ronald Worland MD, was simultaneously sent a copy of the July 2, 2010 MCO enrollment notice. (Exs 4-6 through 4-7). Thus both claimant and his physician knew he was limited to MCO providers *before* claimant came to treat with IPC. Accordingly, it was incumbent on claimant to notify IPC that he was subject to MCO rules. Neither rule nor statute allows claimant to seek treatment outside the MCO without pre-authorization, nor excuses IPC from its failure to comply with the MCO rules due to alleged ignorance of claimant’s MCO-enrollment status.

The WCD’s order is supported by substantial evidence. The WCD’s order did not err in interpreting the applicable law. IPC has adduced no persuasive basis on which to modify the WCD order, and therefore I affirm it.