

In the Managed Care of
Tammie D. Jimenez, Claimant

Contested Case No: 07-135H

ORDER OF REMAND

May 15, 2008

TAMMIE D. JIMENEZ, Petitioner
SAIF CORPORATION, Respondent

Before Steve Rissberger, Administrative Law Judge

Pursuant to notice, a hearing was scheduled for August 27, 2007 in Portland, Oregon before Administrative Law Judge Rissberger. Claimant is represented by his attorney, Michael A. Gilbertson. The employer B&E4 LLC, and its insurer, SAIF, are represented by their attorney, William Blitz. Prior to the scheduled hearing, the parties agreed to submit this matter on the documentary record. Exhibits 1-37 were received and admitted into evidence. The record closed on April 16, 2007 following claimant's waiver of a written reply response.

At issue is claimant's appeal of an October 30, 2007 Administrative Order on Remand issued by the Medical Section Resolution Team of the Workers Compensation Division (WCD), acting on behalf of the director. In its October 30, 2007 order, WCD found that SAIF was not liable for medical services provided to claimant at Silverton Hospital on October 24, 2005 and, further, that claimant may be liable for the same services. (Ex. 36.)

Claimant sustained a compensable injury on May 27, 2004. On August 17, 2004, SAIF initially accepted the claim for tendonitis for the right lateral epicondyle and right rotator cuff tendonitis. (Ex. 2.) Also on that date, SAIF enrolled claimant into Oregon Health Systems, an MCO. (Ex. 3.) SAIF closed the claim on January 12, 2005. (Ex. 4.)

On October 18, 2005, George Zakabib, M.D. performed right shoulder surgery at Silverton Hospital. The surgery was to treat acromioclavicular (AC) joint arthritis and chronic impingement syndrome. (Exs. 7, 8, 9 and 14.)

On October 24, 2005, claimant went to Silverton Hospital Emergency Department for nausea and vomiting. Claimant was examined, lab tests were conducted, and she was prescribed medications. (Ex. 15.) Silverton Hospital billed SAIF for the ER visit. SAIF disapproved payment because the treating provider was not in the MCO, and because the ER visit was for complications due to the noncompensable October 18, 2005 surgery. (Exs. 17; 30, p. 2.)

On July 21, 2006, claimant requested that WCD review SAIF's refusal to pay for surgery. (Ex. 21.) Thereafter, WCD requested SAIF to provide "all relevant medical information." (Ex. 22.) In its August 4, 2006 Specification of Medical Issues, SAIF responded that the disputed medical service was disapproved because the service was "for a new/omitted condition which the worker has asked for acceptance and a decision is pending." (Ex. 23.) In late August, 2006, SAIF provided medical records to WCD. (Ex. 24.)

WCD bifurcated the dispute between the surgery and the October 24, 2005 ER visit. On October 10, 2006, WCD found that the OHS contract required pre-certification of the surgery in

order to be reimbursable and that Dr. Zakaib, an OHS participating provider, did not seek pre-certification for the surgery. As a result, WCD found that SAIF was not liable for the surgery. WCD also found that, pursuant to OAR 436-009-0015(1), claimant was not liable for the surgery services because she followed the directions of her attending physician and received care as directed. (Ex. 35, p. 2) The order was not appealed and became final.

WCD issued its second order on November 9, 2006. WCD found that the services provided by the Silverton Hospital on October 24, 2005 were for postoperative complications related to the October 18, 2005 surgery. Relying on its October 10, 2006 order, WCD concluded that since SAIF was not liable for the surgery, it was also not liable for the medical services provided on October 24, 2005. (Ex. 30) WCD did not address claimant's liability for the services. Claimant requested a hearing on this order. (Ex. 33.)

On November 21, 2006, SAIF issued a modified Notice of Acceptance reopening claimant's claim and including right shoulder impingement syndrome as an accepted condition. A week later, on November 29, 2006, SAIF again modified the Notice of Acceptance to add right shoulder bursitis as an accepted condition for this claim. ALJ Kirk Spangler approved a Stipulation submitted by the parties resolving the hearing request for defacto denial of the now accepted conditions. (Ex. 34.)

ALJ Jenny Ogawa held a hearing on August 30, 2007 regarding claimant's appeal of WCD's November 9, 2006 order. On September 20, 2007, ALJ Ogawa issued an order remanding the dispute back to WCD for additional findings so as to fully apply the standards under ORS 656.245(4)(b)(D).

Pursuant to ORS 656.704, hearings regarding WCD orders addressing medical services disputes are conducted by an Administrative Law Judge (ALJ) of the Workers' Compensation Board. In medical and treatment disputes an ALJ may modify the Department's order only if it is not supported by substantial evidence in the record or it reflects an error of law. Substantial evidence supports a finding when the record, viewed as a whole, permits a reasonable person to make the finding. ORS 656.183.482(8)(c); *Armstrong v. Asten-Hill Co.*, 90 Or App 200, 206 (1988). New medical evidence or issues may not be admitted or considered. ORS 656.327(2); OAR 436-001-0225(2).

Here, claimant appeals the director's Administrative Order on Remand, issued on October 30, 2007. In that order, the director found that SAIF was not liable for medical services provided to claimant on October 24, 2005 by Silverton Hospital and, further, that claimant could be found liable for the same services. The focus of claimant's appeal is the director's finding that the medical services claimant received on October 24, 2005 were directed toward non-compensable conditions.

ORS 656.245(1)(a) and (b) provide that for every compensable injury, the insurer is compelled to provide medical services for conditions caused in material part by the injury for such period as the nature of the injury or the process of recovery requires. Claimant had an accepted claim for right lateral condyle tendonitis and right shoulder rotator cuff tendonitis at the time of the disputed services. The claim was ultimately accepted for right lateral condyle

tendonitis, right shoulder rotator cuff tendonitis, right shoulder impingement syndrome and bursitis.

The medical record in this case indicates that claimant sought treatment from Silverton Hospital's emergency department on October 24, 2005 for abdominal symptoms, including vomiting for more than 16 hours. Dr. Brown, the emergency room physician then on-duty, provided the disputed medical services. He examined claimant, administered blood tests, provided fluids through an IV and gave claimant medication for nausea. The director concluded that "Dr. Brown did not diagnose that the nausea was a direct result of the recent surgery, he only noted that Ms. Jimenez was status post surgery for six days and that" ...she was also "post gall bladder removal." A reasonable person could find that this conclusion was supported by Dr. Brown's treatment notes from October 24, 2005. Dr. Brown's chart note did not contain any express reference to a connection between claimant's shoulder surgery and claimant's bowel and nausea symptoms, almost a week later.

Nevertheless, there is a problem with the director's conclusion that claimant's medical services on October 24, 2005 were unrelated to claimant's shoulder surgery on October 18, 2005. As claimant pointed out in his written argument, the director's Administrative Order on Remand contradicted findings made in the director's previous order of November 9, 2006 with regard to the same factual issue. The director's November 9, 2006 order provided: "[b]ased on the record, the director is persuaded that the medical services provided by Dr. Brown at Silverton Hospital on October 24, 2005, were for postoperative complications related to the surgery on October 18, 2005." (Ex. 30, p. 2.) This conclusion was not dicta. It appeared near the end of the Conclusion and Opinion section of the November 9, 2006 Administrative Order and provided the basis for the determination that SAIF was not liable for the October 24, 2005 medical services. At the time, claimant's shoulder surgery was considered to be for a noncompensable condition—a situation which has since changed with the acceptance of two new conditions: right shoulder impingement syndrome and right shoulder bursitis. Further, this conclusion also appeared to have been based on a review of Dr. Brown's October 24, 2005 chart note. In assessing claimant's condition, the director's November 9, 2006 order noted that Dr. Brown specifically referenced claimant's recent surgery, claimant's reported post surgical nausea, her additional problems with constipation and her stopping pain medication.

The director's October 30, 2007 Administrative Order on Remand makes no mention of the contrary finding in the director's previous order or the reason for the agency's evident change of mind on this issue. This is not a case where a contrary factual finding on this issue flows logically from the evidentiary context of ALJ Ogawa's order of remand. ALJ Ogawa's order merely required that WCD make findings fully applying the criteria in ORS 656.245(4)(b)(D). This is also not a case where the agency's inconsistent findings are unimportant to the final outcome. The director's finding that the hospital services claimant received on October 25, 2005 were directed toward noncompensable conditions provided the basis, in part, for the director's determination in the October 30, 2007 order that SAIF was not liable for these services.

OAR 436-001-0170(5) provides that: “[w]here appropriate, the administrative law judge may remand a dispute to the director for further administrative action.” Here, regrettably, I find that a remand is appropriate. WCD failed to offer any explanation or rationale for reaching contradictory conclusions in two orders addressing the same parties, the same issues and the same evidence. An explanation for this apparent change of opinion is necessary for a full, fair and meaningful review of the Administrative Order on Remand.

IT IS THEREFORE ORDERED that claimant’s appeal of the Administrative Order on Remand dated October 30, 2007 is remanded pursuant to OAR 436-001-0170(1) for further consideration.