

In the ORS 656.327 Medical Treatment Dispute of

Lori A. Trevino, Claimant

Contested Case No: 09-041H

PROPOSED & FINAL ORDER

September 11, 2009

LORI A. TREVINO, Petitioner

ZURICH INSURANCE COMPANY, Respondent

Before Gregory J. Naugle, Administrative Law Judge

Pursuant to notice, a hearing was scheduled for this matter on June 24, 2009, before Administrative Law Judge Naugle. Prior to the hearing, the employer's unopposed motion for a postponement and telephonic closing arguments was granted.

On August 14, 2009 telephonic closing arguments were held in Salem, Oregon. Claimant was represented by attorney Gary Borden. The employer, Savers, Inc., and its claims administrator, Broadspire, were represented by attorney Gordon Clark.

Exhibits 1 through 14 were admitted into evidence without objection. The record closed at the conclusion of closing arguments on August 14, 2009.

ISSUE

Whether Administrative Order TX 09-0320, issued March 12, 2009, should be modified to award an assessed attorney fee.

FINDINGS OF FACT

Claimant was compensably injured on January 10, 2007.

John Cummings, M.D., was claimant's attending physician, and he referred claimant to Michael Sandquist, M.D., regarding her cervical condition.

On February 4, 2009, Dr. Sandquist requested authorization for a C4-5 arthroplasty and C5-6 anterior cervical discectomy and fusion. (Ex. 6.)

The insurer, in an undated form 3228 elective surgery notification to Dr. Sandquist, acknowledged receipt of the request for surgery and indicated surgery was not authorized at this time. No consultant examination was requested, and the insurer indicated they were waiting for a report from Dr. Rosenbaum. (Ex. 7-2.)

Claimant's counsel, in February 16, 2009 correspondence to the Department of Consumer & Business Services (DCBS), indicated that he represented claimant with regard to her workers' compensation claim, and that to date, the insurer has not approved Dr. Sandquist's request for surgery. He requested review of the matter for penalties and fees pursuant to ORS 656.262(11). (Ex. 7-1.)

Dr. Rosenbaum, in February 17, 2009 correspondence, indicated that the surgery remains reasonable and necessary. (Ex. 8.)

On February 25, 2009, the Workers' Compensation Division issued an order referring the ORS 656.211(11)(a) penalty proceedings to the Workers' Compensation Board Hearings Division. (Ex. 9.)

Claimant's counsel, in February 26, 2009 correspondence to DCBS, enclosed a copy of Dr. Rosenbaum's February 17, 2009 correspondence and requested that it be included in the review of claimant's February 16, 2009 request for medical director review of claimant's proposed surgery. (Ex. 10.)

Counsel for the employer, in March 5, 2009 to the Medical Review Unit (MRU) of the Workers' Compensation Division (WCD), indicated that its investigation was complete, and based on the report from Dr. Rosenbaum, had notified Dr. Sandquist's office on March 4, 2009, that the proposed surgery was authorized. (Ex. 11.)

On March 12, 2009, WCD issued Administrative Order TX 09-0320, which concluded that the dispute before the director had been resolved and that claimant's attorney was not instrumental in obtaining resolution prior to completion of the proceeding before the director, and therefore, an attorney fee was not due. (Ex. 12.)

Claimant timely requested a hearing. (Ex. 13.)

CONCLUSIONS OF LAW AND OPINION

Claimant contends that Administrative Order TX 09-0320 erred in not awarding an assessed attorney fee. The employer argued that the Administrative Order was correct. As follows, the employer is persuasive.

ORS 656.385(1) provides in relevant part:

“In all cases involving a dispute over compensation benefits pursuant to ORS 656.245, 656.247, 656.260, 656.327 or 656.340, where a claimant finally prevails after a proceeding has commenced, the Director of the Department of Consumer and Business Services or the Administrative Law Judge shall require the insurer or self-insured employer to pay a reasonable attorney fee to the claimant's attorney. In such cases, where an attorney is instrumental in obtaining a settlement of the dispute prior to a decision by the director or an Administrative Law Judge, the director or Administrative Law Judge shall require the insurer or self-insured employer to pay a reasonable attorney fee to the claimant or claimant's attorney.*****”

Here, the record reflects that claimant's attorney's actions consisted of issuing February 16, 2009 and February 26, 2009 correspondence to DCBS.

The February 16, 2009 correspondence indicated that the surgery had not been approved and requested review “for penalties and fees pursuant to ORS 656.262(11).” (Ex. 7-1.) Under ORS 656.262(11)(a), a penalty and attorney fees may be imposed if a carrier “unreasonably delays or unreasonably refuses to pay compensation.” However, a penalty and attorney fees are not “compensation.” *See, e.g., Saxton v. SAIF*, 80 Or App 631, *rev den*, 302 Or 159 (1986). Consequently, as claimant's counsel's February 16, 2009 correspondence did not raise issues of

“compensation,” it is insufficient to form the basis of an assessed attorney fee award under ORS 656.385(1).

The February 26, 2009 correspondence enclosed a copy of Dr. Rosenbaum’s February 17, 2009 correspondence and requested that it be included in the review of claimant’s February 16, 2009 request for medical director review of claimant’s proposed surgery. Here, the record is unclear as to whether WCD received Dr. Rosenbaum’s letter from a source other than claimant’s attorney. However, even assuming *arguendo* that only claimant’s counsel supplied the letter, WCD did not rely on it in making a determination regarding the medical treatment dispute, but rather, concluded that the insurer’s approval of the surgery resolved the dispute. Thus, in the absence of additional supporting evidence, I am unable to conclusively determine that claimant’s counsel’s February 26, 2009 correspondence to DCBS was “instrumental” in obtaining a settlement from the insurer.

In sum, the record does not establish that claimant is entitled to an assessed attorney fee under ORS 656.385(1).

ORDER

Claimant’s request for an assessed attorney fee is denied, and Administrative Order TX 09-0320 is affirmed.