

In the Medical Services of
Shiloh M. Mitchell, Claimant
Contested Case No: 07-130H
PROPOSED & FINAL ORDER

April 23, 2008

COMMERCE & INDUSTRY INSURANCE CO., Petitioner
SHILOH M. MITCHELL, Respondent

Before John Mark Mills, Administrative Law Judge

Hearing in this matter was set before Administrative Law Judge John Mark Mills in Portland, Oregon on February 28, 2008. Claimant was represented by his attorney, L. Leslie Bush. The employer, Plant Services Inc., and its insurer, AIG Domestic Claims, were represented by their attorney, Jerald P. Keene.

Prior to the time of the hearing the parties advised that the matter could be submitted on the documentary record. The WCD record on review, exhibits 1 through 29 were received into evidence. No additional testimony was offered by the parties. Written closing arguments were submitted, the last of which was received on April 3, 2008 and the record was closed on that date.

ISSUES

The insurer requests review of the Administrative Order entered in this matter on November 13, 2007, which directed the insurer to pay for a proposed surgery and to pay an assessed attorney fee to claimant's counsel in the sum of \$740.00. Claimant defends the order and seeks a further assessed attorney fee. The order was issued by the Medical Review Unit (MRU) of the Workers' Compensation Division (WCD).

FINDINGS OF FACT

I adopt the findings of facts set forth in the Administrative Order. No additional findings of fact are made. The scope of review in this case, which concerns medical treatment, is limited to the substantial evidence and error of law standard. While OAR 436-001-0225(2) arguably suggests that some type of new evidence, other than new medical evidence, can be received during such a hearing, the Court of Appeals has made it clear that substantial evidence review does not contemplate that the reviewing body will make additional or supplemental findings of fact. *Liberty NW Insurance Co, v. Kraft*, 205 Or App 59 (2006).

Scope of Review

Under the Administrative Rule cited above, I 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. The insurer's position is that the Director's Order contains errors of law.

CONCLUSIONS AND OPINION

Claimant's treating physician requested authorization to perform a right shoulder surgery on September 18, 2007. Because of the urgency of claimant's condition, the doctor scheduled the surgery for September 20th. As the order points out, under OAR 436-010-0250(2), dealing with medical services, except as otherwise provided in a situation where there is MCO coverage, when the attending physician or surgeon believes elective surgery is necessary, the doctor must give the insurer seven days notice of the surgery. The insurer must respond to that request in some fashion within seven days. If it does not, under OAR 436-010-0250(5), its failure means that the insurer is barred from later disputing the reasonableness of the surgery and its liable for the surgery.

In this case, the insurer did not respond to the surgery request as provided for by the above referenced rule. Rather, pursuant to ORS 656.245(4)(a) it, through its MCO, Oregon Health Systems (OHS) attempted to enroll in claimant in OSH's MCO. Letters to this effect were sent out by OHS to claimant at his PO Box address and were copied to claimant's treating surgeon. The letters were not sent to claimant at his street address or to claimant's counsel. The insurer was aware that claimant was represented.

Claimant's surgeon on September 24th, wrote a note indicating that he felt that it was inappropriate to change claimant's physician given the nature of his condition and the surgeon's prior course of care with the claimant. A second surgery scheduled for September 27, 2007 was cancelled and on that date claimant's counsel wrote to MRU requesting review of the surgery issue. Counsel pointed out that neither claimant nor claimant's counsel had received notice of the MCO enrollment and requested that the attending surgeon remain claimant's treating physician and that MRU direct that this surgery go forward.

MRU requested the insurer's position and the insurer responded that MRU had no jurisdiction over the dispute because claimant had been enrolled in an MCO and the surgeon was not an MCO provider.

However, on October 11, 2007, OHS, after receiving correspondence from the insurer through its counsel and the correspondence sent by claimant's counsel to MRU sent out a new series of letters acknowledging its mistake in not copying claimant's counsel with the initial enrollment letter and sending a new copy to claimant at his street address rather than the prior post address to where the initial notice was sent. The letter indicated that "because copies of the letter are being sent to you and Mr. Mitchell with this letter, that changes the mailing date of those notices to today's date." The letter went on to indicate that the surgery was approved and that Dr. Ulmer's request to remain the attending physician had also been approved.

As I view the MRU Order, based on the above circumstances, I conclude essentially on three different bases that MRU had jurisdiction over the surgery issue and lawfully approved the surgery despite the initial MCO enrollment letter and found that the insurer was precluded from objecting to the reasonableness of the surgery. On review the insurer takes a position that these conclusions by MRU reflect an error of law.

First, the insurer argues that MRU improperly concluded that claimant was not subject to the MCO contract at the time of the initial request for MRU review because claimant's counsel was not copied with the initial MCO letter as required by OAR 436-010-0275(4). The insurer relies on the Director's Proposed and Final Order issued in *Adrian Guzman*, to support the proposition that a failure to provide notice of the MCO enrollment to claimant's counsel does not somehow void the enrollment. 10 CCHR 459 (2005). I do not find the *Guzman* case to be particularly helpful or dispositive in this matter.

The facts of *Guzman* are distinguishable. In *Guzman* there was only a lack of notice a medical provider. Here there was a lack of notice to claimant's counsel and apparently some degree of the lack of notice to the claimant. In addition, in this case, there was a second MCO enrollment letter sent which essentially rescinded the first letter. Also, beyond the differences in facts, the *Guzman* decision is an Order of the Director which followed exceptions to an ALJ Order which reversed the initial MRU Order in that case. At the MRU level, lack of notice to the medical provider was not an issue that was raised. That issue was first raised by the ALJ and one of the exceptions to the ALJ's Order was that the ALJ's ruling was overly broad because of its consideration of that issue. In *Guzman* the Director agreed that the ALJ's ruling was overly broad. In addition, while in *Guzman* the employer characterized the lack of notice as the key issue, the Director indicated that he did not have to reach that issue and ultimately affirmed the MRU Order on the grounds under which it had initially resolved the case. Those grounds did not involve the lack of notice to the medical provider.

Accordingly, I do not find the *Guzman* is persuasive authority for the insurer's position. In addition, MRU's conclusion that claimant was not subject to the MCO contract, either at the time of the initial request for review of the surgery dispute and by the time the seven days had already run for the insurer to review the surgery request, was based not only on the failure of notice to claimant's counsel, but on the fact that the MCO, after discovering the problem with notice, had reissued the enrollment and changed its effective date to October 11, 2007. I do not find that the Order's conclusion that claimant was not subject to the MCO contract constitutes an error of law under those circumstances.

The insurer argues, and I interpret this as a second error of law argument, that the October 11th letter from the MCO, which was clearly intended to reissue claimant's enrollment in the MCO and change the effective date to October 11th, did not necessarily have that legal effect. The insurer does not provide any authority for this position. Clearly the MCO felt that a mistake had been made in terms of its initial notice of the enrollment to claimant and therefore reissued the enrollment and changed its effective date to a later date. Why either the insurer or its agent, the MCO, would not have the lawful authority to do so in those circumstances is unexplained.

Finally, the insurer contends that it was error of law for MRU to essentially determine that the seven day rule regarding the processing of a surgery request trumped ORS 656.245(4)(a) insofar as it establishes the effective date of an MCO enrollment. I agree that if that was what MRU did, it would be inappropriate. However, as I review the Order, MRU's decision is based upon its evaluation and conclusion that claimant was not subject to the MCO contract at the time of the initial request for administrative review and until October 11, 2007, at which point the seven day period for the insurer response to the initial surgery request had expired. Accordingly,

ORS 656.245(4)(a) did not yet apply.

In conclusion, I do not find that the insurer has sustained its burden of proving that the MRU Order should be modified based upon errors of law.

I next address attorney fees. I note that the insurer also contests the fee awarded by the MRU Order under ORS 656.385(1) on essentially two bases, first that there was no dispute before MRU and second that claimant's counsel was not instrumental in obtaining a benefit to claimant. With respect to the first point, there was a dispute before MRU as to the surgery. By the time claimant's counsel initially requested MRU review the seven days to process the surgery request had lapsed and in response to that request for review the insurer continued to take the position that the surgery request would not be processed except through the MCO. Further, I agree that claimant's counsel was instrumental in resolving that matter in a more expeditious manner than otherwise occurred, even though ultimately the surgery was approved.

However, in terms of an award of fees at this level for claimant prevailing against the insurer's request for review of the MRU Order, there at this point no real benefit to claimant. Regardless of the outcome of this review, claimant's surgery will be paid for either by virtue of the MRU Order or by virtue of the MCO authorization of the surgery. There is no attempt in this proceeding to reduce or disallow any compensation due claimant. Accordingly, the only issue involving benefits has to do with whether claimant's award of an assessed fee in the MRU Order should be approved. Claimant's counsel at this stage of the proceeding is not entitled to a further assessed fee for prevailing against an attempt to reduce the award of a prior fee. *See e.g. Dotson v. Bohemia*, 80 Or App 233 (1986).

ORDER

IT IS HEREBY ORDERED that the order issued by MRU in this matter on November 13, 2007 is approved.