
In the Matter of the ORS 656.245 Medical Services Dispute of

David Weitzman, Claimant

Contested Case No: 10-077H

PROPOSED & FINAL ORDER

September 13, 2010

DAVID WEITZMAN, Petitioner

AMERICAN ZURICH INSURANCE COMPANY C/O GALLAGHER BASSETT

INSURANCE SERVICES, Respondent

Before Elizabeth Fulsher, Administrative Law Judge

Pursuant to notice, a hearing was held and the record closed on August 13, 2010 in Portland, Oregon before Administrative Law Judge Fulsher. Claimant was present and was represented by attorney, Jodie Phillips Polich. Starbucks Corp. and Gallagher Bassett Ins. Svcs. were represented by their attorney, Daniel Sato.

Exhibits 1 through 37 were admitted into the record.

ISSUE

Whether claimant's request for hearing was correctly dismissed by the Medical Section Resolution Team (RT). Claimant has appealed the RT's April 15, 2010 Administrative Order on Reconsideration.

CONCLUSIONS OF LAW AND OPINION

Pursuant to OAR 436-001-0225(2), the RT's April 15, 2010 order may only be modified if it is not supported by substantial evidence in the record or if it reflects an error of law. No new medical evidence may be considered.

The relevant findings of fact as found by the RT are summarized as follows. Claimant injured his mid to lower back on November 13, 2007. Claimant sought treatment at Gresham Urgent Care on November 13, 2007 for low back pain. Claimant was diagnosed with a lumbar strain and prescribed medications and physical therapy. On November 16, 2007, claimant saw Dr. Piepgrass for a recheck of the low back. Dr. Piepgrass diagnosed cervical, thoracic, lumbar and shoulder strain and recommended a follow up in one week. Dr. Piepgrass prescribed medications and physical therapy and became claimant's attending physician. On November 19, 2007, claimant saw Dr. Wong, who diagnosed claimant with cervical, thoracic and lumbar strain, prescribed medications and released claimant to modified work. On the same date, claimant saw Dr. Piepgrass and also went to physical therapy. Claimant attended physical therapy on November 23, 2007 and returned to Dr. Wong on November 26, 2007. Claimant had a lumbar MRI on November 28, 2007. This revealed a mild disc bulge at L4-5. Claimant saw Dr. Wong on December 3, 2007. Dr. Wong documented the MRI as negative and continued physical therapy and prescribed medications. Dr. Wong saw claimant for rechecks on December 8, 10, 14, 17 and 23, 2007.

On January 11, 2008, the insurer denied claimant's claim and claimant requested a hearing. On February 18, 2008, claimant's private insurance disallowed payment of physical therapy provided on December 6, 12, and 19, 2007. On October 13, 2008, claimant's private health insurance provided Epic Imaging East with an Explanation of Benefits.

On May 6, 2009, claimant's former attorney withdrew claimant's hearing request with the Board stating that claimant intended to pursue payment of his outstanding medical bills pursuant to ORS 656.247. On December 1, 2009, claimant's private health insurer paid a portion of the bills owed to Gresham Urgent Care, and to Drs. Ross, Mr. Morishige and Dr. Pieprgrass leaving balances. In a December 9, 2009 letter, claimant's attorney requested that Gallagher Bassett pay the remaining balances, citing ORS 656.247. Counsel for the employer responded on December 15, 2009 that because its denial was final, the employer was under no obligation to pay the remaining balance of claimant's medical bills. On December 29, 2009, when payment was not issued for the disputed medical services, claimant's attorney requested administrative review.

The Director dismissed the matter on February 10, 2010. Claimant's attorney sought abatement on February 12, 2010 and the administrative order was abated on February 16, 2010.

On April 15, 2010, the RT issued an Administrative Order on Reconsideration that dismissed claimant's request for administrative review, finding that claimant's request was untimely under OAR 436-009-0008(2)(b). Claimant has appealed the RT's dismissal order and argues that his request was timely and that this matter should be remanded to the Director for a decision on the merits.

OAR 436-009-0008(2)(b) provides that the medical provider, worker, or insurer may request review by the director in the event of a dispute about either the amount of a fee or non-payment of bills for medical services on a compensable injury. For all claims not enrolled in an MCO, or for disputes which do not involve an action or decision of the MCO, the rule provides that the aggrieved party must request administrative review by the director within 90 days of the date the party knew, or should have known, there was a dispute over the provision of medical services. OAR 436-010-0008(5)(b) provides:

“For all claims not enrolled in an MCO, the aggrieved party must request administrative review by the director within 90 days of the date the party knew, or should have known, there was a dispute over the provision of medical services. This time frame only applies if the aggrieved party other than the insurer is given written notice that they have 90 days in which to request administrative review by the director. When the aggrieved party is a represented worker, and the worker's attorney has given written notice of representation, the 90 day time frame begins when the attorney receives written notice or has actual knowledge of the dispute.”

Sandra D. Ellis, 14 CCHR 126 (2009) held that the aggrieved party is the party that requested review. In this case, that is claimant. Under the rules, claimant must request administrative review by the director within 90 days of the date the party knew, or should have

known, there was a dispute over the provision of medical services. OAR 436-010-0008(5)(b) requires written notice or actual knowledge by the workers' attorney of the dispute.

The RT found that claimant knew or should have known of a dispute within 90 days of May 6, 2009, the date claimant's former attorney withdrew his February 21, 2009 request for hearing. The RT apparently found that the attorney's statement that claimant intended to pursue payment of his outstanding medical bills pursuant to ORS 656.247 (the statute pertaining to interim medical benefits) constituted "actual knowledge" of the dispute because no written notice of the 90 day period was ever given to claimant. However, claimant's decision to pursue payment of the medical bills under ORS 656.247 did not mean that claimant's attorney knew that the employer would deny payment or dispute the bills. Until Mr. Sato's December 15, 2009 letter, the employer did not indicate that it was not going to pay the balance of the medical bills under ORS 656.247(4)(b). Under such circumstances, to the extent that the RT's order found actual knowledge of the dispute on May 6, 2009, substantial evidence does not support that conclusion. See *Tony M. Larson*, 12 CCHR 250 (2007) (actual knowledge of a dispute did not occur until SAIF gave notice to the attorney that it would not pay the bill).

Because this matter was dismissed as untimely, the Director did not address the merits. Remand is necessary for the RT to determine if Gallagher Bassett is required to pay the balance of the medical bills under ORS 656.247.

ORDER

IT IS THEREFORE ORDERED that the April 15, 2010 Administrative Order on Reconsideration is set aside and this matter is remanded for a decision on the merits.