

In the ORS 656.260 Managed Care Dispute of

Edger J. Bressler, Claimant

Contested Case Nos: 08-141H, 08-142H

PROPOSED & FINAL ORDER

February 9, 2009

EDGER J. BRESSLER, Petitioner

SAIF CORPORATION, Respondent

Before Chuck Mundorff, Administrative Law Judge

A hearing was scheduled to convene on November 7, 2008 in Eugene, Oregon before Administrative Law Judge (ALJ), Chuck Mundorff. Claimant is represented by his attorney, Christine Jensen. The employer, Norm Johnson Trucking and its insurer, the SAIF Corporation, (SAIF), are represented by Debra Ehrman. The parties requested that the matter be decided on the documentary record in lieu of hearing and there were no recorded proceedings. The record closed on January 8, 2009 following receipt of claimant's final closing written argument.

EXHIBITS

By letter submission dated October 29, 2008, SAIF submitted exhibits 1-82 for inclusion in the record. Exhibits 11,12,13,16, 70 were withdrawn and are not considered. There were no objections to any of the other submitted exhibits and they are admitted into the record.

ISSUES

Claimant appeals two Administrative Orders of Dismissal from the Workers' Compensation Division's Resolution Team (RT) that dismissed claimant's medical services disputes, the first for payment of left upper extremity electromyography, and the second for payment of an orthopedic consultation. (Exs. 80, 81). Claimant seeks attorney fees for being instrumental in obtaining settlement of the disputes prior to a decision by the director. ORS 656.385(1); OAR 436-010-0008(12).

FINDINGS OF FACT

Because the standard of review is for 'substantial evidence,' the following findings are summarized from the July 30, 2008 Administrative Orders. *See, Liberty Northwest Ins. Corp. v. Kraft*, 205 Or App 59, 63 (2006) (holding substantial evidence review does not comport with an adjudicator rendering findings of fact).

Claimant suffered a work related motor vehicle accident in 2002 which resulted in C5 facet fracture, grade 1 left shoulder acromioclavicular separation, complex forehead and scalp laceration, linear tear of the C6 lamina and labral tear of the glenohumeral joint. The carrier for the 2002 injury is SAIF Corporation. On July 23, 2002, SAIF enrolled that claim in Oregon Health Systems (OHS), a managed care organization.

Claimant was compensably injured on January 29, 2008, when he fell down while tightening straps on his trailer¹. The carrier for the 2008 injury is Empire Pacific. On June 17, 2008 claimant sought treatment with Dr. Victor Lin and signed an 827 form to act as attending physician. On June 24, 2008, Dr. Lin submitted a request to SAIF, with a copy to OHS, for an electromyography (EMG) evaluation. On that same day, Dr. Lin submitted a request to SAIF, with a copy to OHS, for a referral to Scott Kitchel for an orthopedic evaluation.

On June 26, 2008, OHS refused to review the requests for either the EMG or the orthopedic evaluation as it determined that neither procedure were directed towards SAIF's accepted conditions of C5 facet fracture, grade 1 left shoulder acromioclavicular separation, complex forehead and scalp laceration, linear tear of the C6 lamina and labral tear of the glenohumeral joint.

On June 27, 2008 SAIF requested records from Empire Pacific for the January 29, 2008 claim. On July 8, 2008 claimant requested Administrative Review from WCD on both issues. On July 15, 2008, RT sent Notices of Required Action on a Medical Dispute to SAIF. SAIF did not respond to either Notice.

The RT reviewer determined that SAIF was investigating its responsibility in light of the 2008 injury, and once responsibility was determined, approved the EMG. Additionally, the reviewer found that SAIF had given Dr. Lin's office verbal approval for the orthopedic consult on July 17, 2008, that it had already taken place, and that SAIF agreed to process the bills once received.

RT then determined neither dispute was ripe for review and dismissed both of claimant's requested disputes. In doing so, RT found that claimant's attorney was not instrumental in resolving either dispute and did not award an attorney fee. Claimant timely appealed the Orders resulting in this proceeding.

FINDINGS OF ULTIMATE FACT

The record, reviewed as a whole, supports a finding that claimant's counsel was instrumental in obtaining a settlement of the disputed medical services.

CONCLUSIONS AND REASONING

Pursuant to ORS 656.704, hearings regarding WCD orders addressing medical services disputes are conducted by an Administrative Law Judge (ALJ) of the Workers' Compensation Board. In medical and treatment disputes an ALJ may modify the Department's order only if it is not supported by substantial evidence in the record or it reflects an error of law. Substantial evidence supports a finding when the record, viewed as a whole, permits a reasonable person to make the finding. ORS 656.183.482(8)(c); *Armstrong v. Asten-Hill Co.*, 90 Or App 200, 206 (1988).

¹ RT's Orders indicate that the date of injury was January 9, 2009, however that is not supported by the record. (Ex. 20).

Here, it is undisputed that claimant's physician's requests for an EMG and orthopedic consultation were denied by OHS. (Exs. 62, 63). In response, claimant's attorney filed a request for review of this denial of medical services on July 7, 2008, prior to any change in the status of the denied services. (Ex. 67).

SAIF argues that OHS reversed the decision in regards to the EMG on its own with no evidence that claimant's counsel's request for review influenced its decision. However, the record shows that while OHS did reverse its decision in regards to appropriateness, it noted that it would apprise the provider that compensability was undetermined and that they would still need to contact SAIF directly for a final decision. (Ex. 69). The procedure remained unapproved until claimant's counsel's requests were received and the RT sent a Notice of Required Action on a Medical Dispute. (Exs. 71, 73, 77).

SAIF argues that there is no evidence that the July 7, 2008 letter was received prior to the reconsideration of the denial of services as that letter contains no date stamp from SAIF or OHS. (Ex. 67). However, in her timeline to RT, SAIF's adjuster clearly notes the July 7, 2008 letter and indicates that OHS reversed its decision five days later. (Ex. 77-2).

As noted by claimant, his physician had made multiple requests for the treatment specified. (Ex. 57, 60). It was only at the commencement of the dispute action that the authorization went forward. As such, the record supports a finding that claimant's counsel was instrumental in obtaining settlement of the dispute prior to a decision by RT.

ORS 656.385 and OAR 436-001-0265 establish the limits on and the factors to be considered in determining attorney fees. The fee cannot exceed \$2,000 unless there is a showing of extraordinary circumstances. ORS 656.385(1); OAR 436-001-0265(1)(b). Claimant's attorney did not argue or offer evidence that this case presents extraordinary circumstances. Claimant's counsel noted that she spent approximately three hours on this issue. In light of the number of attorney hours involved, the value of the benefit received, and the average level of complexity of the legal issues, with reference to the matrix of OAR 436-001-0265, I find a fee of \$750 to be appropriate for this proceeding.

ORDERS

IT IS HEREBY ORDERED that the Administrative Orders of Dismissal dated July 30, 2008, are modified. For services at hearing, claimant's attorney is awarded an assessed fee in the amount of \$750.00, payable by SAIF