
In the ORS 656.245 Medical Services Dispute of

Davidson, Brian K., Claimant

Contested Case No: H03-014

FINAL ORDER

December 5, 2003

LIBERTY NORTHWEST INSURANCE CO., Petitioner

BRIAN K DAVIDSON, Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

Claimant, by and through his attorney Juli Hall Upton, timely filed exceptions to Administrative Law Judge Catherine P. Coburn's June 19, 2003 Proposed and Final Contested Case Hearing Order; insurer, by and through its attorney Meg Carman, timely responded. The issue is whether insurer is liable to reimburse claimant's mileage expenses for travel from his home in Brookings to his attending physician's office in Ashland. The Workers' Compensation Division's Medical Review Unit found insurer liable; the ALJ reversed. The director affirms the ALJ, but based on the reasoning below.

The director adopts the ALJ's findings of fact, which the parties do not dispute.

The Medical Review Unit found that insurer did not comply with OAR 436-010-0270(7).¹ The ALJ, applying ORS 656.245(1)(e)² and 656.245(2)(a),³ found that the unit misconstrued the rule and that insurer complied with its requirements. Insurer is prohibited from

¹ OAR 436-010-0270(7) provides, in pertinent part,

(7) Insurers shall reimburse workers for actual and reasonable costs for travel, prescriptions, and other claim related services paid by a worker in accordance with ORS 656.245(1)(e), 656.325, and 656.327.

(a) Reimbursement by the insurer to the worker for transportation costs to visit their attending physician may be limited to the theoretical distance required to realistically seek out and receive care from an appropriate attending physician of the same specialty who is in a geographically closer medical community in relationship to the worker's home. All medical practitioners within a metropolitan area are considered part of the same medical community and therefore are not considered geographically closer than any other physician in that metropolitan medical community for purposes of travel reimbursement.

* * * * *

(c) Prior to limiting reimbursement under subsection (7)(a) of this rule, the insurer shall provide the worker a written explanation and a list of providers who can timely provide similar services within a reasonable traveling distance for the worker. The insurer shall inform the worker that treatment may continue with the established attending physician; however, reimbursement of transportation costs may be limited as described.

(d) When the director decides travel reimbursement disputes at administrative review or contested case level, the determination will be based on principles of reasonableness and fairness within the context of the specific case circumstances as well as the spirit and intent of the law.

² ORS 656.245(1)(e) provides,

Except for services provided under a managed care contract, out-of-pocket expense reimbursement to receive care from the attending physician shall not exceed the amount required to seek care from an appropriate attending physician of the same specialty who is in a medical community geographically closer to the worker's home. For the purposes of this paragraph, all physicians within a metropolitan area are considered to be part of the same medical community.

³ ORS 656.245(2)(a) provides in part,

"The worker may choose an attending doctor or physician within the State of Oregon."

directing claimant to any particular physician and it is incumbent on claimant, not insurer, to ascertain whether any physicians will agree to treat him. The ALJ held that insurer can limit claimant's mileage reimbursement.

Claimant filed exceptions⁴ to ALJ Coburn's order, contending that the ALJ misapplied ORS 656.245 and OAR 436-010-0270, and that the unit's order should be upheld. Claimant emphasizes the language "who can timely provide similar services" in the rule, and contends that insurer has a duty to ascertain whether any physicians will agree to treat claimant. Contrary to the insurer's position and the ALJ's order, claimant believes that insurer is not directing treatment by providing claimant a list of physicians who can timely provide services. Claimant also seeks attorney fees.

Insurer responds, contending that its actions were sufficient under the rule. To require more - to require insurer to ascertain whether the physicians on the list will agree to treat claimant - would require insurer to provide information about claimant to third parties, which insurer is prevented from doing under privacy laws. Moreover, claimant is free to choose his treating physician. Insurer further argues that the unit's order is inconsistent with the director's order in the *Thomas Miller*, 7 WCSR 163 (2002) (WCD Contested Case No. H01-148).

In the case of *Thomas Miller*, the issue was whether the insurer was required to continue to reimburse the claimant for expenses for traveling from his home in Madras to his treating physician's office in Springfield when it had done so for more than a year. Insurer contended that it was only required to pay expenses for travel to Bend, which was geographically closer to claimant's home and where there were physicians of the same specialty as claimant's treating physician. The Medical Review Unit agreed with insurer after applying ORS 656.245(1)(e) and OAR 436-010-0270(6)(c).⁵ The insurer notified the claimant that his mileage would be reduced, and provided a list of providers in Bend of the same specialty. The unit found that these actions were enough to comply with the law. Claimant appealed and the hearing officer affirmed, agreeing that insurer's actions were adequate under the statute and the rule. At hearing, claimant argued that the specialists in Bend were unable to provide him with the pain management he needed. The hearing officer placed the burden on claimant to renew his dispute if none of the specialists in Bend could in fact provide him with pain management services.

Here, insurer paid claimant's travel expenses to Ashland for at least 11 months. Insurer notified claimant that his mileage would be reduced, and provided him with a list of physicians of the same specialty located in a geographically closer community. Insurer continued to pay the expenses and then provided a second, updated list 11 months later. The unit found the insurer's actions in *Miller* sufficient, and the facts here compel the same conclusion. While claimant

⁴ In his exceptions, claimant cites rules from OAR 839-050 (Bureau of Labor and Industries). The administrative rules that are applicable to contested case hearings before the Workers' Compensation Division are found in OAR 436-001 (Workers' Compensation Division) and OAR 137-003 (Dept. of Justice Model Rules of Procedure for Contested Cases).

⁵ OAR 436-010-0270(6) was renumbered to OAR 436-010-0270(7) effective January 1, 2002, and minor housekeeping changes were made. The substantive language at issue was not amended.

contends that he has been unable to find another doctor who will treat him, the director finds no persuasive evidence in the record that none of the doctors on the lists can provide care.

Claimant is entitled to continue to seek care from Dr. Ewald. However, insurer is only required under ORS 656.245(1)(e) to reimburse mileage expenses as would be required to seek care from a physician of the same specialty in a medical community geographically closer to Brookings.

Claimant has not finally prevailed, therefore his attorney is not entitled to a fee. ORS 656.385(1).

IT IS HEREBY ORDERED the June 19, 2003 Proposed and Final Contested Case Hearing Order reversing the January 28, 2003 Administrative Order is affirmed.

DATED this 5th day of December, 2003.

CORY STREISINGER, DIRECTOR
DEPT. OF CONSUMER AND BUSINESS SERVICES

By: _____
John Shilts, Administrator
Workers' Compensation Division