

In the ORS 656.327 Medical Treatment Dispute of

AUDREY CASTILLO, Claimant

Contested Case No: H04-173

FINAL ORDER

October 5, 2005

RLC INDUSTRIES CO., Petitioner

AUDREY CASTILLO, Respondent

Before Jerry Managhan, Deputy Administrator, Workers' Compensation Division

Respondent claimant, through her attorney Keith Semple, requested abatement and reconsideration of Office of Administrative Hearings Administrative Law Judge (ALJ) Lawrence S. Smith's April 12, 2005 Proposed and Final Order for the purpose of modifying the fee award. The Workers' Compensation Division treated claimant's request as exceptions to the proposed order.¹ Subsequently petitioner employer, through its attorney H. Scott Plouse, submitted exceptions to the proposed order. This matter comes before the director for a final order. The issues are elective surgery under OAR 436-010-0250 and attorney fees. After considering the parties' submissions, I affirm the proposed order on the issue of elective surgery, and modify the proposed order on the issue of attorney fees.

I adopt the ALJ's findings of fact with one exception, discussed below.

The underlying issue in dispute between the parties is whether L1 corpectomy with fusion and instrumentation through transthoracic approach with possible posterior approach, proposed by Dr. Van Pett, is appropriate treatment for claimant's compensable injury. The Medical Review Unit (MRU), in the October 7, 2004 Administrative Order, found that employer was barred from challenging the surgery under OAR 436-010-0250(5) because it failed to comply with the requirements of OAR 436-010-0250(3).² Accordingly, MRU did not review the

¹ Under OAR 137-003-0655(1), the ALJ may not revise or amend a proposed order more than three days after it is issued, except at the request of the agency.

² OAR 436-010-0250, effective November 1, 2002, provides, in part:

“(2) * * * [W]hen the attending physician or surgeon upon referral by the attending physician, believes elective surgery is needed to treat a compensable injury or illness, the attending physician or the surgeon shall give the insurer actual notice at least seven days prior to the date of the proposed surgery. Notification shall give the medical information that substantiates the need for surgery, and the approximate surgical date and place if known.

“(3) When elective surgery is recommended, the insurer may require an independent consultation with a physician of the insurer's choice. The insurer shall notify the recommending physician, the worker and the worker's representative, within seven days of receipt of the notice of intent to perform surgery, whether or not a consultation is desired by submitting Form 440-3228 (Elective surgery Notification) to the recommending physician. When requested, the consultation shall be completed within 28 days after notice to the attending physician.

“* * * *

appropriateness of the surgery and held employer liable for it if provided. Employer requested a hearing and the ALJ affirmed.

Employer acknowledges it never submitted Form 3228 as provided in OAR 436-010-0250(3). Employer contends, however, it never received notice of proposed surgery as provided in OAR 436-010-0250(2). Therefore, according to employer, its obligation to respond was never triggered.

The ALJ adopted MRU's findings of fact. MRU found, in part, that Dr. Van Pett faxed a surgery request to employer, with supporting documentation, on November 11, 2003. MRU stated: "The request was date stamped and initialed faxed 11/11/03." MRU's finding is not supported by the record. The "Prior Authorization Request" is marked as exhibit 46 in the record. It is dated November 11, 2003 and indicates that it was being submitted to employer. However, nothing on the face of the document indicates that it was faxed to employer on November 11, 2003, or any other date. Markings on the document indicate that it passed through two fax machines on May 7, 2004 (although they do not indicate who sent or received the fax), and that it was received by the Workers' Compensation Division on May 7, 2004, but not that it was faxed on November 11, 2003. I find no other documentation in the record to support MRU's finding. Accordingly, I decline to adopt it.

Nonetheless, I agree with the ALJ's conclusion that substantial evidence in the record supports MRU's conclusion that employer received notice of the proposed surgery and did not respond timely under the rule. Therefore, I adopt and affirm the ALJ's conclusion of law and opinion.

Claimant has prevailed and her attorney is entitled to a fee under ORS 656.385(1). MRU awarded \$1,800 for services at administrative review. For the hearing process, the ALJ awarded \$862.50 for Mr. Semple's time (5.75 hours at \$150 per hour), and claimant's attorney requests an additional \$750 for Christine Jensen's time (3 hours at \$250 per hour). Employer disputes claimant's attorneys' hourly rates and opposes the request for additional fees.

Attorney fee awards under ORS 656.385(1) are limited. They are not simply a matter of multiplying an hourly rate by the number of hours. Rather, they must be proportionate to the benefit of the injured worker, and primary consideration must be given to the results achieved and the time devoted to the case. Accordingly, the director has adopted a matrix. OAR 436-001-0265, 436-010-0008(13). The award may not fall outside the ranges in the matrix nor exceed \$2,000 absent a showing of extraordinary circumstances or agreement of the parties. Extraordinary circumstances are not established by merely exceeding the values in the matrix. OAR 436-001-0265(1)(c).

Claimant's attorney has not requested that I find extraordinary circumstances in this case, and I find none. Therefore, I am bound by the limits of ORS 656.385(1) and the matrix.

"(5) * * * Failure of the insurer to timely respond to the physician's elective surgery request * * * shall bar the insurer from later disputing whether the surgery was excessive, inappropriate, or ineffectual."

Claimant's attorneys have devoted a total of 13.75 hours to this matter (5 hours before MRU, 8.75 hours before the ALJ). The estimated results achieved for claimant are in excess of \$10,000. Accordingly, I award the maximum fee of \$2,000.

IT IS HEREBY ORDERED the April 12, 2005 Proposed and Final Order is affirmed as modified.