

In the ORS 656.260 Managed Care Dispute of

Shawn Tabbytite, Claimant

Contested Case No: 11-046H

PROPOSED & FINAL ORDER

November 14, 2011

MID-CENTURY INSURANCE COMPANY, Petitioner

SHAWN TABBYTITE, Respondent

Before Keith Kekauoha, Administrative Law Judge

Hearing convened in Portland, Oregon, on October 12, 2011, before the undersigned Administrative Law Judge. Claimant, who was not present, was represented by his attorney, Edward Hill. The employer, Jiffy Lube Service Center, and its insurer, Mid-Century Insurance Company, were represented by their attorney, Brad Scheminske. An insurer representative, Karen Betka, was present. The hearing was recorded by the Administrative Law Judge. Exhibits 1- 19 and 17A were admitted into evidence. Testimony was taken and, following recorded closing arguments, the record closed on October 12, 2011.

ISSUE

Attorney Fees. The insurer requested a hearing on the portion of the Director's Administrative Order dated March 1, 2011, as reconsidered on March 8, 2011, that ordered the insurer to pay claimant's attorney an assessed attorney fee of \$510.

FINDINGS OF FACTS

The following facts are taken from the Director's Administrative Order on reconsideration.

Claimant sustained a compensable injury on June 6, 2009. The insurer accepted the claim for a disabling right second finger contusion and enrolled claimant in a managed care organization, Oregon Health Systems (OHS).

On September 2, 2010, OHS informed claimant and Dr. Madey that the issue of pain management prescribed by Dr. Madey is not a matter OHS handles because requests must come from OHS-authorized providers. OHS included appeal rights to the Director.

On September 29, 2010, claimant, through his attorney, requested Administrative Review regarding OHS's disapproval of a pain management consultation.

On October 4, 2010, OHS wrote claimant's attorney, clarifying that the issue is not whether claimant may be allowed to treat with Dr. Madey, but whether he may be allowed to treat with Dr. Fiks, an OHS-authorized provider, for pain management.

OHS agreed to allow Dr. Fiks to provide treatment and forwarded medical records for his review and consideration regarding future treatment.

On October 14, 2010, Dr. Rask, who is in the same office as Dr. Fiks (Advanced Pain Management Center), examined claimant and issued a report of his pain management evaluation.

On inquiry from the Workers' Compensation Division (WCD), the insurer responded that the disputed service is not compensable under ORS 656.245(1)(c). The insurer further contended that it declined to review Dr. Madey's request for a pain management consultation because claimant is enrolled in OHS and Dr. Madey is not an OHS-authorized provider. The insurer provided a copy of an October 4, 2010 letter from OHS to claimant's attorney summarizing the attorney's subsequent agreement to treatment of claimant by Dr. Fiks, an OHS-authorized provider. The insurer contended that, because claimant was enrolled in OHS and was thus required to seek treatment with an OHS-authorized provider, the request for an appointment with Dr. Madey was not a compensable medical service under ORS 656.245.

The insurer indicated that Dr. Fiks evaluated claimant on October 14, 2010 and that “* * * all parties are satisfied with the selection of Dr. Fiks from the OHS provider network and that no medical dispute actually exists since October 4, 2010.”

After his examination and review of lab reports, Dr. Rask concluded that claimant would have to undergo further treatment before Dr. Rask prescribed narcotic medications.

CONCLUSIONS OF LAW AND OPINION

The WCD, on behalf of the Director, concluded that, since OHS and the insurer had agreed to allow Dr. Fiks to provide consultation and claimant had obtained that treatment, the dispute had been resolved except for the issue of attorney fees payable to claimant's attorney. The WCD further concluded that, since the agreement was made after claimant had requested Administrative Review, his attorney had been instrumental in the resolution of the dispute. The WCD reasoned that, had the dispute not been brought to the Director, it would not have been resolved. In addition, the WCD found that claimant had "prevailed in this matter." Turning to the amount of the attorney fee, the WCD applied the factors set forth in OAR 436-001-0400(2) and concluded that claimant's attorney was entitled to an assessed attorney fee in the amount of \$510.

The insurer requested a hearing on the WCD's order, contending that the WCD erred in awarding an assessed attorney fee to claimant's attorney. Claimant responds that the attorney fee award is correct and should be affirmed. Based on the following opinion, I agree with claimant's position.

The standard for reviewing the Director/WCD's order is set forth in ORS 656.260(16), which provides that "the order may be modified only if it is not supported by substantial evidence in the record or reflects an error of law." See OAR 436-001-0225(2) ("In * * * managed care disputes under ORS 656.260(16), the administrative law judge may modify the director's order only if it is not supported by substantial evidence in the record or if it reflects an error of law.")

Substantial evidence supports a finding of fact "when the record, viewed as a whole, would permit a reasonable person to make that finding." ORS 183.482(8)(c). In reviewing a finding to determine whether it is supported by substantial evidence, the reviewing entity must "evaluate evidence against the finding as well as evidence supporting it to determine whether substantial evidence exists to support that finding. If a finding is reasonable in light of countervailing as well as supporting evidence, the finding is supported by substantial evidence." *Garcia v. Boise Cascade Corp.*, 309 Or 292, 295 (1990). As the Court of Appeals has explained, "'substantial evidence' review is not what has been referred to as the 'any evidence' rule * * * but it is also *not de novo* review." *Liberty Northwest Ins. Corp. v. Kraft*, 205 Or App 59, 62 (2006) (quoting *Armstrong v. Asten-Hill Co.*, 90 Or App 200, 206 (1988)) (emphasis in original).

In *Liberty Northwest Ins. Corp. v. Mundell*, 219 Or App 358, 363 (2008), the court explained that

‘in reviewing the [WCD's] order for substantial evidence, the ALJ was limited to evaluating the evidence in the record to determine whether, based on that evidence, a reasonable factfinder in the [WCD's] position could have made the findings that the [WCD] actually made. The ALJ does not have authority to determine whether the record could support findings different from those reached by the [WCD], nor does the ALJ have authority to reweigh the evidence and substitute its view of the evidence for that of the [WCD].’

On the merits, ORS 656.385(1) governs the award of attorney fees in cases involving a dispute over compensation benefits pursuant to ORS 656.260. It provides that

‘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 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's attorney. * * *.’

Under this provision, the Director is required to award an assessed attorney fee *either*: (1) where a claimant "finally prevails" after a proceeding has commenced; *or* (2) where an attorney is "instrumental in obtaining a settlement of the dispute" prior to a decision by the Director.

In this case, the WCD found both that claimant's attorney had been instrumental in the resolution of the medical service dispute and that claimant had "prevailed in this matter." The insurer argues that the WCD erred in find that claimant had prevailed in this matter. Noting that claimant had specifically requested OHS approve Dr. Madey's request for a pain management consultation by "going off panel" (i.e., approving treatment with a non-OHS authorized provider), the insurer asserts that claimant ultimately saw an OHS-authorized provider (Dr. Fiks) and thus did not prevail in this dispute.

I agree with the insurer's assertion that, contrary to the WCD's finding, claimant did not prevail on his specific request for approval of "going off panel." I conclude, however, that the WCD was nevertheless required to award an assessed attorney fee in this case. I reason as follows.

It is undisputed that the parties reached a settlement of the medical service dispute prior to a decision by the WCD/Director. The insurer and OHS agreed to allow claimant to obtain a pain management evaluation by Dr. Fiks, and claimant obtained that evaluation at Dr. Fiks' office, albeit by a different physician (Dr. Rask). (Ex. 9). Because the medical services dispute in this case was settled before a decision by the Director, the second sentence in ORS 656.385(1) applies in this case, and the Director was required to award an assessed attorney fee if claimant's attorney was "instrumental in obtaining a settlement of the dispute."

The WCD found that claimant's attorney was instrumental in the resolution of this dispute. The WCD reasoned that, had the dispute not been brought to the Director, it would not have been resolved. I agree. At the time claimant's attorney filed the request for Administrative Review, (Ex. 5), OHS was declining to review Dr. Madey's request for a pain management consultation because he is not an OHS-authorized provider, and had advised claimant and Dr. Madey of their appeal rights to the Director. (Ex. 3). After filing the request for Administrative Review and initiating this proceeding, claimant's attorney discussed this matter with OHS, and OHS subsequently sent a letter clarifying that the issue was not whether claimant should be allowed to continue treatment with Dr. Madey, but whether he should be allowed to treat with Dr. Fiks for pain management. OHS indicated that claimant would be allowed to treat with Dr. Fiks, an OHS-authorized provider, and that the medical records had been forwarded to Dr. Fiks' office for his review and consideration regarding future treatment. (Ex. 6). Claimant subsequently saw Dr. Rask, who is in the same office as Dr. Fiks, for a pain management evaluation, and the insurer approved that service. I conclude that, by filing the request for Administrative Review and then discussing this matter with OHS, claimant's attorney played an instrumental role in obtaining OHS's approval of a pain management evaluation for his client. I conclude that there is substantial evidence in this record to support the WCD's finding that claimant's attorney was instrumental in obtaining a settlement of this dispute. Accordingly, the WCD's order will be affirmed.

ORDER

The insurer's request for relief is denied, and the Director's Administrative Order dated March 1, 2011, as reconsidered on March 8, 2011, is affirmed.