

In the ORS 656.260 Managed Care Dispute of

Shiloh M. Mitchell, Claimant

Contested Case No: 07-130H

FINAL ORDER

September 8, 2008

SHILOH M. MITCHELL, Petitioner

COMMERCE AND INDUSTRY INSURANCE CO., Respondent

Before John Shilts, Workers' Compensation Division Administrator

Claimant/Petitioner filed exceptions to Administrative Law Judge John Mark Mills' April 23, 2008 Proposed and Final Order. That order affirmed the November 13, 2007 Administrative Order issued by the Workers' Compensation Division's Resolution Team (RT).¹ The matter is before the director for a final order under ORS 656.704(2)(a). The issue is whether the ALJ erred in denying claimant's request for attorney's fees for representation of claimant before the ALJ. I find this was error. I adopt the ALJ's order as to all other issues, but vacate and modify it as to attorney fees. I award claimant's attorney fees for representation at the contested case hearing because claimant prevailed in a dispute over compensation benefits. ORS 656.385(1).²

FACTUAL SUMMARY

I adopt the facts as found in the ALJ's order. Claimant compensably injured his shoulder. Dr. Ulmer performed surgery on the shoulder in June 2007. In September, 2007, Dr. Ulmer concluded it was necessary to perform an arthroscopic examination of the shoulder to evaluate its condition. On September 18, 2007, Dr. Ulmer faxed a surgical authorization request to insurer/respondent.

Insurer enrolled claimant in an MCO on September 20, 2007. However the notice was sent to claimant's PO box, not his street address. The MCO provided notice to Dr. Ulmer, but not to claimant's attorney. The MCO notice stated claimant would have to find a new medical provider as Dr. Ulmer was not on the MCO panel.

On September 26, 2007, Dr. Ulmer wrote a note that he believed it would be detrimental to claimant to change providers.

Because no authorization was received, the surgery was twice scheduled and twice

¹ The ALJ refers to the Workers' Compensation Division unit which reviewed this matter as the "MRU." The unit was formerly titled the "Medical Review Unit." However, the current label for this unit, as stated on the administrative order, is the Medical Section "Resolution Team." This order will use the current title, abbreviated as RT.

² ORS 656.385(1) provides in relevant part:

"In all matters involving a dispute over compensation benefits pursuant to ORS 656.245 . . . [or] 656.260 . . . where a claimant finally prevails after a proceeding has commenced . . . the Administrative Law Judge shall require the insurer . . . to pay a reasonable attorney fee to the claimant's attorney."

cancelled. When claimant did not receive approval for the surgery, he requested administrative review.³ Claimant's September 27, 2007 request for administrative review sought an order authorizing Dr. Ulmer to remain as the attending physician and requiring insurer to approve the surgery. On October 1, 2007, RT notified insurer of claimant's request for review.

On October 11, 2007, the MCO sent claimant another notice of enrollment and copied claimant's attorney. The notice also stated Dr. Ulmer was approved as the attending physician, that the surgery was found medically necessary, and that October 11 would be deemed the effective notice date. The MCO sent a formal notice on October 12, 2007, that the surgery was deemed medically necessary.

Insurer argued to the RT that it did not have jurisdiction over the matter because claimant was enrolled in an MCO and had not exhausted the MCO appeal procedures. ORS 656.260; OAR 436-010-0008. Insurer additionally argued RT should dismiss the matter as moot because the MCO had approved both the surgery and retaining Dr. Ulmer as the treating physician.

The RT reviewer found claimant had not been enrolled in the MCO at the time Dr. Ulmer requested authorization for surgery. The reviewer also found insurer failed to respond to that request appropriately or within the required time frame and that, therefore, insurer was barred from later disputing whether the surgery was excessive, inappropriate or ineffectual. OAR 436-010-0250(3)(a), (5).⁴ The order states insurer is liable for the surgery, if performed. As to

³ ORS 656.327(1)(a) states in part:

"If an injured worker . . . believes that the medical treatment, not subject to ORS 656.260, that the injured worker has received, is receiving, will receive or is proposed to receive is . . . inappropriate [or] ineffectual . . . the injured worker . . . must request administrative review of the treatment by the director prior to requesting a hearing on the issue and so notify the parties."

⁴ OAR 436-010-0250 provides in part:

. . .

"(2) Except as otherwise provided by the MCO, when the attending physician or surgeon upon referral by the attending physician or authorized nurse practitioner, believes elective surgery is needed to treat a compensable injury or illness, the attending physician, authorized nurse practitioner, or the surgeon must give the insurer notice at least seven days prior to the date of the proposed surgery.

. . .

(3)(a) The insurer must notify the recommending physician, the worker and the worker's representative, within seven days of receipt of the notice of intent to perform surgery, whether or not a consultation is desired.

(A) The insurer's notice must either communicate approval to the physician or,

(B) If approval is not given, the insurer must submit a completed Form 440-3228 (Elective Surgery Notification) to the recommending physician.

(b) If the form is not completed or insurer approval is not communicated to the physician, the physician is not required to respond.

. . .

attorney fees, the reviewer found claimant's attorney was instrumental in resolving the dispute about the surgery, that the attorney's efforts contributed to resolving the dispute expeditiously, and that attorney's fees were therefore appropriate.

Insurer filed a request for hearing concerning the administrative order. In its written argument to the ALJ, insurer asked that the ALJ issue a "Proposed and Final Order vacating the Administrative Order and issuing an Order of Dismissal of claimant's treatment dispute." Insurer asked in the alternative for an order eliminating the attorney fee award.

The ALJ affirmed the administrative order. He found claimant had not been enrolled in the MCO at the time surgery was requested and that RT acted properly in approving the surgery. The ALJ also approved RT's attorney fee award on the grounds there was a dispute about the surgery authorization at the time claimant sought administrative review and that counsel was instrumental in resolving the dispute in a more expeditious manner than would have occurred otherwise.

The ALJ refused claimant's request for attorney fees for representation at the hearing level, however, on the grounds there was no attempt at the hearing to reduce or disallow any compensation to claimant. ORS 656.385(3).⁵ He reasoned that claimant's surgery would ultimately be paid for, either as a result of the RT order, or because the MCO had approved it. The ALJ therefore characterized the hearing as an action only intended to attempt to reduce the prior award of attorney's fees.

CONCLUSIONS OF LAW

As the only issue on review concerns attorney's fees, I review de novo. OAR 436-001-0225(1).

When a claimant finally prevails in a dispute over compensation benefits under ORS

(5) If the insurer believes the proposed surgery is excessive, inappropriate, ineffectual, or is in violation of these medical rules and cannot resolve the dispute with the recommending physician, the insurer must request an administrative review by the director within 21 days of the notice provided in subsection(4)(c) of this rule. Failure of the insurer to timely respond to the physician's elective surgery request either by communicating the insurer's approval of the surgery or by submitting a completed Form 440-3228, or to timely request administrative review under this rule shall bar the insurer from later disputing whether the surgery is or was excessive, inappropriate, or ineffectual."

⁵ OAR 656.385(3) states:

"If a request for a contested case hearing . . . is initiated by an insurer . . . and the Administrative Law Judge . . . finds that the compensation awarded under ORS 656.245 [or] 656.260 . . . to a claimant should not be disallowed or reduced, the 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 . . . for legal representation by an attorney for the claimant at the contested case hearing . . ."

656.245 or 656.260 the ALJ is required to order the insurer to pay a reasonable attorney fee to claimant's attorney. ORS 656.385(1).⁶ Here, RT issued an order in claimant's favor, insurer sought contested case hearing review of the order, and the ALJ affirmed that order. Claimant clearly prevailed at both levels of review. Claimant was therefore entitled to an order requiring insurer to pay claimant an attorney's fee.

Insurer takes the position that there was no "dispute over compensation" because the only matter at issue in the contested case hearing was the question of attorney fees. If that were the case, no fee award would be justified because attorney fees are not "compensation" in this context. See *Dotson v. Bohemia, Inc.*, 80 Or App 233 (1986). The ALJ denied the request for an attorney fee on the grounds there was no risk claimant's compensation would be disallowed or reduced, thereby implying attorney fees were the only issue. See ORS 656.385(3). However, this is not what the record reflects.

In its written closing argument to the ALJ, insurer asked for an order vacating the administrative order in its entirety. Only as an alternative, did insurer ask for an order only eliminating the fees. Thus, insurer asked for relief much broader than was necessary if the fee were the only issue. Had the RT order been vacated, this would have had more legal effect than simply nullifying the fee award.

The ALJ also listed more issues in his order than simply the fee question. The ALJ described the issues presented in this manner: "The insurer requests review of the Administrative Order entered in this matter on November 13, 2007, which directed the insurer to pay for a proposed surgery and to pay an assessed attorney fee to claimant's counsel in the sum of \$740.00." The ALJ also divided his legal conclusions into two categories. In the first part of the conclusions section, the order states: "In conclusion, I do not find that the insurer has sustained its burden of proving that the MRU Order should be modified based upon errors of law." Clearly, insurer and the ALJ believed the validity of the RT order was under question. The ALJ order then states: "I next address attorney fees. I note that the insurer also contests the fee awarded by the MRU Order . . ." (emphasis added.) Thus the question of attorney fees was seen as an issue separate from and in addition to the validity of the RT order.

The ALJ's reasoning that upholding the RT order was of no practical effect, and therefore did not resolve a dispute, is inaccurate. Affirming the RT order did provide claimant a benefit, and therefore did resolve a dispute over compensation. The RT order, which the ALJ affirmed in all respects, prohibited the insurer in the future from disputing whether the requested surgery was excessive, inappropriate, or ineffectual. The order also mandated that the insurer be financially liable for the surgery, if it were performed. The RT order ensures that claimant will receive medical services which claimant's physician has stated are necessary. If the RT order had been vacated insurer would have been in a position to dispute or refuse authorization for the surgery. Absent the RT order, claimant could have been put in the position of having to pursue an appeals process to obtain the surgery, and possibly even being denied the surgery as a result of losing

⁶ The RT reviewer characterized this case as a managed care dispute under ORS 656.260. The ALJ titled it a medical services dispute. OAR 656.245. The attorney fee statute includes both types of cases and therefore the specific characterization is not significant.

that appeals process. By preserving the RT order, claimant's attorney helped resolve a dispute over compensation in claimant's favor. Claimant was therefore entitled to an attorney fee award for representation at the contested case hearing.

Insurer also argues the RT order did not benefit claimant because the MCO would have been estopped in the future from withdrawing or denying the approval it had already granted. *See Meier and Frank v. Smith-Sanders*, 115 Or App 159 (1992), *mod on recon*, 118 Or App 261 (1993), *rev den*, 316 Or 142 (1993).⁷ This argument proves the point that claimant benefited from the issuance of the RT order, and would therefore have suffered a detriment had the order been vacated. Estoppel is not a protection which is equivalent to the RT order. Rather than preventing the MCO from withdrawing or amending its approval of surgery, estoppel is a principle claimant would have been forced to raise in a review proceeding, without a guarantee of success, had the MCO actually withdrawn its approval of the surgery in the future.

Insurer argues, in hindsight, that there was no dispute about claimant's surgery and that, therefore, the RT order was of no value, because the MCO did approve the surgery. However, at the time claimant sought administrative review, he had appropriately requested authorization for surgery and not received a timely or responsive reply. This constitutes a dispute. It was not until after RT contacted insurer that the MCO issued its corrected enrollment notice and approval of the treating physician and surgery. RT found, and the ALJ confirmed, it was reasonable to conclude claimant's attorney's actions played a valuable role in moving matters forward. I note that an attorney is also entitled to a fee when they help to obtain a dispute settlement prior to receiving a decision from a reviewing authority. ORS 656.385(1).⁸

Attorney fees awarded under ORS 656.385(1) are calculated according to factors listed in the statute and the related rule. See OAR 436-001-0265.⁹ The ALJ affirmed the RT attorney fee

⁷ Estoppel may act to prevent a party from asserting a right contrary to their own previous position or representation when another party has reasonably, materially, and detrimentally changed their position in reliance on the first party's representation. *SAIF Corp. v. Jensen*, 183 Or App 439, 446 (2002).

⁸ ORS 656.385(1) provides in part:

'In [all cases involving a dispute over compensation benefits . . . 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 . . . to pay a reasonable attorney fee to the claimant or claimant's attorney.'

⁹ ORS 656.385(1) states in part:

'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 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.'

OAR 436-001-0265 states in part:

award. The administrative order adopted claimant's attorney's billing statement that stated 5.3 hours had been spent on the case as of that time, and which requested compensation of \$740. The billing statement acknowledged there were no extraordinary circumstances.¹⁰ The reviewer found the value to claimant to be more than \$6000. Counsel did not submit a statement of hours spent on the contested hearing. In the absence of such a statement, I can assume the time spent was one to two hours. OAR 436-001-265(1)(d), 436-010-0008(12)(a)(B). The hearing was conducted on the briefing so counsel was not required to appear. Considering the relevant factors, the value to claimant is relatively high, the results obtained were favorable to claimant, the complexity of the case is average, the quality of legal representation was good and the risk that claimant's attorney would not otherwise be compensated is high. The middle matrix value for one to two hours is \$650 and this seems an appropriate fee for representation at the contested case hearing.

IT IS HEREBY ORDERED the April 23, 2008 Proposed and Final Order is adopted in part and vacated in part. That portion of the order addressing issues other than attorney fees is affirmed. The portion of the order addressing an award of attorney fees for representation of

“(1) In cases where the director or administrative law judge is required to assess an attorney fee under ORS 656.385(1):

(a) The fee must be based on the factors listed in ORS 656.385(1).

(b) Absent a showing of extraordinary circumstances or unless otherwise agreed by the parties, the fee may not exceed \$2,000 nor fall outside the ranges provided in the following matrix:

Estimated Benefit Achieved	Professional Hours Devoted				
	1-2 hours	2.1-4 hours	4.1-6 hours	6.1-8 hours	Over 8 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
Over \$6000	\$400-900	\$800-1300	\$1050-1600	\$1350-1800	\$1550-2000

(c) Extraordinary circumstances are not established by merely exceeding eight hours or exceeding a benefit of \$6000.

(d) In cases under ORS 656.245, 656.247, 656.260, or 656.327, the factors listed in OAR 436-010-0008(12) 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 before an order is issued; and

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

¹⁰ Exhibit 26, p. 2.

claimant at the contested case hearing is vacated. Insurer is ordered to pay to claimant's attorney a fee of \$1390 for all work on this case. The November 12, 2007 administrative order is affirmed in full.

DATED this 8th day of September, 2008.