
In the ORS 656.260 Managed Care Dispute of

David T. Moss, Claimant

Contested Case No: 10-027H

PROPOSED & FINAL ORDER

January 5, 2011

DAVID T. MOSS, Petitioner

SAIF CORPORATION, Respondent

Before Chuck Mundorff, Administrative Law Judge

A hearing convened in these consolidated matters on August 16, 2010 in Eugene, Oregon before Administrative Law Judge Chuck Mundorff. Claimant was present and was represented by his attorney Christine Jensen. The employer, Roberts Supply Company, and its insurer, the SAIF Corporation, were represented by attorney Thomas A. Sieg. Oregon Health Systems (OHS) a managed care organization contracted by SAIF was represented by attorney Arden Olson. Subsequent to the convened hearing the Workers' Compensation Division intervened in the case and was represented at closing argument by Senior Assistant Attorney General Carol Parks. At hearing both SAIF and OHS presented a Motion to Dismiss claimant's requests for hearing. The matter was continued in order for claimant to respond to those motions. The record closed on December 6, 2010 following recorded closing argument.

EXHIBITS

At hearing exhibits 1-43, a, A, 1A-C, 4A-B, 6A, 7A, 10A, 23A, 25A, 32A, 33A were admitted into the record without objection. Following the hearing exhibits 44-46 were received and are hereby admitted into the record.

ISSUES

Claimant appeals two Administrative Decisions dismissing his request for contested case hearings regarding the appropriateness of a proposed L5-S1 laminectomy and fusion related to his accepted claim. Those Orders were dated February 11, 2010 and February 24, 2010 respectively. (Exs. 14, 26). Additionally, claimant seeks penalties and penalty based attorney fees for alleged failure by SAIF to comply with discovery rules.

FINDINGS OF FACT

The findings of fact are adopted and summarized from the Administrative Orders being appealed. *See Liberty Northwest Ins. Corp v. Kraft*, 205 Or App 59, 62-63 (2006).

Claimant sustained a compensable injury on August 16, 2007. His claim was enrolled in the OHS MCO on September 26, 2007. (Ex. a). He was initially treated with conservative care, however his condition deteriorated to the point that fusion surgery was recommended by the treating physicians. (Ex. 5).

Dr. Kitchel requested authorization for L5-S1 fusion which was submitted to OHS for approval. (Ex. 3). OHS deferred a decision on the appropriateness of the surgery pending

receipt of further medical evidence. (Ex. 6). OHS reported to SAIF that it would seek a second opinion on the reasonableness and necessity of the procedure and that it would not approve surgery unless there was proof of cessation of smoking. (Ex. 7A).

Claimant requested review by WCD of the matter and requested that the director order OHS to approve the requested surgery. (Ex. 8). In response to claimant's request, the February 11, 2010 Administrative Order of Dismissal issued noting that appeal rights for the deferral letter were with OHS and not the director. (Ex. 14). As OHS had not completed its review, the request for hearing was dismissed as premature. (Ex. 14-2). Claimant appealed that decision again to the director requesting a contested case hearing. (Ex. 20). Additionally claimant made numerous requests for the certified plan including the rules governing service utilization under the MCO contract. (Exs. 16, 19, 21). OHS declined to provide the requested materials noting that they were proprietary documents. (Exs. 17, 21-2, 24).

On February 19, 2010 claimant again requested a contested case hearing on the propriety of the medical treatment proposed by Dr. Kitchel. (Ex. 22). On February 24, 2010 the director issued the second Administrative Order dismissing the request for contested case hearing essentially on the same grounds as before. (Ex. 26).

Claimant was seen for a second surgical opinion on March 8, 2010 and the proposed surgery was performed on October 10, 2010. (Exs. 32A, 45).

Claimant requested a hearing on both of the Order's identified above and on OHS's failure to provide the certified plan resulting in this proceeding.

CONCLUSIONS AND REASONING

Both SAIF and OHS move to dismiss the requests for hearing citing to ORS 656.260(14) and OAR 436-015-0008 in support the respective motions. As the moving parties in these consolidated cases, SAIF and OHS respectively bear the burden of proof. The Administrative Order here "may be modified only if it is not supported by substantial evidence in the record or reflects an error of law." ORS 656.260(16).

ORS 656.260(14) provides :

"If a worker or the attending physician is dissatisfied with an action of the managed care organization regarding the provision of medical services pursuant to this chapter, peer review, service utilization review or quality assurance activities, that person or entity must first apply to the director for administrative review of the matter before requesting a hearing. Such application must be made not later than the 60th day after the date the managed care organization has completed and issued its final decision."

Additionally, OAR 436-015-0008 reads:

“(2) Administrative review before the director: The process for administrative review of such matters shall be as follows:

(a) Any party that disagrees with an action taken by an MCO pursuant to these rules must first use the dispute resolution process of the MCO. If the party does not appeal the MCO's decision, in writing and within 30 days of the mailing date of the decision, the party will lose all rights to further appeal the decision.

(b) The aggrieved party shall file a written request for administrative review with the administrator of the Workers' Compensation Division within 60 days of the date the MCO issues a final decision under the MCO's dispute resolution process. If a party has been denied access to an MCO dispute resolution process because the complaint or dispute was not included in the MCO's dispute resolution process or because the MCO's dispute resolution process was not completed for reasons beyond a party's control, the party may request administrative review within 60 days of the failure of the MCO to issue a decision. The request must specify the grounds upon which the action is contested.

It is clear from the evidentiary record that in both cases OHS had not completed its internal review nor had it issued a final decision regarding claimant's proposed surgeries. As such, the request for director's review was premature as noted in the contested Order's. There is substantial evidence in the record to support both of the Administrative Orders of Dismissal and the orders are hereby affirmed.

PENALTIES

Claimant asserts that he is entitled to production of the rules used by OHS to determine whether to approve the proposed surgery. SAIF and OHS contend that this material is protected as confidential “data” under ORS 656.260(6); and argue that they cannot be compelled to produce it absent a showing of necessity. I agree. Under ORS 656.260(6),

“[d]ata generated by or received in connection with [provision of medical service to injured workers] * * * or of any review thereof, shall be confidential, and shall not be disclosed except as considered necessary by the director in the administration of this chapter.”

Based upon the confidentiality provisions of the statute – there was no unreasonable conduct upon which to base a penalty or penalty based attorney fee.

ORDER

The Administrative Orders of Dismissal issued February 11 and 24, 2010 are affirmed. All other relief requested by claimant is denied.