

In the ORS 656.260 Managed Care Dispute of

**Diana M. Steinbach, Claimant**

Contested Case No: 11-072H

**PROPOSED & FINAL ORDER**

October 19, 2011

DIANA M. STEINBACH, Petitioner

SAIF CORPORATION, Respondent

Before Joy M. Dougherty, Administrative Law Judge

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A hearing in the above-captioned case was scheduled for August 23, 2011, in Portland, Oregon, before Administrative Law Judge Dougherty. Claimant is represented by her attorney James E. Bailey. The employer, Bar Seven A Trucking Incorporated, and its insurer, the SAIF Corporation, are represented by attorney Kathryn Olney.

Prior to the hearing, the parties arranged for submission of the case "on the record" with written closing arguments. The record closed on receipt of claimant's reply argument on September 21, 2011.

Exhibits 1 through 80, submitted by the Workers' Compensation Division (WCD) are hereby admitted.

**ISSUES**

Timeliness. Claimant appeals a May 5, 2011, Administrative Order of Dismissal which found her March 9, 2011, request for administrative review untimely filed.

**SUMMARY OF FACTS**

The Court of Appeals has held that with a "substantial evidence" standard of review (as here), "findings" of fact are not appropriate. *See Liberty Northwest Insurance Corp. v. Kraft*, 205 Or App 59, 62-63 (2006). Accordingly, for context, I offer the following summary of facts, taken from the record supplied by the WCD.

Claimant sustained a compensable injury on May 4, 2006, when she fell off of a truck. (Ex. 1). The claim was accepted for "multiple abrasions to left knee, left shoulder and back, bilateral frontal subarachnoid hemorrhage, small right subdural hemorage up to 2 mm, parenchymal hemorrhage in right temporal lobe, left zygomatic arch fracture and bilateral distal radius fractures." (Ex. 3).<sup>1</sup> On June 21, 2006, SAIF enrolled her in a Managed Care Organization (MCO). (Ex. 4).

Dr. Desmond, an ophthalmologist, examined claimant and performed diagnostic services. (Exs. 7, 23).

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<sup>1</sup> On July 27, 2006, September 26, 2007, July 17, September 23, December 12, and December 23, 2008, and May 21, 2009, the acceptance was modified to include a large list of additional conditions. (Exs. 5, 6, 24, 33, 38, 60).

On April 23, 2008, claimant requested the acceptance be modified to include traumatic cataracts and open oral antral fistula. (Ex. 8; *see also* Ex. 31). Claimant also requested a list of "OHS" approved physicians. (Ex. 9). The April 23, 2008 expansion request was *de facto* denied. (Ex. 22; *see also* Ex. 36). Claimant requested a hearing. (Ex. 37). Thereafter, additional conditions were requested accepted and denied. (Exs. 40, 41).

On March 10, 2009, Dr. Desmond indicated that claimant's eye condition did not explain her difficulties seeing and recommended she see a neuroophthalmologist. (Ex. 42).

On March 30, 2009, claimant, through counsel, requested that Dr. Desmond's bill be paid as it was "clearly diagnostic," although his examinations ultimately revealed that the pending condition request was inaccurate. (Ex. 45). Stating that claimant's "referral to Dr. Desmond did not go through the MCO," SAIF refused to pay for those medical services. (Ex. 47).

On April 24, 2009, claimant requested administrative review by the Workers' Compensation Division (WCD). (Ex. 52). In that request, claimant noted that SAIF advised the WCD that it was refusing to pay for the medical services because the medical services provided by Dr. Desmond were not requested by claimant's attending physician or approved through the MCO. She also noted that the medical services were related to a denied new or omitted medical condition.

On April 29, 2009, WCD acknowledged claimant's request regarding the unpaid bills and requested SAIF's response. (Ex. 53). In response, SAIF indicated that it maintained its position that Dr. Desmond was not an MCO provider. Alternatively, SAIF asserted that the medical treatment was related to a new or omitted medical condition that had been denied and that the services didn't qualify as diagnostic services. (Ex. 54).

Claimant submitted an argument to WCD's Medical Review Team arguing that Dr. Desmond's examination was an "appropriate diagnostic examination," which impacted the claimed cataracts condition. Claimant also noted that further examination was required to determine the state of her eye condition with respect to the claim. (Ex. 56).

Noting that SAIF's assertion the medical services related to a new or omitted medical condition claim, WCD issued a "Transfer Order" transferring the case to the Board. (Ex. 57). The order further stated, "If there is still a medical issue in dispute after the issue of causal relationship is resolved, either party may bring the dispute back before the director." (Id.)

A prior ALJ addressed the issue of whether there was a causal relationship between the medical service and claimant's work injury. (Ex. 65). At that time, SAIF contended that, if the ALJ found the requisite causal relationship between the medical services and the accepted conditions, other issues required WCD resolution. (Ex. 65-4). Ultimately, the prior ALJ found that the disputed medical services were diagnostic services materially related to the accepted conditions. However, recognizing that SAIF had asserted alternative grounds for denying payment that were within WCD's jurisdiction, the prior ALJ declined to direct SAIF to pay for the medical services. (Id.)

On reconsideration, the ALJ also awarded a "contingent" attorney fee award payable if claimant finally prevailed in the medical services dispute before WCD. (Exs. 66, 67, 68). That January 12, 2010, order was not appealed and has become final. (Ex. 74-2).

On February 22, 2010, claimant requested that WCD issue a final order. In doing so, claimant noted that the compensability dispute had become final and had been found in her favor. Thus, because SAIF had not raised additional basis for denying payment of the services, claimant requested the order find that she had finally prevailed. (Ex. 69).

On March 26, 2010, the WCD responded that it declined to do so, reasoning that, in light of its Transfer Order, there was no issue currently pending before it. (Ex. 70). The WCD stated that if a medical issue was still in dispute, a party could seek administrative review.

On May 19, 2010, claimant requested a hearing, contending that because no issue remained before WCD and the prior ALJ's order became final, she had finally prevailed in the medical services dispute and was entitled to the prior ALJ's attorney fee award. (Ex. 71). The subsequent ALJ reasoned that the prior ALJ had not ordered SAIF to pay for the medical services and, further, that the dispute over other grounds for SAIF's denial remained within WCD's jurisdiction. Accordingly, on September 13, 2010, the ALJ denied claimant's request. (Ex. 74).

On March 9, 2011, claimant again requested administrative review with WCD's Medical Review Unit. (Ex. 75). Claimant also requested Board review of the September 13, 2010, Opinion and Order.

On Board review, claimant argued that because WCD transferred the case to the Board, no other grounds for the denial remained and, therefore, she had finally prevailed in the medical services dispute. The Board disagreed. Citing ORS 656.704(3)(a) and *AIG Claim Services, Inc. v. Cole*, 205 Or App 170, 173-74 (2006), the Board explained that determination of whether jurisdiction over a medical services dispute lies with the Board or the Director depends on whether the dispute is a "matter concerning a claim," in which case it is in the Board's jurisdiction, or not, in which case it is in the Director's jurisdiction. (Ex. 75-3).

In making its determination, the Board noted that, when the medical services dispute first arose before WCD, SAIF raised three grounds for its denial. Two of those grounds concerned a causal relationship between the disputed medical services and the accepted claims for which WCD transferred those matters to the Hearings Division. (Ex. 75-5) (Citing to *Hazel M Hand*, 59 Van Natta 1028 (2007) (medical services dispute transferred to WCB to address causal relationship issue that was in its jurisdiction under ORS 656.704(3)(b)(C)); *Viola F. Kinman*, 58 Van Natta 2085 (2006) (same)). Nevertheless, the Board noted that SAIF also contended the medical services were not requested by claimant's attending physician or approved through the MCO. Because that contention concerned the propriety of the medical services, the Board held that jurisdiction over that matter rested with WCD (on behalf of the Director). ORS 656.704(3)(b)(B).

The Board also held that the record did not establish that SAIF's "propriety" challenge to the medical services claim had either been withdrawn or resolved. Thus, the Board held that claimant had not finally prevailed against SAIF's denial.

Thus, on March 3, 2011, the Board concluded that claimant had not "prevailed finally" over the medical services denial because the "contingency" on which the prior ALJ's attorney fee award was based had not yet been satisfied.

On March 10, 2011, WCD acknowledged claimant's request for administrative review regarding the disputed medical services from Dr. Desmond. (Ex. 76). In response, SAIF asserted that the medical services were not compensable because Dr. Desmond was not an MCO provider. (Ex. 78). Alternatively, SAIF argued claimant's request was untimely because claimant did not request administrative review within 90 days of MRU's letter informing the parties that if there were additional issues, the parties could "bring the matter back before the Director for administrative review." (Ex. 78).

On May 5, 2011, an Administrative Order of Dismissal issued. Citing OAR 436-009-0008(2), the reviewer determined that claimant had 90 days to request administrative review. In determining the beginning of that 90 days, the reviewer cited to the March 26, 2010 letter to claimant informing her that should there be an ongoing dispute, either party could request administrative review. Thereafter, the reviewer held that "[claimant] knew by March 29, 2010, if there was still a dispute about payment of Dr. Desmond's services, she could request Administrative Review." (Ex. 79-7). Finding that the 90 days expired on June 27, 2010, and claimant's request was March 9, 2011, the matter was dismissed. (Id.)

### CONCLUSIONS OF LAW AND OPINION

As noted above, the standard of review is for substantial evidence and errors of law. ORS 656.327(2); *Kraft*.

As evidenced from the above summary of facts, this case has an extensive and complex litigation history. However, in claimant's initial requests for payment of Dr. Desmond's medical services, which was made on March 30, 2009, to SAIF, claimant asserted that bill be paid as it was "clearly diagnostic." (Ex. 45). In its initial response, SAIF refused to pay for those medical services because "referral to Dr. Desmond did not go through the MCO." (Ex. 47). Thus, on April 24, 2009, claimant requested administrative review by the Workers' Compensation Division (WCD) of SAIF's refusal to pay for Dr. Desmond's medical services. (Ex. 52).

In the April 2009 request for administrative review, claimant noted that SAIF was refusing to pay for the medical services because the medical services provided by Dr. Desmond were not requested by claimant's attending physician or approved through the MCO. As a second matter, claimant also noted that the medical services were related to a denied new or omitted medical condition.

In its transfer order, WCD transferred the causation disputed to WCB. (Ex. 57). Transfer was appropriate where SAIF contested the causal relationship between the proposed medical

services and the accepted claim. Such is consistent with ORS 656.704(3)(b)(C), which states that the determination of a causal relationship between a medical service and an accepted claim is a matter concerning a claim. Consistent with their authorized jurisdiction, the prior ALJ is limited their determination to whether there was a causal relationship between the accepted condition and the requested medical services sufficient to meet the requirements of ORS 656.245(1). They found that there was.

However, aside from the causation disputed, was the parties' dispute involved whether or not the medical services were requested by claimant's attending physician or approved through the MCO. OAR 436-010-008(1) states that administrative review is before the Director. Subsection (1)(a) goes on to state that except as otherwise provided in ORS 656.704, the director has exclusive jurisdiction to resolve all matters concerning medical services disputes arising under ORS 656.245, ORS 656.247, ORS 656.260, ORS 656.325 and ORS 656.327. (See also OAR 436-010-008(4)). Thus, the question of whether Dr. Desmond's services qualify for payment given claimant's enrolment in an MCO is an issue before the Director. ORS 656.245(4). Moreover, the record in this matter does not support a finding that SAIF's "propriety" challenge to the medical services claim had either been withdrawn or resolved. Thus, jurisdiction over those issues remained with WCD and have yet to be determined.

In light of the forgoing, this matter is remanded to WCD to determine the remaining issues raised in the April 2009 request for administrative review. Accordingly, the May 5, 2011, Administrative Order of Dismissal is reversed and remanded.

IT IS SO ORDERED.