

In the ORS 656.248(12) Medical Fee Dispute of

TURNER WHITFIELD, Claimant

Contested Case No: H00-005

FINAL ORDER

October 29, 2004

SAIF CORPORATION, Petitioner

TURNER WHITFIELD & DONALD OSBORN, Respondent

Before John Shilts, Administrator, Workers' Compensation Division

Claimant, through his attorney James C. Egan, submitted exceptions to Office of Administrative Hearings Administrative Law Judge (ALJ) Catherine P. Coburn's August 12, 2004 Revised Proposed and Final Order on Remand. This matter comes before the director for issuance of a final order. The only issue is attorney fees. The director adopts and affirms the August 12, 2004 order with the following supplementation.

Claimant requests fees under ORS 656.385(1). Under ORS 656.385(1), attorney fees are awardable to a claimant's attorney when the claimant finally prevails in a dispute over compensation benefits pursuant to ORS 656.245, 656.260, 656.327, or 656.340.¹ Fees are not awardable under ORS 656.385(1) in disputes under ORS 656.248.

Disputes regarding the compensability of medical services fall under ORS 656.245. ORS 656.245(7)² provides,

“Subject to the provisions of ORS 656.704, if a claim for medical services is disapproved, the injured worker, insurer or self-insured employer may request administrative review by the director pursuant to ORS 656.260 or 656.327.”

(Emphasis added.)

Disputes regarding payment for compensable medical services fall under ORS 656.248. ORS 656.248(12)³ provides,

¹ ORS 656.385(1) was amended effective January 1, 2004, making fees awardable at the administrative review level, and establishing criteria on which the fee must be based. Or Laws 2003, ch 756, § 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.

² In 1999, when this case first arose, this subsection was numbered ORS 656.245(6) and provided, “If a claim for medical services is disapproved for any reason other than the formal denial of the compensability of the underlying claim and this disapproval is disputed, the injured worker, the insurer or self-insured employer shall request administrative review by the director pursuant to this section, ORS 656.260 or 656.327. * * *”

The changes to the language made by the 1999 legislature do not change the analysis of which section this dispute falls under.

³ In 1999, this subsection was numbered ORS 656.248(13). The language has not changed.

“When a dispute exists between an injured worker, insurer or self-insured employer and a medical service provider *regarding either the amount of the fee or nonpayment of bills for compensable medical services*, notwithstanding any other provision of this chapter, the injured worker, insurer, self-insured employer or medical service provider shall request administrative review by the director. * * *”

(Emphasis added.)

Claimant’s attorney argues that, although the ALJ found that this matter arose under ORS 656.248, the insurer’s arguments bring this matter under ORS 656.245.⁴ Claimant contends insurer’s arguments that Mr. Osborn was not licensed or qualified were arguments that his services were unnecessary, raising the issue of the compensability of the services under the guise of a fee dispute.

The insurer, SAIF Corporation, through its attorney Jerome P. Larkin, responds that claimant’s attorney’s fee request is barred by the law of the case; claimant’s attorney did not properly raise the issue; the ALJ had no authority to address the issue of attorney fees; and claimant’s attorney’s request is too late.

The director does not reach insurer’s arguments, finding that this case falls under ORS 656.248, not ORS 656.245.

All prior actions in this matter clearly indicate this was a dispute over fees, not a dispute over medical services. The action giving rise to this dispute was insurer’s Medical Bill Analysis dated May 19, 1999. (Ex. 7). Insurer denied payment of \$709.80 billed by Mr. Osborn for services provided during a compensable surgery performed on April 5, 1999. (Ex. 6). Mr. Osborn requested director intervention using a “Medical Fee Dispute Resolution Request” form. (Ex. 9). Mr. Osborn’s request was acknowledged with a letter stating, “The Dispute Resolution Section has received a complaint (see attached) *concerning unpaid bills for treatment provided to the above claimant.*” (Emphasis added) (Ex. 10-1). Insurer responded explaining that it denied payment because Mr. Osborn was not licensed; it did not deny compensability of the surgery itself. (Ex. 11).

The Medical Review Unit, on behalf of the director, issued an Administrative Order on December 6, 1999. The matter was captioned as an ORS 656.245 medical services dispute. The issue was stated as “whether SAIF should reimburse Mr. Osborn for * * * services provided to Mr. Whitfield on April 5, 1999.” (Ex. 14-1). The unit concluded that the services were reimbursable and SAIF was liable. (Ex. 14-3).

⁴ The November 22, 2000 Interim Order Denying Motion in Limine indicates that, at that time, claimant’s attorney argued that this matter arose under ORS 656.327. That section pertains to disputes regarding whether medical treatment is excessive, inappropriate, ineffectual, or in violation of rules regarding the performance of medical services.

The insurer requested a contested case hearing. On November 22, 2000, the ALJ⁵ issued an Interim Order Denying Motion in Limine. At issue was the appropriate scope of review.⁶ Claimant argued the matter arose under ORS 656.327; therefore, the evidentiary record was closed. Insurer argued the matter arose under ORS 656.248; therefore, the ALJ may consider additional evidence. The ALJ agreed with insurer, noting that the compensability of the medical service was not in dispute. With the interim order, the caption of this matter changed to an ORS 656.248(12) medical fee dispute.

On March 13, 2001 the ALJ issued a Proposed and Final Contested Case Hearing Order. The issue was stated as “whether technical medical services provided by Donald Osborn, OTC during a compensable surgery performed on April 5, 1999 are reimbursable under ORS 656.248(12).” The ALJ found that the services were not reimbursable, but noted that insurer conceded that the surgery was compensable, reasonable, and necessary. The ALJ did not award fees because “ORS 656.385(1) excludes medical fee disputes arising under ORS 656.248 from an award of attorney fees.”

Claimant submitted exceptions to the ALJ’s proposed order⁷ arguing, in part, that the ALJ erred in characterizing this as a matter regarding a fee. The director reversed the ALJ’s proposed order by Amended Final Order dated September 26, 2001, finding that the services were reimbursable. As to attorney fees, the director agreed with the ALJ finding, “Although claimant has prevailed at the contested case level, he is not entitled to an assessed fee under ORS 656.385 because this dispute falls under ORS 656.248. *See Safeway Stores, Inc. v. Cornell*, 148 Or App 107 (1997).” (Footnote omitted.)

Between November 21, 2001 and September 29, 2003, this matter was pending before the Court of Appeals. The court issued a per curiam opinion affirming the director’s final order; attorney fees were not an issue on appeal. On February 5, 2004, the Workers’ Compensation Division remanded the matter to the ALJ “to issue a revised Proposed and Final Contested Case Hearing Order regarding the issue of Mr. Osborn’s usual and customary fee.” The ALJ issued that order on August 12, 2004. As to attorney fees, the ALJ again found, “ORS 656.385(1) excludes medical fee disputes arising under ORS 656.248 from an award of attorney fees. Therefore, claimant is entitled to no attorney fee.”

At all stages, this dispute has been treated as one over payment of bills for compensable medical services, not as one over the compensability of the services themselves. This dispute clearly falls under the language of ORS 656.248(12) - “When a dispute exists * * * regarding either the amount of the fee or nonpayment of bills for compensable medical services * * *” - not under the language of ORS 656.245(7) - “* * * if a claim for medical services is disapproved * * *.” *Safeway Stores, Inc. v. Cornell*, 148 Or App 107, 112-13 (1997). By the express terms of ORS 656.385(1), attorney fees are not awardable.

⁵ Prior to May 22, 2003, the ALJ’s title was Hearing Officer. Or Laws 2003, ch 75. Although this matter arose before May 22, 2003, the director uses Administrative Law Judge for consistency.

⁶ See OAR 436-001-0225. At the time, disputes under ORS 656.245 and 656.248 were reviewed *de novo*, while disputes under ORS 656.327 were reviewed for substantial evidence and errors of law. The rule has since been changed to provide that disputes under ORS 656.248 are reviewed *de novo*, while disputes under ORS 656.245 and 656.327 are reviewed for substantial evidence and errors of law.

⁷ The Dispute Resolution Section, of which the Medical Review Unit is a part, also submitted exceptions.

IT IS HEREBY ORDERED the August 12, 2004 Revised Proposed and Final Order on Remand is adopted and affirmed as supplemented above.