

In the Compensation of
Bonifacio Bravo-Morales, Sr., Claimant

Contested Case No: 06-013H

PROPOSED & FINAL ORDER

June 1, 2006

BONIFACIO BRAVO-MORALES SR., Petitioner
BARRETT BUSINESS SERVICES INC., Respondent
Before John Mark Mills, Administrative Law Judge, Workers' Compensation Board

Hearing convened and closed in this matter before Administrative Law Judge Mills in Bend, Oregon on May 3, 2005. Claimant was represented by his attorney, Phil Garrow who was present. The employer, Barrett Business Services and their processing agent, Pinnacle, were represented by their attorney, Travis Terrall, who appeared by phone. The hearing was limited to argument. Exhibits 1 through 29, the record on review from the Workers' Compensation Division (WCD) was received into evidence.

ISSUE

Claimant contests the WCD Administrative Order dated January 10, 2006 issued with respect to a dispute over an MRI, a medical service. Claimant contests the Order's failure to award an assess attorney fee pursuant to ORS 656.385(1).

I review the order pursuant to OAR 436-001-0225(2) and may modify the Order only if it is not supported by substantial evidence in the record or reflects an error of law. No new evidence may be considered.

FACTUAL BACKGROUND

The pertinent findings of fact which I take from the Administrative Order are as follows:

Claimant sustained a compensable injury on December 15, 2003 and filed a claim which was accepted for a right shoulder strain/contusion. On June 22, 2005 during the course of treatment, an MRI was requested on behalf of claimant by his physician, Dr. Shannon (Ex. 2). Referring to the denial of claimant's aggravation claim, Pinnacle's representative denied the request for authorization by letter dated June 27, 2005 (Ex. 3). Claimant, through counsel Phil Garrow, requested review before the MRU of this decision by letter dated July 14, 2005 (Ex. 6).

Pinnacle then issued a current condition denial on July 27, 2005 (Ex. 10). In a submission dated July 29, 2005 to MRU, counsel for Pinnacle argued that the MRI continued to be denied and was not related causally to claimant's accepted condition, further referencing the current condition denial. However, on August 15, 2005 while proceedings were still ongoing before the MRU, Pinnacle advised that it would authorize the MRI and that it should be obtained as soon as possible for use in a scheduled IME that was to occur on September 19, 2005 (Ex. 15)

CONCLUSIONS

The Administrative Order issued in this matter concluded that, while the dispute over the right shoulder MRI was settled when Pinnacle agreed to authorize the disputed MRI, there was no evidence that claimant's counsel was instrumental in obtaining settlement such that an attorney fee would be owing under ORS 656.385(1). As noted above, I review that conclusion under a substantial evidence and error of law standard. I note at the outset that the parties, both before the MRU and during the course of this hearing, made various arguments as to the underlying compensability of the MRI in dispute. I do not find these arguments persuasive or relevant. Regardless of the underlying compensability of the MRI and regardless of the dispute over MRU's jurisdiction over the compensability of the MRI, there is no dispute that a claim for an MRI was made, the claim was denied on the basis of compensability and that denial was rescinded by Pinnacle after claimant, through counsel, requested review of the denial. Pinnacle issued the denial and the denial was rescinded. The underlying merits of the denial, are not relevant to claimant's counsel's entitlement to a fee. See e.g. *Lisa Oishi*, 56 Van Natta 3026, 3028 (2004).

I find that counsel is entitled to a fee under either a substantial evidence or error of law standard of review.

First, with respect to substantial evidence, while not listed as a finding of fact in that section of the Order, the reviewer made a finding of fact in discussing the attorney fee that "there is no evidence" that claimant's counsel was instrumental in obtaining the rescission of the denial of the MRI. The evidentiary findings of fact from the Order establish that, following the denial, claimant's counsel filed a request for review and it was only after that that the denial was rescinded. The finding of no evidence that counsel was instrumental in obtaining rescission of the denial is not supported by substantial evidence. As the Board noted in *Oishi*, if claimant's counsel had not filed the request for hearing in that matter, the insurer's denial would have become final. Similarly here, if claimant's counsel had not contested the denial of the MRI, principles of preclusion could have been relied on by Pinnacle in subsequent actions concerning the underlying compensability of the MRI request. Filing a timely request for review in the appropriate forum is a condition precedent to obtaining rescission a denial. Had there been no timely request for review leading to litigation pending at the time of the rescission of Pinnacle's decision, Pinnacle would have had no incentive or obligation to consider whether to rescind the denial of the MRI.

Based upon similar reasoning under *Oishi*, I also conclude that where there is a denial, a request for hearing and rescission of the denial, claimant's counsel has, as a matter of law, been instrumental in obtaining rescission or, under the terms of ORS 656.385(1) obtaining that settlement. Pursuant to that statute, the amount of the assessed fee should take into account the level of claimant's counsel's involvement in obtaining the settlement. However, filing a request for hearing to protect claimant's rights and put the matter into litigation in the appropriate forum is sufficient as a matter law to establish entitlement to a fee.

I therefore modify the Order to award an assessed fee. The record includes claimant's counsel's various submissions including a November 3, 2005 submission specifically dealing

with the issue of attorney fees (Ex. 22). Pursuant to ORS 656.385(1) and OAR 436-001-0265(1)(b) I assess a fee in the sum of \$750.00.

IT IS SO ORDERED.