

In the ORS 656.245 Medical Services of

Kerry Hagen, Claimant

Contested Case No: 08-367H

PROPOSED & FINAL ORDER

April 15, 2009

AIG DOMESTIC CLAIMS, Petitioner

KERRY HAGEN, Respondent

Before John P. McCullough, Administrative Law Judge

The above-captioned case involves claimant's April 1, 2004 injury claim with Elmer's Pancake and Steak House and its workers' compensation claims administrator, AIG Claim Services. Representing claimant in this matter is her attorney, Ron Fontana. Representing the employer and AIG is their attorney, Jerald Keene.

On November 19, 2008, the Workers' Compensation Division (WCD) of the Department of Consumer and Business Services issued an Administrative Order (MS 08-1514) that directed the employer's workers' compensation claims administrator to authorize and pay for Oxycontin prescribed by Dr. Thomas for claimant's compensable condition. The claims administrator also was ordered to pay claimant's attorney a fee of \$280.

On December 16, 2008, the employer and claims administrator filed a request for hearing with WCD, appealing the November 19, 2008 Administrative Order. On January 7, 2009, WCD referred the matter to the Workers' Compensation Board, Hearings Division, pursuant to ORS 656.704(2)(a) and OAR 436-001-0019. Thereafter, a hearing was scheduled on February 25, 2009 in Portland, Oregon before the undersigned Administrative Law Judge. Notice of the hearing was mailed to the parties and their attorneys on January 20, 2009. The parties' attorneys subsequently requested that the matter be submitted for a decision based on documentary evidence and written arguments. That request was granted, and the February 25, 2009 hearing was cancelled.

On February 18, 2009, WCD submitted to the Hearings Division, with copies to the parties' attorneys, Exhibits 1-77 and an accompanying exhibit list, representing the documentary record on which the November 19, 2008 Administrative Order was based. On February 25, 2009, Mr. Fontana submitted for supplemental inclusion in the record a November 14, 2008 letter from Dr. Thomas (marked as Exhibit 71A). On March 5, 2009, Mr. Keene filed a letter objecting to the admission of Exhibit 71A, contending that it was new medical evidence and, therefore, inadmissible pursuant to ORS 656.327(2) and OAR 436-001-0225(2). On March 5, 2009, Mr. Fontana filed a letter in response to Mr. Keene's March 5, 2009 objection to Exhibit 71A. In his letter, Mr. Fontana provided information indicating that WCD had received Dr. Thomas' November 14, 2008 letter prior to the issuance of the November 19, 2008 Administrative Order and that Dr. Thomas' letter was part of the record before WCD.

In a March 11, 2009 letter to the parties' attorneys, I advised that based on the information provided by Mr. Fontana in his March 5 letter, Dr. Thomas' November 14, 2008

report would be admitted in evidence in this proceeding along with the other exhibits (1-77) submitted by WCD on February 18, 2009.

On March 10, 2009, WCD submitted a revised exhibit list: Exhibits 1-77, including Exhibit 71A.

In an April 1, 2009 letter, Mr. Keene advised that he had contacted WCD for further clarification concerning Exhibit 71A, and was advised by WCD that said exhibit was received by WCD prior to the issuance of the November 19, 2008 Administrative Order, although not until the day before the Order was finalized by WCD's clerical staff and mailed. Mr. Keene further advised that he and his client had decided to withdraw their request for hearing.

On April 3, 2009, Mr. Fontana submitted a response to Mr. Keene's April 1 letter. In his letter, Mr. Fontana requested the issuance of an order assessing a \$750 penalty against the claims administrator based on its alleged unreasonable basis for initiating the contested case with WCD. He also requested the assessment of an attorney fee payable by the claims administrator.

On April 10, 2009, Mr. Keene submitted a response to Mr. Fontana's April 3 request for a penalty and assessed attorney fee. On April 14, 2009, Mr. Fontana submitted a response to Mr. Keen's April 10 letter.

Because the claims administrator has withdrawn its request for hearing challenging the November 19, 2008 Administrative Order issued by WCD, I conclude that said Order should be affirmed.

Regarding the penalty issue raised by claimant's attorney, no such issue was raised in the proceeding before WCD which led to the issuance of the November 19, 2008 Administrative Order (see Ex. 76). Therefore, the penalty issue is a "new" issue and cannot be considered in this proceeding. See ORS 656.327(2) and OAR 436-001-0225(2).

Regarding claimant's attorney's request for an assessed fee, ORS 656.385(1) provides that where an attorney is instrumental in obtaining a settlement of a medical treatment dispute prior to a decision by an Administrative Law Judge, the attorney is entitled to a reasonable attorney fee payable by the employer/claims administrator. I find that the claims administrator's withdrawal of its request for hearing challenging the November 19, 2008 Administrative Order is tantamount to a settlement of the dispute prior to a decision by an Administrative Law Judge. I further find that claimant's attorney was instrumental -- in terms of the information he provided in his March 5, 2009 letter -- in obtaining this resolution of the dispute. Considering the factors set forth in ORS 656.385(1) and OAR 436-001-0265, I find that a reasonable assessed fee for claimant's attorney's services in this proceeding is \$200.¹

ORDER

¹ The November 19, 2008 Administrative Order awarded claimant's attorney a fee for his services in the proceeding before WCD.

IT IS THEREFORE ORDERED that the November 19, 2008 Administrative Order (MS 08-1514) issued by the Workers' Compensation Division of the Department of Consumer and Business Services is affirmed.

IT IS FURTHER ORDERED that AIG Claim Services pay claimant's attorney an assessed fee of \$200 for services at the Hearings Division level.

IT IS FURTHER ORDERED that claimant's request for the assessment of a penalty is denied.