

In the ORS 656.385(1) Attorney Fee Dispute of

DEBORA NEFF, Claimant

Contested Case No: H04-079

PROPOSED AND FINAL ORDER

September 17, 2004

DEBORA NEFF, Petitioner

DESCHUTES COUNTY & GATES McDONALD , Respondent

Before Ella D. Johnson, Administrative Law Judge

HISTORY OF THE CASE

Claimant appeals an April 21, 2004 Administrative Order issued by the Medical Review Unit (MRU) of the Workers' Compensation Division (WCD), Department of Consumer and Business Services (the director or the department) which determined that the vein wrap procedure to correct scarring/pain post tarsal tunnel right foot surgery is appropriate treatment, but declined to award claimant an attorney fee as the prevailing party because claimant's attorney failed to submit the statement of services and retainer agreement requested within three days after MRU's request. On June 17, 2004, the matter was referred to the Office of Administrative Hearings (OAH) for hearing

On July 6, 2004, the parties requested the opportunity to submit this matter on the record and written closing argument to Administrative Law Judge (ALJ) Ella D. Johnson. Consequently, the ALJ did not conduct a hearing on the record, no witnesses testified and no audio tape recording was created as part of the record. Attorney James E. Bailey III represented Debora Neff (claimant). Scott F. Gilman represented the self-insured employer Deschutes County and its claims processing agent, Gates McDonald (insurer). The record closed on August 25, 2004.

ISSUE

Whether MRU's decision declining to award claimant an assessed attorney fee because claimant's attorney failed to submit a statement of services and retainer agreement within three days after MRU requested the documents was unreasonable, an abuse of discretion and contrary to law.

EVIDENTIARY RULING

The record consists of Exhibits 1 through 100, which are admitted into the record. I also marked the parties' written arguments as Exhibits 101, 102 and 103 and admit them into the record. If either party objects to any of these exhibits they should contact this office within seven days of the mailing date of this order.

FINDINGS OF FACT

I adopt affirm and republish the Findings of Fact contained in MRU's April 21, 2004

Administrative Order with the following supplementation:

(1) On Thursday, April 15, 2004 at 3:00 p.m., MRU sent claimant's counsel a fax requesting that he submit within three days a valid retainer agreement, a statement of services and a statement describing any extraordinary circumstances that warranted exceeding the attorney fee schedule matrix set forth in OAR 436-010-0008. The fax did not state that the order would be issued in three days or that it would be issued without any attorney fee if the documents requested were not submitted within that period of time. (Exs. 89, 101.)

(2) Claimant's counsel was out of his office on Thursday, April 15 and Friday, April 16, 2004. Upon receiving MRU's request on Monday, April 19, 2004, he asked his record keeper, who was not located in his office, to provide a printout of the time devoted to the case. (Ex. 101.) Claimant also had a Workers' Compensation Board (WCB) case pending during the same period as her WCD case. The printout indicated that claimant's counsel had devoted 54.75 hours to the case at \$200 per hour for total billable hours for both claimant's WCD and WCB cases, equal to \$10,950.00. (Ex. 90.)

(3) On April 21, 2004, MRU issued the Administrative Order in this matter finding that the proposed surgery was appropriate treatment for claimant's compensable condition, but declining to award an assessed attorney because claimant's counsel failed to provide a statement of services and a retainer agreement within three days. MRU did not follow up on its request to inquire about the documents requested before issuing the order. (Exs. 91; 101.)

(4) The record-keeper provided a printout to claimant's attorney of the time devoted to claimant's WCB and WCD cases late on Tuesday, April 20, 2004. Claimant's counsel faxed the information requested to MRU on April 22, 2004. (Exs. 90, 101.) When he received MRU's order, he requested that an amended order be issued awarding an assessed fee based on the documents faxed to MRU on April 22, 2004. MRU declined to issue an amended order addressing the attorney fee issue. (Ex. 101.)

(5) This matter was complex and required a substantial amount of work on the part of claimant's counsel. There was also a high probability that claimant's counsel would not be compensated, warranting an attorney fee beyond the matrix set forth in OAR 436-010-0008. (Ex. 90.)

CONCLUSIONS OF LAW

MRU's decision declining to award claimant an assessed attorney fee and issue an amended order because claimant's attorney failed to submit a statement of services and retainer agreement within three days after MRU requested the documents was unreasonable and an abuse of discretion.

OPINION

This dispute arises under ORS 656.385(1), and therefore, jurisdiction lies with the director. Inasmuch as ORS 656.385(1) contains no standard or scope of review, I review *de*

novo. *Archie Ulbrick*, H96-264 (Proposed and Final Order, March 1997.) The burden of proving a fact or position falls upon the proponent. ORS 183.450(2). 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 legislation adopting a different standard, the standard of proof in an administrative hearing is preponderance of evidence). Proof by a 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 (1989). I conclude that claimant has met her burden.

In her written argument, claimant advances three arguments supporting her entitlement to an assessed attorney fee in this case. First, she argues that the limitation on submission of documents in “at least 3 business days” set forth in OAR 436-010-0008 exceeds the director’s statutory authority because there is no such limitation contained in the statute. Second, she argues that, even if the limitation contained in the rule does not exceed the director’s statutory authority, the rule is permissive and the three business day limitation is the minimum number of days required. Therefore, MRU’s decision to allow only the three business days for counsel to submit the attorney fee information is subject to a reasonableness standard and the decision not to allow additional time for a response given the complexity of the case is an abuse of discretion. Finally, she argues that MRU’s decision to allow only three business days for a response was unreasonable in light of the modern practice of law because the sheer volume of paper, faxes, and notices involved in the practice of workers’ compensation law demands greater leeway in receiving, processing, and responding to such requests.

ORS 656.726 gives the director broad statutory authority to regulate the workers compensation system, stating in relevant part:

(4) The director hereby is charged with duties of administration, regulation and enforcement of ORS 654.001 to 654.295, 654.750 to 654.780 and this chapter. To that end the director may:

(a) Make and declare all rules and issue orders which are reasonably required in the performance of the director’s duties.

In that regard, ORS 656.385(1) gives the director specific authority to promulgate rules concerning the award of attorney fees for matters decided under her jurisdiction, stating:

(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.)

Pursuant to that authority, the director has promulgated OAR 436-010-008(13), which states:

(13) In any dispute in which a represented worker prevails after a proceeding has commenced before the director, the director shall award an attorney fee to be paid by the insurer or self-insured employer, as provided in ORS 656.385 (§2, ch. 756, OL 2003). The attorney fee will be proportionate to the benefit to the injured worker. Primary consideration shall be given to the results achieved and the time devoted to the case. Absent extraordinary circumstances or agreement by the parties, the fee may not exceed \$2000, nor fall outside the ranges for fees as provided in the following matrix:

Estimated Benefit Achieved -- Professional Hours Devoted	
1-2 hours --	2.1-4 hours -- 4.1-6 hours -- 6.1-8 hours -- 8.1-12 hours
\$1-\$2000 --	\$100-400 -- \$200-700 -- \$300-750 -- \$600-1000 -- \$800-1250
\$2001-\$4000 --	\$200-500 -- \$400-800 -- \$600-900 -- \$800-1300 -- \$1050-1500
\$4001-\$6000 --	\$300-700 -- \$600-1000 -- \$800-1250 -- \$1000-1450 -- \$1300-1750
\$6001-\$10000 --	\$400-900 -- \$800-1300 -- \$1050-1600 -- \$1350-1800 -- \$1550-2000

(a) An attorney must submit the following to the director in order to be awarded an attorney fee:

(A) A current, valid retainer agreement, and

(B) A statement of hours spent on the case if greater than two hours. In the absence of such a statement, the director shall assume the time spent on the case was 1-2 hours.

(b) In determining the value of the results achieved, the director may consider, but is not limited to, the following:

(A) The fee allowed by the fee schedule provided in OAR 436-009;

(B) The overall cost of the medical treatment or service; or

(C) A written agreement between the parties regarding the value of the benefit to the worker submitted to the director prior to the issuance of an order.

(c) If any party believes extraordinary circumstances exist that justify a fee outside of the ranges provided in the above matrix or above \$2000, they may submit a written or faxed statement of the extraordinary circumstances to the director.

(d) In order to provide parties an opportunity to inform the director of agreements, or submit statements of extraordinary circumstances or professional hours for consideration in determining the attorney fee, the **director will provide the parties notice by phone or fax at least 3 business days in advance that an order**

(e) An assessed attorney fee shall be paid within 30 days of the date the order authorizing the fee becomes final.

(Emphasis added.)

With respect to claimant's first argument that the period of "at least 3 business days" set forth in OAR 436-010-0008 exceeds the director's statutory authority, I do not find claimant's argument persuasive given the director's broad grant of regulatory authority set forth generally in ORS 656.726(4) and specifically in ORS 656.385(1). With respect to claimant's second argument, I agree with her that the rule is permissive and that the three-day period is the minimum number of days notice that the director must give claimant to obtain the information necessary to award attorney fees. However, claimant argues that MRU abused its discretion in limiting her counsel's response to three working days. Abuse of discretion exists when an agency "exercises its discretion to an end or purpose not justified by and clearly against reason and evidence." *Far West Landscaping v. Modern Merchandizing*, 287 Or 653, 664 (1979); *Casciato v. Oregon Liquor Control Commission*, 181 Or 707, 717 (1947). I do not find MRU's action in that regard rises to the level of abuse of discretion. On the other hand, MRU's refusal to amend its order once claimant requested an amended order to recover her attorney fees does rise to the level of abuse of discretion. Claimant's counsel devoted approximately a considerable number of hours to her case just on administrative review before MRU and as the prevailing party she is entitled to an assessed attorney fee pursuant to ORS 656.385(1).

I also find claimant's third argument persuasive. MRU's decision to allow only three business days to respond is subject to a reasonableness standard in light of the complexity of the

case and the modern practice of law. I agree that the sheer volume of paper, faxes, and notices involved in the practice of workers' compensation law in particular demands greater leeway in receiving, processing, and responding to such requests. The record establishes that claimant's counsel was out of the office from the date that MRU faxed the request for information on April 15, 2004 until the following Monday, April 19, 2004. At that point, he received the fax and immediately ordered a copy of the record of the number of hours devoted to claimant's case from his record keeper who was not housed in the law firm. He faxed the attorney fee request to MRU on the fourth day after personally receiving the fax.

Insurer makes much of the fact that claimant failed to contact MRU to ask for an extension in submitting the requested information. However, MRU's fax to counsel did not state that the order would be issued on April 21, 2004, regardless of whether the information had been received. If that were the case, claimant's counsel would have no doubt called and asked MRU for an extension given the amount of time devoted to the case and the amount of money involved. Consequently, inasmuch as MRU was aware of counsel's strong participation in the case, I find that MRU's action in issuing the order without checking with counsel by telephone was unreasonable and that its action in refusing to issue an amended order upon claimant's request constituted an abuse of discretion.

Claimant's counsel appears to be requesting a fee of \$10,950.00 for 54.75 hours devoted to claimant's case. However, some of those time entries are prior to the request for administrative review or clearly devoted to the case before the Workers' Compensation Board. Accordingly, subtracting those entries from counsel's printout and considering the factors set out in OAR 436-001-0265(2), including the complexity of the case, the risk that counsel would go uncompensated and the need to litigate the attorney fee instead of being awarded a fee by MRU, I conclude that claimant and her counsel are entitled to an assessed attorney fee of \$4,500.00 for counsel's work at the administrative level.

ATTORNEY FEES

Claimant has prevailed in this matter. However, I am without authority to award an assessed fee at this level because ORS 656.385(1) provides no attorney fee for appeal of MRU's decision to award no attorney fee. Consequently, she is not entitled to attorney fees for work performed at the contested case level.

ORDER

IT HEREBY ORDERED that MRU's Administrative Order dated April 21, 2004 is **AFFIRMED** in part and **REVERSED** in part. That part of MRU's order that found employer liable for the proposed surgery is **AFFIRMED**. That part of MRU's order which declined to award an assessed attorney fee to claimant as the prevailing party is **REVERSED**. Claimant's counsel is awarded an attorney fee of \$4,500.00 for work performed at the administrative review level to be paid by the insurer.