In the ORS 656.245 Medical Service Dispute of

Howard D. Smith, Claimant

Contested Case No: 06-059H

PROPOSED & FINAL ORDER

August 30, 2007

HOWARD D. SMITH, Petitioner
LIBERTY NW INSURANCE CORP, Respondent

Before Kate Donnelly, Administrative Law Judge

Claimant appealed the Director's Administrative Order DMS 05-1200 on January 5, 2006 (Ex. 38). Pursuant to notice, a hearing convened in Eugene, Oregon on November 15, 2006 before Administrative Law Judge Kate Donnelly. Claimant was present and was represented by his attorney, David A. Vinson. The employer, Little W Logging, Inc., and its insurer, Liberty Northwest Insurance Corporation (Liberty), were represented by Meg M. Carman. The hearing was continued to allow claimant's attorney the opportunity to review the Medical Review Unit (MRU) Exhibits in the above cases, which he had not received.[1]

On April 24, 2007, claimant submitted a Motion to Remand to the Workers' Compensation Division's MRU for reconsideration and clarification of the above listed Order. Liberty's attorney responded to claimant's Motion to Remand on May 3, 2007. On May 9, 2007, claimant replied to Liberty's response.

An Interim Order issued on June 4, 2007, denying claimant's Motion for Remand. The June 4, 2007 Interim Order is hereby incorporated by reference into this Proposed and Final Order.

Unrecorded telephonic closing arguments were held on August 6, 2007. The record closed on August 8, 2007 upon receipt of claimant's submission of Exhibit 3a.

EVIDENTIARY ISSUES

During closing arguments on August 6, 2007, claimant referred to Exhibit 3a that he had intended to submit into evidence at the November 15, 2006 hearing. The undersigned Administrative Law Judge, requested that claimant submit Exhibit 3a in order to determine whether it should be admitted into the record. Liberty objected to admission of Exhibit 3a on the grounds that it was not a part of the MRU's evidentiary record in this case. Exhibit 3a consists of prescription and mileage reimbursement checks received by claimant from Liberty NW through December 28, 2005. Having reviewed the exhibit list submitted by MRU regarding WCB Case No. 06-00059H, it does not appear that Exhibit 3a was part of the evidentiary record considered by the MRU. Consequently, I find that Exhibit 3a should not be admitted into the evidentiary record. *See Liberty Northwest Ins. Corp. v. Kraft*, 205 Or App 59 (2006) (under a substantial evidence review, the administrative law judge may not supplement the evidentiary

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[1] Claimant's attorney stated that he had received the Exhibit list Indexes, but the actual exhibits were not enclosed.

record developed by the MRU).

On November 9, 2006, claimant submitted an exhibit packet containing Exhibits 1 through 14. It was not admitted at the hearing or as part of the Interim Order. Consequently, I review these exhibits to determine whether any or all of them are admissible at this time. This exhibit packet contains several duplicates of the MRU's exhibits submitted in the various case numbers.[2] Additionally, claimant's exhibit packet contains documents that were not a part of the evidentiary record developed by the MRU. Finally, some of the proposed exhibits are not relevant to the issue in this case. Consequently, I decline to admit claimant's proposed Exhibits 1 through 14.

WCD Exhibits 1 through 38 in WCB Case No. 06-00059H were admitted into evidence in the June 4, 2007 Interim Order. Therefore, the record consists of Exhibits 1 through 38. *See* OAR 436-001-0225(2).

ISSUE

Whether substantial evidence supports the MRU's December 30, 2005 Administrative Order of Dismissal (DMS 05-1200) (Ex. 37). The stated issue was:

> "whether Liberty Northwest Insurance Corporation (Liberty) is liable for reimbursement to [claimant] for prescriptions Proventil and Combivent purchased on March 20, and April 2, 2003; Combivent on April 25 and May 16, 2003; theophylline on June 4 and July 3, 2003; Proventil and Combivent on July 3, 2003; Proventil, theophylline and Combivent on August 13, 2003; Combivent and theophylline on September 18, 2003; Combivent and Pulmicort on April 26, 2004; theophylline on February 14, 2005; Skelaxin on February 22, 2005; theophylline and Azmacort on April 1, 2005; Skelaxin on April 8, 2005; Combivent and Proventil on April 23, 2005; Azmacort on July 8, 2005; Proventil and Combivent on July 21, 2005; Pulmicort on August 16, 2005; and theophylline on August 3, 2005" (Ex. 37-1).

FINDINGS OF FACT

I adopt the "Findings of Fact" as set forth in the December 30, 2005 Administrative Order of Dismissal (DMS 05-1200) with the following supplementation (*See* Ex. 37).

Claimant sustained a compensable injury on March 25, 1986. At that time, the insurer was not required to issue a Notice of Acceptance. In 2002, the insurer stopped payment of various prescriptions and medical bills. Claimant requested Administrative Review from the

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[2] For example, claimant's Exhibit 1 is listed as Exhibit 1 in all three Exhibit lists submitted by the MRU. Exhibit 2 is a September 24, 2004 printout of Bi-Mart Pharmacy prescriptions from January 30, 2002 through September 22, 2004. This Exhibit is listed as Exhibit 31 in the evidentiary record for DMS 05-1200. Consequently, I decline to admit this exhibit as it is already a part of the record in this case.

MRU on April 22, 2004. The MRU deferred review until compensability was finally determined (Ex. 57).

A July 5, 2005 Order on Review issued by the Workers' Compensation Board (WCB) affirmed the ALJ's December 8, 2004 Opinion and Order finding that the disputed medical services were compensably related to the accepted injury claim.

On July 25, 2005, the MRU resumed Administrative Review of the medical services dispute under Contested Case Nos. 06-006H and 06-058H.[3]

On November 18, 2005, claimant faxed MRU a list of medical services that had allegedly not been reimbursed (Ex. 29).

On November 29, 2005, claimant provided the MRU with a list of claimant's medical expenses (Ex. 31). MRU considered this a new request for Administrative Review (*See* Ex. 37).

On December 2, 2005, the MRU faxed claimant a follow-up message that the November 18, 2005 attached issues submitted for review appeared to have been paid and, therefore, would not be reviewed (Ex. 32).

On December 9, 2005, the MRU faxed a second follow-up message to claimant regarding his November 18, 2005 fax and November 29, 2005 letter. The MRU noted that the attached issues were duplicates of previously submitted requests currently under review. Consequently, the MRU would not open them for review (Ex. 33). Additionally, the MRU faxed claimant a message that these attached issues appeared to have been paid (Ex. 34).

On December 23, 2005, Liberty provided MRU with information requested via fax on December 14, 2005 (Ex. 36). Liberty noted that some of the information had been provided in its response of December 9, 2005. However, Liberty had identified multiple newly submitted prescription reimbursements totaling $327.22. Ms. James, Liberty's Senior Case Manager, stated that these newly submitted prescriptions had been sent for payment and would be paid within the allotted 30 days (Ex. 36).

A December 30, 2005 Administrative Order of Dismissal found that there was no issue ripe for review regarding those prescriptions that Liberty had paid prior to the request for Administrative Review (Ex. 37-2). For the prescriptions of Proventil and Combivent purchased on March 20 and April 2, 2003, and Combivent purchased on April 25, 2003, the MRU found there was no issue ripe for review because Liberty had not received a written request for reimbursement and supporting documentation until presented with the request for Administrative Review (Ex. 37-3). Consequently, the Director ordered that the matter be dismissed (Ex. 37-3).

CONCLUSIONS OF LAW AND OPINION

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).

[3] Those orders are addressed in a separate Proposed and Final Order issued today, August 30, 2007.

The scope of review in this case is controlled by OAR 436-001-0225(2), which provides, in part, that in medical service and medical treatment disputes under ORS 656.245, 656.247(3)(a) and 656.327, the administrative law judge may modify the Director's Order only if it is not supported by substantial evidence in the record or if it reflects an error of law.

Under "substantial evidence" review, the reviewing tribunal "look[s] at the whole record with respect to the issue being decided, rather than at one piece of evidence in isolation. 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." *Armstrong v. Asten-Hill Co.,* 90 Or App 200, 206 (1988). Thus, "substantial evidence" review "is not what has been referred to as the 'any evidence' rule * * * but it is also not *de novo* review." *Id.* (citation omitted); *see also United States Bakery v. Shaw*, 199 Or App 286, 288-89 (2005). Under a substantial evidence review, the administrative law judge may not supplement the evidentiary record developed by the MRU. *Liberty Northwest Ins. Corp. v. Kraft,* 205 Or App 59, 62-63 (2006).

After review of the MRU's evidentiary record in this case, I conclude that the December 30, 2005 Administrative Order of Dismissal is supported by substantial evidence. Liberty responded with the payment dates for each specific prescription listed in the request for Administrative Review (Ex. 37-2). Per Liberty, reimbursement was issued on various dates including August 11, 2005, March 22, 2005, May 9, 2005, May 11, 2005, and August 26, 2005. This is supported by Liberty's "Medical Cost Summary List" showing payments made on those dates (Ex. 1-1). Claimant has not submitted any contrary evidence that the listed bills have not been paid by Liberty.

Under such circumstances, I find that the MRU correctly concluded that the matter should be dismissed. Because the December 30, 2005 Administrative Order of Dismissal is supported by substantial evidence and does not contain errors of law, the Order should be affirmed.

IT IS THEREFORE ORDERED, that the December 30, 2005 Administrative Order of Dismissal in MRU Order No. DMS 05-1200 is affirmed.