

In the ORS 656.260 Managed Care Dispute of

**Daren S. Kirkpatrick, Claimant**

Contested Case No: 11-098H

**PROPOSED & FINAL ORDER**

December 7, 2011

DAREN S. KIRKPATRICK, Petitioner

SAIF CORPORATION, Respondent

Before Kate Donnelly, Administrative Law Judge

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On June 14, 2010, Peter Kosek, MD, requested Administrative Review to resolve a medical treatment dispute after Providence MCO completed its internal dispute resolution process on May 19, 2010. The Medical Section Resolution Team (RT) reviewed the matter and issued Administrative Order MTX 10-0687 on September 14, 2010. Claimant appealed the matter and Administrative Law Judge (ALJ) Charles Mundorff reversed the RT's order. SAIF Corporation (SAIF) requested director review. On April 5, 2011, the director ordered that ALJ Mundorff 's January 27, 2011 Proposed and Final Order not be adopted and vacated RT's September 14, 2010 Administrative Order. The matter was remanded to RT to make a determination on whether the MCO's denial of Dr. Kosek's request for authorization for a single epidural steroidal injection was proper.

On June 17, 2011, RT issued Administrative Order on Remand MTX 11-0438 ordering that one single C7-T1 interlaminar cervical epidural steroid injection as proposed by Dr. Kosek was not appropriate for claimant, and if provided, SAIF was not liable for payment.

Claimant appealed the Administrative Order on Remand (MTX 11-0438) issued on June 17, 2011 by RT. Pursuant to notice, a hearing was scheduled for October 18, 2011, in Eugene, Oregon, before ALJ Kate Donnelly. Claimant is represented by attorney Dale C. Johnson. The employer, Don Cunningham, Inc., and its insurer, SAIF are represented by Trial Counsel, Heidi M. Havercroft. Prior to the scheduled hearing, the parties agreed to submit this matter on the documentary record. The record closed on November 22, 2011, following receipt of the final written closing arguments.

**EXHIBITS**

The evidentiary record consists of the August 18, 2011 submission by WCD of Exhibits 1-61.

**ISSUE**

Whether the MCO's denial of Dr. Kosek's April 30, 2010 request for authorization for a single interlaminar C7-T1 epidural steroid injection was proper.

## FINDINGS OF FACT

I adopt the "Findings of Fact" as set forth in the June 17, 2011 Administrative Order on Remand, as corrected below.

Paragraph 3, page 4, of the Order is corrected to reflect that SAIF, rather than claimant, filed exceptions to the Proposed and Final Order {*See* Ex. 60-4}.

## CONCLUSIONS OF LAW AND OPINION

OAR 436-001-0225 prescribes the standard of review governing an ALJ's review on appeal of an RT order in a proceeding under ORS 656.260:

- (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 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.

Under "substantial evidence" review, the reviewing tribunal "look[s] at the whole record with respect to the issue being decided, rather than at one piece of evidence in isolation. If an agency's finding is reasonable, keeping in mind the evidence against the finding as well as the evidence supporting it, there is substantial evidence." *Armstrong v. Asten-Hill Co.*, 90 Or App 200, 206 (1988). Thus, "substantial evidence" review "is not what has been referred to as the 'evidence' rule \*\*\* but it is also not *de novo* review." *Id.* (citation omitted); *see also United States Bakery v. Shaw*, 199 Or App 286, 288-89 (2005). Under a substantial evidence review, the administrative law judge may not supplement the evidentiary record developed by the RT. *Liberty Northwest Ins. Corp. v. Kraft*, 205 Or App 59, 62-63 (2006).

Claimant has the burden of showing that the Administrative Order is not supported by substantial evidence or that it reflects an error of law. OAR 436-001-0225(2).

Here, claimant does not assert any error of law. I therefore review the record to determine if the order is supported by substantial evidence.

The RT concluded:

"[t]herefore, based on the record submitted RT is persuaded by Dr. Borgoy's opinion that there are no indications *for the proposed single injection*. RT concludes that the proposed single C7/T1 interlaminar epidural steroid injection is not appropriate for Mr. Kirkpatrick, and if provided, SAIF is not liable" (Ex. 60-6) (Emphasis added).

However, a review of Dr. Borgoy's report does not support that conclusion. First, this matter was remanded to RT by the director to address an issue that had not previously been addressed; i.e., whether the MCO's denial of Dr. Kosek's request for authorization for a single epidural steroidal injection was proper (*See* Ex. 54-3). On remand, RT did not ask Dr. Borgoy to clarify his opinion regarding whether a single epidural steroid injection was appropriate. A review of Dr. Borgoy's August 12, 2010 report reveals that the issue he addressed was the appropriateness of "3 C7-T1 interlaminar epidural steroid injection" (Ex. 48-1). Substantial evidence does not support RT's conclusion that Dr. Borgoy expressed an opinion on the appropriateness of a single injection.

Second, and more importantly, Dr. Borgoy's actual opinion was directly the opposite of RT's conclusion that Dr. Borgoy opined that there were no indications for the proposed single injection. Dr. Borgoy wrote:

"In my opinion, the most rational course of therapy would be to perform a single C7-T1 interlaminar epidural steroid injection, followed by clinical assessment a few weeks later. If the patient had significant improvement (50 % or greater), repeat epidural steroid injection could be performed up to 3 or 4 times annually.

"If he did not have significant improvement after a single epidural steroid injection, it would be reasonable to perform a second steroid injection. If he did not have sustained and durable analgesia after two injections, there would be no indication for further injection.

"There is no indication for routinely repeating injections that do not provide sustained and durable analgesia" (Ex. 48-3).

Under such circumstances, I find that Dr. Borgoy's opinion does not support the holding of the Order on Remand. Therefore, the June 17, 2011 Administrative Order on Remand is reversed.

### **Attorney Fees**

Claimant's attorney is entitled to an assessed attorney fee for services at hearing under ORS 656.385(1). After considering the factors set forth in OAR 438-015-0010(4) and applying them to this case, I find that a reasonable fee for claimant's counsel's services is \$3,000, payable by SAIF. In reaching this conclusion, I have particularly considered the time devoted to the case (as represented by the size and content of the record; the complexity of the issues; the skill and extensive experience of the lawyers involved; the value of the interest involved; and the significant risk that claimant's counsel could go uncompensated.

### **ORDER**

1. Administrative Order on Remand MTX 11-0438 is reversed.

2. Claimant's counsel is awarded an assessed attorney fee of \$3,000.00 pursuant to ORS 656.385(1).