
In the ORS 656.245 Medical Services of

Constance L. Kilby, Claimant

Contested Case No: 11-077H

FINAL ORDER

January 20, 2012

CONSTANCE L. KILBY, Petitioner

ST. ELIZABETH HEALTH SERVICES, Respondent

Before John Shilts, Workers' Compensation Division Administrator

Claimant Constance L. Kilby (claimant) initiated a dispute when employer St. Elizabeth Health Services (employer) offset an overpayment against claimant's request for reimbursement for expenses she incurred traveling to a medical arbiter exam. I find employer was not entitled to this offset.

FACTUAL SUMMARY

I adopt the facts as found in the Administrative Order and restate them here in part for clarity. Claimant has an accepted claim. In 2010 employer notified claimant it had overpaid her. Subsequently, claimant attended a medical arbiter exam. Claimant requested reimbursement for the costs, mileage, and lodging for travel to that exam. Employer refused to pay the reimbursement and instead offset that potential reimbursement against the overpayment. Claimant disputed this action. The Workers' Compensation Division Resolution Team (RT), in an April 29, 2011 Administrative Order, found the offset proper. Claimant requested a hearing and the parties agreed to submit the dispute on the record. Administrative Law Judge (ALJ) Robert Pardington issued a Proposed and Final Order on October 19, 2011. ALJ Pardington found the requested reimbursement did not constitute "compensation" so that employer could not offset against it. Employer filed exceptions to that order.¹²

CONCLUSIONS OF LAW

In an ORS 656.245 medical services dispute I may only modify the administrative order if it is not supported by substantial evidence or reflects an error of law. OAR 436-001-0225(2).

A self-insured employer is required to pay the costs of a medical arbiter exam. These costs include travel, meals, and lodging. ORS 656.268(7)(f), 656.325(1)(f); OAR 436-010-0330.

A self-insured employer that has made an overpayment is entitled to offset "any compensation payable to the worker to recover an overpayment . . ." ORS 656.268(13)(a). The issue in this dispute is whether claimant's costs to travel to the medical arbiter examination constitute "compensation" against which employer is entitled to offset overpayments.

¹ Employer actually asked for reconsideration of the ALJ's order which we treat as exceptions. OAR 436-001-0246(8).

² Claimant's counsel requested additional time to file a response to insurer's exceptions. Time was granted, however no response to the exceptions was ever received.

Compensation is defined in ORS 656.005(8). That subsection states that “‘compensation’ includes all benefits, including medical services, provided for a compensable injury to a subject worker”

RT concluded that reimbursement for travel to an arbiter exam was compensation for purposes of the offset statute. ALJ Pardington found the costs at issue here were not for “medical services” because claimant received no treatment at this exam. The ALJ also found these costs were not otherwise “benefits” because they were not disability or vocational services benefits and because claimant’s other compensation could have been increased or reduced as a result of the exam. ALJ Pardington therefore concluded insurer could not offset these expenses under ORS 656.268(13)(a).

I conclude a worker’s travel-related expenses, incurred in connection with a medical arbiter exam, are not compensation or benefits under ORS 656.005(8) and that a self-insured employer therefore may not offset against those expenses under ORS 656.268(13). Such expenses are not “medical services” under ORS 656.005(8) because the worker does not receive medical treatment for the accepted condition at an arbiter exam. This type of exam is performed to determine whether the impairment used to rate the worker’s disability in a notice of closure is correct. ORS 656.268(7)(a). In addition, the law requires a self-insured employer to pay for all medical services required for the accepted condition. ORS 656.245(1)(a). If a medical arbiter exam constituted “medical services,” a separate statute requiring a self-insured employer to pay for the costs of arbiter exams would not be necessary, and would be redundant. (*See also Southern Oregon Neurological Associates v. EBI*, 104 Or App 225 (1990) (doctor’s travel expenses to testify at hearing are not paid under medical services fee schedule because they are not “. . . services provided in direct relation to a claimant’s medical needs.” 104 Or App at p. 229.)³

These costs are also not compensation or benefits. To compensate is to “make up for or offset.” Webster’s II New Collegiate Dictionary (1995) at p. 229. A benefit is a payment made under an insurance contract. *Id.* at p. 103. Compensation therefore consists of payments made to help make a worker whole from the work-related injury they suffered. Payment for expenses a worker incurs by attending a medical arbiter exam is reimbursement for expenditures the worker has been forced to incur in order to participate in the workers’ compensation system, not to counteract the harm caused by the compensable injury.

The wording of the defining statute also excludes reimbursement for medical arbiter travel expenses from the meaning of compensation. ORS 656.005(8) states that compensation includes “benefits . . . provided for a compensable injury . . . (emphasis added).” Reimbursement for travel expenses is not payment for the compensable injury. It is not payment made to make up for the injury. Such payments are reimbursement to prevent the worker from bearing the cost of being engaged in the workers’ compensation system. Similarly, in *Lloyd v. Employee Benefits Ins. Co.*, 96 Or App 591 (1989), the court found reimbursement payments to a worker’s private health insurance company were not “compensation” under ORS 656.005(8) because those payments were not made to a worker as that statute requires. 96 Or App at p. 594.

³ Similarly, ORS 656.236(1)(a) separately identifies compensation, attorney fees, and penalties. If those terms were synonymous, the distinction would not be necessary.

(*And see In the Matter of the Compensation of Jeffrey D. Dison*, 46 Van Natta 1927 (1994) (vocational services are compensation because they are a benefit provided for a compensable injury.)

The Court of Appeals of Oregon considered the meaning of compensation under former ORS 656.005(9) in *Dotson v. Bohemia & SAIF*, 80 Or App 233 (1986).⁴ The issue in that case was whether a claimant was entitled to an attorney fee award under ORS 656.382(2) for successfully defending against a challenge to a prior attorney fee award.⁵ That statute allows an attorney fee to be awarded where the claimant successfully defends against an attempt to reduce compensation. The court rejected the worker's argument that compensation includes any money paid to a worker through the workers' compensation system. Instead, the court held that compensation includes only those benefits authorized by ORS 656.202 through 656.258. These include payments for a worker's death or disability, medical services, and vocational assistance. The court said that "[a]ttorney fees are provided for legal services, and not for a compensable injury, and are addressed in ORS 656.382 to ORS 656.388." 80 Or App at p. 236.

Expenses incurred in traveling to a medical arbiter exam do not fall within the definition of compensation *Dotson* established. Claimant's right to reimbursement arose under ORS 656.268(7)(f). Also, as in *Dotson*, the payments here were for expenses for non-medical services, not to make up for the harm of the compensable injury.

In *Matter of Compensation of Bahler*, 60 Or App 90 (1982), the Court of Appeals considered whether penalties are compensation for the purposes of awarding attorney fees under ORS 656.382. The worker sought an attorney fee award when, on review, the Workers' Compensation Board reduced a previously awarded penalty, but did not reduce other compensation. The court found compensation had not been reduced so that the worker was entitled to an attorney fee award. 60 Or App 93-94. (*See also Saxton v. SAIF Corp.*, 80 Or App 631 (1986). The court reiterated this conclusion in *Nero v. City of Tualatin*, 142 Or App 383 (1996), agreeing with the analysis in *Dotson*. The *Nero* court found penalties are not compensation, in part, because a penalty is intended to punish the employer, not to counteract the effects of the compensable injury. 142 Or App at p. 389.

In *In the Matter of the Compensation of Michelle A. Heilbrun*, 61 Van Natta 2615 (2009), the Workers' Compensation Board considered whether litigation costs are compensation under ORS 656.005(8). The issue was whether an insurer should be subjected to penalties under ORS

⁴ Former ORS 656.005(9) provided:

"'Compensation' includes all benefits, including medical services, provided for a compensable injury to a subject worker, or the worker's beneficiaries by a direct responsibility employer or the State Accident Insurance Fund Corporation pursuant to this chapter." Or Laws 1985, ch. 506, § 1.

⁵ Former ORS 656.382(2), which is substantially similar to the current statute, provided in part:

"If a request for hearing, request for review, appeal or cross-appeal to the Court of Appeals or petition for review to the Supreme Court is initiated by an employer or insurer, and the referee, 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 referee, board or the court for legal representation by an attorney for the claimant at and prior to the hearing, review on appeal or cross-appeal." Or Laws, 1983, ch. 568, § 1.

656.262(11)(a) for unreasonably failing to pay compensation where it had failed to pay the worker costs awarded for previous litigation.⁶ In attempting to answer this question, the board referred to the court's opinions in *Dotson* and *Nero*. The board concluded that under those decisions only benefits authorized under ORS 656.202 through 656.258 are compensation. Therefore, the board concluded such costs are not compensation. First, they are not authorized in the statutes specified in *Dotson* and *Nero*. The authorization to award costs appears in ORS 656.386. Second, ORS 656.382 states that expenses are awarded in addition to compensation. Such costs are therefore not a benefit that amounts to compensation.

The obligation to pay a worker's expenses to attend a medical arbiter exam is not found in ORS 656.202 through ORS 656.258. Payment for these expenses does not allay the effects of the accepted condition and a worker does not receive medical services during this type of exam. Such payments are therefore not compensation.

In its order, RT relied on *Matter of Gerard Egan*, 9 CCHR 121 (2004). In that case, an injured worker incurred expenses to travel to receive medical treatment and the insurer found there was an overpayment. There was no dispute about whether the requested expenses constituted compensation. The insurer offset the travel expense reimbursement against the overpayment under ORS 656.268(13)(a) and the worker brought a dispute. The ALJ found that the insurer had already paid what was owed because the offset was proper. *Egan* does not apply here because the requested expenses involved travel to receive medical services and there was no dispute about whether the expenses constituted compensation.

After ALJ Pardington issued his Proposed and Final Order in this matter, employer requested reconsideration, which has been treated as exceptions. OAR 436-001-0246(8). In its request, employer cited *Darling v. Johnson Controls Battery Group, Inc.*, 188 Or App 190 (2003). That decision held that reimbursement for a worker's expenses for travel to an insurer medical examination (IME) (ORS 656.325) constitutes "compensation" under ORS 656.005(8).

Darling is not controlling here because the court's statement about IME expenses was dicta. *Dictum* is a statement in a court's opinion that is not essential to deciding the precise question before the court. *State v. Mullins*, 245 Or App 505, 510 (2011). *Dictum* is normally not binding precedent. *Godfrey v. Fred Meyer Stores*, 202 Or App 673, 680 (2005). In *Darling*, the court rejected a prior Oregon Supreme Court decision as controlling authority because the language cited did not address the issue actually presented to the court to resolve. 199 Or App at p. 204.

The issue in *Darling* was whether an employer could compel a worker to attend an IME after denying the worker's claim. 188 Or App at p. 195-196. Resolving that issue turned on the language of the IME statute, which provides that "[a]ny worker entitled to receive compensation under this chapter" must attend an IME if the employer requests it. ORS 656.325(1)(a) (emphasis added). The court's resolution of this issue turned on its analysis of whether a worker is "entitled

⁶ ORS 656.262(11)(a) provides in part:

"If the insurer or self-insured employer unreasonably delays or unreasonably refuses to pay compensation . . . , the insurer or self-insured employer shall be liable for an additional amount up to 25 percent of the amounts then due plus any attorney fees assessed under this section."

to receive compensation” after their claim is denied. “As the text expressly provides, the obligation to submit to an IME under the statute extends to any worker ‘entitled to receive compensation.’ That language is the flash point of the dispute.” 199 Or App at p. 197-198. Thus, the court did not need to determine what types of payment constituted compensation, only whether or not a worker remains “entitled” to receive compensation after their claim is denied, but before all appeals have been completed.

The court said that the word “entitled” meant a person had a legal right to something. 188 Or App at p. 198. The court therefore concluded the issue was whether a worker whose claim was denied retained the status of a person who had a right to receive compensation, not whether they actually did receive compensation. 188 Or App at p. 198. The court further examined the statutory scheme and determined that the denial of a claim does not terminate the worker’s eventual right to receive benefits. Claim denial only relieves the employer (or insurer) of the immediate duty to pay benefits. If a denial is later overturned, the employer is liable for all benefits that accrued while the denial was litigated. 188 Or App at p. 198-199. “Necessarily, then, the employer’s denial does not extinguish the worker’s *legal entitlement* to receive benefits; it instead suspends the *actual receipt* of most benefits and places the worker’s entitlement in dispute.” 188 Or App at p. 199 (emphasis in original).

After resolving the entitlement issue, the court proceeded to examine what types of compensation a worker was entitled to after claim denial. The court pointed out that former ORS 656.325(1)(c) required the insurer requesting the IME to pay all related costs, including travel, meals, and lodging.⁷ The court concluded this was a “benefit” and “compensation” to which a worker was entitled after claim denial.

This part of the court’s opinion is dicta because the court’s statements about IME cost reimbursement were not necessary to the reasoning the court used to find a worker remains entitled to compensation after claim denial. As described above, the court in *Darling* framed the issue as being whether a worker remains entitled to receive compensation after their claim is denied. The court answered this question affirmatively on the grounds denial does not terminate the right to ultimately receive compensation, but only terminates the obligation to pay compensation while the claim is litigated. Under ORS 656.325, therefore, a worker is still obligated to attend an IME after claim denial if ordered to do so. That was the issue before the court, not what constitutes “compensation.”

In *Darling*, the court also did not discuss its own prior opinions that appear to be inconsistent with the reasoning in *Darling*. Several cases were discussed above that found compensation is limited to benefits authorized by former ORS 656.202 through ORS 656.258. For this reason, those cases found penalties are not compensation. *See Nero*, 142 Or App 383, *Dotson*, 80 Or App 233, *Bahler*, 60 Or App 90, *supra*. In *Darling* the court did not discuss these decisions.

The court, in *Darling*, also did not discuss the language in ORS 656.005(8) that defines compensation as a benefit paid to a worker for a compensable injury. Under the reasoning of

⁷ The same language now appears in ORS 656.325(1)(f). Or Laws 2001, ch. 865, § 13; Or Laws 2007, ch. 274, § 6, ch. 365, § 7.

Dotson, *supra*, payment for travel expenses to an arbiter exam is not made “for” the compensable injury. Such payment is reimbursement for costs imposed on a worker to participate in the workers’ compensation system and therefore should not be considered compensation.

Because the court’s conclusion in *Darling* that IME-related expenses constitute compensation was not necessary to addressing the issue before the court, and because the court did not discuss its own prior decisions that appear to reach a different result, this statement in *Darling* is non-binding dicta. I therefore find reimbursement for travel expenses associated with an arbiter exam is not compensation. Employer is therefore not entitled to offset payments against reimbursement owed for these expenses.

IT IS HEREBY ORDERED RT’s April 29, 2011 Administrative Order is affirmed in part and reversed in part. That part of the Administrative Order that found employer may offset against reimbursement for travel expenses for medical treatment on September 10, 13, and 14, 2010, is affirmed. The part of that order that found employer may offset against reimbursement for travel expenses for a medical arbiter exam on November 2, 3, and 4, 2010, is reversed. ALJ Pardington’s October 19, 2011, Proposed and Final Order is affirmed.