

In the Matter of the ORS 656.385 Attorney Fee Dispute of

ISIDRO LUVIANO, Claimant

Contested Case No: H05-133

PROPOSED AND FINAL ORDER

December 1, 2005

ISIDRO LUVIANO, Petitioner

SAIF CORP., Respondent

Before Catherine P. Coburn, Administrative Law Judge, Administrative Hearings

HISTORY OF THE CASE

Claimant appeals the Administrative Order issued on August 31, 2005 by the Medical Unit of the Workers' Compensation Division (WCD), Department of Consumer and Business Services (department or director). On September 19, 2005, the department referred the matter to the Office of Administrative Hearings (OAH). On November 2, 2005, Administrative Law Judge Catherine P. Coburn conducted a hearing in Beaverton, Oregon. Attorney Aaron E. Clingerman represented petitioner Isidro Luviano (claimant). Attorney David L. Runner represented respondent SAIF Corporation (insurer). No witnesses testified and the record closed on the date of hearing.

ISSUE

Whether claimant is entitled to an attorney fee for services rendered before MRU.

EVIDENTIARY RULINGS

WCD Exhibits 1 through 15 were admitted into the record without objection.

FINDINGS OF FACT

(1) On January 15, 2004, claimant suffered a compensable injury and insurer accepted right L4-5 herniated disc and right shoulder impingement syndrome. (Exs. 1, 2 and 6.) Insurer enrolled claimant in Oregon Health Systems Managed Care Organization (MCO). (Ex. 1-2.)

(2) On March 25, 2005, the MCO approved the medical necessity of a lumbar spine MRI recommended by Kathleen R. Moore, M.D. (Ex. 4.) On April 4, 2005, Central Oregon MRI provided the service at a cost of \$1,681.55. (Exs. 5, 9 and 10.)

(3) On July 18, 2005, claimant's attorney requested administrative review of the unpaid bill. (Exs. 7 and 8.) On July 29, 2005, insurer paid the bill. (Exs. 9 and 10-2.)

(4) On August 10, 2005, MRU provided insurer with a Notice of Required Action concerning the unpaid bill. (Ex. 10.) On the same day, insurer filed a Specification of Issues indicating that the bill had never been disallowed and that there was no dispute. (Ex. 11.)

(5) On August 17, 2005, insurer's claims adjuster stated that she had inadvertently overlooked the bill in the file and had paid it on July 29, 2005. (Ex. 10-2.) She further wrote there was no compensability or causation issue between the parties. (Ex. 12.)

CONCLUSION OF LAW

Claimant is not entitled to an attorney fee for services rendered before MRU.

OPINION

The director exercises jurisdiction over an attorney fee issue arising under ORS 656.385. I review *de novo*. OAR 436-001-0225(4). The burden of proving a fact or position rests with the proponent. ORS 183.450(2); *Harris v. SAIF*, 292 Or 683 (1982). As petitioner, claimant bears the burden of proving by a preponderance of evidence that the administrative order is incorrect. *Cook v. Employment Div.*, 47 Or 437 (1982) (In the absence of contrary legislation, the standard of proof in administrative hearings is preponderance of evidence). Preponderance of 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).

MRU cited ORS 656.247(3)(b)¹ and determined that claimant is entitled to no attorney fee. Claimant first contends that MRU erred by relying upon ORS 656.247 and contends that the case arises under ORS 656.245 instead. Claimant further contends that he is entitled to an attorney fee under ORS 656.385. In contrast, insurer contends that the applicable statute is ORS 656.248 and that no attorney fee is due under ORS 656.385.

To begin, I agree with claimant's first contention that MRU misapplied ORS 656.247. That provision pertains to interim compensation prior to the initial accept/deny decision and does not apply to an accepted claim such as this. However, I agree with MRU's conclusion that no attorney fee is due, albeit through a different analysis.

Next, claimant's attorney contends that the case arises under ORS 656.245, rather than ORS 656.248, and therefore, he is entitled to an attorney fee. I disagree. ORS 656.245² governs

¹ ORS 656.247 provides in pertinent part:

Payment for medical services prior to claim acceptance or denial; review of disputed services; duty of health benefit plan to pay for certain medical services in denied claim.

(1) Except for medical services provided to workers subject to ORS 656.245 (4)(b)(B), payment for medical services provided to a subject worker in response to an initial claim for a work-related injury or occupational disease from the date of the employer's notice or knowledge of the claim until the date the claim is accepted or denied shall be payable in accordance with subsection (4) of this section if the expenses are for:

- (a) Diagnostic services required to identify appropriate treatment or to prevent disability;
- (b) Medication required to alleviate pain; or
- (c) Services required to stabilize the worker's claimed condition and to prevent further disability.

² ORS 656.245(1)(a) provides:

compensability of medical services while ORS 656.248³ pertains to medical fee disputes. Here, the record establishes that there was no medical service dispute and only an unpaid medical bill. Consequently, the case arises under ORS 656.248.

Finally, ORS 656.385⁴ authorizes assessment of attorney fees in cases arising under several statutes, not including ORS 656.248. Moreover, the Director has consistently held that no attorney fee is available even if claimant prevails in an ORS 656.248 medical fee dispute. *Darryl Harris*, 10 CCHR 285 (2005); *Bernard Mello*, 10 CCHR 163 (2005); *Keith Hergert*, 10 CCHR 74 (2005); *Turner Whitfield*, 9 CCHR 366 (2004). Therefore, pursuant to ORS 656.248 and ORS 656.385, no attorney fee is available. Accordingly, finding no error, I affirm the Administrative Order.

ORDER

IT IS HEREBY ORDERED that:

The Administrative Order dated August 31, 2005 is affirmed.

For every compensable injury, the insurer or the self-insured employer shall cause to be provided medical services for conditions caused in material part by the injury for such period as the nature of the injury or the process of the recovery requires, subject to the limitations in ORS 656.225, including such medical services as may be required after a determination of permanent disability. In addition, for consequential and combined conditions described in ORS 656.005 (7), the insurer or the self-insured employer shall cause to be provided only those medical services directed to medical conditions caused in major part by the injury.

³ ORS 656.248(1) provides:

The Director of the Department of Consumer and Business Services, in compliance with ORS 656.794 and ORS chapter 183, shall promulgate rules for developing and publishing fee schedules for medical services provided under this chapter. These schedules shall represent the reimbursement generally received for the services provided. Where applicable, and to the extent the director determines practicable, these fee schedules shall be based upon any one or all of the following:

⁴ ORS 656.385 provides in pertinent 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.