
In the Medical Treatment Dispute of

John L. Watkins, Claimant

Contested Case No: 05-147H

FINAL ORDER

November 22, 2006

LIBERTY NW INSURANCE COMPANY, Petitioner

JOHN L. WATKINS, Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

On July 19, 2006, Administrative Law Judge (ALJ) Keith Kekauoha, of the Hearings Division of the Workers' Compensation Board, issued a Proposed and Final Order (order) in this matter. Petitioner, Liberty Northwest Insurance Company (insurer) through its attorney, Barbara Woodford, submitted exceptions to the Order on August 15, 2006. Respondent (claimant), through his attorney Michael A. Gilbertson, responded on September 5, 2006 that he relied on ALJ Kekauoha's order. This matter comes before the director for a final order. The issue is whether claimant's attorney is entitled to an attorney fee. The scope of my review is for substantial evidence and errors of law. I affirm the Amended Administrative Order issued on September 2, 2005 and the July 19, 2006 order issued by ALJ Kekauoha as supplemented below.

I adopt the ALJ's findings of fact.

Insurer appears to be arguing, in its exceptions, that ALJ Kekauoha's order contains an error of law. Insurer contends that the CDA entered into by claimant and insurer extinguished claimant's right to recover attorney fees for any dispute, including medical services, subsequent to the date of the CDA. Insurer relies on *Rash v. McKinstry Company and Liberty NW Insurance Corp.*, 331 Or 665 (2001) and *Leslie C. Matkins*, 54 Van Natta 2194 (2002). In *Rash*, the Oregon Supreme Court determined that the CDA provision applied broadly, but only applied to the interests of the claimant and not the insurer. Therefore, the court held that insurer's right to recover the lien amount from claimant was not extinguished by the CDA. *Rash* is not applicable to this case because it does not address disputes under the director's jurisdiction. Relying on *Rash*, the Workers' Compensation Board (WCB) held in *Leslie C. Matkins* that a CDA bars claimant from subsequently recovering attorney fees assessed under ORS 656.386(1), which awards attorney fees for prevailing on a denied claim. The attorney fee, in this case, is related to medical services and allowed pursuant to ORS 656.385(1), not 656.386(1). Therefore, *Matkins* is distinguishable. Moreover, the director is not bound by the decisions of the WCB.

ORS 656.236(1) contains the provisions that allow the insurer and claimant to dispose of a claim through a claim disposition agreement, and it states in relevant part:

The parties to a claim, by agreement, may make such disposition of any and 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.

A reasonable interpretation of this provision is that a CDA disposes of all rights under the authority of the WCB because 1) CDAs are under the jurisdiction of WCB; 2) it provides WCB with the authority to adopt rules prescribing the terms and conditions of the CDAs; and 3) it exempts medical services, which are under the jurisdiction of the director. Thus, medical services, which are under the director's jurisdiction, are expressly exempted from the CDA provision. It follows, therefore, that attorney fees, also under the director's jurisdiction, related to the procurement of those medical services would also be exempted from the CDA provision.

The director previously addressed this issue in *Linda C. Richter*, 10 CCHR 252 (2005). There, as in this case, the issue was whether a worker was entitled to receive attorney fees resulting from a medical services dispute. The director's reasoning was as follows:

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 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 [of medical services].

In the order, the ALJ did not accept the court's decision as controlling authority because the court did not specifically address whether a CDA disposed of the right to future attorney fees that may be awarded under ORS 656.385(1). Liberty disagreed with the ALJ's reasoning based on its determination that the court's ruling in *Rash* was broad and should therefore have a broad application. Liberty also argued that WCB followed *Rash* in *Leslie C. Matkins* (claimant prevailed over a current condition denial; no attorney fee because of CDA) and *Matthew J. Rigel*, 57 Van Natta 2027 (2005) (claimant prevailed over a new and/or omitted condition denial; no attorney fee because of CDA). However, in both of these cases, the benefits that would have resulted in an award of attorney fees were "matters concerning a claim" under the jurisdiction of the WCB, and not under the director's jurisdiction.

The ALJ correctly determined that *Rash* was not controlling case law. As discussed in the order, *Rash* did not address whether a CDA disposed of the right to attorney fees pursuant to ORS 656.385(1). In addition, at the time when the court decided *Rash* and the claimant entered into the CDA, attorney fees were not awarded to claimants who prevailed on a medical dispute before MRU. In a case such as this, claimant would not have been awarded an attorney fee because he prevailed without the need for a contested case hearing. Until January 2004, there was no statutory right to receive attorney fees at the MRU level. The 2003 legislature passed SB

620, effective January 1, 2004, which amended ORS 656.385(1) to provide for attorney fees for prevailing “after a proceeding has commenced before the Director ***.” Therefore, insurer is essentially arguing that claimant relinquished his right to an attorney fee before such a right existed. Since the right to receive attorney fees for medical disputes did not exist, absent the need for a contested case hearing, at the time the parties entered into the CDA, the claimant could not have relinquished a nonexistent right. Based on the above, I affirm both the administrative order and the order issued by the ALJ.

ORDER

IT IS HEREBY ORDERED that:

The ALJ’s Order dated July 19, 2006 and the Administrative Order dated September 2, 2005 are affirmed.