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In the ORS 656.385 Attorney Fee Dispute of

**SUSAN DURRANT Claimant**

Contested Case No: H04-111

**PORPOSED AND FINAL ORDER**

November 30, 2004

ALBERTSONS INC., Petitioner

SUSAN DURRANT, Respondent

Before Catherine P. Coburn, Administrative Law Judge, Administrative Hearings

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**HISTORY OF THE CASE**

Insurer appeals an Administrative Order issued on June 21, 2004 by the Medical Review Unit (MRU) of the Workers' Compensation Division (WCD) Department of Consumer and Business Services (director or the department). On August 4, 2004, the department referred the matter to the Office of Administrative Hearings (OAH). On October 26, 2004, Administrative Law Judge Catherine P. Coburn conducted a contested case hearing. Petitioning self-insured employer Albertson's Inc. and its claims administrator, Specialty Risk Services (insurer) was represented by attorney David L. Johnstone. Respondent Susan Durrant was represented by attorney Ronald A. Fontana. Claimant testified on her own behalf and the record closed on the date of hearing.

**ISSUES**

(1) Whether claimant's attorney is entitled to a fee for services rendered before MRU, and if so, what amount is reasonable?

(2) Whether claimant's attorney is entitled to a fee for services rendered before OAH, and if so, what amount is reasonable?

**EVIDENTIARY RULINGS**

WCD Exhibits 1 through 56 as well as insurer's Supplementary Exhibits 17A through 44A and claimant's Supplementary Exhibits 17-2 through 22B were admitted into the record without objection.

**FINDINGS OF FACT**

I adopt and incorporate the findings of fact contained in the administrative order on appeal with the following supplementation:

(1) On May 24, 2002, claimant fell off of a step stool while working in a grocery delicatessen. (Stipulation of the parties.) Insurer accepted the following conditions: cervical and

lumbar strains, C5-6 disc herniation, coccygeal contusion and right rotator cuff tendonitis. (Ex. 4.)

(2) Mary M. Lindquist, MD served as claimant's attending physician (AP) but relinquished that role in October 2003. Dr. Lindquist recommended advanced pain management. (Ex. 6 and 17A.)

(3) In December 2003, claimant sought treatment from Govind Singh, MD in Vancouver, Washington. (Ex. 5.) He referred claimant to Andrew Chui, MD (Anesthesiologist and Pain Management Specialist) at Legacy Pain Clinic. (Exs. 5-2 and 5-6.)

(4) On January 19, 2004, claimant was examined at Legacy Pain Clinic. The report lists Dr. Chui as AP, Dr. Singh as primary care physician and Dr. Lindquist as referring physician. (Ex. 7.) Dr. Chui outlined a multidisciplinary approach to deal with claimant's chronic pain. (Ex. 7-5.)

(5) On January 20, 2004, claimant's attorney advised insurer's claims manager and attorney that claimant would not attend a medical examination scheduled by insurer because the notice failed to comply with applicable administrative rules. He also conveyed claimant's request that insurer's claims manager cease direct contact and communicate with her only in writing with copies to her attorney. (Ex. 9.)

(6) On January 20, 2004, insurer's claims manager notified claimant's attorney that the insurer declined to authorize claimant's treatment at Legacy Pain Clinic. He also indicated that Dr. Lindquist was the AP on record and that the scheduled medical examination was not an independent medical examination (IME). (Ex. 8.)

(7) On January 20, 2004, claimant's attorney requested insurer's attorney to advise insurers' claims manager not to telephone his office. (Ex. 10.)

(8) On January 21, 2004, claimant designated Dr. Singh as her AP. (Ex. 11.) On January 22, 2004, claimant's attorney forwarded the AP designation to insurer. Claimant's attorney noted that Drs. Lindquist, Johnson and Singh had approved claimant's treatment at Legacy Pain Center. (Ex. 12.)

(9) On January 22, 2004, claimant did not attend a medical examination scheduled by insurer and insurer requested a written explanation. (Ex. 13.) On January 22, insurer's claims manager notified claimant's attorney that it had not received documentation designating Dr. Singh as claimant's attending physician and that Dr. Singh was not authorized to assume the role because claimant had exhausted her AP choices. (Ex. 14.) On January 22, insurer's claims manager notified claimant's attorney that Dr. Lindquist had withdrawn as AP and requested claimant's preference for a new attending physician. (Ex. 15.) On January 22, insurer's claims manager requested claimant's attorney to explain why claimant had not attended a scheduled medical examination. The claims manager also warned that without a prompt reply, insurer would suspend benefits on the basis of injurious practices. (Ex. 16.)

(10) On January 22, 2004, claimant's attorney replied that claimant did not attend the

medical examination because the notice did not comply with administrative rules governing an IME. Claimant's attorney identified Dr. Singh as the AP who had approved treatment at Legacy Pain Clinic. (Ex. 17.) On January 22, claimant's attorney requested administrative review. (Ex. 17B.)

(11) On January 23, 2004, insurer's attorney notified claimant's attorney that insurer would evaluate Dr. Singh, who practices out of state, as AP. (Ex. 19.) Insurer further noted that the medical examination that claimant did not attend was not an IME, but had been requested by Drs. Lindquist and Johnson. (Ex. 19-2.)

(12) On January 23, 2004, insurer's claims manager notified claimant that it declined to approve Dr. Singh as claimant's AP because he practiced out of state and suggested two other physicians. (Ex. 18.) On January 23, insurer's claims manager notified claimant that she had designated a series of five AP's not including Dr. Singh and that any subsequent change required approval. (Ex. 19B.)

(13) On January 23, 2004, claimant's attorney wrote to MRU contesting insurer's assertion that claimant had designated a series of five AP's. He also identified Dr. Singh as claimant's current AP. (Ex. 19B.) On January 23, claimant's attorney resent Dr. Singh's contact information to insurer's attorney and requested insurer to acknowledge Dr. Singh as AP. (Ex. 19C.) On January 23, claimant's attorney wrote to MRU to clarify claimant's position concerning the disputed medical examination, the AP and the referral to Legacy Pain Clinic. (Ex. 19D.)

(14) On February 5, 2004, claimant's attorney forwarded a report from Dr. Chiu to MRU and requested MRU to designate Dr. Singh as AP. (Ex. 19E.)

(15) On February 11, 2004, Dr. Singh stated that he would like to serve as "Attending of Record" while Dr. Chui managed claimant's pain treatment and medications. (Ex. 20.)

(16) On February 23, 2004, claimant's attorney forwarded an MRI report to MRU and requested MRU to approve Dr. Singh as AP. (Ex. 22A.)

(17) On February 24, 2004, claimant's attorney wrote to MRU indicating that claimant was scheduled for shoulder surgery with Robert J. Wilson, MD (Orthopedics) on March 23, 2004. Claimant's attorney requested MRU to make a ruling whether Dr. Singh was AP in time to obtain pre-surgical authorization for payment. Claimant's attorney also indicated that insurer had declined to pay for claimant's prescription medications. (Ex. 22B.)

(18) In March 2004, insurer and Dr. Singh's office exchanged telephone calls concerning the referral to Legacy Pain Clinic. (Ex. 5-4.) In April 2004, Dr. Singh examined claimant and noted that Drs. Chui and Wilson were consulting physicians. Dr. Singh noted some confusion with insurer concerning which doctor would authorize claimant's pain medications. (Ex. 5-6.)

(19) On March 2, 2004, claimant presented for a follow-up visit at Legacy Pain Clinic.

After the appointment, insurer contacted the clinic and indicated that it did not authorize the treatment. (Ex. 22.)

(20) On March 31, 2004, claimant's attorney requested administrative review of insurer's refusal to pay for claimant's treatment at Legacy Pain Clinic. (Ex. 25.)

(21) On June 21, 2004, MRU noted that the issues initially presented had been resolved between the parties with insurer authorizing treatment as prescribed by Dr. Singh at Legacy Pain Clinic and that the only remaining issue was that of attorney fees. MRU awarded claimant's attorney a fee of \$320 for his services before the department. (Ex. 51-5.)

### CONCLUSIONS OF LAW

- (1) Claimant's attorney is entitled to a fee for services rendered before MRU.
- (2) Claimant's attorney is entitled to a fee for services rendered before OAH.

### OPINION

The director exercises jurisdiction over an attorney fee issue arising under ORS 656.385. Since claimant was enrolled in an MCO, 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 App 437 (1980) (In the absence of contrary legislation, the standard of proof in administrative hearings is preponderance of evidence). Preponderance of evidence means that the factfinder is persuaded that the facts asserted are more likely true than false. *Riley Hill General Contractors v. Tandy Corp.*, 303 Or 390 (1998).

#### Attorney Fees Before the Department

MRU awarded an attorney fee of \$320 and insurer appeals. Insurer contends that claimant's attorney is not entitled to a fee because there was no dispute to warrant a fee. I find insurer's argument unpersuasive. The record establishes that there were numerous disputes between the parties, including whether claimant was required to attend a medical examination scheduled by insurer, the identity of the attending physician, and the referral to a pain clinic. In January 2004, the parties exchanged no fewer than twelve letters regarding these disputes. In January and February 2004, claimant's attorney wrote to MRU four times requesting administrative review and representing claimant's position. Claimant's attorney fulfilled his ethical obligation to protect the interests of his client and is entitled to be paid for his services. I agree with MRU's determination that claimant is entitled to a fee for his services before the department and that \$320 is a reasonable amount. Accordingly, I affirm.

#### Attorney fees before OAH

ORS 656.385 provides:

(1) In all cases involving a dispute over compensation benefits pursuant to ORS 656.245, 656.260, 656.327 or 656.340, where a claimant finally prevails after a proceeding has commenced before the Director of the Department of Consumer and Business Services, the director shall require the insurer or self-insured employer to pay a reasonable attorney fee to the claimant's attorney. **In such cases, where an attorney is instrumental in obtaining a settlement of the dispute prior to a decision by the director, the director shall require the insurer or self-insured employer to pay a reasonable attorney fee to the claimant or claimant's attorney.** The attorney fee must be based on all work the claimant's attorney has done relative to the proceeding at all levels before the department. The attorney fee assessed by the director, or on appeal from an order of the director, under this section must be proportionate to the benefit to the injured worker. The director shall adopt rules for establishing the amount of the attorney fee, giving primary consideration to the results achieved and to the time devoted to the case. An attorney fee awarded pursuant to this subsection may not exceed \$2,000 absent a showing of extraordinary circumstances.

(Emphasis added.)

On October 26, 2004, claimant's attorney submitted a statement of services requesting an attorney fee of \$1,238. Insurer objects and contends that claimant's attorney is not entitled to a fee because only the attorney fee issue was presented to MRU. However, the underlying issues concerning claimant's attendance at a disputed medical examination, the identity of claimant's AP and her entitlement to medical services arise under ORS 656.245 as required by the attorney fee statute. Additionally, insurer settled the medical issues in claimant's favor prior to the director's decision. Moreover, the record establishes that claimant's attorney was instrumental in obtaining a favorable settlement for claimant and that his services secured significant benefits for her. Furthermore, insurer requested the contested case hearing on the attorney fee issue and claimant prevailed. For these reasons, claimant's attorney is entitled to a reasonable fee for his services under ORS 656.385(1).

Considering the factors listed in OAR 436-001-0265(1)(b), and particularly the value of the benefits obtained for claimant, I find that \$1,238 is a reasonable fee for claimant's attorney's services in this contested case hearing.

### ORDER

IT IS HEREBY ORDERED that:

1. The Administrative Order dated June 21, 2004 is affirmed and insurer shall pay claimant's attorney a fee of \$320.
2. Insurer shall pay claimant's attorney a fee of \$1,238.