

In the ORS 656.245 Medical Service Dispute of

Thomas A. Dourgarian, Claimant

Contested Case No: 06-181H

PROPOSED & FINAL ORDER

March 12, 2007

THOMAS A. DOURGARIAN, Petitioner

MARION COUNTY OREGON, Respondent

Before Douglas C. Crummé, Administrative Law Judge

Pursuant to notice, a hearing convened on the record in the above matter on February 13, 2007, in Salem, Oregon. Dale C. Johnson, attorney at law, represented claimant, who did not personally appear. Dennis S. Reese, attorney at law, represented the employer, Marion County, and its claims processing agent, Sedgwick Claims Management Services. Administrative Law Judge Douglas Crummé presided. Exhibits 1 through 16 are admitted. The record closed on the date of hearing.

ISSUES

I. Evidence and Administrative Notice. Claimant objects to employer's offer of Exhibit 1A and to employer's alternative request that the Board take administrative notice of Exhibit 1A.

II. Medical Services. Claimant challenges the Workers' Compensation Division's (WCD's) October 11, 2006, Administrative Order that denied payment for in-home medical services from June 15, 2001, through July 14, 2001. Claimant requests that employer be ordered to pay attorney fees if claimant finally prevails on this issue.

CONCLUSIONS OF LAW AND OPINION

Employer accepted claimant's worker's compensation claim for an injury on June 9, 2001. Claimant's wife, Linda Dourgarian, is a registered nurse and provided in-home medical services to claimant from June 15, 2001, through July 14, 2001.

On January 5, 2004, employer received a letter from claimant's attorney, Mr. Johnson, requesting that employer "reimburse Mrs. Dourgarian."

Employer concluded that the amount billed was \$100 per day for 30 days. Pursuant to OAR 436-009-0010(5), employer reduced that amount by 10 percent for every 30-day interval beyond 60 days after the dates of service until employer received the bill. Employer paid Ms. Dourgarian a total of \$113.10 on the bill.

Claimant asked WCD to determine the correct amount due for the in-home medical services that Ms. Dourgarian's provided. WCD requested that employer provide various items of information to WCD, including employer's initial notice of acceptance of the claim.

However, the record does not reflect that employer subsequently provided its initial notice of acceptance to WCD.

On October 11, 2006, WCD issued its Administrative Order. WCD found that claimant had requested that employer reimburse claimant. WCD found that the request for reimbursement was untimely under OAR 436-009-0025(3) because employer did not receive the request for reimbursement until January 5, 2004. WCD ordered that employer was not liable to claimant for Mrs. Dourgarian's services.

The record of WCD's proceeding does not contain information that claimant paid Mrs. Dourgarian for her services and was requesting that employer reimburse him as opposed to paying Mrs. Dourgarian.

The record of WCD's proceeding does not contain information that employer had finally determined, by January 5, 2002, that claimant's claim was compensable.

Claimant requested a hearing before the Workers' Compensation Board to challenge WCD's Administrative Order. Subsequently, WCD provided the Board Exhibits 1 through 16, which WCD certified as the full copy of WCD's record. WCD's exhibits did not include Exhibit 1A, which is titled an "Initial Notice of Acceptance." On January 16, 2007, employer offered Exhibit 1A for admission into the Board's hearing.

I. Evidence and Administrative Notice

Claimant's objections to employer's offer of Exhibit 1A and to employer's alternative request for administrative notice of Exhibit 1A should be sustained.

The standard of review in this matter precludes admitting new evidence or taking administrative notice of facts beyond what the WCD received in its record.

ORS 656.327(2), concerning medical treatment disputes, provides in pertinent part,

"...The director shall create a documentary record sufficient for purposes of judicial review. If the worker, insurer, self-insured employer or medical service provider is dissatisfied with that order, the dissatisfied party may request review under ORS 656.704. The administrative order may be modified at hearing only if it is not supported by substantial evidence in the record or if it reflects an error of law. No new medical evidence or issues shall be admitted..."

OAR 436-001-0225(2), concerning medical treatment disputes, provides in pertinent part,

"...[T]he administrative law judge may modify the director's order only if it is not supported by substantial evidence in the record or if it reflects an error of law. New medical evidence or issues may not

be admitted or considered.”

The present matter is a medical treatment dispute because it concerns employer’s liability for medical treatment. As a result, the substantial-evidence/error-of-law standard of review under ORS 656.327(2) and OAR 436-001-0225(2) applies. *Liberty Northwest Ins. Corp. v. Kraft*, 205 Or App 59 (2006). The substantial evidence review under ORS 656.327(2) and OAR 436-009-0225(2) is based on the documentary record that the director’s designee (in this case WCD) creates. Evidence that is not a part of WCD’s record is beyond the scope of the Board’s review authority under the substantial-evidence standard. Exhibit 1A was not in the record of WCD’s proceeding. As such, Exhibit 1A is not admissible in this hearing. Claimant’s objection should be sustained.

Similarly concerning employer’s request that the Board take administrative notice of Exhibit 1A, the Board conducts its substantial evidence review based on WCD’s record. As such, the Board may not, to determine whether substantial evidence supports WCD’s order, rely on officially noticed information outside of WCD’s record.

Even if the Board had authority to take administrative notice of information outside of WCD’s record to review whether substantial evidence supported WCD’s order, the Board should not take official notice of Exhibit 1A based on the source of that document. In general, an agency may take administrative notice of facts “[c]apable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” *SAIF v. Calder*, 157 Or App 224 (1998). Employer appears to be the source of Exhibit 1A. The accuracy of facts stated in a document that a party creates and provides can reasonably be questioned.

Accordingly, the Board should sustain claimant’s objections to the admission of Exhibit 1A and to employer’s request for administrative notice of Exhibit 1A.

II. Medical Services

Claimant challenges WCD’s Administrative Order on several bases. First, claimant argues that WCD legally erred because the rule on which WCD relies, OAR 436-009-0025(3) does not apply to the type of payment that claimant seeks. Second, if OAR 436-009-0025(3) does apply on its face, claimant argues that WCD nevertheless legally erred because WCD lacked authority to adopt the rule. Third, if OAR 436-009-0025(3) applies and WCD had authority to adopt that rule, claimant argues that substantial evidence does not support WCD’s conclusion under the rule that the request for payment to Mrs. Dourgarian was untimely.

Claimant’s position is persuasive that WCD legally erred in applying OAR 436-009-0025(3) to the request for payment for Mrs. Dourgarian’s services. OAR 436-009-0025(3) provides,

“Requests for reimbursement of related services costs must be received by the insurer within two years of the date the costs were incurred or within two years of the date the claim or medical condition is finally determined compensable, whichever date is

later. The insurer may disapprove requests for reimbursement received beyond the two year period as being untimely requested.”

OAR 436-009-0025(1) addresses an employer’s responsibilities to reimburse a claimant for related services costs. OAR 436-009-0025(1) provides that, upon request, an employer will reimburse a claimant for “actual and reasonable costs for travel, prescriptions and other claim-related services” that the claimant has paid.

Claimant argues that the rule only addresses reimbursement to a claimant for the claimant’s out-of-pocket costs such as mileage, lodging, and meals rather than payment for medical services such as Mrs. Dourgarian provided. Assuming for the sake of argument that the rule does address services of the type that Mrs. Dourgarian provided, WCD’s record here nevertheless contains no information that claimant paid Mrs. Dourgarian for the disputed services and that claimant is now asking employer to reimburse him under OAR 436-009-0025(1). Rather, claimant has essentially asked employer to pay Mrs. Dourgarian’s bill for her services. As a result, WCD legally erred in applying the two-year time limit under OAR 436-009-0025(3).

Since OAR 436-009-0025(3) does not apply, it is not necessary to address claimant’s argument that WCD legally erred because WCD lacked authority to adopt the rule.

If OAR 436-009-0025(3) did apply and WCD had authority to adopt that rule, claimant’s argument is nevertheless persuasive that substantial evidence does not support WCD’s conclusion that the request for payment was untimely under the rule. Claimant argues that substantial evidence does not support the WCD’s conclusion because there is no evidence that employer notified claimant that employer would reimburse claimant for claim-related services that claimant paid. OAR 436-009-0025(1) requires such notice. More fundamentally, however, substantial evidence does not support WCD’s conclusion that the request for payment for Mrs. Dourgarian’s services was late under the rule. This is because there is no evidence in WCD’s record about when employer finally determined that claimant’s claim was compensable. As a result, there is not substantial evidence to support WCD’s conclusion that employer received the request for payment more than two years after both when the costs were incurred and when employer finally determined that the claim was compensable.

The parties’ medical services dispute should be remanded to the WCD for reconsideration. On review, an administrative law judge may remand a matter to the director for further action where appropriate. OAR 436-009-0170(5). At the hearing, the parties agreed that, if claimant prevailed, then remand was probably required. Remand is appropriate here to allow WCD to reconsider the request for payment under the applicable authority.

There is not a basis at this time to order employer to pay claimant’s attorney an attorney fee. ORS 656.385(1) provides that an administrative law judge may order an employer to pay such a fee where the claimant “finally prevails after a proceeding has commenced.” Here, claimant has not finally prevailed because the matter should be remanded to the WCD for reconsideration.

ORDER

IT IS THEREFORE ORDERED that this matter is remanded to WCD for reconsideration.