

In the Matter of the ORS 656.260 Managed Care Dispute of

Shannon Reed, Claimant

Contested Case No: H04-069

PROPOSED AND FINAL ORDER

August 05, 2004

SAIF CORPORATION, Petitioner

SHANNON REED, Respondent

Before Ella D. Johnson, Administrative Law Judge

HISTORY OF THE CASE

Insurer SAIF Corporation appeals Administrative Order MMS 04-071 issued on April 19, 2004 by the Medical Review Unit (MRU) of the Workers' Compensation Division (WCD), Department of Consumer and Business Services (director or department). On June 1, 2004, the department referred the matter to the Office of Administrative Hearings.

On July 13, 2004, Administrative Law Judge Ella D. Johnson conducted a contested case hearing. Petitioner SAIF Corporation (SAIF or insurer) was represented by Trial Counsel Jerry Larkin. Respondent Dewey Howerton (claimant) was represented by Attorney at Law Todd Hammond. SAIF called Claims Adjuster Julie Lesmeister as a witness and claimant testified on his own behalf. The record closed following the hearing on July 13, 2004.

ISSUE

Whether MRU's Administrative Order that awarded an assessed attorney fee in the amount of \$405.00 reflects an error of law.

EVIDENTIARY RULINGS

WCD Exhibits 1 through 24 and SAIF's Supplemental Exhibit 11A were admitted into the record without objection.

FINDINGS OF FACT

I affirm and adopt the Findings of Fact set forth in MRU's March 24, 2004 Administrative Order with the following supplementation.

(1) On December 10, 2002, claimant injured his left shoulder while working as a log truck driver for employer. On December 19, 2003, Erik D. Blake, MD referred claimant for a surgical consultation to Dr. Tobin. Claimant scheduled an appointment with Dr. Tobin for January 20, 2004. (Exs. 8, 11A; test. of claimant.)

(2) By letter dated February 4, 2003, SAIF accepted claimant's claim for left shoulder strain and left shoulder calcific tendonitis and notified him that he had been enrolled in SAIF's managed care organization (MCO) Oregon Health Systems (OHS). SAIF also provided a copy of claimant's MCO enrollment to the OHS and to claimant's attending physician, Dr. Blake. (Exs 3-7.)

(3) On December 19, 2003, Dr. Blake wrote in his chart note that he intended to refer claimant to Dr. Tobin for a surgical consultation and that his appointment with Dr. Tobin was on January 20, 2004. SAIF received the chart note January 12, 2004 and OHS received the chart note on January 5, 2004. (Ex. 8.)

(4) On January 6, 2004, Dr. Tobin's office contacted SAIF Claims Adjuster Julie Lesmeister to find out if the referral from Dr. Blake to Dr. Tobin for a surgical consultation would be paid. Lesmeister told Dr. Tobin's office that she could not guarantee payment because she had not received the referral from Dr. Blake and did not know the nature of the referral. Dr. Tobin's billing clerk subsequently called claimant to tell him that SAIF would not pay for the referral. Claimant did not talk to Dr. Tobin and the January 20, 2004 appointment was cancelled. (Test. of Lesmeister and claimant.)

(5) On January 6, 2004, claimant's counsel wrote to MRU that SAIF indicating that there was a medical services dispute with SAIF because it had denied Dr. Blake's request for a referral to Dr. Tobin for a surgical consultation. (Ex. 9.)

(6) On January 13, 2004, SAIF Claims Adjuster Julie A. Lesmeister contacted MRU stating that on the date of claimant's counsel's letter to MRU, SAIF had no knowledge of the referral to another orthopedist. In any event, Lesmeister stated that claimant was now enrolled in an MCO and there was no information in her file indicating that Dr. Blake had requested pre-certification from the MCO for a referral to Dr. Tobin. (Ex. 10.) Lesmeister first learned of the referral on January 15, 2004. OHS first contacted Lesmeister on January 19, 2004. Neither Lesmeister nor OHS initiated administrative review concerning the referral. Lesmeister thought claimant's appointment with Dr. Tobin was still scheduled. (Ex. 11A; test. of Lesmeister.)

(7) On January 14, 2004, Dr. Blake's office requested pre-certification for the referral to Dr. Tobin at claimant's request. On January 16, 2004, OHS notified Dr. Blake that its pre-certification review had concluded that his referral to Dr. Tobin was approved as medically necessary for treatment of claimant's compensable condition. (Exs. 11, 13.) OHS did not review Dr. Blake's request under its dispute resolution process. (Ex. 15.)

(8) On February 3, 2004, MRU requested that claimant's counsel provide information concerning his request for attorney fees. (Ex. 17.)

(9) On February 18, 2004, Dr. Tobin saw claimant for a surgical evaluation. Dr. Tobin consulted with Dr. Burrows on the potential success of the surgery. Dr. Tobin obtained another MRI of claimant's shoulder. (Exs. 8, 20, 21.)

(10) On April 13, 2004, MRU issued an order that found that no dispute existed and awarded an assessed attorney fee of \$405.00. (Ex. 22.)

CONCLUSIONS OF LAW

MRU's Administrative Order that awarded an assessed attorney fee in the amount of \$405.00 reflects an error of law.

OPINION

The issue of first impression presented by this contested case hearing is whether MRU had jurisdiction to award an assessed attorney fee under ORS 656.385 when there was allegedly no ripe dispute between the parties. Inasmuch as ORS 656.385(1) contains no scope or standard of review, I review *de novo* for errors of law. OAR 436-001-0225(6); *Archie M. Ulvich*, 2 WCSR 152 (1995). The burden of proving a fact or position rests with the proponent. ORS 184.450(2). As petitioner, SAIF bears the burden of proving by a preponderance of the evidence that the administrative order is incorrect. *See Cook v. Employment Div.*, 47 Or App 437 (1980) (In the absence of contrary legislation, the standard of proof in an administrative hearing is preponderance of evidence). Preponderance of the evidence means that the fact finder is persuaded that the facts asserted are more likely true than false. *Riley Hill General Contractors v. Tandy Corp.*, 303 Or 390 (1998). I find that SAIF has met its burden.

ORS 656.385 states in relevant part:

(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.)

In interpreting a statute, the court's, and thus my charge, is to determine the legislative intent. ORS 174.020;¹ *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610 (1993). In order to discern the legislative intent, the first level of analysis is to examine both the text and context of the statute. 317 Or at 610-611. The text of the statute is the best evidence of the legislature's intent. If the legislature's intent is unclear after that inquiry, I consider the legislative history, and if still unclear, I apply the general maxims of statutory construction. *Id.*

Applying the foregoing method, I find that ORS 656.385(1) requires that a judicable or ripe dispute exists between the claimant and the insurer or self-insured employer before the department has jurisdiction to award an assessed fee. SAIF argues that claimant is not entitled to an assessed fee because no dispute existed between SAIF and claimant concerning his medical treatment in the MCO. Claimant argues, on the other hand, that there was a dispute, which arose when the claims adjuster allegedly contacted Dr. Tobin's office and said SAIF would not pay for the surgical consultation "under any circumstances."

To begin, I find the testimony of SAIF's claims adjuster to be credible because claimant's rendition of the contact between Dr. Tobin's office and Lesmeister is based solely on hearsay. I also find that Lesmeister's testimony is consistent with the weight of the credible evidence, including the dates that SAIF and OHS first became aware of the referral and the fact that no dispute resolution process was undertaken by OHS.

The credible evidence establishes that it was Dr. Tobin's office that called Lesmeister on January 6, 2004 to find out if the referral from Dr. Blake to Dr. Tobin for a surgical consultation would be paid. Lesmeister had no knowledge of the referral and told Dr. Tobin's office that she could not guarantee payment because she had not received the referral from Dr. Blake and did not know the nature of the referral. Dr. Tobin's billing clerk apparently then called claimant to tell him that SAIF would not pay for the referral. Additionally, OHS did not receive Dr. Blake's request for pre-certification of the referral to Dr. Tobin until January 14, 2004. Consequently, I find that when claimant's counsel wrote to MRU on January 6, 2004, the request for administrative review was premature because at that point neither SAIF nor OHS had received a

¹ ORS 174.020 states:

(1)(a) In the construction of a statute, a court shall pursue the intention of the legislature if possible.

(b) To assist a court in its construction of a statute, a party may offer the legislative history of the statute.

(2) When a general and particular provision are inconsistent, the latter is paramount to the former so that a particular intent controls a general intent that is inconsistent with the particular intent.

(3) A court may limit its consideration of legislative history to the information that the parties provide to the court. A court shall give the weight to the legislative history that the court considers to be appropriate.

pre-certification request from Dr. Blake. When OHS received the referral request, it approved the referral on January 16, 2004 after the pre-certification review had been completed and no dispute resolution process was ever implemented.

Accordingly, inasmuch as there was no actual dispute at the time claimant's counsel requested review and no settlement thereafter, I conclude that claimant's counsel is not entitled to an attorney fee under ORS 656.385(1) and reverse MRU's order with respect to the attorney fee.

ORDER

IT IS HEREBY ORDERED that:

The Administrative Order dated April 15, 2004 is affirmed in part and reversed in part. That portion of the order, which found that OHS had authorized the referral and there was no dispute, is AFFIRMED. That portion of the order that assessed an attorney fee is REVERSED.

DATED this 5th day of August 2004.