

In the ORS 656.260 Managed Care Dispute of

**RICHARD E. ROBUCK, Claimant**

Contested Case No: H04-144

**FINAL ORDER**

January 27, 2006

RICHARD E. ROBUCK, Petitioner

SAIF CORPORATION, Respondent

Before John Shilts, Administrator, Workers' Compensation Division

---

On May 16, 2005, Administrative Law Judge (ALJ) Catherine P. Coburn, of the Office of Administrative Hearings, issued a Proposed and Final Order (Order) in this matter. Petitioner (claimant) through his attorney, Philip F. Schuster II, submitted exceptions to the Order on May 27, 2005. On June 17, 2005, Respondent (insurer) through its attorney, Jerome B. Larkin, issued its response to claimant's exceptions. Claimant filed his reply on June 27, 2005.

This matter comes before the director for a final order. The issues are whether the ALJ: 1) properly excluded exhibits 34 through 39; 2) abused her discretion in declining to remand this case to the managed care organization (MCO); and 3) properly determined that the TENS unit rental was not related to the compensable condition. I limit my review to the issues raised in the exceptions. Having reviewed the proposed order and parties' arguments, I affirm with the following supplementation.

I adopt and supplement the ALJ's Findings of Fact as follows:

(1) On February 17, 2004, the insurer issued a Modified Notice of Acceptance and Current Combined Condition Denial. Through that document, insurer accepted the combined condition -- lumbosacral strain/sprain combined with degenerative disc disease -- beginning on July 2, 2003, but denied that combined condition on and after February 17, 2004. (Exs. 7 and 23).<sup>1</sup>

(2) On July 14, 2004, Insurer issued a partial denial of claimant's sacroiliac joint inflammation.

(3) On July 23, 2004, MRU sent a letter to SAIF Corporation and John Kafrouni, M.D. indicating that a request for Administrative Review regarding the TENS unit rental had been filed. The letter also stated: "Notice to Injured Worker and any other party: Parties may submit any pertinent records and related correspondence." A copy of the letter was sent to claimant and claimant's attorney. (Ex. 26).

(4) A Notice of Contested Case Hearing (Notice) issued on November 29, 2004. It contained the sentence: "[t]his hearing will be conducted pursuant to ORS 656.704 and 726 and

---

<sup>1</sup> This finding broadens the ALJ's #3 Finding of Fact.

183.310 et seq, the Attorney General's Model Rules of Procedure under the Administrative Procedures Act, and OAR 436-001.<sup>2</sup>

(5) Claimant appealed the partial denial, and claimant and insurer resolved the issue through a Stipulation and Disputed Claim Settlement Agreement (DCS), which was approved by an ALJ David D. Lipton on November 4, 2004. (Exs. 39 & 40).

(6) The conditions included within the DCS include sacroiliac joint inflammation, sacroiliac joint dysfunction, sacroiliac joint injury, sacroiliac joint pain and sacroiliac joint arthritis. (Ex. 39).

The underlying dispute between the parties is whether the insurer is liable for the cost of a one month rental of a TENS unit. The Medical Review Unit (MRU), by Administrative Order dated August 23, 2004, found that because Dr. Kafrouni did not relate the prescribed TENS unit to the accepted lumbosacral sprain/strain, the need for treatment was not due to the compensable condition. Therefore, the insurer was not liable for the cost of the rental of the TENS unit.

Claimant requested a hearing on August 26, 2004. In the proposed order, the ALJ affirmed MRU's order concluding that there were no errors of law and that the TENS unit was not prescribed for treatment of the compensable lumbosacral sprain/strain. In response to the Proposed Order, claimant argues that the ALJ erred by 1) sustaining the insurer's objection to Exhibits 34 through 39; and 2) failing to remand this matter to the MCO.

### **1. Exclusion of Exhibits 34 through 39**

The Oregon Administrative Procedures Act applies to contested case hearings before the Director of the Department of Consumer and Business Services (Director). ORS 183.415 provides, in part:

- (1) In a contested case, all parties shall be afforded an opportunity for hearing after reasonable notice, served personally or by registered or certified mail.
- (2) The notice shall include:
  - (a) A statement of the party's right to a hearing, or a statement of the time and place of the hearing;
  - (b) A statement of the authority and jurisdiction under which the hearing is to be held;
  - (c) A reference to the particular sections of the statutes and rules involved; and
  - (d) A short and plain statement of the matters asserted or charged.

---

<sup>2</sup> The two subsequent Notices contained a typographical error in that they referenced OAR 437-001, instead of OAR 436-001. OAR-437-001 applies to OR-OSHA cases.

Therefore, WCD, on behalf of the Director, was required to advise claimant 1) that he has a right to a hearing or notification of the time and place of the hearing; 2) of the agency authority under which the hearing would be held; 3) the statutory provisions and administrative rules involved in the dispute; and 4) the factual basis for the decision in the case.

Claimant contends that he was misled and prejudiced in his ability to prepare his case because the Notice of Hearing did not reference ORS 656.260(16) or OAR 436-001-0225(1). ORS 656.260 is the statutory provision applicable to MCOs; subsection (16) contains the provision that applies to MCO disputes and provides:

At the contested case hearing, the administrative 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.** The dispute may also be remanded to the managed care organization for further evidence taking, correction or other necessary action if the director determines the record has been improperly, incompletely or otherwise insufficiently developed. Decisions by the director regarding medical disputes are subject to review under ORS chapter 183.

(Emphasis added.) Pursuant to her authority, the Director adopted Oregon Administrative Rules, Chapter 436 Division 001, which applies to contested case hearings. OAR 436-001-0225(1) provides:

Review of medical service (ORS 656.245 and 656.247(3)(a)) and treatment (ORS 656.327 and 656.260) disputes is for substantial evidence or error of law. **New medical evidence or issues may not be considered at the contested-case hearing.**

(Emphasis added.) The first Notice issued on November 29, 2004 and contained the statement, “[t]he issue for hearing is Mr. Robuck sustained a compensable injury on July 2, 2003. SAIF initially accepted lumbosacral sprain/strain under ORS chapter 656 and OAR Chapter 436.”<sup>3</sup> That Notice also contained the sentence: “[t]his hearing will be conducted pursuant to ORS 656.704 and 726 and 183.310 et seq, the Attorney General’s Model Rules of Procedure under the Administrative Procedures Act, and OAR 436-001.”

Claimant accurately asserts that the Notice does not reference ORS 656.260 or more specifically subsection (16). Claimant is wrong that OAR 436-001-0225(1) is not referenced. While the first Notice does not reference that specific rule, it does state that the hearing will be conducted pursuant to OAR 436-001. Division 001 of Chapter 436 of the Administrative Rules is titled “Procedural Rules Governing Rulemaking and Hearings.” Therefore, by referencing Division 001, claimant was on notice that all rules within that division would be applicable to the hearing, including OAR 436-001-0225(1).

---

<sup>3</sup> WCD concedes that the issue is inartfully stated.

The Court of Appeals addressed application of ORS 183.415 to contested case hearings in *Drayton v. Department of Transportation*, 186 Or App 1, 11-12 (2003). Relying on the decision in *Villanueva v. Board of Psychologist Examiners*,<sup>4</sup> 175 Or App 345, 27 P3d 1100 (2001), *adh'd to on recons*, 179 Or App 134 (2002), the court stated that an agency providing notice of charges or claims in a contested case must include a reference to any administrative rules involved. *Id.* at 356. In that case, the board's notice of proposed disciplinary action alleged that there was a violation of one set of rules, but the final order concluded that the psychologist had violated another rule, one that was not mentioned in the proposed notice. The court reversed holding that the board was obligated to provide notice of the rule that formed the basis of its final decision. *Id.*

Here, claimant was clearly on notice that all of the administrative rules in OAR 436 Division 001 would apply to the contested case hearing at issue. Therefore, claimant had notice that evidence limitation contained in OAR 436-001-0225(1) would apply to the hearing.

Claimant accurately states that the Notices do not reference ORS 656.260(16). Nevertheless, the record shows that claimant was notified many times, prior to the mailing of the Notices, that ORS 656.260 applied to this case. Initially, claimant was notified on February 13, 2004, that he was enrolled in an MCO. That document put claimant on notice that decisions regarding his treatment would be made by an MCO. ORS 656.260 applies to issues regarding MCOs. Thus, claimant should have known that ORS 656.260 was the law to be applied to issues regarding MCO decisions and resultant disputes.

Additionally, prior to requesting a review of the medical dispute involved in this case, Claimant requested a review of a medical dispute involving physical therapy treatment. On July 23, 2004, MRU sent a letter related to the physical therapy dispute to SAIF Corporation and Dr. Kafrouni and copied the claimant and his attorney. The letter expressly states that the dispute arises under ORS 656.260; and contains the statement "Notice to Injured Worker and any other party: Parties may submit any pertinent records and related correspondence." (Ex. 26). Thus, as of July 23, 2004, claimant had actual notice that ORS 656.260 applied to the dispute with the MCO and that he had the right to provide documents during the dispute review process.

The dispositive fact is that MRU's Administrative Order of August 23, 2004, expressly advised Claimant that the review was pursuant to the Director's authority and pursuant to ORS 656.260 and OAR 436-010-0008. The notice required by ORS 183.415 is provided through a combination of the Administrative Order and the Notices. The Administrative Order contains the right to a hearing, statutory and administrative rules involved in the dispute before MRU, and the factual basis for the decision in this case. The Notices contain the time and place of the hearing and additional statutory and administrative rule citations. Claimant therefore, was timely and properly notified that ORS 656.260 applies to medical disputes with MCOs. *Drayton* does not require an agency to specifically state every subsection to each and every administrative rule and statutory provision that will apply during a contested case proceeding.

---

<sup>4</sup> The Board of Psychologist Examiners disciplined a psychologist for treating a child without the custodial parent's consent.

Claimant also contends that he was misled by the Notices because they state that exhibits may be submitted at hearing. Claimant's reliance on that statement is misplaced for two reasons. First, the statement is consistent with OAR 137-003-0605(4), which states, in relevant part:

Nothing in this rule precludes any party or the agency from seeking to introduce documentary evidence in addition to evidence described in section (2) during the telephone hearing. The administrative law judge shall receive such evidence, subject to the applicable rules of evidence, if inclusion in the record is necessary to conduct a full and fair hearing.

A party's right to submit documents does not automatically result in admission of those documents. The ALJ's authority to accept and admit evidence is separate from the party's right of submission. Moreover, the Notices did not state that all evidence submitted would be admitted into the record. If claimant had submitted exhibits that did not constitute "new medical evidence," it is quite possible the evidence would have been admitted. The only limitation imposed on admission of evidence at hearing is that "no new medical evidence" may be admitted. Therefore, the statement contained in the Notices was consistent with the law and should not have misled claimant. Claimant erred in concluding that any evidence he submitted would be admitted at hearing.

In addition, claimant raises a constitutional argument. In support of his position, claimant relied on *Koskela v. Willamette Industries*, 331 Or 362 (2000). In *Koskela*, the Court addressed the issue of whether a statute limiting claimant's right to present testimony at a contested case hearing violated his due process rights. Citing *Mathews v. Eldridge*, 424 US 319 (1976), the court held that due process required personal contact between claimant and ALJ where credibility was at issue for evaluating the permanent total disability claim. Factually, *Koskela* differs from this case because here claimant's credibility is not a dispositive factor to a decision on the issue of whether the TENS unit ordered by his physician related to the compensable condition.

*Mathews v. Eldridge*, 424 US 319 (1976) provides a three-part analysis: 1) the extent of the private interest that is at stake; 2) the adequacy of the process provided to safeguard the interest; and 3) the state's interest balanced against the cost of added procedural safeguards. *Id.* at 25; *Koskela* 331 at 378 to 382. The private interest here is small – one month's rental of a TENS unit. The process allows the MRU of WCD, which is an impartial reviewer with medical knowledge, to review medical disputes. The insurer, doctors, and the injured worker are provided an opportunity to provide information to MRU to allow for a fair decision. ORS 656.260(16) only applies after the review by MRU. During the review process all of the involved parties have an opportunity to submit evidence. Absent the limitation, a situation could arise where a party might purposely not submit medical evidence until after the review by MRU, which could negatively impact the efficiencies of the process. Therefore, the limitation on evidence at the contested case process as imposed by ORS 656.260(16) does not violate claimant's due process rights.

## 2. Remand

Claimant contended that the ALJ erred in not remanding this case to the MCO because the Notices misled him into believing that medical evidence could be submitted at hearing. Claimant's argument is not persuasive because he was put on notice that ORS 656.260 applied to medical disputes by MRU's letter dated July 23, 2004. Moreover, by the time the Notices issued, the law barred him from submitting new medical evidence because MRU had already issued its Administrative Order. Therefore, the ALJ did not err in refusing to admit the documents or remand to the MCO.

## 3. Relationship of TENS Unit to Accepted Condition

Lastly, claimant argues that there is no evidence supporting the ALJ's determination regarding the relationship of the proposed treatment to the compensable condition. As the proponent, claimant has the burden of proving a fact or position. ORS 183.450(2); *Salem Decorating v. National Council on Comp. Ins.*, 116 Or App 166, 170 (1992), *rev den* 315 Or 643 (1993). Therefore, claimant bears the burden of proving by a preponderance of evidence that the administrative order is incorrect. *Harris v. SAIF*, 292 Or 683 (1982) (general rule regarding allocation of burden of proof is that burden is on the proponent of the fact or position.); *Cook v. Employment Div.*, 47 Or App 437, *rev den* 290 Or 157 (1980) (In the absence of legislation adopting a different standard of proof, the standard in an administrative hearing is preponderance of evidence.) Proof by a preponderance of evidence means that the fact finder is persuaded that the facts asserted are more likely true than false. *Riley Hill General Contractor v. Tandy Corp.*, 303 Or 390 (1987). Moreover, the review at the contested case is limited to a review for substantial evidence and errors of law. ORS 656.260(16).

An insurer is obligated to provide medical services for compensable conditions for such period as the nature of the injury or the process of recovery requires for the worker's lifetime. ORS 656.245(1)(a)&(b). This claim was accepted for lumbosacral strain/sprain combined with degenerative disc disease. However, the insurer issued two denials. The combined condition was denied effective February 17, 2004 and affirmed by an Opinion and Order dated June 10, 2004. On July 14, 2004, the insured issued a partial denial of claimant's sacroiliac joint inflammation, and the compensability of that condition was resolved through a DCS, which was approved by an ALJ on November 4, 2004.

Dr. Kafrouni, in his closing report, stated that claimant's PSIS symptoms benefited from the use of the TENS unit. However, there is no evidence that the PSIS symptoms are related to the accepted condition instead of the conditions that have been combined. In fact, since the combined condition was determined not to be compensable effective February 17, 2004, there is substantial evidence supporting MRU's determination that the disputed TENS unit rental was not related to the compensable conditions and therefore not reimbursable.

***ATTORNEY FEES***

Claimant has not prevailed in a contested case hearing and is not entitled to an attorney fee. ORS 656.385(1).

**ORDER**

IT IS HEREBY ORDERED that:

The Administrative Order dated August 23, 2004 is affirmed.