

In the ORS 656.260 Managed Care Dispute of

Shawna Cooley, Claimant

Contested Case Nos: 11-047H & 11-052H

FINAL ORDER

November 29, 2011

SHAWNA COOLEY, Petitioner

CNA CLAIMS PLUS, Respondent

Before John Shilts, Workers' Compensation Division Administrator

The sole issue under review is whether the Workers' Compensation Division's Resolution Team (RT) erred in awarding claimant Shawna Cooley (claimant) an attorney fee for her attorney's work in seeking review of insurer CNA Claims Plus' (insurer's) denial of claimant's request for a second medical opinion. I affirm RT's order and the fee award.

FACTUAL SUMMARY

I adopt the factual findings from the Administrative Order and restate them here in part for clarity. Claimant suffered a compensable injury in March 2010. Insurer enrolled claimant in the Oregon Health Systems (OHS) managed care organization (MCO). Claimant obtained treatment from Dr. Borden who OHS authorized to provide treatment. On September 24, 2010, OHS revoked Dr. Borden's authorization. Claimant also received treatment from Dr. Tran. After seeing claimant on November 30, 2010, Dr. Tran wrote in claimant's treatment plan that he thought she should get an opinion from another physiatrist about diagnosis and treatment. He also wrote several prescriptions that day but they did not include a request or referral for an opinion from another doctor.

Claimant requested Administrative Review of OHS' decision revoking Dr. Borden's treating authority. (No. 11-00047H). Claimant also requested review of OHS' alleged refusal to authorize obtaining a second opinion. (No. 11-00052H). Claimant's attorney made the latter request in a December 15, 2010 letter to the Workers' Compensation Division (WCD) that stated Dr. Tran had requested a psychiatry second opinion and that insurer had denied that request. It appears another physiatrist examined claimant on December 27, 2010.

On January 6, 2011, WCD sent a written notice to insurer of the dispute concerning the requested referral for a second opinion. Insurer's attorney responded to that notice by letter on January 19, 2011. The only argument insurer's counsel asserted was that the dispute was moot because insurer had already paid for the requested second opinion.

RT issued an Administrative Order on March 30, 2011. The order affirmed OHS' decision concerning Dr. Borden's authorization to treat claimant. The order also found claimant had prevailed on the issue of the request for a second opinion and awarded claimant an attorney fee of \$350.00 under ORS 656.385 and OAR 436-001-0410.¹

¹ OAR 656.385(1) provides in part:

Claimant requested a hearing on the issue of Dr. Borden's treating authority and insurer requested a hearing on the issue of the attorney fee. Insurer's request stated the fee was not justified because Dr. Tran, who requested the second opinion, was not the attending physician. Insurer also argued it had agreed to pay for the second opinion on December 14 before the request for hearing on that issue was mailed on December 15, so the filing of the appeal did not influence insurer's decision.

Administrative Law Judge (ALJ) Jacqueline M. Jacobson held the requested hearing. She issued a Proposed and Final Order on August 10, 2011. ALJ Jacobson held in insurer's favor on the medical issues and in claimant's favor on the attorney fee issue. ALJ Jacobson found there was no evidence in the record insurer withdrew its denial of the request for a second opinion before it received claimant's appeal of that denial and that claimant's attorney was instrumental in obtaining a settlement of the dispute.

Insurer filed exceptions to the ALJ's order solely on the attorney fee issue. Insurer argues there is no evidence in the record establishing insurer denied the request for a second opinion, that there was not a request that meets procedural requirements under OAR 436-010-0240(17), and that the fee was not justified because claimant appealed the denial before insurer had a reasonable time to respond.²

CONCLUSIONS OF LAW

I review a dispute over attorney fees in connection with MCO services *de novo*. OAR 436-001-0225(1); *Shiloh M. Mitchell*, 13 CCHR 249 (2008). Insurer did not raise the OAR 436-010-0240(17) notice issue when the matter was before RT, or during the hearing. I will therefore not address it here.

Insurer argues there is no evidence in the record it denied the request. The record contains a December 15, 2010 letter from claimant's attorney in which he asserts insurer denied the request for a second opinion. Counsel's letter is part of the record and itself is evidence. "Relevant evidence" is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would

"In all cases involving a dispute over compensation benefits pursuant to ORS . . . 656.260 . . . where a claimant finally prevails after a proceeding has commenced, the Director of the Department of Consumer and Business Services . . . shall require the insurer . . . 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 . . . the director . . . shall require the insurer . . . to pay a reasonable attorney fee to the claimant's attorney."

OAR 436-001-0410 contains a matrix for calculating attorney fees based on the value of the service obtained and the time expended.

² OAR 436-010-0240(17) provides in part:

"The attending physician . . . may request consultation regarding conditions related to an accepted claim. The attending physician . . . must promptly notify the insurer of the request for consultation."

be without the evidence.” ORS 40.150. Claimant’s counsel’s letter is relevant under this standard. Claimant’s counsel made this assertion with the knowledge insurer would certainly offer evidence to refute it if the statement was not true. What insurer apparently intends to assert is that this is not sufficient or credible evidence. In his April 12, 2011 letter on this issue, insurer’s attorney does not directly deny claimant’s counsel’s assertion. Insurer did not place any evidence into the record refuting or contradicting claimant’s attorney’s statement. In its exceptions insurer asserts the record does not contain evidence of a denial, but insurer does not directly deny claimant’s attorney’s statement. Counsel’s December 15 letter constitutes uncontradicted and substantial evidence that insurer denied claimant’s request for a second opinion.

Insurer finally argues it did not have a reasonable time in which to respond to the request for a second opinion. Insurer did not raise this argument to RT, in its “cross-appeal” to claimant’s hearing request, or during the hearing. Nevertheless, the evidence in the record, claimant’s attorney’s December 15 letter, states insurer did deny the request. This suggests insurer did have sufficient time in which to formulate a response to claimant’s request.

The evidence in the record is that insurer denied claimant’s request for a second opinion. Insurer acknowledges it ultimately agreed to authorize the second opinion. There is not evidence in the record that insurer withdrew its denial before claimant’s attorney filed his request for review on this issue. It is a reasonable inference, therefore, that claimant’s attorney’s action, in requesting review of insurer’s denial, was instrumental in obtaining a settlement on this issue. It was therefore proper to award claimant an attorney fee.

IT IS HEREBY ORDERED RT’s March 30, 2011 Administrative Order and ALJ Jacobson’s August 10, 2011 Proposed and Final Order are affirmed.