
In the Matter of the ORS 656.327 Medical Treatment Dispute of

Horn, Glenn R., Claimant

Contested Case No: H03-067

FINAL ORDER

June 29, 2004

BARRETT BUSINESS SERVICES, Petitioner

GLENN R. HORN, Respondent

Before John Shilts, Workers' Compensation Division Administrator

Claimant, by and through his attorney Richard D. Adams, submitted exceptions to Office of Administrative Hearings' Administrative Law Judge (ALJ) Catherine P. Coburn's April 7, 2004 Proposed and Final Contested Case Hearing Order. Employer, by and through its attorney Lance M. Johnson, responded and also submitted exceptions. This matter comes before the director for issuance of a final order. The record has been reviewed, including the relevant exhibits, the audio recordings of the hearing, and the parties' written submissions. The director affirms in part and modifies in part.

The ALJ concluded that insurer failed to comply with OAR 436-010-0250(3) and (5) and is barred from disputing the medical appropriateness of the surgery. The ALJ remanded the matter to the Medical Review Unit to address the appropriateness issue. Finally, the ALJ did not award attorney fees, concluding that claimant did not finally prevail.

Before the Medical Review Unit, employer challenged the appropriateness of the requested surgery. The unit determined that the threshold issue was whether employer may challenge appropriateness, under OAR 436-010-0250.¹ In a May 21, 2003 Administrative Order the unit determined that insurer did not comply with the rule. Accordingly, employer could not challenge appropriateness and the decision to proceed with the surgery remained with claimant and his physician.

Claimant argues that, because the ALJ found that insurer was barred from disputing medical appropriateness, the proposed order should be modified to affirm the unit's order. Claimant further requests an attorney fee of \$1,200.

Employer responds that even if it is barred from challenging appropriateness, claimant must still establish a compensable connection between a compensable injury and any medical services caused in material part by the injury. Therefore, this matter should be remanded to the unit, and an attorney fee is not appropriate. Claimant counters that employer should not be allowed to raise the issue of compensability now.

¹ OAR 436-010-0250(5) (eff. 1/1/02) provides, in part, "Failure of the insurer to timely respond to the physician's elective surgery request or to timely request administrative review pursuant to this rule shall bar the insurer from later disputing whether the surgery was excessive, inappropriate, or ineffectual."

Employer also submitted exceptions, disputing the ALJ's finding that employer failed to comply with the rules. Employer argues that its obligation to respond to the surgery request within a specified time was never triggered because there is no evidence of the date it received the request. Therefore, employer is not barred from disputing appropriateness under the rule.

After considering the arguments raised by the parties, the director affirms the ALJ in part and modifies in part. The director adopts and affirms the ALJ's finding that insurer failed to comply with OAR 436-010-0250(3) and (5). Under the terms of that rule insurer is now barred from disputing the appropriateness of the surgery. Because there is no dispute regarding appropriateness to be reviewed by the unit, remand is not appropriate. Accordingly, the ALJ's order is modified and the unit's order is affirmed.

Employer raised the issue of compensability at hearing and in its exceptions, but not before the Medical Review Unit.² The director will not address an issue for the first time in the final order when it was not raised at administrative review or addressed in the proposed order. (*See* ORS 656.327(2) regarding scope of review of medical treatment disputes.) Moreover, the director lacks jurisdiction to decide issues of causation between medical services and an accepted claim, and this is not the proper forum in which to bring the issues. ORS 656.704(3)(b)(C).

Claimant has prevailed, so claimant's attorney is entitled to a fee. Claimant's attorney has requested \$1,200 for six hours of his time and an estimated value of \$3,000 to claimant. Employer has not taken issue with claimant's attorney's figures. Under ORS 656.385(1) (2003) and OAR 436-001-0265 (eff. 4/1/04), the fee must fall within the ranges provided in the director's rules absent a showing of extraordinary circumstances or agreement of the parties. Under OAR 436-001-0265(1)(b), for cases in which the estimated value is between \$2,001 and \$4,000 and the time devoted is between 6.1 hours and eight hours, the range of possible fee awards is \$800 to \$1300. Because claimant's estimated value falls in the middle of the range, and his attorney's time falls in the lower end of the range, the director finds that a fee of \$1,000 is more appropriate.

IT IS HEREBY ORDERED the April 17, 2004 Proposed and Final Contested Case Hearing Order is affirmed in part and modified in part. The May 21, 2003 Administrative Order is affirmed. Employer is ordered to pay to claimant's attorney a fee in the amount of \$1,000.

DATED this _____ day of June, 2004.

² During the course of the administrative review, employer represented that it was not raising issues of compensability or causation. On the "Specification of Disputes Medical Issues" form (Ex. 26), employer checked "no" in the boxes next to the statements, "The disputed medical service is disapproved because [t]he service is not causally related to the accepted condition," and "The disputed medical service is disapproved because [t]he service is not a compensable medical service under ORS 656.245(1)(c)." In a letter to the unit dated April 2, 2003 (Ex. 28-1), employer's attorney stated, "The self-insured employer certifies that there is no issue of causation or compensability of the underlying claim."