

In the ORS 656.327 Medical Treatment Dispute of

Robert Shaddy, Claimant

Contested Case No: 04-200H

ORDER ON REMAND

November 6, 2007

ROSEBERG FOREST PRODUCTS, Petitioner

ROBERT SHADDY, Respondent

Before John Shilts, Workers' Compensation Division Administrator

This matter is before the director on remand from the Court of Appeals. *Roseburg Forest Products v. Shaddy*, 212 Or App 320, *rev denied* 343 Or 159 (2007). The issue is whether claimant's attorney is entitled to a fee for services provided during director review.

The parties brought a dispute regarding proposed surgery before the former Medical Review Unit (MRU).¹ MRU issued an order finding in claimant's favor and awarding claimant's attorney an assessed fee of \$1,200. Employer requested a contested case hearing. The Administrative Law Judge issued an order affirming MRU's order and awarding claimant's attorney an additional fee of \$2,652.50. Employer filed exceptions and requested director review of the ALJ's order. The director issued a final order affirming the ALJ's order. The final order was silent on the issue of attorney fees. Employer filed a petition for review in the Court of Appeals, and claimant filed a cross-petition for review contending that the attorney fee award was inadequate. The Court of Appeals affirmed on employer's petition and remanded for reconsideration on claimant's cross-petition. The court stated that claimant is correct that he is entitled to a fee for prevailing before the director, and that claimant's attorney has already been awarded a fee in excess of \$2,000 for services provided before MRU and the ALJ. The court remanded for consideration of whether claimant is entitled to an additional fee for services before the director. For the following reasons, I find claimant's attorney is not entitled to an additional fee for director review.

ORS 656.385(1) provides:

“In all cases involving a dispute over compensation benefits pursuant to ORS 656.245, 656.247, 656.260, 656.327 or 656.340, where a claimant finally prevails after a proceeding has commenced, the Director of the Department of Consumer and Business Services or the Administrative Law Judge 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 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

¹ The former Medical Review Unit is now known as the Resolution Team of the Medical Section.

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.”

Prior to January 1, 2004, ORS 656.385(1) provided for attorney fees in disputes over medical services, medical treatment, managed care, and vocational assistance “where a claimant finally prevails in a contested case order by the [d]irector.” Fees were not allowed at the administrative review level. There was no cap on the amount of the fee awarded in a contested case order. In 2003, the legislature amended ORS 656.385(1) to provide for fees “where a claimant finally prevails after a proceeding has commenced before the [d]irector.”² This change allowed for fees at the administrative review level, even if the matter did not proceed to hearing. Additional amendments were made in 2005 to provide that the fees could be awarded by an Administrative Law Judge in addition to the director.³ The present language of ORS 656.385(1),

² Oregon Laws 2003, chapter 756, section 2 (Senate Bill 620) provides, in part:

ORS 656.385 is amended to read:

656.385. (1) In all cases involving a dispute over compensation benefits pursuant to ORS 656.245, 656.260, 656.327 or 656.340, where a claimant finally prevails **after a proceeding has commenced before** [*in a contested case order by*] 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. In such cases, [*after a contested case hearing request by the claimant,*] where an attorney is instrumental in obtaining a settlement of the dispute prior to a decision by the director, the director [*may*] **shall** require the insurer or self-insured employer to pay a reasonable attorney fee to the claimant or 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.**

³ Oregon Laws 2005, chapter 26, section 13 (House Bill 2091) provides, in part:

ORS 656.385 is amended to read:

656.385. (1) In all cases involving a dispute over compensation benefits pursuant to ORS 656.245, **656.247**, 656.260, 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*] **or the Administrative Law Judge** shall require the insurer or self-insured employer to pay a reasonable attorney fee to the claimant’s attorney. In such cases, where an attorney is instrumental in obtaining a settlement of the dispute prior to a decision by the director **or an Administrative Law Judge**, the director **or Administrative Law Judge** shall require the insurer or self-insured employer to pay a reasonable attorney fee to the claimant or 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

then, contemplates that a fee may be awarded for services at administrative review, for services at hearing, and for services on director review of a proposed order. At any stage, the fee is to be based on all work the claimant's attorney has done at all levels before the department. The fee awarded at each level of a proceeding, then, must take into account the work done at each previous level of the proceeding. The total fee awarded under ORS 656.385(1) is limited to \$2,000 for services at all levels, unless extraordinary circumstances are shown.

Attorney fee awards under ORS 656.385(1) are not simply a matter of multiplying an hourly rate by the number of hours. Rather, they must be proportionate to the benefit of the injured worker, and primary consideration must be given to the results achieved and the time devoted to the case. Accordingly, the director has adopted a matrix. OAR 436-001-0265, 436-010-0008(13). The award may not fall outside the ranges in the matrix nor exceed \$2,000 absent a showing of extraordinary circumstances or agreement of the parties. Extraordinary circumstances are not established by merely exceeding the values in the matrix. OAR 436-001-0265(1)(c). Other factors may also be considered, including the complexity of the issues involved; the quality of the legal representation; the value of the interest involved; the nature of the proceedings; the risk in a particular case that an attorney's efforts may go uncompensated; the assertion of frivolous issues or defenses; a statement of services; and any other relevant consideration deemed appropriate. OAR 436-001-0265(2)(a)-(h).

Before MRU, claimant's attorney requested \$1,200, stating that she spent five hours on the case, the benefit to claimant was significant, and she expects to be compensated at the rate of \$200 per hour. Finding that the fee requested fell within the ranges of the matrix, MRU awarded claimant's attorney \$1,200.

Before the ALJ, claimant's attorney requested an additional \$2,562.50 for 10.25 hours at the rate of \$250 per hour. Claimant's attorney stated that there was no agreement between the parties regarding the amount of the fee. Claimant's attorney did not allege that extraordinary circumstances existed. The ALJ awarded claimant's attorney the fee as requested, for a total attorney fee of \$3,762.50. The ALJ referenced ORS 656.385(1) and OAR 436-001-0265 and noted "the amount requested is above the limit of \$2,000." The ALJ accepted claimant's attorney's request "based on review of the factors in the administrative rule, particularly the benefit to claimant, the complexity of the issue(s) involved, and the quality of the legal representation."

Before the director on review of the ALJ's order, claimant's attorney did not submit a statement of services or request an additional fee for her services on director review.⁴ Claimant's attorney has already been awarded a fee in excess of the \$2,000 maximum. Claimant has not alleged to the director that extraordinary circumstances exist to support a fee over and above that which has already been awarded. Accordingly, I decline to award an additional fee for services

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.

⁴ Claimant's response to employer's exceptions to the ALJ's order consisted of one sentence requesting that the department affirm its previous order.

on director review. See *Roseburg Forest Products v. Humbert*, 212 Or App 285, 294 (2007).

IT IS SO ORDERED.