

In the ORS 656.245 Medical Services Dispute of

**Daniel M. Clendenon, Claimant**

Contested Case No: 07-133H

**PROPOSED & FINAL ORDER**

March 10, 2008

LIBERTY NW INSURANCE CORPORATION, Petitioner

DANIEL M. CLENDENON, Respondent

Before David D. Lipton, Administrative Law Judge

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Pursuant to notice, a hearing convened on March 3, 2008 in Portland, Oregon before David D. Lipton, Administrative Law Judge. Claimant was present and was represented by Jodie Phillips Polich. The employer, Bridgetown Printing, and its insurer, Liberty NW Insurance Corp., were represented by Meg Carman. Exhibits 1 through 24, received from the Workers' Compensation Division, were admitted.

**ISSUE**

Liberty NW contests the November 9, 2007 Administrative Order which ordered Liberty to reimburse Claimant mileage expense incurred from April 19, 1995 through December 19, 2004 together with payment of an attorney fee.

**FINDINGS OF FACT**

I adopt the Findings of Fact set forth in the Administrative Order except for the second full paragraph on Page 2 of that Order. That paragraph should read: The 2-year rule limitation for submitting reimbursement was first addressed in The Administrative Rules that became effective on February 12, 1996 (Ex. 24-2).

**OPINION AND CONCLUSION**

Liberty NW relies on the 2-year limitation adopted by WCD Administrative Order 96-053 and the case of Mark A. Cavazos, 12 CCHR1 (2007).

I find that Liberty's argument fails for several reasons.

Because OAR 436-60-070 was not amended to include the 2-year limitation for submitting reimbursement requests until February 12, 1996, Liberty's argument that Claimant was aware of the 2-year limitation at the time of the July 13, 1994 Disputed Claim Settlement (Ex. 9) cannot be accurate. I recognize that Liberty relied on the Administrative Order's recitation of an incorrect adoption date in presenting this argument.

More significant is the question concerning whether the amendment to OAR 436-60-070 which was adopted and became effective February 12, 1996 can be applied retroactively. WCD Administrative Order 96-053 is silent concerning a retroactive application of that amendment.

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The relevant maxims of statutory construction recite that retroactive intent is presumed for those rules which are “remedial” or “procedural” as opposed to “substantive” in nature. “A law is substantive when application of it will ‘impair existing rights, create new obligations or impose additional duties with respect to past transactions,’ whereas ‘remedial’ statutes ‘pertain to or affect a remedy.’” Cuff v. Department of Public Safety Standards, 217 Or App 292 (2007).

The amendment adopted by WCD Administrative Order 96-053 does not affect Claimant’s remedy of reimbursement for his reasonable mileage expense. Rather, the amendment restricted an injured worker’s substantive right to exercise that remedy by placing a time limit on it. Thus, by creating “new obligations” or imposing “additional duties with respect to past transactions” the amendment affected a substantive change in Claimant's rights and is therefore not retroactive. (Because the date of injury for Claimant Cavazos is not identified in the Proposed and Final Order, I do not find that Order to be instructive.)

Since the amendment to OAR 436-60-070 cannot be applied retroactively to injuries prior to its February 12, 1996 effective date, it cannot be applied to Claimant who was injured on September 4, 1991. The Order directing that “Liberty is liable for reimbursement of the mileage expense Mr. Clendenon incurred receiving medical services from April 19, 1995, through December 19, 2004” must be affirmed.

Claimant's attorney is entitled to a reasonable assessed attorney fee. ORS 656.385(3) In addition to the attorney fee awarded by the Director, Claimant’s attorney is awarded an additional assessed fee of \$1500.00.

IT IS SO ORDERED.