

In the ORS 656.245 Medical Services of

David Weitzman, Claimant

Contested Case No: 10-077H

FINAL ORDER

April 13, 2011

DAVID WEITZMAN, Petitioner

AMERICAN ZURICH INSURANCE COMPANY, Respondent

Before John Shilts, Workers' Compensation Division Administrator

The Workers' Compensation Division's Resolution Team (RT) found claimant David Weitzman's (claimant's) request for administrative review of insurer American Zurich Insurance Company's (insurer's) denial of payment was untimely and dismissed the matter. Following a hearing, Administrative Law Judge (ALJ) Elizabeth Fulsher reversed RT's order and remanded the matter for resolution of the substantive issues. Insurer requested director review.

FACTUAL SUMMARY

I adopt the facts as found by RT, and summarize them for brevity. Claimant filed a claim for injuries received at work that was ultimately denied. He received medical treatment during the interval between filing his claim and insurer denying the claim. Claimant filed a request for hearing challenging insurer's claim denial, but on May 6, 2009 claimant's attorney wrote a letter withdrawing the request for hearing and stating "[c]laimant intends to pursue payment of his outstanding medical bills pursuant to ORS 656.247." On December 9, 2009 claimant's attorney wrote to insurer's representative asking for payment for unpaid medical bills under ORS 656.247. Insurer's attorney responded with a denial on December 15, 2009. Claimant requested administrative review on December 28, 2009. RT ultimately issued an Administrative Order on Reconsideration on April 15, 2010. That order found claimant had not timely requested review because RT concluded claimant's attorney's May 6 letter indicated claimant had knowledge there was a payment dispute as of that date. ALJ Fulsher held a hearing and found the first evidence claimant knew there was a dispute was insurer's attorney's letter of December 15, 2009 and that claimant had timely requested review within 90 days of that letter.

CONCLUSIONS OF LAW

I may only modify the administrative order if substantial evidence does not support it or if it reflects an error of law. OAR 436-001-0225(2). Substantial evidence supports a finding "when the record, viewed as a whole, would permit a reasonable person to make that finding." ORS 183.482(8)(c). In reviewing a finding to determine whether it is supported by substantial evidence, the reviewing entity must "evaluate evidence against the finding as well as evidence supporting it to determine whether substantial evidence exists to support that finding. If a finding is reasonable in light of countervailing as well as supporting evidence, the finding is supported by substantial evidence." *Garcia v. Boise Cascade Corp.*, 309 Or 292, 295 (1990).

Where an injured worker has a health benefit plan and the worker files a claim for a work-related injury that is ultimately denied, the workers' compensation insurer may be responsible for paying for the costs of medical services provided between the time the claim is

filed and denied, to the extent the health benefit plan does not pay those costs. ORS 656.247(1), (4)(b).¹

An injured worker can request administrative review where there is a dispute about non-payment of medical bills. OAR 436-009-0008(2). The version of OAR 436-009-0008 in effect in May, 2009 provided in part:

“(2)(b) For all claims not enrolled in an MCO, or for disputes which do not involve an action or decision of the MCO, the aggrieved party must request administrative review by the director within 90 days of the date the party knew, or should have known, there was a dispute over the provision of medical services.”

WCD Admin Order 08-063, eff. 1/1/09.

RT also relied on OAR 436-010-0008(5)(b), which provides, in part:

“For all claims not enrolled in an MCO, the aggrieved party must request administrative review by the director within 90 days of the date the party knew, or should have known, there was a dispute over the provision of medical services. . . . When the aggrieved party is a represented worker, and the worker’s attorney has given written notice of representation, the 90 day time frame begins when the attorney receives written notice or has actual knowledge of the dispute. . . .”

RT interpreted claimant’s attorney’s May 6 letter as a request for payment. Insurer had 45 days to respond to that request. OAR 436-009-0030(8). RT found claimant’s review request untimely because he did not submit his request within 90 days of the end of insurer’s 45-day response period. RT considered counsel’s May 6 letter a demonstration of actual knowledge there was a dispute. ALJ Fulsher found substantial evidence did not support this finding.

Two prior decisions are helpful here. In *Harry W. Lucas*, 15 CCHR 221 (2010), the claimant had submitted a request for payment on September 11 and a request for administrative review on December 28. RT found the review request untimely. Following a hearing, the ALJ found RT had erred in concluding the claimant had knowledge there was a dispute as of September 11. The ALJ found submission of a bill is not the equivalent of knowledge there is a dispute. There is not knowledge of a dispute until a claimant or his attorney has information the bill will not be paid.

¹ ORS 656.247 provides in part:

“(1) [P]ayment for medical services provided to a subject worker in response to an initial claim for a work-related injury . . . from the date of the employer’s notice or knowledge of the claim, until the date the claim is accepted or denied, shall be payable in accordance with subsection (4) of this section. . . .
* * * * *

(4)(b) If the claim in which medical services are provided under subsection (1) of this section is denied and a health benefit plan provides benefits to the worker . . . after payment by the health benefit plan, the workers’ compensation insurer . . . shall pay any balance remaining for such services”

Tony M. Larson, 12 CCHR 250 (2007), reached a similar conclusion. Administrative review had also been dismissed on the grounds the request for review was untimely. The ALJ in that case found a letter from the claimant's attorney to the insurer inquiring about an unpaid bill did not demonstrate knowledge there was a dispute. The claimant's attorney did not have knowledge there was a dispute until the insurer informed him it would not pay the bill.

Here, substantial evidence does not support RT's finding claimant's attorney knew, or should have known, or had actual knowledge, there was a dispute when she wrote the May 6, 2009 letter stating claimant was going to seek payment under ORS 656.247. That letter expressed an intent to request payment at an unspecified time in the future. The letter was not directed to insurer, did not specify the amounts at issue, and did not state payment was being requested as of that date. The 45-day period for insurer to respond, and for claimant to take a failure to respond as a denial that constituted notice of a dispute, therefore did not begin running on May 6. RT did not cite any other evidence from the record supporting the finding that counsel had knowledge on May 6 that insurer was refusing to pay the balances owed.

The record also contains a February 16, 2010 letter from insurer's attorney submitted in opposition to claimant's request for reconsideration of the first administrative order that issued. That letter states insurer never received any of the disputed bills until December 9, 2009 when they were attached to claimant's request for payment. It therefore does not seem insurer could have notified claimant before that date that it was denying payment. The evidence in the record as to when claimant did request payment is claimant's attorney's December 9, 2009 letter that expressly sought payment. Insurer responded on December 15, thereby giving notice there was a dispute as of that date. Claimant's December 28, 2009 review request was within 90 days of that date, and was, therefore, timely.

IT IS HEREBY ORDERED RT's April 15, 2010 Administrative Order on Reconsideration is reversed. ALJ Fulsher's October 7, 2010 Amended Proposed and Final Order is affirmed. The matter is remanded to RT for a decision on the merits.