

In the ORS 656.327 Medical Treatment Dispute of

Michael V. Walker, Claimant

Contested Case No: 09-190H

PROPOSED & FINAL ORDER

April 6, 2010

WALKER LIBERTY NW INSURANCE CORPORATION , Petitioner
MICHAEL PETITIONER, Respondent

Before Steve Rissberger, Administrative Law Judge

Liberty Northwest Insurance Corp., (Liberty) has requested a hearing in response to an Administrative Order, issued by the Workers Compensation Division (WCD) on November 3, 2009, that found that the insurer was liable for costs associated with a right L4-5 radiofrequency ablation procedure proposed by R. Scott Brown M.D. Pursuant to notice, a hearing was held on March 5, 2010. Liberty and Northwest Wade Corp. were represented by attorney, Katherine M. Caldwell. Claimant was represented by attorney, Douglas S. Green. Exhibits 1-148 were eventually received into evidence. The record closed on March 8, 2010.

ISSUE STATEMENT

Medical Treatment Dispute—Substantial Evidence: Whether WCD’s determination in its November 3, 2009 Administrative Order that Liberty was time barred by OAR 436-010-0250(5) from objecting to claimant’s proposed elective surgical procedure was supported by substantial evidence?

FINDINGS OF FACT

The Findings of Fact set forth in the February 11, 2009 Administrative Order on pages 1 through 9 are hereby adopted and incorporated by reference. *See Liberty Northwest Ins. Corp. v.*, 205 Or App 59, 62-63 (2006).

CONCLUSIONS AND OPINION

At issue is WCD’s Administrative Order of November 3, 2009, holding that Liberty was liable for costs associated with a right L4-5 radiofrequency ablation procedure proposed by R. Scott Brown, M.D. Liberty maintains that WCD erred when it concluded that the insurer had not filed a timely request for review challenging Dr. Brown’s medical services proposal. Claimant contends that the Administrative order should be upheld.

This is a medical treatment dispute arising under ORS 656.327. The WCD 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). 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).

OAR 436-010-0250 establishes a procedure for approval of elective surgery requests. A surgeon must give the insurer, at least, seven days notice of the proposed surgery. OAR 436-010-0250(2). Notification must provide the medical information that substantiates the need for surgery, the surgical location and an approximate time. Here, Dr. Brown notified Liberty on August 24, 2009 that he was requesting a radiofrequency ablation at L4-5. On August 25, 2009, Liberty responded with an elective surgery form (Form 440-3228), stating that it would not be seeking a consultant exam to evaluate the medical merits of the proposed procedure. Liberty ultimately determined that it opposed the procedure as medically unnecessary.

When a recommending physician determines that agreement cannot be reached regarding an elective surgery procedure, than the physician must notify the insurer, the worker and the worker's representative by signing the elective surgery form (Form 440-3228) or providing other written notice. OAR 436-010-0250(4)(c). Under OAR 436-010-0250(5), if the insurer believes the proposed surgery is excessive, inappropriate or ineffectual, the insurer must request administrative review by the director within 21 days of receiving notice from the recommending physician that an agreement cannot be reached.

In WCD's Administrative Order, a medical reviewer determined that Liberty failed to meet the 21 day deadline for requesting administrative review by the director contained in OAR 436-010-0250(5). Thus, the Administrative Order found that Liberty had lost its ability to oppose Dr. Brown's proposed surgical procedure because the insurer considered the procedure to be excessive, inappropriate or ineffectual.

As Liberty's legal counsel noted at hearing, there are number of problems with WCD's holding. First, it is not clear that Dr. Brown ever provided Liberty with the written notice required by OAR 436-010-0250(4)(c). The Administrative Order states: [t]he director concludes that since Liberty did not request administrative review by September 14, 2009, Liberty is thus barred from disputing whether the proposed surgery is excessive, inappropriate or ineffectual." (Ex. 146, p. 9.) Counting backward from September 14, 2009, this means that WCD found that the 21 day deadline contained in OAR 436-010-0250(5) was triggered on August 24, 2009. On that date, Dr. Brown requested pre-authorization for a right radiofrequency ablation from Liberty. (Ex. 146, p. 8.) This was Dr. Brown's first notice to Liberty that he wanted to perform this procedure. (See Ex. 146, p. 9.) Thus, as WCD found elsewhere in its Administrative Order, Dr. Brown's August 24, 2009 preauthorization request complied with the initial notice requirement contained in OAR 436-010-0250(2).

This is where the reasoning underlying WCD's Administrative Order becomes somewhat contradictory and misapplies portions, at least, of OAR 436-010-0250. Dr. Brown's August 24, 2009 preauthorization request could not have constituted both Dr. Brown's initial seven day notice of proposed elective surgery under OAR 436-010-0250(2) and Dr. Brown's determination that an agreement could not be reached for surgery under OAR 436-010-0250(4)(c). To hold otherwise would be illogical and unreasonable. It would render use of the 440-3228 form and much of the content of OAR 436-010-0250 essentially meaningless. Accordingly, I conclude that WCD erred when it found in its Administrative Order that Dr. Brown's preauthorization request triggered the 21 day deadline under OAR 436-010-0250(5). As a consequence, WCD also erred

when it found that Liberty had until September 14, 2009 to file a request for administrative review.

However, the legal inquiry required by Liberty's hearing request does not necessarily end there. WCD also found in the Administrative Order that "Liberty did not request administrative review by the director." Liberty's legal counsel acknowledged this fact during final argument. Thus, the remaining issue is whether Dr. Brown ever provided the notice required by OAR 436-010-0250(4)(c), triggering the 21 day time limit under OAR 436-010-0250(5). If Dr. Brown did so, then the ultimate determination contained in WCD's Administrative Order—that Liberty was time barred under OAR 436-010-0250(5) from opposing claimant's elective surgery—still could be sustained.

The specific verbiage of OAR 436-010-0250(4)(c) provides:

"(c) When the recommending physician determines that agreement cannot be reached and that further attempts to resolve the matter would be futile, the recommending physician must notify the insurer, the worker and the worker's representative of such by signing **Form 440-3228** or providing other written notification.

Here, Dr. Brown never returned a signed copy of Form 440-3228 to Liberty. Although Dr. Brown eventually submitted a September 22, 2009 letter to WCD requesting reconsideration, this letter did not constitute the kind of "written notification" required by OAR 436-010-0250(4)(c). (Ex. 140) Dr. Brown's September 22, 2009 letter made no reference to efforts to resolve the disagreement over the surgical procedure he had proposed. Even more significantly, the letter did not indicate that copies were sent to the insurer, the worker and the worker's representative. Liberty could not have been expected to respond to a written notification that it did not receive.

In sum, I am persuaded that WCD's administrative order is not supported by substantial evidence and, as a consequence, reflects an error of law. Liberty was not required to submit a request for administrative review within the 21 day period established by OAR 436-010-0250(5) because the recommending physician never returned a signed copy of the Form 440-3228 or provided the insurer with the written notification required by OAR 436-010-0250(4)(c). Accordingly, Liberty is not barred by OAR 436-010-0250(5) from asserting that the proposed surgery in this case is excessive, inappropriate or ineffectual.

The parties at hearing requested that I also address the merits of Liberty's objections to the right L4-5 radiofrequency ablation procedure proposed by Dr. Brown. However, WCD did not reach this issue in its Administrative Order of November 3, 2009. The Hearing Division lacks jurisdiction to address medical treatment issues that have not been reviewed by and decided, in the first instance, by WCD.

ORDER

The Administrative Order issued on February 11, 2008 is set aside. Liberty is not time barred under OAR 436-010-0250(5) from opposing claimant's proposed surgery because Liberty contends the procedure is excessive, inappropriate or ineffectual.