

In the ORS 656.385 Attorney Fee Dispute of

KEITH HERGERT Claimant

Contested Case No: H004-191

FINAL ORDER

August 11, 2005

KEITH HERGERT, Petitioner

LIBERTY NORTHWEST INSURANCE CORP., Respondent
Before John Shultz, Administrator, Workers' Compensation Division

Petitioner claimant, through his attorney George J. Wall, filed exceptions to Office of Administrative Hearings Administrative Law Judge (ALJ) Catherine P. Coburn's March 15, 2005 Proposed and Final Order. Respondent insurer, represented at hearing by attorney Judy L. Johnson, did not respond. This matter comes before the director for a final order. The issue is attorney fees. The director reverses.

I adopt and supplement the ALJ's findings of fact, as follows:

(1) On July 3, 2003, claimant suffered a right shoulder injury while working as a truck driver. (Ex. 1.) On August 20, 2003, insurer accepted a closed comminuted fracture of the right clavicle. (Ex. 2.)

(2) On February 18, 2004, Geoffrey E. Baum, D.O. prescribed a Ben Gay patch for shoulder pain. (Exs. 3, 4, 5, and 6.) Fred Meyer dispensed the prescription, and Working Rx submitted an invoice. (Exs. 4, 5, and 6.)

(3) On June 2, 2004, insurer notified Working Rx that the Ben Gay patches were not authorized, reimbursable, or compensable. (Ex. 6A.)

(4) On October 13, 2004, claimant's attorney requested the Medical Review Unit (MRU) to order insurer to pay the bill for the Ben Gay patch. (Ex. 7.)

(5) On October 21, 2004, MRU requested information from insurer. Insurer's response indicated the bills were paid on November 3, 2004. (Ex. 9, 11.) On November 5, 2004, MRU contacted insurer concerning the unpaid bills. At that time, insurer indicated there was no issue of compensability, the bills were just overlooked. On November 16, 2004, MRU confirmed with Working Rx that the bills had been paid. (Ex. 12.)

This issue is whether this dispute arises under ORS 656.245 or 656.248. Under ORS 656.385(1), claimant's attorney may be entitled to a fee in a dispute under ORS 656.245, but not in a dispute under ORS 656.248.

ORS 656.385(1) provides, in 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.”

ORS 656.245(7) 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.”

ORS 656.248(12) provides, in part:

“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.”

Claimant argues this is a dispute over medical services under ORS 656.245, and cites exhibit 6A in support of his argument. Alternatively, claimant argues he is entitled to a fee under ORS 656.262(11)¹ for insurer's unreasonable refusal to pay the bills.

The Medical Review Unit found that this dispute arose under ORS 656.248, and that insurer did not dispute the compensability of the prescription medications. The ALJ affirmed, finding that the record establishes that there was no medical service dispute, only unpaid bills.

A dispute arises under ORS 656.245 “if a claim for medical services is disapproved.” Exhibit 6A, the letter from insurer notifying Working Rx that the Ben Gay patches were not authorized, reimbursable, or compensable,² is direct evidence that insurer disapproved the prescription. Contrary to the findings of MRU and the ALJ, insurer disputed the compensability of the medical service. That insurer later withdrew its disapproval and paid for the patches before

¹ ORS 656.262(11)(a) provides, in part:

“If the insurer or self-insured employer unreasonable delays or unreasonable refuses to pay compensation, or unreasonably delays acceptance or denial of a claim, the insurer or self-insured employer shall be liable for an additional amount up to 25 percent of the amounts then due plus any attorney fees assessed under this section.”

² Exhibit 6A was not in the record packet provided by the division to the parties and the ALJ. Claimant's attorney stated at hearing that the letter was submitted as an attachment to his request for MRU review, marked as exhibit 7. However, no such attachment was included in the packet.

MRU reviewed the issue of compensability is of no consequence. At the time the dispute was brought, it fell under ORS 656.245.

There is nothing in the record upon which to calculate claimant's attorney's fee. Under ORS 656.385(1), the fee must be proportionate to the benefit to the worker. Primary consideration must be given to the results achieved and the time devoted to the case. At issue here are prescriptions in the amount of \$276.57. It is presumed claimant's attorney devoted minimal time to the matter before MRU, and the small amount of correspondence in the record supports that presumption. *See* OAR 436-010-0265(1)(c), 436-010-0008(13)(a)(B). Applying the matrix in OAR 436-001-0265, claimant's attorney is awarded \$125 for services before MRU. As the only issue on review is attorney fees, claimant's attorney is not entitled to additional fees for services at hearing or during the exceptions process.

Having found that claimant's attorney is entitled to a fee under ORS 656.385(1), I do not reach claimant's alternative argument that he is entitled to a fee under ORS 656.262(11).

IT IS HEREBY ORDERED the March 15, 2005 Proposed and Final Order is reversed.