
In the Matter of the ORS 656.260 Managed Care Dispute of

Brill, Robert L., Claimant

Contested Case No: H03-133

PROPOSED & FINAL ORDER

April 20, 2004

ROBERT L. BRILL, Petitioner

SAIF CORPORATION, Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

HISTORY OF THE CASE

Claimant appeals an Administrative Order issued on October 14, 2003 by the Medical Review Unit (MRU) of the Workers' Compensation Division (WCD) Department of Consumer and Business Services (director or the department). On November 20, 2003, WCD referred the matter to the Office of Administrative Hearings for a contested case hearing. On March 29, 2004, Administrative Law Judge Catherine P. Coburn conducted a hearing. Attorney Charles R. Mundorff represented petitioner Robert L. Brill (claimant). Attorney Michael G. Fetrow represented SAIF Corporation (insurer). CareMark Comp, a managed care organization (MCO) waived appearance. No witnesses testified and the record closed on the date of hearing.

ISSUES

1. Pursuant to OAR 436-009-0025(3), whether insurer is liable to reimburse claimant for mileage expenses incurred traveling to a contested case hearing.
2. Pursuant to OAR 436-009-0025(3), whether insurer is liable to reimburse claimant for mileage and out-of-pocket expenses incurred in medical appointments.

EVIDENTIARY RULINGS

WCD Exhibits 1 through 12 were received into the record without objection. Claimant's Supplementary Exhibits 2A through 2D were received into the record over insurer's relevance objection.

FINDINGS OF FACT

- (1) On February 24, 2001, claimant suffered a back injury while working in automobile sales. (Exs. 1 and 2C.) On April 19, 2001, claimant's condition became medically stationary. (Exs. 2 and 2A.) On April 27, 2001, insurer accepted a low back strain and enrolled claimant in an MCO. (Ex. 1.)
- (2) On October 9, 2001, insurer denied compensability of disc conditions. (Ex. 2B.) On November 30, 2001, Workers' Compensation Board ALJ Tenenbaum affirmed the denial of the L5-S1 disc condition and set aside the denials of the L2-3 and L3-4 conditions. (Ex. 2C-4.) On August 2, 2002, the Workers' Compensation Board affirmed

the Opinion and Order. (Ex. 2D.)

(3) During the time the disc claim was in denied status and subject to litigation and appeal, claimant incurred out-of-pocket expenses in obtaining medical services for the disc condition. These out-of-pocket expenses consisted of 103 miles traveled to medical appointments and \$300 in private medical insurance deductible expenses. Claimant also traveled to an administrative hearing. (Ex. 3.)

(4) On April 25, 2003, claimant submitted a reimbursement request for mileage and private medical insurance deductible amounts incurred from February 24, 2001 through October 31, 2001. (Ex. 3.)

(5) Insurer reimbursed claimant \$11.04 ($\$2.76 + \$4.14 + \$4.14 = \11.04) for mileage to medical appointments on May 1, 2001, May 15, 2001 and May 25, 2001. Insurer did not reimburse claimant for the remaining claimed mileage and medical insurance deductible expenses. Insurer did not reimburse claimant for mileage to a contested case hearing on October 31, 2001. (Ex. 4.)

CONCLUSIONS OF LAW

1. Insurer is not liable to reimburse claimant for mileage expenses incurred traveling to a contested case hearing on October 31, 2001.
2. Insurer is liable to reimburse claimant for 103 miles and \$300 in private medical insurance deductible expenses incurred in obtaining medical appointments.

OPINION

The director exercises jurisdiction over MCO disputes. ORS 656.260(6). I review for substantial evidence and error of law. ORS 656.260(16). The burden of proving a fact or position rests with the proponent. ORS 183.450(2); *Harris v. SAIF*, 292 Or 683 (1982). As petitioner, claimant bears the burden of proving by a preponderance of evidence that the administrative order is incorrect. *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). Proof by a preponderance of the evidence means that the fact finder is persuaded that the facts asserted are more likely true than false. *Riley Hill General Contractors v. Tandy Corp.*, 303 Or 390 (1998).

MRU determined that insurer is not liable to reimburse any of the disputed expenses because claimant submitted the request more than two years after the dates of service. Claimant contends that MRU incorrectly applied OAR 436-009-0025(3) and insurer is liable for reimbursement because claimant submitted the request within two years after compensability of the L2-3 and L3-4 disc conditions became final following litigation. In contrast, insurer contends that MRU correctly applied the rule and that the administrative order should be affirmed.

Travel to a Hearing

Claimant requests reimbursement for mileage expenses he incurred in traveling to a contested case hearing. In the administrative order, MRU incorrectly determined that insurer had paid claimant \$11.04 for this expense. However, substantial evidence does not support this finding. Based on the record, I find that insurer paid claimant \$11.04 for mileage expenses incurred traveling to medical appointments and insurer has not paid claimant for travel to a hearing.

ORS 656.245(1) limits reimbursable expenses to those that are directly related to medical services. The court has held that child care expenses are not reimbursable. *Lorenzen v. SAIF*, 79 Or App 751 (1986.) The court has also held that housekeeping services are not reimbursable. *Baar v. Fairview Training Center*, 139 Or App 196 (1996). In construing ORS 656.245(1)(b), the court applied *ejusdem generis* as a rule of statutory construction. The court reasoned that because child care and housekeeping services are not the “same kind or class” as those listed in the statute, the legislature did not intend them to be compensable medical services. *Id* at 205. Similarly, I find that mileage expenses incurred traveling to a contested case hearing are not reimbursable because they are not related to medical services. Therefore, SAIF is not liable for reimbursement of the October 31, 2001 travel expense.

Travel to Medical Appointments and Private Medical Insurance Deductible Amounts

OAR 436-009-0025(3) provides:

Request for reimbursements of related services costs must be received by the insurer within two years of the date the costs were incurred or within two years of the date the claim or medical condition is finally determined compensable, whichever date is later. The insurer may disapprove requests for reimbursements received beyond the two year period as being untimely requested.

Under the rule, claimant is entitled to reimbursement if the request meets a two-year deadline based on either date of service or establishment of compensability, whichever occurs later. Here, the L2-3 and L3-4 disc conditions were finally determined compensable by Order on Review dated August 2, 2002. Claimant’s request for reimbursement is dated April 25, 2003. Based on the record, I find that insurer received the reimbursement request within two years of the date the medical conditions were finally determined compensable. Consequently, insurer is liable to reimburse claimant for out-of-pocket expenses he incurred obtaining medical services while the disc conditions were denied and litigated. Specifically, insurer is liable for reimbursement of 103 miles and \$300 in private medical insurance deductible amounts.

ATTORNEY FEES

Claimant has finally prevailed in a contested case hearing on some issues, and therefore, is entitled to a reasonable attorney fee. ORS 656.385(1). Claimant’s attorney submitted a

statement of services listing 2.25 hours and requesting a fee of \$1,000. Insurer objected to the amount of the attorney fee requested. Applying the factors listed in OAR 436-001-0265, I find that \$700 is a reasonable fee for claimant's attorney in this case.

ORDER

IT IS HEREBY ORDERED that:

1. The Administrative Order dated January 8, 2004 is modified.
2. Insurer is not liable to reimburse claimant for 16 miles he traveled to a contested case hearing on October 31, 2001.
3. Insurer is liable to reimburse claimant for 103 miles he traveled to medical appointments.
4. Insurer is liable to reimburse claimant for \$300 in private medical insurance deductible amounts.