
In the Matter of the ORS 656.245 Medical Services Dispute of

Hernandez, Abraham T., Claimant

Contested Case No: H02-095

FINAL ORDER

July 1, 2003

FRERES LUMBER COMPANY & SAMIS, Petitioner

ABRAHAM T. HERNANDEZ, Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

Administrative Law Judge (ALJ) Vincent issued a Proposed and Final Contested Case Hearing Order on March 21, 2003, which affirmed the August 7, 2002 Administrative Order finding employer liable for payment of the medical services provided by F. Douglas Day, MD from January 10 through March 30, 2001.

Claimant's attorney timely submitted exceptions, to which employer timely responded. Claimant's attorney timely replied. The only issue raised by the parties is attorney fees.

In the proposed order, the ALJ indicates that while claimant's attorney is entitled to a fee under ORS 656.385(1), claimant's attorney failed to submit a statement of services despite two requests to do so.¹ In the absence of a statement of services, the ALJ found no basis upon which to assess a fee. Claimant's attorney requests reconsideration of the ALJ's denial of a fee, citing unfamiliarity with the process and difficulty submitting a statement. Additionally, she argues that the ALJ could have awarded a fee based on the information before him. Claimant's attorney estimates that she spent four hours in the hearing process. Employer responds that unfamiliarity with the process is not an excuse, and the ALJ's order should not be amended based on claimant's attorney's lack of due diligence. Claimant's attorney replied and indicated that she spent an additional 30 minutes in the exception process.

In medical services cases, where a claimant finally prevails in a contested case order by the director, the director *shall* require the insurer or self-insured employer to pay a reasonable attorney fee to the claimant's attorney. ORS 656.385(1). A statement of services may be considered as a factor in assessing the award if submitted within seven days of the hearing date. OAR 436-001-0265(1). A statement of services is not a prerequisite to a fee award, however. The ALJ may consider any information deemed relevant and appropriate. OAR 436-001-0265(1)(j). Accordingly, the ALJ erred in declining to award a fee for lack of a statement of services.

Additional factors that may be considered in assessing a fee include the time devoted to the case; the complexity of the issues involved; the quality of the legal representation; the value of the interest involved; the nature of the proceedings; the benefit secured for the claimant; the risk that an attorney's efforts may go uncompensated; and the assertion of frivolous issues or

¹ The ALJ told claimant's attorney on the record that if she intended to file a request for attorney fees, she needed to submit that before the record closed. The ALJ held the record open for one week from the hearing date for the attorney fee submission.

defenses. OAR 436-001-0265(1). The time devoted to pursuing a fee award, including the additional 30 minutes spent in the exceptions process, is not considered.

There is no reason to doubt that four hours, including a one-hour hearing, spent in defending the administrative order is reasonable or accurate. No witnesses testified at hearing. Employer presented several arguments; claimant's attorney's argument was brief in comparison. The services of an interpreter made the hearing longer than it otherwise would have been. While there are 65 exhibits in the record, only a fraction of those exhibits were referred to at hearing. Issues regarding the compensability of medical services vary in complexity. This case involved legal argument beyond the usual interpretation of ORS 656.245, including interpretation of medical records in determining whether an attending physician had declared claimant medically stationary. Claimant's interest is not insignificant; the medical services were provided on a regular basis over more than a two-month period, and the total amount due exceeded \$3,500.² Considering these factors, the director finds that an attorney fee award in the amount of \$700 is reasonable.

IT IS HEREBY ORDERED that the March 21, 2003 Proposed and Final Contested Case Hearing Order is modified. The order is adopted and affirmed except that portion regarding attorney fees. Employer shall pay to claimant's attorney a fee in the amount of \$700.

DATED this 1st day of July, 2003.

CORY STREISINGER, DIRECTOR
DEPT. OF CONSUMER AND BUSINESS SERVICES

BY: _____
John Shilts, Administrator
Workers' Compensation Division

² The ALJ did not make a finding as to the amount owing for the medical services, but there is evidence in the record of the amount. *See* Ex. 21 and 46.