

In the ORS 656.245 Medical Services Dispute of

THERESA M. PATTERSON, Claimant

Contested Case No: H04-045

FINAL ORDER

October 29, 2004

EXPLORER INSURANCE CO., Petitioner

THERESA M. PATTERSON, Respondent

Before John Shilts, Administrator, Workers' Compensation Division

This matter comes before the director for issuance of a final order. The amount of attorney fees is the only issue. The director reduces the attorney fee award, and otherwise adopts and affirms.

Office of Administrative Hearings Administrative Law Judge (ALJ) Catherine P. Coburn, by Proposed and Final Contested Case Hearing Order dated August 5, 2004, modified the Medical Review Unit's March 3, 2004 Administrative Order. The unit found petitioner insurer liable for physical therapy and psychological counseling, and awarded respondent claimant's attorney \$1,140. Insurer requested a hearing. The ALJ affirmed on the issue of physical therapy, but reversed on the issue of counseling. The ALJ affirmed the unit's award of \$1,140, and awarded an additional \$750 for prevailing on the one issue at hearing.

Insurer submitted exceptions, arguing the fee awarded by the unit should be reduced in proportion to the benefits obtained, as claimant only prevailed on one-half of the issues raised before the unit. Further, insurer argues, claimant's attorney's request is based on time spent in matters related to issues other than the disputed medical services.

Claimant's attorney responds he estimated his time spent on the medical services issues to the best of his ability, and the issue on which claimant has prevailed is significant and important to claimant. Claimant's attorney further argues that the contingent nature of these proceedings should also be taken into account. Claimant's attorney states that he has spent an additional 20 minutes on the exceptions process.

The ALJ found,

“[The unit] awarded claimant's attorney a fee of \$1,140 for services rendered at the agency level. In light of the factors listed in OAR 436-001-0265, I agree that \$1,140 is a reasonable fee for claimant's attorney's services before MRU.

“Claimant has prevailed in the contested case hearing on one issue and is entitled to a reasonable attorney fee for his services here. ORS 656.385(1). On October 9, 2003, claimant's attorney submitted a statement of services requesting a fee in the amount of

\$1,500.¹ Considering the factors listed in OAR 436-001-0265, in particular the split decision, I find that \$750 is a reasonable fee for claimant's attorney's services in this case."

ORS 656.385(1), as amended by Oregon Laws 2003, chapter 756, section 2 (Enrolled Senate Bill 620),² provides, in relevant part:

"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."

(Emphasis added.)

A claimant's attorney is only entitled to fees under ORS 656.385(1) in cases where a claimant "finally" prevails. "Final" means "1. Forming or occurring at the end : LAST. 2. Of, relating to, or constituting the last element in a series, process, or procedure. 3. Ultimate and definitive : UNALTERABLE <The judges' decision is *final*.>" WEBSTER'S II NEW COLLEGE DICTIONARY 419 (1995). A claimant does not "finally" prevail before a forum unless the forum finds in claimant's favor and that finding is not appealed. *Greenslitt v. City of Lake Oswego*, 305 Or 530, 534 (1988); *see also Shoulders v. SAIF*, 300 Or 606, 616 (1986) (claimant's attorney entitled to fee under ORS 656.382(2) for successfully defending against reduction of compensation for two conditions, even though compensability of two other conditions reversed), *Longview Inspection v. Snyder*, 182 Or App 530, 538 (2002) (where court reverses and remands, claimant has not "finally" prevailed under ORS 656.386(1)). If a claimant does not prevail, her attorney is entitled to no fee under ORS 656.385(1).

Claimant prevailed on both issues that were before the unit, and the unit awarded a fee. Claimant did not "finally" prevail, however; insurer appealed the unit's order. The ALJ affirmed the unit on one issue but reversed on the other. Claimant has only finally prevailed, therefore, on one-half of her issues. The unit's fee award should have been reduced accordingly.

Claimant's attorney is entitled to additional fees for his services at hearing,³ but only for prevailing on the one issue. Fees are not awardable for time spent requesting and defending attorney fee awards. Since the only issue before the director is attorney fees, claimant's attorney is not entitled to additional fees for the exceptions process.

As to the amount of the fee, the statute and rules provide some guidance. ORS 656.385(1)

¹ Such a document is not in the file. What is in the file is a letter dated October 8, 2003 requesting fees in no specific amount for services before the unit (Ex. 72), and a statement of services dated February 27, 2004 requesting \$1,200 (Ex. 94).

² The amendments to ORS 656.385(1) apply to all claims for which an order relating to the issue on which attorney fees are sought has not become final on or before January 1, 2004. Or Laws 2003, ch 756, § 3.

³ ORS 656.385(1) further provides, "*** 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."

further provides,

“The attorney fee * * * 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.”

OAR 436-001-0265 and 436-010-0008(13)⁴ contain the following matrix factoring in time devoted and results achieved.⁵

Results Achieved	Time 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 fee award may not fall outside the matrix absent a showing of extraordinary circumstances or agreement of the parties. Other factors may also be considered, including the complexity of the issues involved; the quality of the legal representation; the value of the interest involved; the nature of the proceedings; the risk in a particular case that an attorney’s efforts may go uncompensated; the assertion of frivolous issues or defenses; a statement of services; and any other relevant consideration deemed appropriate. OAR 436-001-0265(2)(a)-(h).

No extraordinary circumstances have been alleged here, and the parties have not reached an agreement on attorney fees. Therefore, the director is bound by the matrix and considers the time devoted and the results achieved.

As to the results achieved, at issue was Dr. Crone’s prescription for physical therapy, which was yet to be provided. On one occasion, Dr. Crone prescribed physical therapy three times a week for three weeks, then one to two times a week for three weeks, for a total of twelve to fifteen sessions (Ex. 68). Subsequently, Dr. Crone prescribed physical therapy three times a week for four weeks, for a total of twelve sessions (Ex. 84). There is no evidence in the record as to the estimated dollar value of twelve to fifteen sessions of physical therapy. Although claimant’s attorney argues that the physical therapy issue is “significant and important for this worker,” and the director does not disagree, the rules require a dollar value to be assigned. Neither the unit nor the ALJ provided any explanation for how they valued the results achieved. Without evidence to the contrary, the director presumes the value to be less than \$2,000, the lowest range on the matrix.

As to the time devoted, claimant’s attorney estimated that he spent approximately six

⁴ OAR 436-001-0265 applies to attorney fee awards in contested cases; 436-010-0008(13) applies to attorney fee awards in medical services disputes before the Medical Review Unit.

⁵ The matrix was not referenced by the unit, the ALJ, or the parties.

hours before the unit, and represented that he usually charges \$200 per hour. (Ex. 94-1). Attorney fee awards under ORS 656.385(1) are not simply a matter of multiplying the number of hours by the hourly rate, however. *Suzanne Blakley*, 9 CCHR 287, 296 (2004). At hearing, insurer took issue with claimant's attorney's estimate, and further argues time spent in litigating the aggravation claim was, but should not have been, included. Claimant's attorney responds that he estimated his time to the best of his ability.

Only time spent on the medical services dispute under ORS 656.245 may be considered under ORS 656.385(1). At the same time the medical services dispute was pending before the Medical Review Unit, claimant's aggravation claim was pending before the Hearings Division of the Workers' Compensation Board. Claimant's attorney argued at hearing that the deposition of Dr. Crone crossed over to the medical issues, and time for that should be included. The director disagrees, at least in part. The deposition was obtained by the employer for purposes of litigating claimant's aggravation claim before the Hearings Division of the Workers' Compensation Board. (Ex. 82-1, 82-4, 86). While there may have been some cross-over to the issues before the director, the deposition was not obtained for the purposes of the ORS 656.245 dispute. However, information obtained from Dr. Crone during the deposition was relevant to the medical issues dispute. Therefore, it is reasonable to consider a portion of the time devoted to the deposition.

Claimant's attorney stated that his time spent in this matter is an estimate. In light of insurer's objections to claimant's attorney's estimate, and without further documentation, the director looks to the record in determining how much time was reasonable. Claimant's attorney sent two letters to the unit, one dated October 8, 2003 and the other dated January 26, 2004 (Exs. 72, 87),⁶ and one letter to the insurer dated December 3, 2003 (Ex. 83). All letters were seven or fewer lines long. In addition to these letters, it is reasonable to assume the attorney spent time doing things such as making phone calls, reading and responding to notices from the unit and the insurer's responses thereto (Ex. 78, 80), and communicating with his client. Based on the information in the record, the director finds that four hours is a more reasonable estimate of the time spent before the unit.

Claimant's attorney represented that he spent approximately two and a half hours at the contested case hearing level. The insurer does not take issue with this estimate, and the director finds that this is a reasonable amount of time. For this time, claimant's attorney requested \$750, considering his hourly fee and the factors listed in OAR 438-015-0010(4).⁷

Considering the total time devoted (six and a half hours) and the estimated results achieved (less than \$2,000), based on the matrix the director finds that \$700 is an appropriate fee, had claimant finally prevailed on all issues. Because claimant prevailed on one issue and lost on one issue, a total fee of \$350 is awarded for services rendered at all levels.

⁶ Claimant's attorney sent another letter to the unit on February 27, 2004. However, this letter was devoted entirely to the issue of attorney fees and is therefore not considered. (Ex. 94).

⁷ The rule cited by claimant applies to attorney fee awards made by the board, not attorney fee awards made by the director. A similar list of factors appears in OAR 436-001-0265(2).

IT IS HEREBY ORDERED:

(1) The August 5, 2004 Proposed and Final Contested Case Hearing Order is reversed as to attorney fees. Insurer shall pay claimant's attorney a total fee of \$350 for services rendered at all levels.

(2) The August 5, 2004 Proposed and Final Contested Case Hearing Order is adopted and affirmed in all other respects.