

In the Matter of an ORS 656.245 Medical Services Dispute of

Massingale, Frank A., Claimant

Contested Case No: H02-086

FINAL ORDER

July 14, 2003

ROSEBURG FOREST PRODUCTS, Petitioner

FRANK A. MASSINGALE, Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

Administrative Law Judge Vincent issued an Amended Proposed and Final Contested Case Hearing Order on April 3, 2003. Employer Roseburg Forest Products timely submitted exceptions, and claimant Frank Massingale timely responded. Employer replied on May 13, 2003.¹ The entire record has been reviewed.

The issue is whether Roseburg Forest Products is liable for reimbursement to Mr. Massingale for out-of-pocket expenses incurred from September 18, 2001 through January 3, 2002.

The director adopts and affirms the April 3, 2003 amended proposed order. Roseburg Forest Products is liable for reimbursement to Mr. Massingale.

FACTS

The director adopts the judge's statement of the facts.

CONCLUSIONS OF LAW

This matter has had a rather complicated history since the date of hearing. The judge issued a Proposed and Final Contested Case Hearing Order that was neither signed nor dated; as indicated on the Certificate of Service attached to the order, it was served on the parties on December 13, 2002. On January 2, 2003, claimant's attorney wrote to the judge noting that the order was unsigned and undated, and further requesting an attorney fee in the amount of \$1,000. By letter dated January 6, 2003, the Workers' Compensation Division requested the judge to "conduct further hearing if necessary, on the issue raised in the January 2, 2003 letter and issue an amended order with new appeal rights."

On January 10, 2003, noting that the time for filing exceptions was running, employer's attorney submitted exceptions to the proposed order. Also on January 10, 2003, employer's attorney sent a letter to the division requesting that the proposed order be abated. By order dated January 16, 2003, the division further requested the judge to abate and withdraw the proposed order; to "hold further hearing, if necessary to address the remaining issue of attorney fees"; and to issue an Amended Proposed and Final Order addressing the issue of attorney fees and

¹ Employer's reply was due 10 days after the Response date, or in this case by May 12, 2003. Accordingly, its reply was untimely.

including a date and signature. The parties were requested to re-submit their exceptions to the director after the amended order issued.

On April 2, 2003, pursuant to the division's January 16, 2003 request, the judge abated and withdrew the original proposed order. On April 3, 2003, the judge issued an Amended Proposed and Final Contested Case Hearing Order. The amended order was signed and dated, and addressed claimant's attorney's fee request. On April 11, 2003, employer re-submitted its exceptions. Claimant timely responded to employer's exceptions and requested an additional fee.

Employer makes nine specific exceptions. Claimant responds, noting agreement with the proposed order.

Employer first objects to the judge's issuance of an amended order without holding further hearing, contrary to the division's directive. As discussed below, the judge acted properly in issuing the amended order.

Employer's first three exceptions are that neither the underlying administrative order nor the judge's amended proposed order are supported by substantial evidence; that the judge's conclusion is defective as a matter of law; and that the judge used the incorrect standard of review. The judge reviewed the underlying administrative order for substantial evidence, and after reviewing the record found the order was supported by substantial evidence. The director adopts the judge's rationale. As these exceptions otherwise raise issues that were already argued at hearing, the director will not address them further.

Employer's next three exceptions address the post-hearing history in this matter: the judge failed to timely abate the original proposed order; the judge failed to follow the division's directives regarding abatement and taking further evidence prior to the issuance of the amended order; and the judge failed and refused to consider or to admit employer's January 10, 2003 Notice of Exceptions and enclosures.

The judge fully complied with the division's request and did not have authority to consider or to admit employer's exceptions. Once a proposed order is issued, the Administrative Law Judge may not hold any further hearing except at the request of the agency. OAR 137-003-0655(1). The agency shall specify the scope of the hearing and the issues to be addressed. OAR 137-003-0655(2). The division requested the judge to conduct further hearing *if necessary* to address the issue of attorney fees, and further requested that the original proposed order be abated and an amended order, with date and signature, be issued.

The judge abated the order on April 2, 2003 and issued an amended proposed order on April 3, 2003. The amended order addresses the issue of attorney fees, and is signed and dated. The judge was within his discretion to not hold any further hearing if he did not consider it necessary, and was not authorized to consider the parties' exceptions or to admit further evidence. *See also* OAR 137-003-0655(5). The division specifically requested the parties to re-submit their exceptions to the director once an amended order issued. The exceptions are properly before the director at this time. *See* OAR 137-003-0650(1).

There is no time frame in the rules for when an Administrative Law Judge must comply with an agency's request. However, the parties have 30 days from the date of service in which to file exceptions. If no exceptions are filed, the order becomes final. OAR 436-001-0275(1) and (2). The original proposed order was served on the parties on December 13, 2002. Claimant's attorney wrote the judge on January 2, 2003, and employer's attorney submitted exceptions on January 10, 2003. Both actions took place within 30 days of the date of service. Accordingly, the proposed order did not become final under OAR 436-001-0275(2). While employer is correct that the judge did not abate the original proposed order in a timely fashion, employer's actions in timely submitting exceptions prevented the order from becoming final.

With its January 10, 2003 exceptions, employer submitted a copy of Administrative Order No. MS 02-745² and asked that administrative notice be taken of it. Employer argued that the proposed order is inconsistent with this administrative order; employer renews this exception in the April 11, 2003 exceptions. The director takes notice of Administrative Order MS 02-745.³ The order was issued on December 5, 2002; the hearing in this matter was held on November 22, 2002. The issues and record before the reviewer in the subsequent administrative review are not the same as the issues and record before the judge in this matter. While there may be similarities between the two matters, the director's review in this matter is limited to the record developed at hearing. *See* OAR 137-003-0655(5) limitations on agency consideration of new or additional evidence. Taking notice of the order itself does not amount to taking notice of the evidence and facts on which the reviewer relied. On this record, the director affirms.

Employer's last two exceptions are that the judge erred and the division abused its discretion in interpreting OAR 436-010-0230(1) and (3). As the interpretation of this rule was argued at hearing, the director declines to re-address it here and adopts the judge's rationale.

ATTORNEY FEE

The judge awarded claimant's attorney a fee in the amount of \$1,000. Claimant requests an additional amount of \$250 for the exceptions process. Because claimant has prevailed, he is entitled to an attorney fee award. ORS 656.385(1). OAR 436-001-0265 lists ten factors that may be considered in assessing an attorney fee. Employer, however, has not objected to the fee awarded by the judge, nor to claimant's request for an additional fee. An additional fee in the amount of \$250 seems reasonable in light of the amount of correspondence that has been exchanged since the hearing in this matter. Accordingly, an additional fee of \$250 is awarded.

² Employer also included a copy of a letter dated September 20, 2002 from Dr. Bilder to Jean Zink of the Medical Review Unit. Employer does not refer to this letter in its April 11, 2003 exceptions, and it is accordingly not addressed. Further, in addition to the prohibition against the judge holding further hearing without a specific request from the agency, the agency may not consider new or additional evidence in the absence of such a request. OAR 137-003-0655(5). Accordingly, the September 20, 2002 letter may not be considered.

³ After a proposed order is issued, an agency may take notice of judicially cognizable facts and may take official notice of general, technical or scientific facts within the specialized knowledge of the agency if the agency provides notice to the parties in writing and allows the parties the opportunity to present rebuttal evidence. OAR 137-003-0615(4). Here, employer asks the division to take notice of Administrative Order MS 02-745. Claimant was given the opportunity to respond to employer's request; both claimant and claimant's attorney were copied with employer's January 10, 2003 exceptions and enclosures, and with employer's April 11, 2003 exceptions. In his May 1, 2003 response, claimant did not specifically respond to employer's request. Regardless, the director does not rely on Administrative Order MS 02-745 in reaching her conclusions.

ORDER

The April 3, 2003 Amended Proposed and Final Contested Case Hearing Order is adopted and affirmed.

Roseburg Forest Products is liable for reimbursement to Mr. Massingale for his out-of-pocket prescription expenses incurred from September 1, 2001 through January 3, 2003.

Roseburg Forest Products shall pay claimant's attorney a fee in the total amount of \$1,250, including the \$1,000 awarded by Judge Vincent and the \$250 awarded here by the director.

DATED this 14th day of July, 2003.

CORY STREISINGER, DIRECTOR
DEPT. OF CONSUMER AND BUSINESS SERVICES

BY: _____
John Shilts, Administrator
Workers' Compensation Division