

In the Managed Care of
Charles M. Davis, Claimant
Contested Case No: 09-034H
PROPOSED & FINAL ORDER

July 9, 2009

JULIO ORDONEZ, M.D., Petitioner
SAIF CORPORATION, Respondent

Before Steve Rissberger, Administrative Law Judge

Julio Ordonez, M.D., has requested a hearing in response to the Administrative Order that found that SAIF was not liable to pay for costs associated with a surgical procedure Dr. Ordonez performed on September 10, 2008. Pursuant to notice a hearing was held on June 11, 2009. Dr. Ordonez was represented in this matter by his attorney, Jodie Phillips Polich. Claimant was represented by his attorney, John Oswald. The employer, Eastern Oregon Freight and the insurer, SAIF, were represented by SAIF's attorney, Chad Kosieracki. Exhibits A, 1-30, 12A-B, 16A-B were received into evidence during the hearing. The record closed following final argument on the date of the hearing.

ISSUE STATEMENT

Managed Care Dispute—Substantial Evidence: Whether the Medical Review Unit's (MRU) February 11, 2009 Administrative Order finding SAIF not liable for costs incurred during an emergency surgical procedure performed by Dr. Ordonez is supported by substantial evidence in light of new evidence provided by both parties at a lengthy contested case hearing held on June 11, 2008?

FINDINGS OF FACT

The Findings of Fact set forth in the February 11, 2009 Administrative Order on pages 1 through 2 are hereby adopted and incorporated by reference. *See Liberty Northwest Ins. Corp. v.*, 205 Or App 59, 62-63 (2006). Since new evidence was presented at the contested cause hearing held on June 11, 2009 that was not in the record at the time the Administrative Order was issued, I make the following supplemental factual finding:

Dr. Ordonez's office submitted a retrocertification request to Caremark via fax on multiple occasions during a 30 day period following claimant's September 10, 2008 surgery.

CONCLUSIONS AND OPINION

At issue is SAIF's liability for costs resulting from the emergency back surgery Dr. Ordonez performed on September 10, 2008. SAIF argues that it is not liable to pay for claimant's surgical procedures because Dr. Ordonez failed to comply with Caremark's requirements regarding precertification and retrocertification of surgical procedures. Dr. Ordonez maintained that his office has complied with Caremark's procedures and that WCD erred in finding otherwise. If claimant prevails with respect to financial issues raised by this managed care dispute, he also seeks an award of assessed attorney fees

This is a managed care dispute arising under ORS 656.260. The MRU order “may be modified only if it is not supported by substantial evidence in the record or reflects an error of law. No new medical evidence or issues shall be admitted. *** Decisions by the director regarding medical disputes are subject to review under ORS 656.704.” ORS 656.260(16).¹ In conducting a substantial evidence review, I look to the whole record with respect to the issue being decided. “If an agency’s finding is reasonable, keeping in mind the evidence against the finding as well as the evidence supporting it, there is substantial evidence. *Kraft* 205 Or App at 62, citing *Armstrong v. Asten Hill Co.*, 90 Or App 200, 206 (1988).

ORS 656.245(4) provides that those workers who are subject to an MCO contract shall receive medical services in the manner prescribed in the contract. Here, the underlying contract between SAIF and Caremark, a certified MCO, was not made part of the record either during administrative review or during the contested case hearing. Relevant provisions from a guidebook entitled Caremark Comp. Administrative Manual provided the only available evidence of the Caremark contract. The Administrative Order contains the following factual findings regarding the contents of the Caremark Contract:

“Per the Caremark contract participating providers are required to obtain certification of medical necessity for MHN for any inpatient admission and/or surgery whether emergent or elective. Caremark will not review services and procedures submitted for review by participating providers more than thirty days after the services have been rendered. In cases where payment is disallowed due to lack of precertification and the provider fails to seek retrospective certification within thirty days of the actual service, provider agrees to hold the enrolled injured worker harmless for the cost of the un-reviewed, disallowed services.” (Ex. 26, p. 2.)

Despite the absence of the actual contract in the record, I am persuaded that these factual findings are supported by substantial evidence.

Dr. Ordonez performed surgery on an emergency basis on September 10, 2008. Since the urgency of claimant’s medical situation did not allow for precertification of the surgery, WCD’s reviewer “found that Dr. Ordonez was required to request retrocertification within 30 days of the surgery.” (Ex. 26, p. 3.) In effect, this case boils down to competing factual assertions regarding what the contract required, and what Dr. Ordonez’s office did in its efforts to obtain Caremark review of Dr. Ordonez’s retrocertification request.

At hearing and before MRU, Dr. Ordonez argued that his office made multiple requests for retroauthorization during the allowable 30 day period. WCD’s Administrative Order makes

¹ The dispute may also be remanded to the managed care organization for further evidence taking, correction or other necessary action if the Administrative Law Judge or the director determines that record has been improperly, incompletely or otherwise insufficiently developed. ORS 656.262(16). I considered remanding this matter to obtain a copy of Caremark’s contract. However, it seems unlikely that a remand would prove beneficial since neither party produced the contract either before MRU, or before me at hearing.

several references to this contention in the Findings of Fact section of the Order. It provides, in relevant part:

“Ms. Ordonez noted that she submitted a request to MHN late September or early October. Ms. Ordonez noted that she called MHN and was told that there was no record of a request for certification. Ms. Ordonez responded that she re-sent a request for recertification.” (Ex. 26, p. 2)

The Conclusion and Opinion portion of the Administrative Order contains a similar reference. There the order states: “[w]hile Dr Ordonez’ office indicated retro-certification was requested, Caremark had no record of receiving the request.” (Ex. 26, p. 3.)

What is striking about the quoted language is its neutrality. These references in the administrative order attribute assertions about the retrocertification request to an individual in Dr. Ordonez’s office—most frequently the office manager, Claudia Ordonez. The Administrative Order does not state, in a manner that could be considered an objective factual finding, that Dr. Ordonez’s office submitted a retrocertification request to Caremark. However, the order also does not state that Dr. Ordonez’s office failed to submit a retrocertification request to Caremark.

Likewise, the information provided by Caremark and SAIF during the MRU’s investigation of this matter is treated with equal neutrality. The Administrative Order merely notes that “Caremark had no record of receiving the [retrocertification] request.” The order does not address what this finding means with respect to Dr. Ordonez’s assertion that his office submitted a request for retrocertification on multiple occasions within the required 30 day period. No findings are included regarding the accuracy of Caremark’s recordkeeping procedures, the reliability of Claudia Ordonez’s supporting statements, or the relative persuasiveness of the evidence provided by either party.²

Despite the neutral character of MRU’s factual findings, the MRU eventually ruled in favor of SAIF and Caremark. The December 11, 2008 administrative order offered the following discussion:

“While Dr. Ordonez’ office indicated retrocertification was requested, Caremark had no record of receiving the request. Consequently, because Caremark did not retrospectively review the surgery within 30 days of the provision, the director finds that SAIF is not liable for reimbursement of all costs associated with

²A fact finder need not weigh the relative weight of evidence from opposing sources when the evidence does not necessarily conflict. In the absence of explicit findings in the administrative order, that appears to be approach taken here. Certainly, Dr. Ordonez’s and Caremark’s contentions are not irreconcilable. However, what follows logically from this neutral approach, attaching equal weight to the evidence offered by each party, is an inference that Dr. Ordonez submitted the recertification request, but the request either was not received by Caremark, or if it was received, no record was made of it.

the provision of the September 10, 2008 surgery Dr. Ordonez provide[sic]”

MRU’s reviewer could have reached this conclusion in one of two ways. Either the medical reviewer found that Claudia Ordonez was not credible and Dr. Ordonez did not submit a retrocertification request within 30 days, or the reviewer found that Caremark’s contract required that Dr. Ordonez do something more than submit a retrocertification request within 30 days in order to obtain a review of that request. Neither of these formulations is supported by substantial evidence in the record—particularly in light of the new evidence that was added to the record during a lengthy contested case hearing.³

The problem with the first option—as noted above—is that there are no explicit findings in the Administrative Order that assess the reliability or persuasiveness of the evidence offered by Dr. Ordonez’s office. SAIF understandably urged this interpretation of the Administrative Order at hearing. However, if MRU’s reviewer found that the evidence offered by Dr. Ordonez’s office was unreliable, or simply unpersuasive, then it is difficult to understand why there is no discussion of this determination in the Administrative Order.

Perhaps more importantly, Claudia Ordonez testified at length at the hearing regarding her efforts to submit a retrocertification request to Caremark within the required 30 day period. This is pivotal evidence that was simply not available to the MRU’s medical reviewer. This testimony was offered under oath, subject to lengthy and skillful cross-examination from SAIF’s attorney and was delivered in a straightforward and credible manner. No comparable witness or evidence was offered by SAIF or Caremark. Based on Ms. Ordonez’s testimony, and supporting documentary evidence offered by Dr. Ordonez’s legal counsel during the hearing, I am persuaded that Dr. Ordonez’s office submitted a retrocertification request by fax on multiple occasions during the required 30 day period.

I turn next to the administrative manual. Under basic principles of contract interpretation, any ambiguities in a contract’s content are generally resolved against the drafter of the contract. Here, SAIF has failed to provide a copy of Caremark’s contract. Relevant portions of the administrative manual merely state that retrocertification must be “submitted” within 30 days in order to be reviewed. The administrative manual does not contain language specifically addressing the situation posed by this controversy. It does not state what consequences might follow when a party submits a request for retrocertification, but the request is not received or simply is not reviewed by Caremark employees. Accordingly, I find there is insufficient evidence in this record to find that Dr. Ordonez violated any relevant provisions of Caremark’s MCO contract with respect to the doctor’s request for retrocertification following emergency surgery.

³ My role as ALJ in this case is somewhat unusual. Although I am limited to a substantial evidence review under OAR 436-001-0225 in considering MRU’s Administrative Order, I am not limited to considering the same evidentiary record as MRU, so long as any new evidence submitted at hearing is not medical evidence. The dispute between the parties in this case does not focus on medical issues. Thus, the record before me is very different than that before MRU.

The Administrative Order also held that claimant could not be held liable for any cost associated with the September 10, 2008. This portion of the Administrative Order was not contested by the parties at hearing.

In sum, that portion of the February 11, 2009 Administrative Order that found that SAIF is not liable for surgical costs because Dr. Ordonez's office failed to submit a timely recertification request is not supported by substantial evidence and, as a consequence, should be set aside. However, the portion of the order that found that claimant could not be held liable for costs stemming from the September 10, 2008 surgery should be affirmed.

During the hearing, the doctor's attorney also asserted entitlement to an assessed attorney fee. However, she has not cited to a statute or rule that authorizes such a fee to an attorney representing a medical provider in a case arising out of ORS 656.260. The attorney fees referred to in ORS 656.385 do not appear to apply to cases under ORS 656.260. Likewise, OAR 436-001-0265 does not appear to authorize a fee in a ORS 656.260 case. Accordingly, I find an attorney fee is not authorized by law.

ORDER

The Administrative Order issued on February 11, 2008 is reversed, in part, and affirmed, in part. That portion of the February 11, 2009 Administrative Order that found that SAIF is not liable for surgical costs because Dr. Ordonez's office failed to submit a timely recertification request is set aside. However, the portion of the order that found that claimant could not be held liable for costs stemming from the September 8, 2008 surgery is affirmed.

Dr. Ordonez's request for assessed attorney fees is denied.