

In the ORS 656.245 Medical Services Dispute of

**EDUARDO PEREZ, Claimant**

Contested Case No: H04-134

**INTERIM ORDER ON REMAND**

October 22, 2004

SAIF CORPORATION, Petitioner

EDUARDO PEREZ, Respondent

Before Ella D. Johnson, Administrative Law Judge, Administrative Hearings Division

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Insurer appeals a July 15, 2004 Administrative Order issued by the Medical Review Unit (MRU), Workers' Compensation Division (WCD), Department of Consumer and Business Services (department or director). MRU found that the Emergency Room medical service provided by Warren Sparks, MD was a compensable diagnostic service and that SAIF was liable for payment. SAIF Corporation (SAIF or insurer) timely requested a hearing challenging MRU's decision. On August 23, 2004, the department referred the case to the Office of Administrative Hearings (OAH) for hearing.

On September 24, 2004, OAH Administrative Law Judge Ella D. Johnson conducted a telephone hearing in this matter. Petitioning insurer was represented by Attorney at Law Jerry Larkin. Respondent Eduardo Perez (claimant) represented himself without benefit of counsel. Claimant testified on his own behalf. At hearing, insurer argued *inter alia* that MRU's decision was not supported by substantial evidence because there was no medical evidence in the record establishing any connection between the injury and the symptoms reported by claimant and the need for diagnostic testing. In his testimony, claimant attempted to read from a medical report authored on September 14, 2001 by Dr. Sparks indicating that there was a connection between the injury and his symptoms.

Insurer objected to the admission of the medical report, arguing that the record was closed and no new medical evidence could be admitted. On further examination, it appeared that claimant was attempting to read from SAIF's Exhibit 11 contained in its exhibit list which was submitted to MRU by Ellen Ball during the course of administrative review. SAIF's Exhibit 11 is listed as a two-page Willamette Valley Medical Center Emergency Department Report by Dr. Sparks dated September 14, 2001. In contrast, that same report is listed on WCD's Exhibit List for submission on contested case review and appears in the record as only a one-page exhibit, Exhibit 9. However, SAIF objected to my consideration of the second page of Exhibit 9 based on OAR 436-001-0225(1) because it was not transmitted by WCD as part of the record in this case.

In light of this apparent discrepancy in the number of exhibit pages transmitted by MRU, I transmitted the following questions to WCD pursuant to OAR 436-001-0225:

**Questions: In cases decided under ORS 656.245 where the medical record submitted for contested case hearing contains an obvious error by failing to include the full medical report of the treating physician, does OAR 436-001-0225 prohibit the administrative law judge from reopening the record and admitting the missing part of the report, if it appears that a portion was left**

**out of the record in error? If not, is there another mechanism available for the administrative law judge to insure that the record is complete?**

On October 14, 2004, WCD provided a response to the transmitted question, a copy of which is attached. Following review of the administrative review file in this case, WCD found that through a clerical error, pages one and two of Dr. Spark's report had been separated and page two was inadvertently excluded from the record used for administrative review. As a result, the medical reviewer did not consider Dr. Spark's full report. Moreover, WCD determined that because of the higher standard of review in this case, the agency had an affirmative duty to include and consider all available evidence submitted by the parties. Consequently, WCD concluded that under these circumstances, the reviewer's failure to consider the second page of the medical report was grounds for remand.<sup>1</sup> Accordingly, this matter shall be remanded to MRU for review of Dr. Sparks' September 14, 2001 medical report in its entirety.

IT IS SO ORDERED.

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<sup>1</sup> Because WCD's recommendation was to remand the matter to MRU for consideration of the full medical report, WCD did not reach the question of whether the ALJ has the authority to reopen the record under these circumstances.