
In the Matter of the ORS 656.385 Attorney Fee Dispute of

Penfold, Donald M., Claimant

Contested Case No: H04-024

PROPOSED & FINAL ORDER

May 6, 2004

SAIF CORPORATION, Petitioner

DONALD M. PENFOLD, Respondent

Before Catherine P. Coburn, Administrative Law Judge, Office of Administrative Hearings

HISTORY OF THE CASE

Insurer appeals an Administrative Order issued on January 12, 2004 by the Medical Review Unit (MRU) of the Workers' Compensation Division (WCD) Department of Consumer and Business Services (director or the department). On February 26, 2004 WCD referred the matter to the Office of Administrative Hearings (OAH) for a contested case hearing. On April 8, 2004, Administrative Law Judge Catherine P. Coburn conducted a hearing. Petitioner SAIF Corporation (insurer) was represented by attorney Jerome P. Larkin. Respondent Donald M. Penfold was represented by attorney David A. Vinson. CareMark Comp, a managed care organization (MCO) waived appearance. No witnesses testified and the record closed on the date of hearing.

ISSUES

- (1) Whether claimant's attorney is entitled to a fee pursuant to ORS 656.385(eff. 1/1/04.).
- (2) If so, what is a reasonable attorney fee amount?

EVIDENTIARY RULINGS

WCD Exhibits 1 through 89 were received into the record without objection.

FINDINGS OF FACT

- (1) Insurer accepted the claim for situational adjustment reaction with depression and syncopal episode of May 21, 1980. (Ex. 69-1.)
- (2) In 1998, claimant was enrolled in a managed care organization (MCO). (Ex. 66.)
- (3) On September 23, 2003, claimant requested administrative review of an MCO decision to deny prescription medications. (Ex, 75.)
- (4) On December 16, 2003, claimant's attorney submitted a Statement of Services to WCD, requesting an attorney fee of \$2,625 for 15 hours work. He specified that issue was

“Medical dispute, prescription medications.” He indicated that he had 36 years of experience handling workers’ compensation cases and that he devoted 60 percent of his practice to workers’ compensation cases. Under “Complexity,” he listed, “Medical issues; SAIF alleges the medical services are not causally related to the accepted condition; that they are excessive, inappropriate, ineffectual or in violation of medical service rules; MCO dispute.” (Ex. 83.)

(5) On December 18, 2003, MRU issued Administrative Order MTX 03-1264 determining that insurer was liable for the disputed prescription medications and awarding no attorney fee. Neither party appealed. (Ex. 84.)

(6) On December 22, 2003, claimant’s attorney requested abatement and reconsideration of the administrative order because it awarded no attorney fee. (Ex. 86.)

(7) On January 12, 2004, MRU issued Amended Administrative Order MTX 03-1264 awarding an attorney fee of \$2,000. (Ex. 87.)

(8) On January 30, 2004, insurer requested a hearing to contest the attorney fee. (Ex. 89.)

CONCLUSIONS OF LAW

(1) Claimant’s attorney is entitled to a fee pursuant to ORS 656.385(eff. 1/1/04.).

OPINION

The director exercises jurisdiction over an attorney fee issue arising under ORS 656.385. Since claimant was enrolled in an MCO, I review for substantial evidence and error of law. ORS 656.260(16). The burden of proving a fact or position rests with the proponent. ORS 183.450(2); *Harris v. SAIF*, 292 Or 683 (1982). As petitioner, claimant bears the burden of proving by a preponderance of evidence that the administrative order is incorrect. *Cook v. Employment Div.*, 47 Or 437 (1982) (In the absence of contrary legislation, the standard of proof in administrative hearings is preponderance of evidence). Preponderance of evidence means that the factfinder is persuaded that the facts asserted are more likely true than false. *Riley Hill General Contractors v. Tandy Corp.*, 303 Or 390 (1998).

MRU awarded an attorney fee of \$2,000 without explaining how it calculated the amount. Insurer first contends that claimant’s attorney is not entitled to any fee because the amended statute does not apply to the case. Insurer next contends that MRU abused its discretion by awarding an excessive fee and that a fee of \$1,225 is reasonable. Finally, insurer contends that MRU erred by awarding an attorney fee without explaining why the specific amount was reasonable. In contrast, claimant contends that the administrative order awarding a \$2,000 fee is correct and should be affirmed. Additionally, claimant requests a penalty of \$750. However, inasmuch as a penalty dispute is not the sole issue presented, I lack jurisdiction and do not address the penalty question. ORS 656.262(11)(a)¹.

¹ ORS 656.262(11)(a) provides in pertinent part:

Entitlement to Attorney Fee

In 2003, the legislature amended ORS 656.385, in Or Laws 20003, chapter 756, Sec. 2 (Senate Bill 620). The amended statute provides:

(1) In all cases involving a dispute over compensation benefits pursuant to ORS 656.245, 656.327 or 656.340, where a claimant finally prevails after a proceeding has commenced before the Director of the Department of Consumer and Business Services, the director shall require the insurer or self-insured employer to pay a reasonable attorney fee to the claimant's attorney. *** The attorney fee must be based on all work the claimant's attorney has done relative to the proceeding at all levels before the department. The attorney fee assessed by the director, or on appeal from an order of the director under this section must be proportionate to the benefit to the injured worker. The director shall adopt rules for establishing the amount of the attorney fee, giving primary consideration to the results achieved and to the time devoted to the case. An attorney fee awarded pursuant to this subsection may not exceed \$2,000 absent a showing of extraordinary circumstances.

Section 3 of the act provides that the amendment to ORS 656.385 applies to all claims for which an order relating to the issue on which attorney fees are sought has not become final on or before the effective date of the act, regardless of the date of injury.

Because Senate Bill 620 contained no emergency clause, the amendment to ORS 656.385 became effective on January 1, 2004. ORS 171.022. Here, MRU issued Administrative Order MTX 03-1264 on December 18, 2003. The order became final 30 days later, on January 18, 2004, after the statute's effective date. Inasmuch as Administrative Order MTX 03-1264 was not final until after the statute's effective date, claimant's attorney is entitled to a reasonable fee for services rendered before MRU.

Amount of Attorney Fee

Following the statutory amendment, WCD promulgated OAR 436-001-0265 (eff. 4/1/04) which provides that in any dispute in which a represented worker prevails before the director, the director shall award an insurer-paid fee. The rule further provides that, absent extraordinary circumstances, the fee may not exceed \$2,000 nor fall outside the ranges for fees provided in a matrix.

OAR 436-001-0265(1)(b) provides:

(b) Absent a showing of extraordinary circumstances or unless

Notwithstanding any other provision of this chapter, the director shall have exclusive jurisdiction over proceedings regarding solely the assessment and payment of the additional amount described in this subsection.

otherwise agreed by the parties, the fee may not exceed \$2,000 nor fall outside the ranges provided in the following matrix:

Estimated Results Achieved -- Attorney Time Devoted

1-2 hours -- 2.1-4 hours -- 4.1-6 hours -- 6.1-8 hours -- 8.1-12 hours

\$1-\$2000 -- \$100-400 -- \$200-700 -- \$300-750 -- \$600-1000 -- \$800-1250

\$2001-\$4000 -- \$200-500 -- \$400-800 -- \$600-900 -- \$800-1300 -- \$1050-1500

\$4001-\$6000 -- \$300-700 -- \$600-1000 -- \$800-1250 -- \$1000-1450 -- \$1300-1750

\$6001-\$10000 -- \$400-900 -- \$800-1300 -- \$1050-1600 -- \$1350-1800 -- \$1550-2000

(c) In cases under ORS 656.245, 656.260, or 656.327, the factors listed in OAR 436-010-0008(13) may also be considered.

(d) In cases under ORS 656.340, the factors listed in OAR 436-120-0008(2) may also be considered.

(2) Except as provided in section (3), in cases where the administrative law judge or director assesses an attorney fee, the following factors may also be considered:

- (a) The complexity of the issue(s) involved;
- (b) The quality of the legal representation;
- (c) The value of the interest involved;
- (d) The nature of the proceedings;
- (e) The risk in a particular case that an attorney's efforts may go uncompensated;
- (f) The assertion of frivolous issues or defenses;
- (g) A statement of services, if submitted within seven days of the hearing date, unless the administrative law judge instructs otherwise; and

(h) Any other relevant consideration deemed appropriate by the administrative law judge or director.

(3) In cases under ORS 656.262(11) (§1, ch. 756, OL 2003) where the issue is solely the assessment and payment of a penalty and attorney fee, OAR 438-015-0110 applies.

(4) If an attorney fee has been assessed by an administrative law judge in a proposed order, the opposing parties may file written exceptions to the fee under OAR 436-001-0275.

In *Schoch v. Luepold & Stevens*, 162 Or App 242 (1999) the court considered the amount of an attorney fee in a workers' compensation case. The court held that mere recitation of the factors listed in the applicable administrative rule and awarding an amount is insufficient without explanation. The court remanded the case to the Workers' Compensation Board requiring it to explain why the factors considered lead to the conclusion that a specific fee amount was reasonable. Although *Schoch* arose under the previous statute, the reasoning is the same. Merely reciting the administrative factors and positing a fee amount is insufficient to determine whether MRU abused its discretion. Accordingly, I remand to MRU to further address the issue of the attorney fee amount. OAR 436-001-0170(7).

ATTORNEY FEES

Upon remand, claimant has not finally prevailed in a contested case hearing, and therefore, is entitled to no attorney fee. ORS 656.385.

ORDER

IT IS HEREBY ORDERED that:

Amended Administrative Order MTX 03-1264 dated January 12, 2004 is remanded to MRU.