

In the ORS 656.260 Managed Care Dispute of

Gayle J. Williams, Claimant

Contested Case No: 10-029H, 10-047H

INTERIM ORDER

May 13, 2010

SAIF CORPORATION, Petitioner

GAYLE J. WILLIAMS, Respondent

Before Bruce D. Smith, Administrative Law Judge

This matter is before the undersigned Administrative Law Judge on claimant's motions to compel discovery, and to dismiss the request for hearing of Oregon Health Systems, Inc. (OHS). Claimant is represented by attorney Christopher D. Moore. Employer South Coast Lumber Company and its insurer SAIF Corporation are represented by their attorney Michael G. Fetrow. OHS is represented by attorney Arden J. Olson.

FINDINGS OF FACT

Claimant suffered a compensable injury to her spine on March 24, 1986 (Ex. 3); and the claim was ultimately accepted for thoracic/lumbar strain, and retrolisthesis at L3-4. (Ex. 82). On October 13, 1998 claimant was enrolled in OHS, SAIF's managed care organization (MCO). (Ex. 57).

On July 17, 2009 Dr. Ross submitted a precertification request to OHS, seeking authorization to perform an L3-4 fusion. (Ex. 83). On July 20, 2009 OHS responded to Dr. Ross, indicating that the request for surgical authorization had been deferred, pending receipt of additional medical information. (Ex. 84). On July 30, 2009 OHS wrote again to Dr. Ross, to the same effect. (Ex. 85).

OHS wrote a second July 30, 2009 letter to Dr. Ross, informing him that the requested surgery did not meet OHS criteria, and asking him to withdraw the request; but in his hand-written response Dr. Ross reiterated his request for authorization to proceed with surgery. (Ex. 86).

On August 7, 2009 OHS wrote to Dr. Ross, indicating that his request for precertification of L3-4 fusion surgery had been disapproved. (Ex. 88). Claimant's attorney promptly requested administrative review on August 18, 2009. (Ex. 90-1). On August 21, 2009 the director issued an Administrative Order of Dismissal, finding that WCD was without jurisdiction to consider claimant's appeal, as claimant had not exhausted the MCO's dispute resolution process. (Ex. 90).

On August 26, 2009 OHS wrote to claimant's attorney, acknowledging his appeal of the August 7, 2009 decision disapproving the proposed surgery; and informing him that the issue would be reviewed in accordance with its dispute resolution procedures. (Ex. 91). OHS informed the attorney, "[y]ou will be notified of **the final outcome** of our review by 10/26/09." (*Id.*). (Emphasis added).

On October 20, 2009 OHS wrote again to claimant's attorney, informing him that its Medical Review Committee had met on October 13, 2009; and had "voted unanimously to uphold the disapproval of the request from Dr. Ross for L3-4 fusion surgery." (Ex. 93-1). Accompanying the letter was a copy of the detailed, seven-page report of the Committee, explaining its decision. (Ex. 93-2 through -8). The letter and report were separately signed by OHS Medical Director Charles P. Moore, MD.

The October 20, 2009 letter itself was short and to the point; and concluded with the following:

"NOTICE TO THE WORKER AND ALL OTHER PARTIES: If you want to appeal this decision, you must notify the director of the Department of Consumer and Business Services (DCBS) in writing within 60 days of the mailing date of this notice. Send written requests for review to: Department of Consumer and Business Services, Workers' Compensation Division, Medical Section, 350 Winter Street NE, PO Box 14480, Salem, OR 97309-0405. If you do not notify DCBS in writing within 60 days, you will lose all rights to appeal the decision. For assistance, you may call the Workers' Compensation Division's toll-free hotline at 1-800-452-0288 and ask to speak with a Benefit Consultant." (Ex. 93-1). (Bold in original).

On October 23, 2009 claimant's attorney sent a copy of the decision to DCBS at the address indicated, and requested review in accordance with the notice provided by the MCO. (Ex. 94).

On October 27, 2009 the director's Medical Resolution Team sent SAIF a Notice of Required Action on a Medical Dispute; and sent copies to claimant, her attorney, and OHS. (Ex. 96). SAIF delivered its response the same day by courier, indicating in the Specification of Disputed Medical Issues form that the only issue was that the disputed medical service is "excessive, inappropriate, [and/or] ineffectual." (Ex. 97). SAIF sent a copy of its response to OHS. (*Id.*).

On February 17, 2010 the director found that SAIF was liable for the disputed L3-4 fusion procedure. (Ex. 117). On March 1, 2010 SAIF timely requested a hearing, specifying the issues in dispute as medical services under ORS 656.245; and managed care dispute under ORS 656.260. (Ex. 118).

On March 17, 2010 OHS also timely requested a hearing, contending that when claimant sought administrative review on October 26, 2009 the MCO had not yet completed its "internal dispute process," and had not issued its final decision. (Ex. 119).

SAIF has offered a six-page excerpt from the Provider Manual used by OHS in its medical review process. (Ex. 73A).

CONCLUSIONS OF LAW AND OPINION

Motion to Compel Discovery

Claimant moves for an order compelling discovery of the Provider Manual of OHS. For the reasons set forth below, I deny claimant's motion.

Claimant asserts that she is entitled to production of the Provider Manual used by OHS to determine whether to approve the proposed surgery. Claimant argues that, since SAIF has offered a portion of the manual, she is entitled to the entire document, "to see if there is anything relevant in the rest of the manual." (Rec.).

SAIF and OHS contend that the manual is protected as confidential "data" under ORS 656.260(6); and argue that they cannot be compelled to produce it absent a showing of necessity. I agree.

Under ORS 656.260(6),

"[d]ata generated by or received in connection with [provision of medical services to injured workers] * * * or of any review thereof, shall be confidential, and shall not be disclosed except as considered necessary by the director in the administration of this chapter."

"Data," as used in this section, has been interpreted to include, *inter alia*, "all documents" relating to a claim, including the MCO contract. *Thompson-Springer v. SAIF Corp.*, 205 Or App 568 (2006) (affirming without opinion Proposed and Final Contested Case Hearing Order in DCBS No. H03-084). Without having seen the manual in question I cannot determine whether it contains any arguably relevant "data," much less whether the director might consider any such material "necessary * * * in the administration of [ORS Chapter 656]." The only substantive questions¹ before me are whether the director erred in determining that the disputed medical services are compensable, and whether the director's decision is supported by substantial evidence. There is nothing in this record, however, to suggest that the director had to consult the Provider Manual in reaching her decision. Accordingly, I conclude that the manual was not essential to the director's decision, and I find that its production is not necessary here.

Motion to Dismiss Request for Hearing

Claimant moves for an order dismissing the request for hearing of insurer's Managed Care Organization (MCO), OHS. For the reasons set forth below, I deny claimant's motion.

Claimant contends that the request for hearing by OHS should be dismissed, based upon two² jurisdictional challenges: (1) lack of OHS standing as a "party" to appeal the director's

¹ I have found herein that OHS has not waived its jurisdictional challenge; and will allow claimant to renew her motion to compel discovery should OHS choose to rely on the Provider Manual to assert lack of jurisdiction.

² Claimant asserts a third argument, which is a factual dispute over whether the MCO had completed its internal dispute resolution process. Both because this argument does not go to jurisdiction, and because it underlies claimant's second jurisdictional challenge, I do not address it separately.

February 17, 2010 Administrative Order; and (2) failure of OHS to exhaust its administrative remedies.

Claimant first argues that OHS does not have standing to dispute the director's decision. Citing the definition found in ORS 656.005(21), claimant contends that an MCO is not a "party" with regard to Workers' Compensation matters covered under ORS Chapter 656. Claimant notes that under ORS 656.260(14) only "a worker, insurer, self-insured employer or the attending physician" has standing to seek administrative review of an action of the MCO; and argues that, by extension, only those parties can challenge the director's resulting order under ORS 656.260(15).

OHS responds that under OAR 436-010-0005(31) the MCO is designated (together with the worker, insurer and medical providers) as a "party;" and is therefore entitled under OAR 436-010-0008(13) to challenge the director's Administrative Order here. That rule reads as follows:

"(13) Any party who disagrees with an action or administrative order under these rules may request a hearing by filing a request for hearing as provided in OAR 436-001-0019 within 30 days of the mailing date of an order under ORS 656.245, 656.260, or 656.327, or within 60 days of the mailing date of an order under ORS 656.247. OAR 436-001 applies to the hearing."

Claimant is correct that under ORS 656.260(14) only the worker, insurer (or self-insured employer) or attending physician can seek administrative review of an MCO's treatment decision. Why, after all, would the MCO want the director to review the MCO's own decision? Once the director has completed review of the disputed issues, however, under OAR 436-010-0008(13) "[a]ny party," including the MCO, is entitled to request a hearing.

Finally, the ORS 656.005(21) definition cited by claimant for "party" is subject to the limitation stated in ORS 656.003: "**Except where the context otherwise requires**, the definitions given in this chapter govern its construction." (Emphasis added). I agree with OHS that here the context requires what the above-cited administrative rules hold – namely, that the MCO whose medical judgment is at issue is entitled to participate in the contested case hearing as a party.

The second prong of claimant's argument has its basis in a factual dispute: OHS contends that claimant's October 23, 2009 request for administrative review should have been dismissed as premature, because its own internal review process had not yet run its course; and that claimant had therefore failed to exhaust her administrative remedies. Claimant disagrees, and argues that, by not raising this issue before the director, it is OHS that has failed to exhaust **its** administrative remedies. Claimant points out that under OAR 436-001-0225(2) no new issues can be raised at hearing in medical treatment disputes and managed care disputes; and contends that the Hearings Division is without jurisdiction to address the exhaustion issue raised by OHS for the first time here.

OHS does not deny that its exhaustion issue was not explicitly before the director; but does deny that this is a "new issue" here. Instead, OHS argues that the director simply erred in

failing to dismiss claimant's request for review *sua sponte*, on the grounds that claimant had not exhausted her rights under the MCO's internal dispute resolution process. Noting that OAR 436-010-0008(4) requires the worker to "complete the internal dispute resolution process within the MCO before requesting an administrative review," OHS contends that the director should have dismissed claimant's request for review for lack of jurisdiction. This, indeed, is what the director had done in the Administrative Order of Dismissal it issued on August 21, 2009 (Ex. 90), in response to claimant's earlier (premature) request for review. I agree with OHS that it has not waived the jurisdiction issue.

While I agree with claimant that under OAR 436-001-0225(2) – and indeed under ORS 656.260(16) – no new (substantive) issues are admissible at the contested case hearing, it is well settled that lack of subject matter jurisdiction cannot be waived. *See, e.g., Evalyn V. Stevens*, 59 Van Natta 1925, 1926 (2007). Accordingly, OHS is entitled to raise the jurisdiction issue at any stage of the proceedings, including the contested case hearing. *Jerry W. Breazeale*, 55 Van Natta 2051, 2053 (2003).

ORDER

IT IS HEREBY ORDERED that claimant's motion to compel discovery of the OHS Provider Manual of is denied.

IT IS FURTHER ORDERED that claimant's motion to dismiss the request for hearing of OHS is denied.