
In the ORS 656.245 Medical Services Dispute of

Corrinne I. Mitchell, Claimant

Contested Case No: 07-094H

ORDER ON REMAND

October 31, 2007

RONALD JOHANSEN D.C., Petitioner

SAIF CORPORATION, Respondent

Before Emerson G. Fisher, Administrative Law Judge

Ronald Johansen D.C., appeals the Director's Administrative Order issued on June 27, 2007 by the Medical Review Unit (MRU) of the Workers Compensation Division (WCD), Department of Consumer and Business Services (director or department).

Pursuant to notice, a hearing was convened before the undersigned Administrative Law Judge (ALJ) in Portland, Oregon on October 27, 2007. Dr. Johansen was present and proceeded *pro se*. Arlin Inc., and its insurer, the SAIF Corporation, were represented by attorney Holly O'Dell. The proceedings were recorded by the ALJ.

The documentary evidence consists of Exhibits 1 through 17 submitted by MRU on August 7, 2007.

The record closed on October 27, 2007.

ISSUE

Whether SAIF is liable for chiropractic services rendered by Dr. Johansen to Corrine I. Mitchell (claimant) from June 28, 2006, through July 12, 2006.

CONCLUSIONS OF LAW AND OPINION

MRU's Order of August 7, 2007 may be modified only if it is not supported by substantial evidence in the record or if it reflects an error of law. OAR 436-0001-0225(2). Insofar as an ALJ's review of factual findings is concerned, if a finding by MRU is reasonable, keeping in mind the evidence against the finding as well as the evidence supporting it, the finding is supported substantial evidence. See *Liberty Northwest Insurance Corporation v. Kraft*, 205 Or App 59, 62 (2006); *Armstrong v. Asten-Hill Co.*, 90 Or App 200, 206 (1988).

Where appropriate, the ALJ may remand a dispute to the director for further administrative action. OAR 436-001-0170(5).

The pertinent facts, as determined by MRU, are as follows:

- (1) Claimant compensably injured her thoracic spine on June 26, 2006. Claimant's initial care was provided by Dr. Seymour, who, on June 28, 2006, referred claimant to Dr. Johansen for

chiropractic care. The referral was for six visits over two to three weeks;

(2) Dr. Johansen provided the services ordered by Dr. Seymour, billing SAIF for the services. Copies of Dr. Johansen's chart notes accompanied the bills. Dr. Seymour was copied with the billing chart notes as directed on the referral order;

(3) SAIF received Dr. Johansen's bills on July 27, 2006. On August 22, 2006, SAIF disallowed payment and sent Dr. Johansen an Explanation of Benefits (EOB) asserting that the services were not authorized by the attending physician's treatment plan and were not submitted as required by OAR 436-010-0230. The EOB informed Dr. Johansen that any appeal had to be filed within 90 days of the date of the EOB;

(4) Dr. Johansen received the EOB on August 25, 2006. Dr. Johansen's chart notes reflect that his office called Kyle Kinsey at SAIF on September 13, 2006 and was advised that "they probably just need the doctor's treatment plan. He will look it over and call back."

(5) Dr. Johansen faxed a copy of the treatment plan to SAIF on September 14, 2006;

(6) Dr. Johansen did not file an appeal for administrative review until April 20, 2007, 340 days after the date of the EOB. (Exs., 16-1; 16-2).

Concluding that Dr. Seymour's order contained all requirements of a treatment plan, and reasoning that Dr. Johansen had provided SAIF with that plan as of September 14, 2006, MRU further concluded that SAIF should have allowed payment of Dr. Johansen's services. (Ex. 16-2). Nonetheless, relying on OAR 436-009-0008(8), MRU dismissed Dr. Johansen's appeal as untimely.¹ (Ex. 16-4).

In the record presented to MRU, Dr. Johansen asserts, among other things, that SAIF had promised payment upon receipt of the treatment plan. Knowing that SAIF had received the treatment plan by at least September 14, 2006, it appears that Dr. Johansen delayed requesting administrative review because he believed (based on information from SAIF) that payment was forthcoming. It is, therefore, arguable that the doctrine of equitable estoppel is applicable to this dispute.

¹ OAR 436-009-0008(8) provides: "A written request for review must be sent to the administrator of the Workers' Compensation Division within 90 days of the disputed action and must specify the grounds upon which the action is contested."

The doctrine of equitable estoppel “is that a person may be precluded by his act or conduct *** when it was his duty to speak, from asserting a right which he otherwise would have had.” See *Meier & Frank v. Smith-Sanders*, 115 Or App 159, 163 (1992), *rev den* 316 Or 142 (1993), quoting *Marshall v. Wilson*, 175 Or 506, 518 (1944). Estoppel only protects a person who changes a position in reliance on another’s act or representation. *Meier & Frank*, 115 Or App at 163. Equitable estoppel is applicable to matters before the department. See *Jean M. Lewis*, 2 WCSR 33 (1997).

Because of my limited review, I am unable to consider, on a *de novo* basis, whether all the factual elements of equitable estoppel have been satisfied to preclude SAIF from raising “timeliness” as a defense. Therefore, remand pursuant to OAR 436-001-0170(5) is appropriate.

Based on the forgoing, this matter is remanded to MRU for further administrative proceedings.

IT IS SO ORDERED