
In the ORS 656.327 Medical Treatment Dispute of

John L. Watkins, Claimant

Contested Case No: 05-147H

PROPOSED & FINAL ORDER

July 19, 2006

LIBERTY NORTHWEST INS CORP, Petitioner

JOHN L. WATKINS, Respondent

Before Keith Kekauoha, Administrative Law Judge

Hearing convened in Portland on July 5, 2006 before Keith Kekauoha, Administrative Law Judge. Claimant, who was not present, was represented by his attorney, Michael Gilbertson. Employer, Western Cedar, and its insurer, Liberty Northwest Insurance Corporation, were represented by their attorney, Barbara Woodford. The hearing was recorded by the Administrative Law Judge. Exhibits 1-205 (including 205-8) were admitted into evidence. No testimony was offered. After recorded closing arguments, the record closed on July 5, 2006.

ISSUE

Attorney Fees. Insurer appealed the portion of the Medical Review Unit's (MRU's) Administrative Order that ordered insurer to pay claimant's attorney a fee of \$1,750 for prevailing over insurer's refusal to provide a wheelchair accessible van with modifications.

FINDINGS OF FACT

On June 13, 2000, while working as a roofer, claimant fell 15 feet onto a hardwood floor and sustained a serious back injury. He received emergency treatment and underwent spinal canal decompression and fusion surgeries.

Insurer initially accepted the injury claim for L1 burst fracture and left T12-L1 facet complex fracture. Insurer later modified its claim acceptance to include neurogenic bowel and bladder.

Claimant suffered partial paralysis of the lower extremities and was determined to be permanently wheelchair dependent.

In February 2001, the parties entered a Claim Disposition Agreement (CDA) in which claimant "release[d] all rights to all workers' compensation benefits allowed by law, including temporary disability, permanent disability, vocational rehabilitation, aggravation rights to reopen claim, attorney fees, penalties, and survivor's benefits potentially arising out of this claim, and any subsequent claim for new medical conditions, except for medical services, regardless of the condition(s) stated in this agreement. The insurer/employer's obligation to provide these benefits is also released." The CDA was approved by the Board on February 16, 2001. (Ex. 75).

In January 2005, claimant, through his attorney, requested Administrative Review of insurer's refusal to provide a wheelchair accessible van.

On August 29, 2005, MRU issued an Administrative Order finding that a wheelchair accessible van, equipped with appropriate modifications to include hand controls and a power ramp, is reasonable and appropriate for claimant's compensable condition. Insurer was ordered to purchase such a van. However, MRU did not award an attorney fee to claimant's attorney because a retainer agreement was not submitted. (Ex. 196).

Claimant's attorney subsequently submitted a retainer agreement and a statement of hours. On September 2, 2005, MRU issued an Amended Administrative Order that awarded claimant's attorney a fee of \$1,750.

CONCLUSIONS OF LAW AND OPINION

Insurer contends that MRU erred in awarding an attorney fee, arguing that the parties' CDA disposed of claimant's right to attorney fees. Claimant responds that, notwithstanding the CDA, ORS 656.385 provides that an attorney fee must be awarded for prevailing in a medical treatment dispute.

Attorney fees are authorized in medical treatment disputes under ORS 656.385(1), which 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."

The issue in this case is whether the parties' CDA disposed of claimant's right to attorney fees under ORS 656.385(1). ORS 656.236(1) provides:

"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."

In *Linda C. Richter*, 10 CCHR 252 (2005), the Director (through his designee, the Administrator of the Workers' Compensation Division) held that a CDA may not dispose of attorney fees awarded in medical treatment disputes under ORS 656.385(1). The Director reasoned 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 attorney 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.” *Richter*, 10 CCHR at 253-54.

The *Richter* order was appealed to the Court of Appeals, and this case was deferred pending a decision from the court. However, the *Richter* matter was settled by the parties, and the appeal was apparently dismissed. The *Richter* order was not reversed, vacated, or altered in any way; it therefore remains controlling case authority in matters within the Director’s jurisdiction.

This matter is within the Director’s jurisdiction. A dispute over the appropriateness of a medical service under ORS 656.327 is not a matter concerning a claim. See ORS 656.704(3)(a) and (b)(B). Therefore, any request for hearing in such a dispute must be filed with the Director. ORS 656.704(2)(a). The Director must refer the request for hearing to the Workers’ Compensation Board for a hearing before an Administrative Law Judge; however, the order of the Administrative Law Judge is subject to review by the Director rather than the Board. *Id.* See OAR 436-001-0019(5), 436-001-0170(2).

Because the Director’s decision in *Richter* is controlling, I must affirm MRU’s award of an attorney fee under ORS 656.385(1).

Insurer cites the Supreme Court’s decision in *Rash v. McKinstry Co.*, 331 Or 665 (2001). However, the Court did not address whether a CDA disposed of a right to attorney fees. Rather, the Court held that, where a CDA did not specifically preserve an insurer’s lien rights against any recovery that the claimant might receive in a pending tort action, the CDA resolved the insurer’s lien. Because the Court did not address whether a CDA resolves the right to future attorney fees that may be awarded under ORS 656.385(1), it is not controlling authority in this matter.

Insurer also cites the Board’s decisions in *Leslie C. Matkins*, 54 Van Natta 2194 (2002), and *Matthew J. Rigel*, 57 Van Natta 2027 (2005). In those cases, the Board held that, where a CDA did not preserve the right to future attorney fees related to denials of compensability of future medical services, the CDA disposed of the right to attorney fees.

Matkins and *Rigel* are distinguishable because neither case involved attorney fees under ORS 656.385(1). Furthermore, to the extent that the Board's reasoning in those cases is contrary to the Director's decision in *Richter*, I must abide by the decision of the Director, who has review authority in this matter, rather than the Board. For these reasons, MRU's attorney fee award must be affirmed.

ORDER

MRU's Administrative Order dated August 29, 2005, as amended on September 2, 2005, is affirmed.