

In the ORS 656.385 Attorney Fee Dispute of

DARRYL HARRIS, Claimant

Contested Case No: H04-147

PROPOSED AND FINAL ORDER

December 28, 2004

DARRYL HARRIS, Petitioner

SAIF CORP., Respondent

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

HISTORY OF THE CASE

Claimant appeals the Administrative Order issued on September 15, 2004 by the Medical Review Unit (MRU) of the Workers' Compensation Division (WCD), Department of Consumer and Business Services (director or department). On November 4, 2004, the department referred the matter to the Office of Administrative Hearings (OAH). On December 16, 2004, Administrative Law Judge Catherine P. Coburn conducted a contested case hearing in this matter. Petitioner Darryl Harris was represented by attorney James Dodge. Respondent SAIF Corporation was represented by attorney Jerome P. Larkin. No witnesses testified and the record closed on the date of hearing.

ISSUE

Whether MRU correctly determined that claimant is entitled to no attorney fee.

EVIDENTIARY RULINGS

WCD Exhibits 1 through 47 were admitted into the record without objection.

FINDINGS OF FACT

(1) On October 28, 2003, claimant suffered multiple injuries in a work-related motor vehicle accident. (Exs. 18 and 19.) On April 22, 2004, insurer accepted face, neck and back injuries and enrolled claimant in a managed care organization (MCO). (Exs. 19 and 20.)

(2) Donald M. Ferrante, DC, provided medical services to claimant from January 16, 2004 through April 30, 2004. (Ex. 22.)

(3) On May 19, 2004, insurer denied payment, asserting that Dr. Ferrante was no longer qualified as the attending physician.¹ (Exs. 24 and 26.) On May 20, 2004, claimant requested

¹ See ORS 656.005(12) provides in pertinent part:

(b) Except as otherwise provided for workers subject to a managed care contract, "attending physician" means a doctor or physician who is primarily responsible for the treatment of a worker's compensable injury and who is: (B) For a period of 30 days from the date of first visit on the initial claim or for 12 visits, whichever first occurs, a doctor or physician licensed by the State Board of Chiropractic Examiners for the State of Oregon or a similarly licensed doctor or physician in any country or in any state, territory or possession of the United States.

administrative review. (Ex. 24.) From May 20 through August 4, 2004, claimant's attorney wrote seven letters concerning the denial of medical services. (Exs. 26, 27, 29, 30, 35, 36, 37.) On August 17, 2004, insurer agreed to pay the disputed bills, citing human error. (Ex. 38-2.)

CONCLUSION OF LAW

MRU incorrectly determined that claimant is entitled to no attorney fee.

OPINION

ORS 656.385(1) governs attorney fees and provides:

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 the director shall require the insurer or self-insured after a proceeding has commenced before the Director of the Department of Consumer and Business Services, 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.

Attorney Fee before MRU

The first question is which statute applies to the underlying dispute concerning provision of chiropractic medical treatment. MRU listed the following caption: "In the ORS 656.248 Medical Fee Dispute of Darryl Harris" and determined that no attorney fee was due because the parties settled. As petitioner, claimant contends that the administrative order is incorrect and an attorney fee is due. In contrast, insurer contends that the case arises under ORS 656.248 as MRU listed it and that no fee is due because ORS 656.385 excludes ORS 656.248 as the basis of an attorney fee. In support of its position, insurer cites *Turner Whitfield, on remand*, 9 CCHR 275 (2004).

I find insurer's argument unpersuasive. In *Whitfield*, insurer's liability for certain

medical services was already established and the only remaining issue was the amount of the fee for those services under ORS 656.248.² No attorney fee was due because ORS 656.385 excludes ORS 656.248 as the basis of a fee. However, here, the dispute concerning insurer's liability for Dr. Ferrante's chiropractic service arises under ORS 656.245³ which is included in ORS 656.385. Moreover, claimant was enrolled in a managed care organization under ORS 656.260,⁴ which is also listed in ORS 656.385 as the basis of an attorney fee. Finally, claimant's attorney was instrumental in obtaining a settlement while the medical service dispute was pending before the director. Therefore, claimant is entitled to a reasonable fee for services rendered before MRU. However, the record contains no statement of services reflecting claimant's attorney's services before MRU. Inasmuch as the record is not developed adequately for assessing a reasonable attorney fee, I remand to MRU for further administrative action.

Attorney Fee before OAH

On remand, claimant has not finally prevailed in a contested case hearing as required by ORS 656.385(1), and therefore is entitled to no attorney fee.

ORDER

IT IS HEREBY ORDERED that:

The Administrative Order dated September 2, 2004 is remanded to MRU.

² ORS 656.248(1) provides:

The Director of the Department of Consumer and Business Services, in compliance with ORS 656.794 and ORS chapter 183, shall promulgate rules for developing and publishing fee schedules for medical services provided under this chapter. These schedules shall represent the reimbursement generally received for the services provided. Where applicable, and to the extent the director determines practicable, these fee schedules shall be based upon any one or all of the following:

- (a) The current procedural codes and relative value units of the Department of Health and Human Services Medicare Fee Schedules for all medical service provider services included therein;
- (b) The average rates of fee schedules of the Oregon health insurance industry;
- (c) A reasonable rate of markup for the sale of medical devices or other medical services;
- (d) A commonly used and accepted medical service fee schedule; or
- (e) The actual cost of providing medical services.

³ ORS 656.245(1)(a) provides:

For every compensable injury, the insurer or the self-insured employer shall cause to be provided medical services for conditions caused in material part by the injury for such period as the nature of the injury or the process of the recovery requires, subject to the limitations in ORS 656.225, including such medical services as may be required after a determination of permanent disability. In addition, for consequential and combined conditions described in ORS 656.005 (7), the insurer or the self-insured employer shall cause to be provided only those medical services directed to medical conditions caused in major part by the injury.

⁴ ORS 656.260(1) provides:

Any health care provider or group of medical service providers may make written application to the Director of the Department of Consumer and Business Services to become certified to provide managed care to injured workers for injuries and diseases compensable under this chapter. However, nothing in this section authorizes an organization that is formed, owned or operated by an insurer or employer other than a health care provider to become certified to provide managed care.