

In the Medical Services of
Warren D. Duffour, Claimant
Contested Case No: 10-178H
PROPOSED & FINAL ORDER

April 20, 2011

WILLIAM D. DUFFOUR, Petitioner
PORTLAND COMMUNITY COLLEGE, Respondent
Before Darren L. Otto, Administrative Law Judge

A hearing was convened in the above entitled matter on January 27, 2011 in Portland, Oregon before Administrative Law Judge Darren L. Otto of the Workers' Compensation Board. Claimant was not present but was represented by his attorney, Ronald A. Fontana. The employer, Portland Community College, and its processing agent, Pinnacle Risk Management Services, were represented by their attorney, Matthew F. Denley. Exhibits 1 through 8 and 7A were received into evidence.

The hearing was continued to allow the parties to submit written closing arguments. On February 15, 2011, claimant filed his initial written closing argument. On March 2, 2011, the employer filed its written response. On March 9, 2011, claimant filed his reply and Statement of Services seeking an assessed fee in the amount of \$9700.00 based on a normal hourly rate of \$275 and 35.4 hours spent on all issues litigated in this proceeding. On March 24, 2011, the employer filed a motion to strike claimant's Statement of Services and alternative response to the requested fee. That motion to strike is denied, but the employer's alternative response to claimant's Statement of Services is allowed. On March 28, 2011, claimant filed his surreply closing argument. On April 6, 2011, the hearing concluded upon receipt of Employer's Response to Claimant's Surreply Closing Argument.

WCB Case Numbers 10-04095 and 10-00178H, which were consolidated for this hearing, concerned separate and distinct issues as well as separate exhibit lists and required separate orders. Therefore, claimant's two Requests for Hearing were bifurcated at the conclusion of the hearing. The issues regarding the sufficiency of the employer's notice of acceptance and claimant's entitlement to penalties and attorney fees in WCB Case Number 10-04095 will be addressed in a separate Opinion and Order.

ISSUES

Claimant seeks an assessed attorney fee pursuant to ORS 656.385(1) in the amount of \$1,000.00 to \$1,200.00. The employer concedes claimant's attorney is entitled to an assessed fee but asserts that a \$400.00 fee is more appropriate. The issue is what is a reasonable attorney fee under the statute?

FINDINGS OF FACT

On August 3, 2010, claimant sought medical treatment for a compensable traumatic brain injury and associated vertigo/dizziness/vestibular dysfunction and cognitive issues from Michael Wilson, D.O. (Ex. 1-11). Among his many recommendations, Dr. Wilson referred claimant to

Marsha Johnson, audiologist at the Oregon Tinnitus and Hyperacusis Center, for treatment of his right ear tinnitus (Ex. 1-13).

On August 19, 2010, claimant was treated by Audiologist Johnson, audiologist, who diagnosed moderate to severe hyperacusis and tinnitus and felt that treatment for those conditions would be beneficial (Ex. 1-6). Specifically, Ms. Johnson recommended the use of an OASIS unit by Neuromonics for assisting with claimant's recovery by providing habituation and sound desensitization over a 12 to 18 month period. *Id.* That device cost \$4,617.00 (Exs. 1, pgs 8-9 & 6-3). On September 24, 2010, claimant asked the employer to pay that medical services bill (Ex. 1-7). On that same day, the employer denied payment of the audiologist's proposed treatment on the grounds that it did not appear to be for the accepted condition (Ex. 1-5).

On October 20, 2010, claimant requested medical review from the DCBS Medical Review Unit of the employer's refusal to pay for the audiologist's proposed treatment (Ex. 1-1). In that letter, claimant's attorney contended that the proposed medical services were compensable both as diagnostic medical services and as medical services materially related to the compensable injury under ORS 656.245 and asked that the WCD either order the employer to pay for the proposed treatment or issue a Defer and Transfer Order so that the matter could be decided by the WCB (Ex. 1, pgs 1-2).

On October 27, 2010, the WCD issued a Notice of Required Action on a Medical Dispute letter asking the employer to complete a specification of the disputed medical issues form (Ex. 2). The WCD expected a response from the employer by November 10, 2010 (Exs. 3 & 4). On November 10, 2010, the employer responded to the WCD by stating that it was still processing the tinnitus claim and associated \$4,617.00 audiologist bill (Ex. 6). Subsequently, however, the employer paid for the disputed tinnitus treatment (Ex. 7-2).

On November 12, 2010, an Administrative Order found that claimant prevailed in the medical service dispute but declined to award an attorney fee under ORS 656.385 because payment of the medical service bill was not an admission of liability and acceptance of the claim was still pending (Ex. 7-2). On November 15, 2010, the employer modified its Notice of Acceptance to include claimant's left temporal parietal subarachnoid hemorrhage, right frontal subarachnoid hemorrhage with intraparenchymal hematoma, nasal fracture, right periorbital ecchymosis and contusion, scalp laceration, traumatic brain injury, cognitive disorder secondary to traumatic brain injury and *tinnitus* secondary to traumatic brain injury (Ex. 7A; emphasis added).

On November 16, 2010, claimant filed a Request for Hearing with the WCD concerning medical services and attorney fees (Ex. 8).

CONCLUSIONS OF LAW AND OPINIONS

Claimant contends that his attorney is entitled to an assessed fee in the amount of \$1,000.00 to \$1,200.00 for his efforts in obtaining acceptance of the audiologist's medical service bill associated with the accepted tinnitus condition. The employer asserts that claimant's

attorney did a minimal amount of work prior to the employer's acceptance of claimant's tinnitus claim and a more appropriate fee would be \$400.00.

ORS 656.385(1) provides that the Administrative Law Judge shall require the insurer to pay a reasonable attorney fee to claimant's attorney when claimant prevails in a dispute of compensation benefits or medical services pursuant to ORS 656.245. ORS 656.385(1) further provides that an attorney fee awarded under that section may not exceed \$3,000.00 absent showing of extraordinary circumstances.

OAR 436-001-0400 outlines the factors to consider in determining an attorney fee award under ORS 656.385(1), including the time devoted to the case, the complexity of the issues involved, the value of the interest involved, the skill of the attorney and the quality of representation, the nature of the proceedings, the benefit secured for the worker, the risk in a particular case that an attorney's efforts may be uncompensated, and the assertion of frivolous issues or defenses. OAR 436-001-0400(3)(a) through (h). Also, OAR 436-001-0400(2) provides, "In cases in which time devoted is a factor in determining the amount of the fee, the attorney should submit a statement of the number of hours spent on the case. If the attorney has submitted a statement of hours and then spends more time on the case, the attorney may submit an updated statement, which the Director will consider if an order has not already been issued. If the attorney does not submit a statement of hours, the Director will presume the attorney spent one to two hours on the case."

Here, claimant's attorney submitted a Statement of Services in the amount of \$9700 regarding all of the work he performed on the various issues brought to hearing. The amount of time spent solely on obtaining payment of the audiologist's bill was not distinguished from work spent on the more significant issues. Nevertheless, claimant filed a Statement of Services. Therefore, it can not be presumed that he spent only one to two hours on the medical service dispute.

Although defense counsel urges a fee of \$400.00 based on the amount of time presumably spent on this particular issue, the time devoted to the case is only one factor to consider. The value of the interest involved and the benefit secured for claimant was a very significant \$4,617.00 treatment bill from his audiologist. Also, the risk that claimant's attorney's efforts would go uncompensated was high given the employer's initial denial of the medical service claim. Finally, the skill of claimant's attorney, as well as the quality of representation, was high. When all of those factors are considered, a reasonable attorney fee of \$1000.00 is appropriate and shall be awarded.

ORDER

IT IS HEREBY ORDERED that Portland Community College and Pinnacle Risk Management Services are assessed a reasonable attorney fee pursuant ORS 656.385(1) in the amount of \$1000.00 (One thousand dollars) to be paid directly to claimant's attorney.