
In the ORS 656.260 Managed Care Dispute of

Robert L. Churnside, Claimant

Contested Case No: 15-058H

Administrative Order No: MTX 15-0531

PROPOSED & FINAL ORDER

June 6, 2016

ROBERT L. CHURNSIDE, Petitioner

SAIF CORPORATION, Respondent

Before Nicholas M. Sencer, Administrative Law Judge

Pursuant to notice, the hearing was scheduled to convene on January 29, 2016 in Durham, Oregon, before Administrative Law Judge, Nicholas M. Sencer. By agreement of the parties, the case was submitted for decision based on the admitted exhibits and written closing arguments. Peter O. Hansen in association with Julene M. Quinn represent claimant. Janelle Newbry represents the employer, Moore Excavation, Inc., and its insurer, SAIF Corporation.

Exhibits 1 through 72, together with interlineated exhibits 7A, 9A-B, 10A, 16A, 20A, 23A-B, 24A, 29A, 30A, 33A, 38A, 40A, 42A, 45A, 46A, 57A, 59A, 60A, 62A, 63A and 70A are admitted into the record. Please note that two exhibits 71 were submitted; claimant's submission of 71 has been renumbered 70A. Further, pursuant to SAIF's closing argument, the original exhibit 5 has been replaced with the exhibit identified on the cover sheet.

The record closed on May 23, 2016 upon my receipt of claimant's reply argument.

SCOPE OF REVIEW

The administrative order may be modified at hearing only if it is not supported by substantial evidence in the record or if it reflects an error of law. No new medical evidence or issues shall be admitted. ORS 656.260(16).

ISSUES

Claimant challenges Administrative Order MTX 15-0531 dated October 2, 2015. The issue is claimant's right to choose his non-MCO panel primary care physician as his attending physician. Claimant asserts that the Administrative Order under review, and the Dispute Resolution Summary dated May 11, 2015 on which it is based, erroneously concluded that the MCO has the authority to select claimant's attending physician. Claimant also seeks a penalty.

In its responding argument, the insurer asserts,

“The clear intent of the MCO statutory provisions is to create an alternate determination of attending physician status than in those claims without MCO enrollment. An MCO is

authorized to designate a worker's attending physician or to designate categories of attending physicians."

For the reasons discussed below, I conclude that Administrative Order MTX 15-0531 reflects an error of law. Accordingly, it will be modified.

SUMMARY OF FACTS

Claimant sustained a compensable injury on February 13, 2014. On July 28, 2014, the insurer issued a Modified Notice of Acceptance that sets forth the following accepted conditions: forehead laceration, displaced left sinus fracture with extension into left orbital roof, anterior frontal subarachnoid hemorrhage, traumatic brain injury, tinnitus secondary to the traumatic brain injury, hypsomnia secondary to the traumatic brain injury, and left shoulder strain. (Ex 20A).

On February 24, 2014, Robert Mullen, M.D., claimant's long-term primary care physician, became his attending physician with respect to the February 13, 2014 injury claim. (Ex 3). On March 19, 2014, the insurer enrolled claimant in Majoris Health Systems, an MCO. (Ex 5). The insurer advised claimant that Adventist Health was not a member of the MCO and that he must receive care from an MCO provider. (Ex 5). Consequently, claimant selected Danielle Erb, M.D., an MCO provider, as his attending physician. Dr. Erb examined claimant on April 3, 2014. (Ex 6).

On November 4, 2014, claimant signed an 827-form advising the insurer of his decision to change attending physician to Dr. Mullen. (Ex 34). On February 18, 2015, claimant's attorney sent a letter to Dr. Erb in which he wrote, "I was informed that you advised Mr. Churnside that Dr. Mullen could not be his attending physician because he was not in Majoris." (Ex 40). Dr. Erb responded in handwriting on that letter, "I am a doctor not a lawyer. He can choose Dr. Mullen and they can deal with SAIF and Majoris. I do not control this." (Ex 40).

On March 2, 2015, Dr. Mullen signed the following statement prepared by claimant's attorney,

"This will confirm that you have been Mr. Churnside's long time physician prior to his injury. You maintain his records and have a documented history of treatment of him. You have agreed to refer him to the managed care organization for any specialized treatment, including physical therapy, to be furnished by another provider that he may require. You have agreed to comply with all the rules, terms and conditions regarding services performed by the managed care organization and provide treatment that is determined to be medically appropriate according to the service utilization review process of the managed care organization." (Ex 41).

On March 6, 2015, Majoris wrote a letter to Dr. Mullen advising that he could apply for authorization as a temporary care provider under the MCO agreement. (Ex 43).

On March 11, 2015, Majoris sent a letter to claimant in which it advised that the MCO, “has determined the most appropriate level of care would best be provided by a Physical Medicine and Rehabilitation physician with a focus on brain injuries. Your current attending physician, Dr. Danielle Erb, not only is a Physical Medicine and Rehabilitation specialist, she is also a Certified Medical Specialist in Brain Injury Medicine. We recommend you continue to treat with Dr. Erb as your attending physician. Should you wish to select another network provider, you may access a list of Physical Medicine and Rehabilitation Specialists on our website.” (Ex 44).

This letter included a notice of appeal rights. By letter dated March 17, 2015, claimant’s attorney asserted an appeal based on the MCO’s, “refusal to allow Mr. Churnside to select his long time primary care physician as his attending physician.” (Ex 47).

On March 26, 2015, Majoris wrote a letter to Dr. Mullen in which it advised, “This letter is to advise that you have been authorized as a Temporary Majoris Health Systems Inc provider as it relates to the above claim.” (Ex 51).

On May 11, 2015, Majoris wrote a letter to claimant’s attorney advising,

“After careful review of the medical record, the Committee voted unanimously to uphold the notification issued on March 11, 2015 indicating that the appropriate Level of Care for this worker is with a Physical Medicine and Rehabilitation Specialist. Further, the Committee also upheld the authorization of Dr. Robert Mullen as a Temporary Credentialed Provider for this claim.” (Ex 60A).

The Committee Decision section of the MCO Internal Dispute Resolution Process report explains that the issue it was considering was an appeal of the “March 11, 2015 level of care notification, as well as the authorization of Dr. Robert Mullen as a Temporary Credentialed Provider for Mr. Churnside’s claim.” (Ex 61, p 8). Without directly saying so, the report appears to equate the worker’s choice of attending physician with its determination concerning the appropriate “level of care.” In other words, if the MCO believes that the appropriate level of care should be a particular medical specialty, then the worker must choose an attending physician from its list of doctors in that specialty, be it orthopedics, neurology or, as in this case, physical medicine and rehabilitation medicine.

On October 2, 2015, the Workers’ Compensation Division issued Administrative Order MXT 15-0531. In its Conclusion and Opinion, the medical reviewer wrote,

“The issue before the director is Majoris’ May 11, 2015, decision regarding whether the most appropriate level of care for the worker is with a physical medicine and rehabilitation specialist, and whether Dr. Mullen continuing as a temporary credentialed provider is appropriate.” (Ex 71, p 9).

The reviewer then wrote,

“The director further finds that Dr. Mullen meets all the criteria pursuant to ORS 656.260(4)(g) for Majoris to authorize him as a temporary MCO provider. In fact, Majoris is mandated to authorize Dr. Mullen as a provider, which they have done and upheld in its May 11, 2015, decision. . . . The worker, through his attorney, contends that Majoris is denying his option to choose his primary care physician as his attending physician. The director disagrees. In accordance with its terms and condition of the MCO contract, with which Dr. Mullen has agreed to comply, and the certified plan and provider manual, Majoris has made a decision regarding the appropriate level of care based on its review of the medical record and determined that the appropriate level of care exceeds the limitations of Dr. Mullen’s expertise; and that a physical medicine and rehabilitation specialist with a focus on head injuries is a more suitable attending physician considering the specialized nature of their expertise and training.” (Ex 71, p 11).

Based on the foregoing, the medical reviewer affirmed the May 11, 2015 MCO decision in its entirety. (Ex 71, p 12).

CONCLUSIONS OF LAW AND OPINION

It is well settled that workers’ compensation claimant’s have the right under Oregon law to select their attending physician and to change attending physicians at least twice. OAR 436-010-0220(2). There is nothing in the MCO statutes or rules that abrogates that right.

ORS 656.260 governs the procedure for certifying MCO providers. Pursuant to that statute, workers are entitled to receive compensable medical treatment from a primary care physician who is not a member of the MCO in which the insurer enrolls them if the provider complies with various requirements. ORS 656.260(4)(g)(A). The record establishes that Dr. Mullen complied with the applicable requirements and that the MCO has authorized him to provide compensable medical services. The MCO has not, however, recognized Dr. Mullen as claimant’s attending physician.

The MCO has taken the position that, given claimant’s accepted conditions, Dr. Erb is better qualified than Dr. Mullen to act as his attending physician. However, there is no provision in either the statutes or rules that allows the MCO to substitute its judgment for that of the worker in making such a decision. The only applicable provision concerns the situation in which a non-MCO primary care physician renders treatment that is determined to be medically inappropriate. ORS 656.260(4)(g)(A)(iii). There is no such allegation in this case.

The director has promulgated rules regulating the conduct of MCOs. OAR 436-015. OAR 436-015-0095 is titled “Insurer’s Rights and Duties” and provides,

“Insurers shall also comply with OAR 436-010 and 436-009 when carrying out their duties under these rules.”

Most significantly, OAR 436-010-0220 provides,

(1) The worker may have only one attending physician or authorized nurse practitioner at a time. Concurrent treatment or services by other medical providers, including specialist physicians, must be sufficiently different that separate medical skills are needed for proper care, and must be based on a written referral by the attending physician or authorized nurse practitioner. The referral must specify any limitations and a copy must be sent to the insurer. A specialist physician is authorized to provide or order all compensable medical services and treatment he or she considers appropriate, unless the referral is for a consultation only. The attending physician or authorized nurse practitioner continues to be responsible for authorizing temporary disability even if the specialist physician is providing or authorizing medical services and treatment. (Emphasis added).

(5) Managed Care Organization (MCO) Enrolled Workers.

An MCO enrolled worker must choose:

- (a) A panel provider unless the MCO approves a non-panel provider, or
- (b) A “come-along provider” who provides medical services subject to the terms and conditions of the governing MCO.

Majoris approved Dr. Mullen as a non-panel provider. Claimant chose Dr. Mullen as his attending physician. There is no evidence, or even an allegation, that Dr. Mullen has administered inappropriate treatment. The administrative rules, and OAR 436-010-0220(1) in particular, anticipate that a primary care attending physician may utilize specialist providers for consultation or concurrent treatment without losing their status as attending physician. Based on the record before me, it would appear that there is no reason why Dr. Erb, or another physical medicine specialist, could not provide concurrent care with Dr. Mullen as attending physician. Of course, that is not the issue before me. The issue concerns claimant’s right to choose Dr. Mullen as his attending physician.

Dr. Mullen qualifies as a non-panel primary care provider. Consequently, I conclude that claimant is entitled to choose Dr. Mullen as his attending physician. Because the administrative order under review holds otherwise, it reflects an error of law and will be modified.

Penalty

Claimant asserts that he is entitled to a penalty pursuant to ORS 656.262(11) based on the insurer’s allegedly unreasonable conduct. Claimant is entitled to a penalty if the insurer unreasonably delays or unreasonably refuses to pay compensation, or unreasonably delays acceptance or denial of the claim. The standard for determining unreasonable resistance to the payment of compensation is whether, from a legal standpoint, the insurer had a legitimate doubt as to its liability. *International Paper Company v. Huntley*, 106 Or 107 (1991). If so, the refusal

to pay is not unreasonable. Unreasonableness and legitimate doubt are to be considered in light of all the evidence available. *Brown v. Argonaut Insurance Company*, 93 Or App 588 (1988).

Although I have concluded that the MCO was wrong in failing to recognize Dr. Mullen as claimant's attending physician, that does not render the insurer's conduct unreasonable. Claimant concedes in his closing argument that the legal issue is novel and that there are no cases specifically on point. Based on the insurer's argument and the evidentiary record, I conclude that the MCO and the insurer had a reasonable basis for their actions. Accordingly, I will not impose a penalty.

Attorney Fee

Claimant is entitled to an assessed attorney fee pursuant to ORS 656.385(1) and OAR 436-001-0410. His attorney submitted a statement of services in excess of 30 hours and asserts that her hourly rate in contingent matters is \$425. Based on the complex nature of the issue, the exceptional skill of both attorneys, the risk in a particular case that an attorney's efforts may go uncompensated, and the time devoted to the case, I conclude that claimant has established extraordinary circumstances that justify an award of an assessed fee in excess of \$4,000. I find that a reasonable assessed attorney fee is \$12,000.

ORDER

IT IS HEREBY ORDERED that administrative order MTX 15-0531 is modified. Claimant is entitled to select Dr. Mullen as his attending physician.

IT IS FURTHER ORDERED that pursuant to ORS 656.385 and OAR 436-001-0410, the employer and its insurer are assessed an attorney fee in the amount of \$12,000 to be paid directly to claimant's attorney of record, Peter Hansen.