

In the Matter of the ORS 656.248(12) Medical Fee Dispute of

Kelley Jr, John R, Claimant

Contested Case No: HH02-034**PROPOSED & FINAL ORDER**

May 3, 2002

AARON J. ROBERSON , Petitioner

HARTFORD CASUALTY INSURANCE CORPORATON , Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

HISTORY OF THE CASE

Medical provider Aaron J. Roberson, DC appeals an Amended Administrative Order issued on February 13, 2002 by the Medical Review Unit (MRU) of the Workers' Compensation Division (WCD), Department of Consumer and Business Services (director or department). On May 2, 2002, Administrative Law Judge Catherine P. Coburn conducted a hearing in this matter. Petitioner Aaron J. Roberson, DC failed to appear. Respondent Hartford Casualty Insurance Corporation (insurer) was represented by attorney John E. Snarskis. John R. Kelley (claimant) was represented by attorney Daniel Spencer and waived appearance on the record. The Workers' Compensation Division (WCD) waived appearance. No witnesses testified and the record closed on the date of hearing.

The record of this proceeding, consisting of a tape recording of the hearing, all evidence received, and all hearing papers filed, has been considered. The findings of fact set out below are based upon the entire record.

ISSUE

The issue is whether insurer is liable for medical services provided to claimant by Dr. Roberson from April 24 through June 6, 2001.

EVIDENTIARY RULINGS

WCD Exhibits 1 through 30 and insurer's Supplementary Exhibits 29A, 31 were received into the record without objection. On the ALJ's own motion at hearing, the Notice of Hearing dated March 26, 2002 was marked as Exhibit 32 and received into the record without objection.

FINDINGS OF FACT

On March 26, 2002, the Hearing Officer Panel issued a Notice of Hearing and copied all parties including petitioner. (Ex. 32) The Hearing Notice was delivered to all parties including petitioner by certified mail¹. The Notice of Hearing provides:

NOTICE TO PARTIES

YOU ARE RECEIVING THIS NOTICE BECAUSE YOU ARE A PARTY TO THIS CONTESTED CASE. IF YOU WISH TO PARTICIPATE IN THIS HEARING, YOU MUST NOTIFY THE HEARING OFFICER PANEL OF YOUR INTENT TO PARTICIPATE AT LEAST TWO WEEKS PRIOR TO THE HEARING.

The issue for hearing is whether Hartford is liable for additional payment for medical services provided to Mr. Kelley, by Dr. Roberson, from April 24 through June 6, 2001, under ORS chapter 656 and OAR chapter 436.

IF THE PARTY REQUESTING THE HEARING FAILS TO APPEAR AT THE SCHEDULED HEARING WITHOUT GOOD CAUSE, AN ORDER OF DISMISSAL MAY BE ISSUED. (Emphasis in the original).

Petitioner failed to appear at hearing and made no contact with the Hearing Officer Panel to explain the failure to appear.

CONCLUSIONS OF LAW AND REASONING

This case presents a medical fee dispute between a medical provider and an insurer arising under ORS 656.248. Jurisdiction lies with the director. ORS 656.248(12) and OAR 436-009-0008(1). The statute does not specify a standard of review, and therefore, I review *de novo*. *Archie M. Ulrich*, 2 WCSR 152 (1997); OAR 436-001-0225(2). The person making the claim has the burden of proving the claim. ORS 183.450(2); *Salem Decorating v. National Council on Comp. Ins.*, 116 Or App, 170 (1992), *rev den* 315 Or 643 (1993). As petitioner, Dr. Roberson bears the burden of proving by a preponderance of the evidence that the administrative order is

¹ Petitioner's Domestic Return Receipt was signed by Courtney Johnson on March 27.

incorrect. *See Cook v. Employment Div.*, 47 Or 437 (1982) (in the absence of contrary legislation, the standard of proof in administrative hearings is preponderance of evidence).

Where, as here, petitioner received notice of the time set for hearing and failed to appear, for reasons not beyond his reasonable control, I may issue an order by default upon a *prima facie* case made on the record. ORS 183.415(6) and OAR 137-003-0670(2). The Hearing Officer Panel notified the parties, including petitioner, of the time of the hearing by letter dated March 26, 2001. The Notice of Hearing instructed the parties to contact the Hearing Officer Panel if they intended to participate in the hearing and petitioner failed to do so. The Notice of Hearing also informed petitioner that if the party requesting the hearing failed to appear without good cause, an Order of Dismissal might be entered. Petitioner failed to appear at hearing and failed to contact the Hearing Officer Panel with information explaining any reason for his failure to appear. Under the circumstances, I find that a default order, based upon a *prima facie* case established by the record is appropriate.

In the administrative order, MRU determined that insurer was liable for certain medical services and not liable for others. First, MRU found that insurer was liable for a total of \$325 plus a 1.5% late payment fee for medical services from April 24 through May 10, 2001. Second, MRU found that insurer was liable for no medical services from May 11 through June 6, 2001 because the record contained no evidence that Dr. Amstutz' treatment plan was mailed to insurer as required by OAR 436-010-0220(2) and OAR 436-010-0230(3)(b).

At hearing, insurer contended that the administrative order was correct and should be affirmed. Additionally, insurer raised an overpayment issue, contending that Dr. Roberson should repay insurer \$1,341.72.

Medical Bills: Having reviewed the record, I conclude that a *prima facie* case establishes that the administrative order is correct. In reaching this conclusion, I note that the evidentiary record does not contain documentation showing that Dr. Amstuz' treatment plan was provided to insurer. Accordingly, I affirm the administrative order.

Overpayment: At hearing, insurer raised a new issue, contending that Dr. Roberson was overpaid and that he should repay insurer \$1,341.72. Contested case hearings presented to the Hearing Officer Panel are governed by the Administrative Procedures Act contained in ORS chapter 183. Under the heading "Notice, hearing and record in contested case", ORS 183.415(2)(d) provides:

(2) The notice shall include:

(d) A short and plan statement of the matters asserted or charged.

In *Villanueva v. Board of Psychologist Examiners*, 175 Or App 349 (2001), the court held that failure to provide notice of an applicable rule before the opening of the hearing precluded an agency from relying on that rule in reaching its decision. Here, the Notice of Hearing defined the issue as insurer's liability for certain medical services. The Notice of Hearing did not specify an overpayment issue. Insurer filed no cross request for hearing and sought to raise the

overpayment issue at hearing. ORS 183.415(2)(d) requires parties in administrative hearings to be given notice of the matters in dispute in advance of the hearing and prohibits parties from raising new issues at hearing. Therefore, the insurer is barred from raising the overpayment issue and I do not address it.

ORDER

IT IS HEREBY ORDERED that:

1. Petitioner's request for hearing is dismissed with prejudice.
2. Administrative Order dated February 13, 2002 is affirmed.

DATED this _____ day of May 2002.

Catherine P. Coburn
Administrative Law Judge
Hearing Officer Panel