

In the ORS 656.260 Managed Care Dispute of

**Sandra Holmstedt, Claimant**

Contested Case No: 10-169H

**PROPOSED & FINAL ORDER**

January 25, 2012

SANDRA HOLMSTEDT, Petitioner

SAIF CORPORATION, Respondent

Before John Mark Mills, Administrative Law Judge

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Hearing in this matter was set before Administrative Law Judge John Mark Mills in Astoria, Oregon on June 28, 2011. This specific matter and other related matters were postponed in order to allow Motions to Dismiss to be filed in a number of the cases. Several of the cases were bifurcated and the parties directed to brief those matters on a documentary record. The Motions to Dismiss were denied. Claimant was represented in this proceeding by her attorney, Jodie Phillips Polich. The employer, Joseph Shawa, D.M.D., and his insurer, SAIF Corporation were represented by their attorney, Larry Schucht. No proceedings were recorded. The WCD record on review, Exs. 1 through 76, was received into evidence.

**ISSUES**

Claimant contests the Administrative Order issued in this matter (MMS 10-0872) on September 14, 2010. Claimant seeks the award of assessed attorney fees should she prevail. The insurer defends the Order.

**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 denied by a managed care organization (MCO), is limited to the substantial evidence or error of law standard. ORS 656.260(16). No new issues or medical evidence can be offered in the hearing before the Administrative Law Judge. While that evidentiary provision arguably suggests that some type of new evidence other than medical evidence can be received during a hearing, the Court of Appeals has made it clear that substantial evidence review does not contemplate that the Administrative Law Judge will make supplemental findings of fact. *Liberty Northwest Ins. Co. v. Kraft*, 205 Or 59 (2006).

**CONCLUSIONS AND OPINION**

The issue in this case concerns claimant's appeal of a Director's Order which approved the MCO's refusal to allow claimant to obtain surgery with a physician, Dr. Delashaw, who is not part of the MCO's panel of physicians. As noted above, claimant has the burden of proving that the Director's Order is not supported by substantial evidence or reflects errors of law.

The factual background of this case is not in dispute. Claimant sustained a compensable injury on December 2, 2004. The claim has been accepted for claimant's L5-S1 condition. Claimant became subject to the MCO in May of 2005. She has been seeing doctors who initially proposed surgery at L5-S1, but who have subsequently proposed surgery at both that level and L4-5. The L4-5 condition has been denied and the denial is final so it a non-compensable condition.

In December of 2009, claimant saw Dr. Delashaw on referral from Dr. Voeller, her main attending physician. Dr. Delashaw is not on the MCO panel. He proposed surgery at both levels on February 24, 2010. Dr. Voeller requested that the MCO approve this off panel physician. That request was denied on March 23, 2010. The matter went to the Director for review and the Director's Order issued, denying claimant relief, on September 14, 2010.

Claimant's position that the off panel referral should have been granted is based on two factors. First, she asserts that she is comfortable with the physician and would rather have him perform the surgery than another physician who is on the panel. Second, Dr. Delashaw is a preferred provider on claimant's private insurance through her employer. Claimant is concerned about potential financial liability for the surgery if it is performed by a MCO physician given that the L4-5 condition is in denied status. Accordingly, claimant would prefer, for financial reasons, to have Dr. Delashaw, a preferred provider under her private insurance, perform the surgery.

As far as I can tell, there are no specific administrative rules or statutes that govern this issue, or for that matter, provide a basis for the relief that claimant requests. There are statutes, for example ORS 656.245(4) and ORS 656.260(3)(g) which address circumstances where claimant can have a non-panel physician be a provider subject to the rules of the MCO. However, none of those statutes apply to the circumstances at issue in this case.

However, the MCO did not deny claimant's request for off panel referral because there was no statutory or administrative basis for such a referral. Rather the MCO denied it on the basis that there was no medical necessity established and the Director reviewed that determination. The record makes it clear that the MCO has a number of physicians who could perform the surgery on its panel. Substantial evidence supports the Director's finding that there has been no medical necessity established for an off panel physician based on either claimant's preference to go forward with Dr. Delashaw or the financial issues which may exist.

In addition, while there is no statutory or rule basis for an off panel referral based on the type of financial concerns that claimant has, those concerns under certain circumstances could be completely understandable and the Director's Order did address that issue as well. Substantial evidence supports the Director's finding that the MCO provides a number of physicians on its panel who are qualified to perform the surgery claimant is seeking. The Order further concluded that there was no reason to believe that none of those physicians were also on the preferred provider list for claimant's private insurance. Claimant did not provide any evidence to that effect. Claimant has the burden of proof. Accordingly, substantial evidence supports the Director's Order finding that claimant did not establish a potential financial liability if she was not allowed to have the surgery performed by an off panel provider.

Accordingly, I do not find any basis for modifying the Directors' Order in this case. I approve the Order.

**ORDER**

IT IS HEREBY ORDERED that substantial evidence supports the Order issued in this matter, Order MMS 10-0872, on September 14, 2010 and that the Order is not based on errors on law.