

In the Matter of the ORS 656.245 Medical Services Dispute of

**Keeland, Clyde, Claimant**

Contested Case No: H01-001

**FINAL ORDER**

February 11, 2002

CLYDE KEELAND, Petitioner

HERCULES INCORPORATED, Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

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On April 26, 2001, Hearing Officer Catherine P. Coburn conducted a telephone hearing. Petitioner, Clyde Keeland (claimant), was not present but was represented by attorney Edward J. Hill. Pamela A. Schultz represented respondent Hercules Incorporated (employer) and its claims agent ESIS. The Department of Consumer and Business Services, Workers' Compensation Division (WCD) waived appearance. No witnesses testified.

The respondent, Hercules Incorporated, filed exceptions to Hearing Officer Coburn's September 5, 2001 Proposed and Final Contested Case Hearing Order, which determined that a proposed cervical discogram was compensable as a diagnostic medical service and which awarded a \$3,500 assessed attorney fee. The petitioner, claimant, timely responded to the exceptions. Before the Director, the issue is attorney fees. The entire record, consisting of a tape recording of the hearing, all evidence received, and all documents filed, has been considered.

**Findings of Fact**

Claimant sustained a compensable right shoulder injury on December 29, 1997. (Ex. 1). The employer accepted the claim, on February 10, 1998, for a right rhomboid strain. (Ex. 12). Also on that date, the employer enrolled claimant in the Providence Vantage MCO. (Ex. 13). Claimant's condition was found to be medically stationary on August 11, 1999. The employer closed the claim on January 28, 2000 without an award of permanent disability. (Ex. 79). On September 9, 1999, claimant retained counsel, Edward Hill. (Ex. 99-4).

On May 10, 1999, Dr. Keenen, orthopedic surgeon, performed a consulting examination regarding claimant's complaints of neck, right shoulder and arm pain. Dr. Keenen referred claimant for further diagnostic studies. (Ex. 46). Dr. Keenen became claimant's attending physician on September 28, 1999. (Ex. 63). IME doctors, Dr. Farris and Dr. Thompson, initially attributed claimant's symptoms to the industrial injury. (Exs. 41, 54). However, they changed their opinions, after being presented with additional information (regarding claimant's non-work activities), and no longer attributed claimant's cervical symptoms to the injury. On December 13, 1999, Dr. Keenen requested authorization from Providence MCO to perform discography to help determine the parameters for surgery. (Ex. 69). On January 6, 2000, Providence MCO declined to authorize the proposed discography because it was not related to the accepted condition. (Ex. 71).

On March 6, 2000, Mr. Hill filed a request for hearing with the Hearings Division of the Worker's Compensation Board (Board) to appeal the employer's denial of the discogram. Also

on March 6<sup>th</sup>, Mr. Hill requested the Medical Review Unit (MRU) of the WCD to review the medical services dispute. Along with the request to MRU, Mr. Hill submitted a 4½ page position paper. He, however, requested MRU to defer its review until the Board determined jurisdictional issues. (Ex. 80, 81). The employer responded on March 28, 2000 and also enclosed 63 exhibits for MRU's consideration. (Exs. 85, 86). On April 4, 2000, MRU deferred its review and transferred the matter to the Board. (Ex. 87).

The Board hearing convened on June 6, 2000. The employer moved to dismiss for lack of jurisdiction, contending that claimant failed to make a formal written request for acceptance of a C4-5 disc protrusion. The Board Administrative Law Judge (ALJ) found that the only issue in dispute was Dr. Keenen's authorization request for a discogram and that jurisdiction over this issue resided with the Director. The ALJ affirmed the employer's denial of payment for the discogram on the grounds that it was not causally related to the accepted rhomboid strain. The ALJ dismissed, for lack of jurisdiction, the dispute regarding the reasonableness and necessity of the discogram. (Ex. 88).

On October 2, 2000, claimant renewed his request for MRU review of whether the discogram was reasonable and necessary medical service to determine the relationship between his injury and the cervical disc. (Ex. 90). MRU issued its order on December 8, 2000, concluding that the proposed discography was not appropriate and necessary diagnostic tool for evaluating claimant's accepted rhomboid strain. (Ex. 97). On January 4, 2001, claimant requested a contested case hearing. (Ex. 99). The contested case hearing convened on April 26, 2001. On September 4, 2001, claimant submitted a statement of services and requested a \$3,500 fee. Mr. Hill did not itemize his services. Rather, he indicated that he devoted 15.5 hours to the case and that he bills at \$175 per hour. He also requested consideration of a contingency factor. He further stated that, because of unclear jurisdictional issues as the result of the 1999 legislative changes, the medical services dispute required filing dual request for review, one before the Director and one before the Hearings Division of WCB. Mr Hill also stated he performed services in both forums, including two levels of review before the Director. The hearings officer issued her order on September 5, 2001, finding that the discogram was compensable as a diagnostic medical service and awarding claimant's counsel a \$3,500 attorney fee under ORS 656.385.

### **Conclusions of Law and Opinion**

The employer limits its exceptions to the attorney fee award, contending the fee is not reasonable. The employer asserts that a reasonable fee in this case would be \$500.

Claimant has prevailed in a contested case arising under ORS 656.245. His attorney, therefore, is entitled to a reasonable fee. ORS 656.385(1). Pursuant to OAR 436-001-0265, the factors to be considered in determining an appropriate attorney fee are: 1) time devoted to the case; 2) the complexity of the issues; 3) the value of the interest involved; 4) the nature of the proceedings; 5) benefit secured for the claimant; 6) risk in a particular case that an attorney's efforts may go uncompensated; 7) assertion of frivolous issues or defenses; 8) a statement of services; and 9) any other relevant consideration deemed appropriate.

The employer's contentions are as follows: (1) the hearing took approximately one hour, with no witnesses testifying, and consisted of only oral argument; (2) the medical services issue was not complex; (3) the value of the interest was minimal, because it involved claimant's entitlement to one diagnostic procedure; (4) claimant submitted three exhibits, which had been solicited for a previous hearing before the Board; and (5) claimant's counsel's statement of services was untimely.<sup>1</sup> Additionally, the employer cites to a number of Board cases for a comparison of the attorney fee award.<sup>2</sup>

Claimant's counsel, Mr. Hill, contends that the employer failed to object to his statement of services prior to the closure of the record and, therefore, waived any objections to them. This contention is without merit. Claimant submitted his statement of services on September 4, 2001, and the hearing officer issued her order the next day. Thus, the employer did not have an opportunity to respond to claimant's statement of services at the contested case hearing level.

The untimeliness of claimant's statement of services does not preclude my consideration of it. *See e.g., Ronald M. Ross*, (1997) (director considered the statement of services that was received after proposed order issued). The statement of services is but one factor considered in assessing a reasonable attorney fee. However, the statement of services was not specific as to the services performed or as to which forum and which agency review level the services were performed. Given the lack of specificity, I assume a broader range of discretion in awarding a fee in this case. *See SAIF v. Bacon*, 160 Or App 596 (1999) (not agency error to fail to go into greater detail regarding attorney fee award given absence of a specific statement of services or specific objection to fee award); *but cf. Schoch v. Luepold & Stevens*, 162 Or App 242 (1999).

This medical services dispute was presented in two forums. The compensability issue before the Board; and the appropriateness issue before the Director. The bifurcated adjudication is a statutory requirement. However, attorney fees may only be awarded for legal representation at the contested case hearing. *Donald Shaw*, 3 WCSR 237 (1998). Thus, I cannot consider time devoted to matters, including jurisdictional issues, before MRU. Jurisdiction was not an issue raised at the contested case level. Services rendered at the Board hearing also cannot be considered. Claimant filed his request for contested case hearing on January 4, 2001. However, inherent in every contested case request is work performed in preparation of filing a request for a contested case hearing which should be calculated into a reasonable fee. *Id.* Accordingly, I consider the time expended regarding appealing MRU's December 8, 2000 order, but before filing the request for contested case hearing.

The contested case hearing was initially set for, and convened on, April 4, 2001, but was reset for April 26, 2001 because claimant's attorney had not received WCD's exhibit list. The April 4 hearing lasted about 15 minutes. The April 26 hearing lasted about 45 minutes, starting about 1:30 p.m. and concluding about 2:15 p.m. The parties appeared by telephone. The evidentiary record consisted of 103 exhibits, of which claimant submitted three exhibits. The

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<sup>1</sup> OAR 436-001-0265(1)(a) allows consideration of a statement of services, "if submitted within seven days of the hearing date, unless the presiding officer instructs otherwise."

<sup>2</sup> Although the Board considers similar factors in assessing attorney fees, the Board cases are merely instructive given the difference in nature of proceedings and forums. Rather, I rely on other Director cases in deciding this issue.

hearing consisted of oral argument. Both parties were represented by skilled attorneys, who vigorously litigated their respective positions. This proceeding was Mr. Hill's first appearance before the Director.

The case was of average complexity. The reasonableness and necessity of discography is an issue frequently litigated before the Director. The employer contends that the case "involved simply the entitlement to one diagnostic procedure." The cost of the discogram is unknown. However, the fact that the amount in controversy may be minimal is relevant to the reasonableness of an attorney fee, but is not a limitation. *Charles Newbeck*, 3 WCSR 305 (1998). The proposed discography was to assist in diagnosing claimant's current symptoms complex. Claimant had already undergone other diagnostic studies, including cervical MRI, cervical myelogram, and facet injections, yet his diagnosis remained unclear. A correct diagnosis is necessary to render appropriate treatment. In this case, this is a significant benefit to claimant.

Because Mr. Hill did not itemize his services and considering the above, I may only surmise the time spent in representing his client at the contested case hearing, but not before the MRU or the Board.<sup>3</sup> A "contingency factor" is appropriate. *Donald E. Hanson*, (H98-176)(March 1999)(although \$3500 requested, awarded \$1,300 fee for five hours regarding a \$189 medical service). Lastly, because attorney fees are not compensation, claimant's counsel is not entitled to an additional fee for defending the attorney fee award at the exceptions process. After consideration of the above relevant factors, I find that the \$3,500 attorney fee award is unreasonable, and instead award a fee of \$1,400 to be paid by the self-insured employer.

IT IS HEREBY ORDERED that the September 5, 2001 Proposed and Final Contested Case Hearing Order is modified in part and affirmed in part. The employer shall pay claimant's attorney an assessed fee in the amount of \$1,400. The remainder of the order is affirmed.

DATED this 11<sup>th</sup> day of February, 2002.

**MARY NEIDIG, DIRECTOR  
DEPARTMENT OF CONSUMER  
AND BUSINESS SERVICES**

By: \_\_\_\_\_  
John Shilts, Administrator  
Workers' Compensation Division

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<sup>3</sup> In addition, because the issues before the Board and the Director were substantially similar—jurisdiction and compensability of the proposed discography, this raises the assumption that claimant's attorney's services were duplicative.