

In the ORS 656.245 Medical Services of
Antonio Fonseca-Domingues, Claimant

Contested Case No: 09-101H

PROPOSED & FINAL ORDER OF DISMISSAL

December 9, 2009

ANTONIO FONSECA-DOMINGUES, Petitioner
OREGON CONTRACTORS WORKERS' COMPENSATION TRUST INC.,
Respondent

Before Nicholas M. Sencer, Administrative Law Judge

Pursuant to notice, the hearing initially convened on September 21, 2009 in Portland, Oregon before Administrative Law Judge Nicholas M. Sencer. Due to various circumstances set forth in the record, the hearing was postponed. Subsequently, the parties agreed to submit the case for decision based on the exhibits and closing arguments. Matthew Roy represents claimant and claimant's chiropractor, Dr. John L. Platt. David Levine represents the employer, Leo Gentry Wholesale Nursery, Inc., and its processing agent, Alliant Specialty Insurance Services. Exhibits 1 through 32 are admitted into the record. Proposed exhibits 33 through 55 were withdrawn. The record closed on November 23, 2009, following recorded closing arguments.

ISSUES

Dr. Platt challenges the March 26, 2009 Administrative Order, MS 09-0391. The issue for Dr. Platt concerns whether the order is supported by substantial evidence or reflects an error of law. The employer moves to dismiss on the basis that the March 26, 2009 Order was abated and that no appeal has been filed from the April 29, 2009 Administrative Order on Reconsideration, MS 09-0552. For the reasons set forth below, the employer's motion is granted.

FINDINGS OF FACT

Claimant sustained a compensable injury on September 3, 2008. On September 10, 2008, John Platt, D.C. signed an 827-form indicating his status as claimant's attending physician. (Ex 2). Dr. Platt performed frequent chiropractic treatments throughout September, October, November and December, 2008. (Ex 3).

On February 26, 2009, Dr. Platt requested administrative review before the Workers' Compensation Division to resolve a medical service dispute concerning the processing agent's refusal to pay him for a period of treatment rendered to claimant. (Ex 28). That request resulted in Administrative Order MS 09-0391 dated March 26, 2009. (Ex 28). The issue framed in that order concerns whether the processing agent is liable for medical services that Dr. Platt provided from September 15, 2008 through December 9, 2008. The medical reviewer concluded that Dr. Platt violated the administrative rules and, consequently, that the processing agent is not liable for the subject medical services. (Ex 28).

On April 2, 2009, Dr. Platt wrote to the Workers' Compensation Division requesting that

“the finding of fact for this administrative order be reviewed again, the conclusion appropriately corrected and the order to be properly amended to allow payment to Dr. John Platt for services rendered up to and including November 25, 2008.” (Ex 29, p 3).

On April 7, 2009, Mr. Roy wrote to the Workers’ Compensation Division, advising that he had enclosed claimant’s Request for Hearing and Retainer Agreement. (Ex 31). The Request for Hearing indicates the order being appealed as “MS-0391.” (Ex 31, p 2).

On April 29, 2009, the Workers’ Compensation Division issued Administrative Order on Reconsideration, MS 09-0552. (Ex 32). This order indicates that Dr. Platt “timely requested reconsideration” and that the “director granted reconsideration and abated Administrative Order MS 09-0391 on April 9, 2009.” (Ex 32, p 1). On reconsideration, the medical reviewer concluded that Dr. Platt violated the administrative rules and that the processing agent is not liable for services provided from October 28, 2008 through December 9, 2008. (Ex 32, p 6). A copy of this order was mailed to Dr. Platt, but was not mailed to Mr. Roy.

When the hearing in this matter initially convened on September 21, 2009, it became apparent that Mr. Roy was not aware that the director had issued either the Order of Abatement or the Amended Order on Reconsideration. I conclude that the director did not mail a copy of either order to Mr. Roy.

CONCLUSIONS OF LAW AND OPINION

Dr. Platt, through counsel, argues that the April 29, 2009 Administrative Order on Reconsideration is void because a copy of that order was not sent to his attorney. He also argues that the director was without jurisdiction to abate the March 26, 2009 Administrative Order because his attorney had requested a hearing challenging that order prior to the date the director issued the Order of Abatement. Consequently, Dr. Platt argues that the only order subject to review is the original March 26, 2009 Order.

The employer argues that the Order of Abatement is valid and that the original order is now a nullity. Moreover, the employer argues that as there was no appeal filed from the April 29, 2009 Administrative Order on Reconsideration, that order is now final and not subject to further review.

Pursuant to OAR 436-010-0008(10)(c)(C), the director retains jurisdiction to reconsider or withdraw any order that has not become final by operation of law. Consequently, notwithstanding Mr. Roy’s request for hearing, I conclude that the director had jurisdiction to abate the March 26, 2009 Administrative Order. Accordingly, that order is a nullity.

Concerning claimant’s challenge to the validity of the April 29, 2009 Administrative Order on Reconsideration, I rely on the law that applies to matters concerning a claim that are adjudicated before the Workers’ Compensation Board. In such cases, it is well settled that the failure of the Hearings Division to mail a copy of an order to a party’s attorney does not render the order void. The only requirement is that a copy of the order be mailed to the actual parties to the dispute. ORS 656.289(2). Attorneys are not included in the definition of “party.” See, *Terry*

J. Rose, 54 Van Natta 452, 453 (2002). In the instant matter, the director mailed a copy of the April 29, 2009 Administrative Order on Reconsideration to Dr. Platt. Accordingly, I conclude that the order is valid. I also conclude that the Administrative Order on Reconsideration is final in that no party has filed a request for hearing challenging that Order.

Based on the foregoing, the April 7, 2009 request for hearing appealing the March 26, 2009 Administrative Order is dismissed. **IT IS SO ORDERED.**