

In the ORS 656.260 Managed Care Dispute of

Tammy L. Daugherty, Claimant

Contested Case No: 10-114H

PROPOSED & FINAL ORDER

December 28, 2010

TAMMY L. DAUGHERTY, Petitioner

SAIF CORPORATION, Respondent

Before Kate Donnelly, Administrative Law Judge

HISTORY OF THE CASE

Claimant appeals a June 30, 2010 Administrative Order of Dismissal (DMTX 10-0616) issued by the Medical Section Resolution Team (RT) of the Workers' Compensation Division (WCD), Department of Consumer and Business Services (DCBS). The RT concluded that the director had jurisdiction over the MCO dispute (whether an injection of the sacroiliac (SI) joint proposed by Dr. Kassube was appropriate) pursuant to ORS 656.260(6), ORS 656.245(7), and ORS 656.704(3)(a). The RT dismissed the MCO dispute without prejudice because the proposed medical treatment was for a condition that had not been accepted by the SAIF Corporation (SAIF) and claimant had not requested formal written acceptance of the condition as a new and/or medical condition pursuant to ORS 656.267(1). Additionally, RT determined that it did not have jurisdiction over the issue whether the proposed treatment was causally related to an accepted condition. The RT did not issue a Defer and Transfer Order referring the causal relationship issue to the Workers' Compensation Board, Hearings Division. Instead, claimant requested a hearing appealing the Order of Dismissal directly to the Workers' Compensation Board, Hearings Division.

Pursuant to notice, a hearing was scheduled for October 20, 2010, in Eugene, Oregon, before Administrative Law Judge (ALJ) Kate Donnelly. Claimant is represented by Allison B. Lesh. The employer, Bring Recycling, and its insurer, SAIF, are represented by Dennis Ulsted. Prior to the scheduled hearing, the parties agreed to submit this matter on the documentary record. The record closed on December 1, 2010, following receipt of the final written closing argument.

EVIDENTIARY ISSUES

On July 23, 2010, the WCD submitted Exhibits 1 through 35. On October 5, 2010, claimant offered into evidence Exhibit 31 (an October 1, 2010 handwritten response from Dr. Kassube), that was not a part of the record before the WCD. SAIF objected to admission of the new medical evidence pursuant to ORS 656.327(2) on the grounds that the proposed exhibit was not contained in the WCD's record and is therefore, not admissible in this proceeding.

OAR 436-001-0225(2) provides that new medical evidence or issues may not be admitted or considered in managed care disputes under ORS 656.260(16). Consequently, claimant's proposed Exhibit 31 is not admitted into the record.

The WCD's Exhibits 1 through 35 are hereby admitted into the record.

ISSUE

Whether the WCD erred as a matter of law when it issued the June 30, 2010 Administrative Order of Dismissal?

FINDINGS OF FACT

The Findings of Fact in the June 30, 2010 Administrative Order of Dismissal are accepted and incorporated in this Proposed and Final Order, with the following supplementation.

The accepted condition in this claim is a lumbar strain (Exs. 4; 8; 20).

On August 3, 2009, SAIF enrolled claimant in Oregon Health Systems (OHS), a managed care organization (MCO) (Ex. 7).

Claimant's attending physician is Dr. Ackerman (Exs. 7-3; 24).

Claimant was evaluated by Dr. Kassube on October 15, 2009. He recommended a repeat lumbar MRI, a neurosurgical consultation, and transforaminal epidural steroid injections at L4-5 (Ex. 12-4).

An October 26, 2009 lumbar MRI showed no change from the prior study (Ex. 12-5).

Dr. Kassube performed a transforaminal epidural steroid injection at L4-5 on November 17, 2009 (Ex. 12-5). On January 26, 2010, Dr. Kassube performed a second transforaminal steroid injection at L4-5 (Ex. 12-5).

On February 18, 2010, OHS informed Dr. Kassube that it was deferring a decision on his request to perform a right sacroiliac (SI) joint injection until it had received a response from Dr. Ackerman to its letter (Exs. 9; 10). Dr. Kassube withdrew his request to perform a right SI joint injection and informed OHS that he would revisit his request at claimant's next visit and determine if there was substantial evidence to proceed (Ex. 11-2).

On March 9, 2010, Dr. Swan, an occupational medicine physician, performed an insurer-requested medical examination (IME) (Ex. 12). His diagnoses were: (1) lumbar strain, resolved and medically stationary; (2) degenerative disc disease of the lumbar spine, preexisting; (3) degenerative joint disease of the SI joints, preexisting; and (4) excessive pain behavior (Ex. 12-9). Dr. Swan opined that the work incident of November 24, 2008 was not a material cause of the current need for treatment. He thought that the accepted condition of lumbar strain was medically stationary as of March 9, 2009 (Ex. 12-11).

On March 15, 2010, OHS informed SAIF that the physician reviewer had declined to review Dr. Kassube's request to perform a right SI joint injection because the requested procedure was not directed towards the accepted condition of lumbar strain (Ex. 13).

On April 14, 2010, Dr. Ackerman responded to SAIF's April 8, 2010 letter (Ex. 17). He agreed with Dr. Swan that claimant was capable of regular work in regards to the accepted lumbar strain. He also agreed with the medically stationary date in the report. Dr. Ackerman agreed that there was no permanent impairment due to the accepted lumbar strain and that any impairment noted in the March 9, 2010 exam was not related to the accepted lumbar strain. Finally, he agreed with Dr. Swan that the work incident was not a material contributing cause of claimant's current disability or need for treatment and that it was only a material contributing cause until March 9, 2009 (Ex. 17-2). Dr. Ackerman subsequently notified SAIF that claimant was medically stationary for the accepted lumbar strain on September 28, 2009 (Ex. 18).

A May 19, 2010 Notice of Closure awarded temporary disability and no award of permanent partial disability (Ex. 23-1).

On June 2, 2010, OHS informed Dr. Kassube that it was declining to review the request to perform a right SI joint injection because the requested procedure was not directed towards the accepted condition of lumbar strain (Ex. 26).

On June 8, 2010, claimant requested Director's review of the June 2, 2010 OHS denial of a right SI joint injection (Ex. 27).

On June 23, 2010, SAIF responded to the RT that the medical service had been disapproved for two reasons. SAIF contended that the service was inappropriate or ineffectual and also contended that the service was directed towards a new/omitted medical condition which claimant had not asked for acceptance (Ex. 29).

The WCD issued an Administrative Order of Dismissal on June 30, 2010 (Ex. 33).

On July 9, 2010, claimant requested a Contested Case Hearing regarding the June 30, 2010 Administrative Order of Dismissal (Ex. 34).

At the time of issuance of the June 30, 2010 Administrative Order of Dismissal, claimant has not requested that SAIF amend its acceptance to include an SI joint condition as a new and/or omitted medical condition.

FINDINGS OF ULTIMATE FACT

The proposed medical service was for a new and/or omitted medical condition involving the right SI joint that had not been accepted by SAIF at the time of the request for medical review and claimant had not yet requested formal written acceptance of the condition as a new and/or medical condition pursuant to ORS 656.267(1).

The RT had subject matter jurisdiction over the MCO dispute under ORS 656.260(14).

CONCLUSIONS AND REASONING

In her opening argument, claimant contends that the Director did not have subject matter jurisdiction to dismiss claimant's request for review because a causal relationship is at issue. Claimant argues that the Workers' Compensation Board (WCB) has jurisdiction over the causation issue. Consequently, claimant requests that the Director's order be vacated and transferred to the WCB's Hearings Division for further proceedings.

SAIF responds that the Director has subject matter jurisdiction because it is a dispute involving an action of an MCO and therefore, it is a dispute under ORS 656.260(14). Additionally, SAIF argues that there is no causation issue unless there is first a claim. In the present case, SAIF notes that claimant has not made a claim for a new and/or omitted medical condition involving the right SI joint pursuant to ORS 656.267. Consequently, SAIF argues that there is no compensability issue to refer over to the Hearings Division.

In her reply argument, claimant acknowledges that at the time of her appeal of the MCO's June 2, 2010 denial of the SI joint injection, the Director had jurisdiction over that appeal. However, claimant argues that once SAIF alleged that the injection was both inappropriate and related to a condition not yet accepted, SAIF raised a compensability issue and, therefore, created a matter concerning a claim over which the Hearings Division has jurisdiction. Claimant contends that the Director should have issued a Defer and Transfer Order to the Hearings Division rather than issuing an Order of Dismissal. Claimant requests that the matter be remanded back to the Director so that it can issue a Defer and Transfer Order.

Claimant has the burden of showing that the Administrative Order is not supported by substantial evidence or that it reflects an error of law. OAR 436-001-0225(2).

This is a managed care dispute arising under ORS 656.260. The administrative order may be modified only if it is not supported by substantial evidence in the record or reflects an error of law. New medical evidence or issues may not be admitted or considered. Decisions by the Director regarding medical disputes are subject to review under ORS 656.704. ORS 656.260(16); OAR 436-001-0225(2).

ORS 656.704(3)(b)(B) vests the Director of the Workers' Compensation Division (Director) with jurisdiction over any dispute regarding whether medical services are excessive, inappropriate, ineffectual or in violation of the rules regarding performance of medical services or a determination of whether medical services for an accepted condition qualify as compensable medical services among those listed in ORS 656.245(1)(c). Any dispute that requires a determination of whether a sufficient causal relationship exists between medical services and an accepted claim to establish compensability is a matter concerning a claim within the jurisdiction of the Board. ORS 656.704(3)(b)(C).

ORS 656.267(1) requires the worker to clearly request formal written acceptance of a new and/or omitted medical condition claim from the insurer. ORS 656.262(6)(d) provides, in relevant part, that an injured worker who believes that a condition has been incorrectly omitted from a notice of acceptance, or that the notice is otherwise deficient, first must communicate in writing to the insurer or self-insured employer the worker's objections to the notice pursuant to ORS 656.267.

Here, at the time of the Order of Dismissal, claimant had not made a new and/or omitted condition claim for an SI joint condition. Nor does the evidence support a conclusion that the requested SI joint injection was directed at the accepted lumbar strain condition. Consequently, I conclude that there was no causal relationship issue to be referred to the WCB Hearings Division. Under such circumstances, I find that the RT did not err as a matter of law when it issued an Order of Dismissal rather than a Defer and Transfer Order.

Accordingly, the June 30, 2010 Administrative Order of Dismissal is affirmed.

ORDER

IT IS THEREFORE ORDERED that the June 30, 2010 Administrative Order of Dismissal (DMTX 10-0616) is affirmed.