
In the Compensation of
Deborah J. Swingle, Claimant
Contested Case No: 06-025H
PROPOSED & FINAL ORDER ON RECONSIDERATION
October 12, 2006
DEBORAH J. SWINGLE, Petitioner
JELD-WEN, Respondent
Before Kate Donnelly, Administrative Law Judge

On July 27, 2006, claimant's attorney requested reconsideration of the July 24, 2006 Proposed and Final Orders in WCB Case Nos. 06-00025H and 06-00060H. Pursuant to OAR 436-001-0246, the undersigned Administrative Law Judge forwarded the reconsideration request to the director for review. On August 3, 2006, the Technical Coordinator of the Workers' Compensation Division sent the parties a letter acknowledging claimant's timely filing of exceptions to the July 24, 2006 Proposed and Final Order. On August 11, 2006, the director issued an Order Remanding to the Workers' Compensation Board, claimant's request for reconsideration of the Proposed and Final Order.

On August 17, 2006, claimant's counsel requested that the July 24, 2006 Proposed and Final Order be abated. An Order of Abatement issued on August 18, 2006 granting opposing counsel 20 days to respond to claimant's Motion for Reconsideration and 10 days for claimant's counsel to reply.

Having received the parties' arguments, I proceed with my reconsideration.

Claimant continues to assert that jurisdiction over this matter lies with the Workers' Compensation Division. Claimant relies on *Mary M. Mitchell*, 47 Van Natta 300 (1995) for the proposition that the Director has jurisdiction to resolve the medical service dispute in the present case. While I agree that the Director has jurisdiction to resolve medical service disputes, these are limited to those disputes that arise under ORS 656.245, 656.247, 656.248, 656.260 or 656.327. See ORS 656.704(3)(a). There is no provision in the statute, or case law cited by claimant, that allows the Director to order the self-insured employer to pay for non-compensable medical services. The terms of the DCS included a statement that, "in consideration for the payments set out above, claimant agrees that her claims shall remain in denied status" (Ex. 36A-4).

Under such circumstances, I continue to find that the Director correctly dismissed claimant's request for Administrative Review of the alleged medical services dispute.

Accordingly, on reconsideration, as supplemented herein, I adhere to and republish my July 24, 2006 Proposed and Final Order.

HISTORY OF THE CASE

Claimant appeals two Administrative Orders of Dismissal issued by the Medical Review Unit (MRU) of the Workers' Compensation Division (WCD), Department of Consumer and Business Services (DCBS) on January 5, 2006 (DMS 06-035 and DMS 06-036). The MRU concluded that the director lacked jurisdiction over the disputed medical service (a November 20, 2003 MRI provided by Merle West Medical Center) because it was for a denied condition, pursuant to a Disputed Claim Settlement (DCS). Claimant's appeal was referred to the Workers' Compensation Board, Hearings Division, under ORS 656.704(2)(a) and OAR 436-001-0019.

A hearing was scheduled to convene on June 7, 2006, in Klamath Falls, Oregon before Administrative Law Judge Kate Donnelly. Claimant is represented by Jodie Phillips Polich. The self-insured employer, Jeld-Wen Incorporated (Jeld-Wen), and its claims administrator, Crawford and Company (Crawford), are represented by Lance M. Johnson. The hearing did not take place after the parties agreed that the matter be decided upon the documentary record in lieu of hearing. Claimant waived appearance in this matter. There were no recorded proceedings. The record closed on June 28, 2006, following receipt of claimant's written reply argument.

ISSUES

1. Jurisdiction. Whether the WCD has jurisdiction over this medical services dispute.
2. If it is determined that the WCD has jurisdiction over this matter, whether OAR 436-009-0030(9) (WCD Admin. Order 05-051, eff 4/1/05), requires the employer to pay for the disputed medical service.
3. Sanctions pursuant to ORS 656.390.
4. Attorney fees.

EVIDENTIARY RULINGS

On May 18, 2006, the employer submitted Exhibits 1 through 52. On April 14, 2006, the employer submitted supplemental Exhibit 36A. There being no objections, Exhibits 1 through 52, and 36A, are admitted into the documentary record.

FINDINGS OF FACT

The Findings of Fact in the January 5, 2006 Administrative Orders are accepted and incorporated in this Proposed and Final Order, with the following supplementation:

On October 3, 2003, the employer accepted a lumbar strain combined with non-compensable lumbar degenerative arthritis (Ex. 15). On that same date, the employer issued a current condition denial of the above condition (Ex. 16). Claimant requested a hearing before the Workers' Compensation Board Hearings Division (Ex. 17).

On November 20, 2003, claimant underwent an MRI scan of the lumbar spine (Ex. 25).

On November 26, 2003, Merle West Medical Center billed Crawford for the MRI scan in the amount of \$1,335.40 (Ex. 24). The adjuster on the April 8, 2003 injury claim was Tamera Tamez (Ex. 20). On January 12, 2004, the outstanding bill for the MRI was emailed to Ms. Tamez (Ex. 52-1). Ms. Tamez confirmed that she received the email (Ex. 52-1).

On May 7, 2004, claimant reached a settlement agreement (DCS) regarding her denied low back claim (Ex. 36A-3). The DCS was signed by an Administrative Law Judge on June 30, 2004 (Ex. 36A-6).

FINDINGS OF ULTIMATE FACT

The November 20, 2003 MRI was for a denied condition. Consequently, the director lacked jurisdiction to resolve the medical services dispute.

CONCLUSIONS AND REASONING

Claimant contends that the WCD had jurisdiction to resolve the medical services dispute under OAR 436-009-0030(9). Specifically, claimant argues that the evidence shows that Crawford had the disputed medical bill in its possession at the time of the settlement agreement (May 7, 2004) and, therefore, under OAR 436-009-0030(9), Crawford must pay the bill as if it had been listed in the approved DCS.

The employer responds that the version of OAR 436-009-0030(9) that claimant cites is not applicable to the present matter. In the alternative, the employer argues that the WCD has no jurisdiction to alter the DCS or to order payment for medical services with regard to a settled denied claim. The employer requests that sanctions be imposed on claimant's counsel pursuant to ORS 656.390, arguing that claimant has cited no authority to support her appeal of the two administrative orders.

Jurisdiction

OAR 436-009-0030(9) provides:

“The insurer must pay a medical provider for any bill related to the claimed condition received by the insurer on or before the date the terms of a disputed claim settlement (DCS) were agreed on, but was either not listed in the approved DCS or was not paid to the medical provider as set forth in the approved DCS. Payment must be made by the insurer as prescribed by ORS 656.313(4)(d) and OAR 438-009-0010(2)(g) as if the bill had been listed in the approved settlement or as set forth in the approved DCS, except if the DCS payments have already been made, the payment must not be deducted from the settlement proceeds. Payment must be made within 45 days of the insurer's knowledge of the outstanding bill.”

This rule was adopted on March 25, 2005 and became effective on April 1, 2005. *See* WCD Admin. Order 05-051. Prior to its adoption, there had been no similar provision for the payment of medical bills which had been received by the insurer prior to settlement, but not included in the settlement document.

The issue is whether this rule applies to the facts of this case. I conclude that it does not apply, based on the following reasoning.

OAR 436-009-0003(1) addresses the applicability of the rules and states:

“These rules apply to all services rendered on or after the effective date of these rules.”

The MRI in dispute was performed on November 20, 2003. Because this service was rendered prior to the effective date of the rule, I conclude that OAR 436-009-0030(9) does not apply.

OAR 436-010-0008(1)(A) provides:

“Except as otherwise provided in ORS 656.704, the director has exclusive jurisdiction to resolve all matters concerning medical services disputes arising under ORS 656.245, 656.247, 656.260, 656.325 and 656.327.”

ORS 656.247(3)(c) provides:

“Except as provided in subsection (2) of this section, when a claim is settled pursuant to ORS 656.289(4), all medical services payable under subsection (1) of this section that are provided on or before the date of the denial shall be paid in accordance with subsection (4) of this section. The insurer or self-insured employer shall notify each affected service provider of the results of the settlement.”

Here, the claim was denied on October 10, 2003 and was settled by a DCS pursuant to ORS 656.289(4). However, the disputed November 20, 2003 MRI was performed after the date of the denial. Consequently, I find that the WCD did not have jurisdiction to resolve payment of the disputed MRI bill under ORS 656.247.

Moreover, because the disputed bill was for a denied claim, I conclude that the WCD correctly determined that it lacked jurisdiction to resolve this matter under ORS 656.245.

In summary, I conclude that the WCD lacked jurisdiction to hold the employer liable for payment of the November 20, 2003 MRI bill. Consequently, the January 5, 2006 Administrative Orders of Dismissal in DMS 06-035 and DMS 06-036 are affirmed.

Sanctions Pursuant to ORS 656.390

The employer seeks sanctions under ORS 656.390(1) alleging that claimant had no reasonable basis for appealing the Administrative Orders of Dismissal. I decline to impose sanctions for the following reasons.

First, this matter is reviewed under WCD Admin. Order 06-050 (eff. January 17, 2006). There is no provision in the above administrative rule for the imposition of sanctions pursuant to ORS 656.390. Moreover, OAR 436-001-0225(2) provides, in relevant part, that new issues may not be considered when reviewing the director's order. After reviewing the record before the WCD, I find no evidence that the employer raised this issue before the director in response to claimant's request for administrative review (*See* Exs. 43; 44; 45; 46;47; 48). Finally, ORS 656.390(1) applies in cases where either party "requests a hearing before the Hearings Division." Here, claimant requested a hearing before the Workers' Compensation Division (Ex. 50). Due to a recent change in the statute, these WCD cases are now referred to the Workers' Compensation Board Hearings Division. Nonetheless, claimant's appeal was of an administrative order from the WCD and is decided under the rules provided in WCD Admin. Order 06-050. As discussed above, these rules do not provide for sanctions under ORS 656.390.

Even if I were to conclude that sanctions were available under ORS 656.390 in a review of the WCD Administrative Orders of Dismissal, I would not impose them in the present case because I find that claimant's argument was not "frivolous" as defined in ORS 656.390(2). Claimant presented an argument that most likely would have prevailed if the disputed medical bill did not predate April 1, 2005. Additionally, claimant has presented substantial evidence supporting a conclusion that Crawford was in possession of the disputed bill prior to reaching the settlement agreement in May 2004. The fact that I concluded that the director did not have jurisdiction to resolve this denied medical bill, does not mean that claimant initiated the matter without reasonable prospect of prevailing. Consequently, I decline to impose sanctions on claimant's counsel pursuant to ORS 656.390.

Attorney Fees

Because I have affirmed the January 5, 2006 Administrative Orders of Dismissal (DMS 06-035 and DMS 06-036), claimant's attorney is not entitled to an assessed attorney fee under OAR 436-010-0008(12).

Additionally, because I have declined to impose sanctions under ORS 656.390, the employer's counsel is not entitled to recover expenses or a reasonable attorney fee from claimant's counsel.

ORDERS

IT IS THEREFORE ORDERED that the WCD's January 5, 2006 Administrative Orders of Dismissal (DMS 06-035 and DMS 06-036) are affirmed.