
In the ORS 656.245 Medical Services of

Daniel M. Clendenon, Claimant

Contested Case No: 07-133H

FINAL ORDER

August 11, 2008

LIBERTY NW INSURANCE CO, Petitioner

DANIEL M. CLENDENON, Respondent

Before John Shilts, Workers' Compensation Division Administrator

Insurer/petitioner timely filed exceptions to Administrative Law Judge David P. Lipton's March 10, 2008 Proposed and Final Order. ORS 656.704(2)(a); OAR 436-001-0246. Claimant responded. The matter comes before the director for a final order. The issue is whether claimant is entitled to mileage reimbursement under OAR 436-009-0025(2)(c)¹, after having delayed more than two years before requesting reimbursement.² The ALJ found claimant was entitled to reimbursement for all of his expenses and I affirm that order.

FACTUAL SUMMARY

I adopt the factual findings of the administrative order. Claimant suffered a compensable injury at work on September 4, 1991. Insurer's September 20, 1991 notice of acceptance of claim informed claimant that insurer would reimburse claimant for claim-related expenses he personally paid if he submitted written requests supported by receipts and documentation. The parties reached a Disputed Claim Settlement (DCS) which was entered on July 13, 1994.

On March 21, 2006, claimant submitted a mileage reimbursement request for 1994 through 2003. ORS 656.245. Claimant's attorney submitted a follow-up letter on April 5, 2007. On May 8, 2007, insurer denied this request on the grounds the request was not timely because it was submitted more than two years after the expenses occurred. OAR 436-009-0025(3). Claimant requested administrative review by the Medical Section Resolution Team (RT) of this

¹ The ALJ's order refers to OAR "436-60-070." The November 9, 2007 administrative order cites OAR 436-009-0025. OAR 436-060-0070 was renumbered to current OAR 436-009-0025 effective January 1, 2002. WCD Admin. Order No. 01-064, eff. 1/1/02. The wording of the rules is identical and reference here will be to the current rule, for clarity. OAR 436-009-0025(2)(c) provides:

"(2) Reimbursement of the costs of meals, lodging, public transportation and use of a private vehicle shall be reimbursed as provided in this section. . . . When a worker has documentation of the expense which includes the date of the expense, he or she may be entitled to reimbursement for:

. . . .

(c) Mileage when using a personal vehicle based on the beginning and ending addresses. Reimbursement may exceed the maximum if special transportation is required. Public transportation will be reimbursed based on actual cost."

² "Requests for reimbursement of claim-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(3).

decision on July 28, 2007. ORS 656.245(6); OAR 436-010-0008.

RT issued an administrative order on November 9, 2007. The reviewer found insurer liable for the requested expenses as the two year limitation on requesting reimbursement had not existed at the time petitioner advised claimant of his reimbursement rights.³ Therefore, while claimant may have had knowledge he was entitled to reimbursement, insurer had not notified claimant of the, as of then non-existent, two-year limit on seeking payment. The reviewer also awarded claimant attorney's fees as a prevailing party. ORS 656.385.

Insurer filed a request for a contested case hearing on November 28, 2007. ORS 656.704(2); OAR 436-001-0019. ALJ David D. Lipton held a hearing on March 3, 2008, and issued a Proposed and Final Order on March 10, 2008. Under the principles of statutory construction the ALJ concluded the time limit at issue here was substantive and would have imposed on claimant additional duties or new obligations concerning a prior transaction. The ALJ therefore reasoned that the two year limit could not be applied in the case of injuries which occurred before its adoption. The ALJ's order affirmed the administrative review and held insurer liable to reimburse claimant for his mileage expenses. The order also awarded claimant additional attorney's fees. ORS 656.385(3).

Insurer filed exceptions to the ALJ's Proposed and Final Order on March 25, 2008. ORS 656.704(2); OAR 436-001-0246.

CONCLUSIONS OF LAW

The administrative order in a medical services dispute may only be modified if it is not supported by substantial evidence or if it is based on an error of law. ORS 656.247((3)(a); OAR 436-001-0225(2); *Liberty Northwest Ins. Co. v. Kraft*, 205 Or. App. 59, 61-62 (2006). Under the substantial evidence standard, the reviewing body examines the entire record, rather than focusing on any single piece of evidence. If the agency's finding is reasonable, considering both the evidence supporting and opposing the agency's decision, there is substantial evidence. *Liberty Northwest*, 205 Or. App. at 62.

There is a factual dispute here; whether insurer did adequately inform claimant of his right to reimbursement. However neither the reviewer nor the ALJ found that issue controlling. Both based their decisions on the legal question of whether claimant should be subject to the two year limit which was not in force at the time claimant was injured or at the time insurer alleges it formally notified claimant of his general right to reimbursement.

In determining whether to apply the two year rule retroactively, the ALJ in this case relied on case law discussing the principle of statutory construction whereby rules are presumed to be retroactive if they are remedial or procedural rather than substantive. See *Cuff v. Department of Public Safety Standards*, 217 Or. App. 292 (2007), review granted, 344 Ore. 401

³ The two-year restriction was inserted into the rule effective February 12, 1996. WCD Admin. Order 96-053, eff. 2/12/96. The administrative order erroneously cites the effective date of the two-year limit as February 2, 1992. Exhibit 22, p. 2. However that error does not affect the reasoning of any decision makers in the case, including the present one.

(2008). However there is another legal rule which more accurately addresses this issue. The general rule is that, unless another intent has been expressed, a new rule adding or shortening a statute of limitations will not be applied retroactively. *Boone v. Wright*, 314 Ore. 135, 139-140 (1992).

The rule at issue here is exactly analogous to a statute of limitations. No intent to make the rule retroactive was expressed when the two year rule was introduced. The controlling legal principle therefore warrants applying the two year rule only prospectively.

Insurer first relies on a previous order issued by an ALJ under similar facts. In that case the ALJ concluded a claimant was not entitled to reimbursement for expenses because the claimant sought reimbursement more than two years after incurring the expenses. *Mark A Cavazos*, 12 CCHR 1 (2007). The ALJ in that decision specifically found the claimant was not entitled to recovery even though the insurer had not advised the claimant about the two year limit. 12 CCHR at p. 2.

Cavazos is not controlling here for several reasons. First, the expenses for which reimbursement was sought in that case were all incurred after the two year rule was instituted. 12 CCHR at p. 2. The order in that case also does not state the date on which the injury occurred. *Cavazos* therefore does not address the issue of retroactivity.

Cavazos is also distinguishable because of the order's failure to state the date of injury. The question of whether that claimant ever had an opportunity to learn of the two year rule, through having that information provided in the notice of acceptance of claim, played no role in the ALJ's decision. In the present case, claimant was injured before the two year rule was enacted and he therefore would not have learned of the two year rule in the normal course of pursuing his claim. *Cavazos* is silent on the issue of whether a claimant in these circumstances should be subject to the two year rule.

Cavazos is not determinative here for yet another reason. The only basis for the ALJ's decision in *Cavazos* was that he understood WCD had a policy the two year rule could be applied even if the insurer had not advised a claimant of that rule's existence. 12 CCHR at p. 2. The ALJ cited no legal authority and presented no other rationale supporting his decision. The relevant rule has been amended in a manner which strongly contradicts that policy interpretation. Effective July 1, 2007, OAR 436-009-0025(1) was amended to require that insurers notify claimants in writing of the two year rule.⁴ WCD Admin. Order No. 07-051, eff. 7/1/07.⁵ As expressly stated in the rule, it is now the clear policy of the department that insurers must warn claimants about the two year rule. The rule's function would be defeated if insurers could fail to advise claimants and yet still rely on the two year restriction.

⁴ Which date interestingly preceded both the administrative review and hearing in this matter. Nobody in this case commented on this rule change.

⁵ "The insurer shall notify the worker in writing at the time of claim acceptance that claim-related services, not otherwise addressed by these rules, paid by the worker will be reimbursed by the insurer as provided in this rule. The notification must include notice to the worker of the two year time limitation to request reimbursement" OAR 436-009-025(1).

Insurer finally argues that, even if the two year rule is not applied retroactively, that rule should bar claimant from recovering expenses incurred between 1996, when the two year limit took effect, and 2004, since claimant did not file his request until 2006.⁶ I have reviewed the recording of the hearing before the ALJ and insurer did not make this argument in that forum. Insurer cites no legal authority supporting this contention. *Cavazos* is not persuasive on this point for the reasons discussed above. The party asserting error in a prior order or decision bears the burden of proving legal error in the previous proceedings. *Marvin Wood Products v. Callow*, 171 Or. App. 175, 183-184 (2000). Insurer has not met that burden.

The order of March 10, 2008, is adopted and affirmed.

⁶ The rule having come into effect in 1996, insurer contends claims for reimbursement submitted in 2006 should only be valid for expenses incurred beginning in 2004. Claimant only sought reimbursement for expenses incurred through 2003.