

In the ORS 656.327 Medical Treatment Dispute of

LINDA C. RICHTER, Claimant

Contested Case No: H04-063

FINAL ORDER

July 11, 2005

LUMBERMANS MUTUAL CASUALTY CO., Petitioner

LINDA C. RICHTER, Respondent

Before John Shilts , Administrator, Workers' Compensation Division

Petitioner employer, through its attorney Jerald P. Keene, moves for reconsideration of Office of Administrative Hearings Administrative Law Judge (ALJ) Ella D. Johnson's December 28, 2004 Proposed and Final Contested Case Hearing Order. Respondent claimant, through her attorney Randy Elmer, opposes employer's motion. This matter comes before the director for issuance of a final order. The only issue is attorney fees. The director adopts and affirms with the following supplementation.

The underlying issue is whether proposed surgery is appropriate treatment for claimant's compensable condition. The Medical Review Unit found it appropriate by Administrative Order dated March 25, 2004. The unit declined to award an attorney fee, finding that the claim disposition agreement (CDA) between the parties bars a request for fees. The ALJ affirmed the unit's order and awarded claimant's attorney \$500 for successfully defending the unit's order on appeal.

Employer asks that the ALJ's fee award be vacated because claimant disposed of her rights to further awards of attorney fees in the CDA. Employer cites *Leslie C. Matkins*, 54 Van Natta 2194 (2002). Claimant responds that *Matkins* is distinguishable from the facts here, and further cites a Hearings Division Order on Reconsideration in the matter of *Matthew J. Rigel* (12/22/04).

Attorney fees in disputes over medical treatment arise under ORS 656.385(1), which provides:

“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. * * *”

At issue here is whether the parties' CDA disposes of claimant's right to attorney fees under ORS 656.385(1). ORS 656.236(1) provides:

“(a) The parties to a claim, by agreement, may make such disposition of any or all matters regarding a claim, *except for medical services*, as the parties consider reasonable, subject to such terms and conditions as the Workers' Compensation Board may prescribe. * * * Unless otherwise specified, a disposition resolves all

matters and all rights to compensation, attorney fees and penalties potentially arising out of claims, *except medical services*, regardless of the conditions stated in the agreement.”

(Emphasis added.) The Workers’ Compensation Board approved the parties’ agreement on June 10, 2002. The relevant portions of the CDA provide:

“13. Pursuant to ORS 656.236, in consideration of the payment of \$18,812.50 in a lump sum by the insurer, claimant releases her right to the following workers’ compensation benefits: further temporary disability benefits, permanent disability benefits, whether partial or total, penalties and attorney fees, vocational rehabilitation benefits, further disability benefits in any form in conjunction with any aggravation claim or claim for Own Motion relief, all rights to survivor’s benefits, death benefits, and burial benefits, and further benefits of any kind regarding her claim, *other than her right to medical services for the compensable injury which is expressly retained*. The insurer’s obligation to provide these benefits, except for medical benefits as set forth above, is also released.

“16. *Claimant retains her right to medical services for the compensable injury.*”

(Emphasis added.)

The Workers’ Compensation Board has taken the position that, unless a CDA expressly reserves the right to future attorney fees, a CDA releases the right to future attorney fees under ORS 656.386(1).¹ *Leslie C. Matkins*, 54 Van Natta 2194 (2002) (claimant not entitled to fees under ORS 656.386(1) for prevailing over insurer’s denial of current condition because CDA did not partially release claimant’s right to attorney fees, nor “otherwise specify” that claimant retained the right to future attorney fees). *See also Kim J. Hayes*, 54 Van Natta 750 (2002) (claimant entitled to fees under ORS 656.386(1) where CDA expressly excepted attorney fees from release of future rights).

The director, however, is persuaded by the ALJ’s reasoning in the Order on Reconsideration in the matter of *Matthew J. Rigel*, cited by claimant. The ALJ awarded claimant’s attorney \$5,000 under ORS 656.386(1) for prevailing over the insurer’s denial of claimant’s current condition, despite claimant’s release in a CDA. The ALJ reasoned that the text and context of ORS 656.236(1) and 656.386(1) allow an award of attorney fees when a worker prevails over an insurer’s denial of future medical services.

A worker cannot dispose of medical services in a workers’ compensation claim. ORS 656.236(1)(a). The insurer has a duty to provide compensable medical services for the life of the worker. ORS 656.245(1)(b). Inevitably, disputes will arise from time to time over the compensability or appropriateness of future medical services. The workers’ compensation system provides a process for resolving those disputes. ORS 656.245(7), 656.327. ORS 656.385(1) provides, without exception, that if the claimant finally prevails in such disputes the

¹ ORS 656.386(1) provides for attorney fees before the Workers’ Compensation Board or its Hearings Division, the Court of Appeals, and the Supreme Court where a claimant finally prevails against a denied claim.

director shall require the insurer to pay a reasonable fee to claimant's attorney. Inherent in the right to lifetime medical benefits is the right to challenge a denial of those benefits, with or without the assistance of an attorney. ORS 656.385(1) provides the basis for an attorney to be compensated if the worker prevails over the insurer's denial.

IT IS HEREBY ORDERED the December 28, 2004 Proposed and Final Contested Case Hearing Order is adopted and affirmed.