
In the ORS 656.327 Medical Treatment Dispute of

Georgiana White, Claimant

Contested Case No: 06-039H

PROPOSED & FINAL ORDER

July 18, 2006

KLAMATH CARE SERVICES INC., Petitioner

GEORGIANA WHITE, Respondent

Before G. Duff Bloom, Administrative Law Judge

A hearing convened and the record closed in Medford, Oregon on June 27, 2006 before Administrative Law Judge Bloom. The claimant was not present and was represented by Attorney Jodie Anne Phillips Polich. The employer, Merle West Medical Center, and its insurer, Health Future, LLC, were represented by Attorney Adam T Stamper. WCD waived appearance on March 21, 2006. The record consists of Exhibits 1 through 60.¹ ALJ Bloom of WCB recorded the proceedings.

ISSUES

1. Medical treatment dispute: employer requests this hearing from WCD-MRU's January 25, 2006 Administrative Order on Reconsideration No TX-06-097. (Ex 58).

2. Assessed attorney's fee.

FINDINGS OF FACT

I adopt the "Findings of Fact" as set forth in the January 25, 2006 Administrative Order on Review, as supplemented below. (Ex 58-1 through 58-4). *See Liberty Northwest v Kraft and DCBS*, 205 Or App 59 (2006) (the Court of Appeals held: "Nothing in our understanding of 'substantial evidence' review comports with an adjudicator rendering findings of fact.").

The MRU of WCD ordered that, pursuant to ORS 656.245(1)(c)(L), employer was "liable for" the surgery prescribed by attending surgeon Miguel Schmitz, MD. (Ex 58-4).

The MRU of WCD ordered claimant's counsel entitled to a \$1,070 assessed attorney's fee. (Ex 58-5).

Employer timely requested a hearing on February 23, 2006. (Ex 59).

The Director referred the hearing to the Board on March 15, 2006. (Rec).

CONCLUSIONS AND OPINION

1. Medical treatment.

¹ Exhibits 1 through 60 were submitted by WCD on April 3, 2006.

This medical treatment dispute arises under ORS 656.245, 656.327, and OAR 436-010-0008. I review for substantial evidence and errors of law. ORS 656.327(2); OAR 436-001-0225(2); *Kraft, supra*.

The burden of proving a fact or position rests with its proponent. ORS 183.450(2); *Salem Decorating v. National Council on Comp. Ins.*, 116 Or App 170 (1992), *rev den* 315 Or 643 (1993). As the proponent of its position, employer bears the burden of proving by a preponderance of evidence that the administrative order is incorrect. *See Harris v. SAIF*, 292 Or 683 (1982) (general rule regarding allocation of burden of proof is that burden is on the proponent of the fact or position.); *Cook v. Employment Div.*, 47 Or 437 (1982) (in the absence of legislation adopting a different standard of proof, the standard in an administrative hearing is preponderance of evidence). Proof by a preponderance of evidence means that the fact-finder is convinced that the facts asserted are more likely true than not. *Riley Hill General Contractors v. Tandy Corp*, 303 Or 390 (1989). I hold employer has failed to meet its burden.

Pursuant to ORS 656.245(1), an insurer is required to provide medical services for compensable conditions for such period as the nature of the injury or the process of recovery requires. Once the worker is medically stationary, however, only particular medical services are compensable. ORS 656.245(1)(c). In this case, MRU determined that the shoulder surgery proposed by Dr. Schmitz was compensable and reimbursable as post-medically stationary curative care under ORS 656.245(1)(c)(L). Under that subsection, “curative care” is compensable if it is “provided to a worker to stabilize a temporary and acute waxing and waning of symptoms of the worker's condition.”

Employer argues that claimant’s proposed shoulder surgery is not curative care and therefore not compensable under ORS 656.245(1)(c)(L). Claimant, on the other hand, contends that the administrative order is correct and should be affirmed. I agree with claimant.

Although it never clearly stated so, it appears that part of employer’s argument can be understood as asserting MRU erred as a matter of law. I hold the MRU reviewer did not err in interpreting ORS 656.245(1)(c)(L). The medical reviewer found that, based on the medical record, claimant “experienced acute and temporary waxing and waning of symptoms; therefore the director concludes that [claimant] meets the requirements of curative care under ORS 656.245(1)(c)(L).” (Ex 58-4). That is precisely the inquiry the legislature demanded be investigated; the statutory language is not enigmatic. I hold there is no error of law.

The essence of employer’s frustration actually lies in its disagreement with the medical reviewer’s analysis of the record -- specifically, employer believes that Dr Schmitz’s opinion, when read as a holistic piece from the initiation of treatment through the date of the dispute, proves that claimant falls into a statutory netherworld wherein she is experiencing not an *acute and temporary* waxing and waning of symptoms, but rather what employer considers a non-compensable “*permanent and chronic*” waxing and waning of symptoms, thus removing her from the statutory promise of medical services for her compensable work injury. That presents a “substantial evidence” argument, and I hold it unpersuasive.

ORS 183.482(8)(c) provides “Substantial evidence exists to support a finding of fact when the record, viewed as a whole, would permit a reasonable person to make that finding.” In order to conduct a review under ORS 183.482(8)(c), “[I] must be able to know what the [medical reviewer] found as fact and why it believes that its findings led to the conclusions that it reached. That requires a reasoned opinion based on explicit findings of fact.” *Armstrong v. Asten-Hill Co.*, 90 Or App 200, 205 (1988) (footnote omitted); *see also Christman v. SAIF*, 181 Or App 191, 197-98 (2002) (holding that, to conduct a meaningful review for substantial evidence, the body whose order is being reviewed must explain its conclusions in a manner that is supported by substantial reason).

In *Armstrong*, the court held that in workers' compensation cases, if there is evidence on both sides of a medical issue, whichever way the Board finds the facts will probably have substantial evidentiary support. *Id* at 206. In *SAIF v. Valencia*, 148 Or App 263 (1997), the court held that a physician's “sparse” opinion (consisting of words underlined and circled on an attorney’s letter) constituted “substantial evidence” supporting the Board's decision. Even ambiguous or equivocal evidence of causation may constitute “substantial evidence.” *See SAIF v. Chipman*, 166 Or App 443, 449 (2000).

I hold the medical reviewer’s findings are eminently reasonable on this record, and see no reason to disturb the reviewer’s final determination in this matter. Finding no persuasive basis on which to modify MRU’s order, I therefore affirm it.

2. Assessed attorney’s fee.

Claimant requests an assessed fee for prevailing over employer’s request for hearing, and employer does not quarrel with that. I agree that is appropriate. The quandary is whether I can, and if so, where I find, the authority to award such a fee.

At first blush, I considered claimant’s fee found its basis in the plain language of ORS 656.382(2), which provides, in pertinent part:

“If a request for hearing * * * is initiated by an employer or insurer, and the Administrative Law Judge, board or court finds that the compensation awarded to a claimant should not be disallowed or reduced, the employer or insurer shall be required to pay to the claimant or the attorney of the claimant a reasonable attorney fee in an amount set by the Administrative Law Judge, board or the court for legal representation by an attorney for the claimant at and prior to the hearing * * *” (Emphasis added).

At hearing, claimant and employer disagreed with me, and asserted that, should claimant prevail over employer’s request for hearing, her attorney’s fee would have to find approval under OAR 436-010-0008. The parties did not cite to any specific subsection of that rule, so I presume they refer to OAR 436-010-0008(12), which expressly provides for a fee for successful services rendered on a claimant’s behalf “before the director.” I hold that is not strictly applicable to a contested case hearing conducted under the auspices of the Board on the director’s behalf.

After much investigation and study of the WCD rules (both OAR Ch 436, Div 010; and OAR Ch 436, Div 001), the Board's rules (OAR Ch 438) and the statute, I conclude claimant is entitled to an assessed fee under ORS 656.385(3), which provides:

“If a request for a contested case hearing, review on appeal or cross-appeal to the Court of Appeals or petition for review to the Supreme Court is initiated by an insurer or self-insured employer, and the director, Administrative Law Judge or court finds that the compensation awarded under ORS 656.245, 656.247, 656.260, 656.327 or 656.340 to a claimant should not be disallowed or reduced, the insurer or self-insured employer shall be required to pay to the claimant or the attorney of the claimant a reasonable attorney fee in an amount set by the director, the Administrative Law Judge or the court for legal representation by an attorney for the claimant at the contested case hearing, review on appeal or cross-appeal.”

OAR 438-015-0010(4) considers the following factors in determining a reasonable assessed attorney's fee:

“(a) The time devoted to the case; (b) the complexity of the issue(s) involved; (c) the value of the interest involved; (d) the skill of the attorneys;(e) the nature of the proceedings; (f) the benefit secured for the represented party; (g) the risk in a particular case that an attorney's efforts may go uncompensated; and (h) the assertion of frivolous issues or defenses.”

I hold a reasonable fee in this matter to be \$2,500. Giving primary consideration to factors, I find: the issues not complex; that claimant benefited in a substantial way, being able to have the surgery she needs; and claimant's and employer's counsel are each experienced, gifted attorneys who presented zealous, engaged and engaging cases; that being said, claimant's counsel did not have to generate or submit any evidence in the instant matter, as the record had been developed at the MRU level immediately below. Finally, claimant's counsel did have to respond to an employer-generated litigation, and did risk going uncompensated for her professional efforts.

ORDER

IT IS THEREFORE ORDERED that MRU's January 26, 2006 Administrative Order is affirmed.

IT IS FURTHER ORDERED that claimant's attorney, Jodie Anne Phillips Polich, is awarded an assessed attorney's fee of \$2,500, to be paid by employer.