
In the ORS 656.327 Medical Treatment Dispute of

Gerald P. Peterson, Claimant

Contested Case No: 11-143H

PROPOSED & FINAL ORDER

December 7, 2012

GERALD P. PETERSON, Petitioner

SAIF CORPORATION, Respondent

Before Kirk Spangler, Administrative Law Judge

Pursuant to notice, a hearing was convened and continued on May 15, 2012, in Klamath Falls, Oregon, before Administrative Law Judge Kirk Spangler. Claimant was represented by his attorney, Jodie Phillips-Polich. The employer, Loveness Logging, Incorporated, insured by SAIF Corporation, was represented by Kim Shubin, SAIF Trial Counsel. Exhibits 1 through 20 were received in evidence.¹ Written closing arguments were completed on October 30, 2012, on which day the record was closed.

ISSUES

1. The proper amount of SAIF reimbursement for claimant's out-of-pocket expense and actual payment of home health care services for the month of February 2011.
2. Entitlement to an attorney fee under ORS 656.385.
3. The assessment of a penalty under ORS 656.262(11)(a).

FINDINGS OF FACT

Claimant sustained a serious compensable injury in 1969. He was 28 years old. As a result of his injury he became permanently and totally disabled and a paraplegic. He required home health care.

Claimant's wife, Mrs. Peterson, assumed the responsibility for her husband's home health care. Her daughters assisted. In 1988, Mrs. Peterson hired some CNAs to assist. However, she still performed most of the care. She worked from 3:30 p.m. until 7:30 a.m. – a 16 hour shift.

Mrs. Peterson had been utilizing a business called Sky Lakes to provide CNAs to help care for claimant. Their residence was in Tulelake, California. In December 2009, however, Sky Lakes withdrew from Klamath Falls and no longer provided caregivers. At that point, Mrs.

¹ It was agreed at the May 15, 2012 hearing in WCB Case No. 11-00045H that the testimony of Mrs. Peterson and Mrs. Jackson would be admitted in all five of the originally consolidated cases, which were bifurcated. Moreover, in my Proposed and Final Order in that case I concluded that my review was *de novo* pursuant to OAR 436-001-0225 (1). In essence, I decided that the case concerned a dispute over "either the amount of the fee or nonpayment of bills for compensable medical services," which is controlled by ORS 656.248(12). That reasoning applies here, as well.

Peterson became proactive and thoroughly searched for new caregivers. She informed SAIF every step of the way.

Eventually, Mrs. Peterson found and hired two new caregivers. She initially thought that they were licensed CNAs, but subsequently learned that they were not.

At the same time, Mrs. Peterson was undergoing her own loss of health and eventually became unable to provide bowel care for claimant. Thus, beginning in June 2010 through January 2011, claimant had to pay increased home health care costs for his bowel care.

SAIF adjuster, Amy Jackson, reviewed the matter and met with SAIF nursing staff. SAIF determined that \$4,232.00 a month was a reasonable and fair amount to pay Mrs. Peterson.² Yet, claimant's actual home health care expenses exceeded that amount. The difference, for the month of February 2011, was approximately \$1,158.00.

In denying full reimbursement to claimant for his actual out-of-pocket home health care expenses, SAIF never indicated that claimant had not submitted proper documentation or billings or had not hired licensed caregivers under the supervision of Dr. Rushton.³

Consequently, claimant hired an attorney who sought review before the Director for full reimbursement of claimant's actual home health care expenditures. SAIF responded and argued that the amount of reimbursement sought by claimant exceeded the "SAIF negotiated amount".

On October 6, 2011, the Director issued an Administrative Order (TX 11-0893), which denied the relief sought by claimant. Shortly thereafter, claimant's attorney requested a hearing to appeal the Director's October 6 Order.

ULTIMATE FINDINGS OF FACT

In February 2011, home health care providers were limited in the Tulelake region. During that period, claimant's wife suffered deteriorating health and was unable to perform claimant's bowel care. Consequently, after a thorough search, she hired unlicensed home health care providers to perform that function at an additional cost. Claimant paid the additional cost and then sought full reimbursement from SAIF. The additional cost was approximately \$1,158.00. Pursuant to its Explanation of Benefits (EOB) forms, SAIF's only argument for not fully reimbursing claimant was that the requested amount exceeded the "SAIF negotiated agreement". Ex. 8.

² Upon inquiry from the Medical Review Unit, SAIF acknowledged that after auditing the billings it had actually paid only \$4,063.00 a month. Ex. 12-1. Claimant's out-of-pocket expense was \$5,221.00, which he actually paid and sought reimbursement from SAIF.

³ Dr. Rushton, a physician, became claimant's attending physician in the Spring of 2010.

CONCLUSIONS OF LAW AND OPINION

Claimant argues that the director raised issues *sua sponte* (i.e., lack of physician direction and control, lack of demonstrated caregiver competency, and failure to provide receipts) that never formed the basis of SAIF's refusal to reimburse him for his actual home health care expenses. To that end, claimant emphasizes that SAIF specifically stated in its Explanation of Benefits (EOB) that it did not fully reimburse claimant because the requested amount exceeded the "SAIF negotiated amount". Ex. 8.

SAIF, however, argues that the legislature delegated authority to the Director to promulgate rules and that he is required to apply them.

I agree with claimant.

Based on my observation of witness demeanor, I conclude that both Mrs. Peterson and Mrs. Jackson testified credibly. Mrs. Peterson credibly testified about the tremendous difficulties that she faced in finding home health care in Klamath Falls, Oregon, for claimant (her longtime husband, who was compensably injured in 1969, resulting in his permanent and total disability). In short, Mrs. Peterson made nothing less than heroic efforts to obtain competent and reliable home health care services, which she was no longer physically capable of performing.

Under such circumstances, and particularly given the limited home health care options in Tulelake, I conclude that the unique facts of the instant case are not adequately addressed by the Director's rules. Therefore, the "catch-all" provision of OAR 436-009-0025 should be applied to cover claimant's actual costs of home health care services for the month of February 2011.

To that end, SAIF never denied full reimbursement to claimant based on any of the bureaucratic rules cited by the Director.⁴ It was error for the Director to *ad hoc* apply those rules to deprive claimant of full reimbursement for his actual payments. SAIF's sole reason for denying full reimbursement to claimant was that his actual payments exceeded the "SAIF negotiated amount". On this record, I find no evidence that claimant agreed to some sort of a contract – formal or informal – with SAIF. I do find, however, that SAIF unilaterally determined what it believed was a reasonable monthly amount for claimant's home health care. Yet, SAIF did not properly consider the unique circumstances confronting claimant in the Klamath Falls region. The "catch all" provision of OAR 436-009-0025 is designed to cover this type of specific fact pattern.

OAR 436-009-0025 requires claim-related expenses to be reimbursed based on actual cost. There is no requirement that the injured worker do anything more than provide evidence of actual cost of claim-related expense and they *will be reimbursed*.

Here, claimant did everything required under Oregon law to qualify for the requested reimbursement. His requests for reimbursements reflect the actual cost of the care already

⁴ In its EOBs SAIF did not raise any issue or argument that it had not been properly billed or that claimant's caregivers lacked demonstrated competency or direction and control by Dr. Rushton.

provided. There is nothing in OAR 436-009-0025 that limits payment to the rate schedule in OAR 436-030-0040 or requires the agreement of SAIF. More importantly, SAIF did not deny payment of the requested reimbursements because they exceeded the rate schedule. SAIF should not be allowed to amend its denial retroactively to justify its failure to provide reimbursement for claim related expenses that reflect the actual cost of those expenses as required by Oregon Law.

Moreover, on these facts, neither OAR 436-010-0210(4) or 411-030-0040(34). First, claimant's home health care services are not being provided by persons licensed to provide such services. They were not CNAs. Second, claimant's home health care is not being rendered under Dr. Rushton's direction and control, because the rules do not allow him to do so unless the care is being administered by a family member. There is no such evidence. Last, OAR 436-030-0040(34) applies to payment of medical service providers.⁵ This case involves *reimbursement to claimant* for his actual out of pocket expenses to pay for his home health care.⁶

For all of the above reasons, I conclude SAIF should pay claimant for the relief that he sought. That is, his actual cost of home health care that he paid for the month of February 2011. The discrepancy between what SAIF paid and what claimant sought is approximately \$1,158.00.

Claimant's attorney seeks an insurer-paid fee pursuant to ORS 656.385 (1). Subsection (2) indicates that the attorney fee must be based on all the work the attorney has done relative to the proceeding at all levels before the Director. It further instructs that the attorney fee should be proportionate to the benefit secured for the injured worker.

Here, claimant's attorney has expended great time and effort on claimant's behalf through letter writing, filings, traveling to Klamath Falls on two occasions for hearings, litigating in two hearings, and writing closing arguments. Thus, if the law permitted me to order such a fee, I would award a \$1,000 attorney fee.

However, I have already concluded that this case involves a medical services fee and/or billing dispute under ORS 656.248 (12). That is, SAIF has never argued that the home health care service that was provided was excessive, inappropriate, or ineffectual. ORS 656.247 (3) (a). Rather, SAIF refused full reimbursement to claimant for his actual home health care costs because they exceeded the "SAIF negotiated amount".

ORS 656.385(1) allows for the payment of an insurer-paid fee if the claimant's attorney prevails in a dispute pursuant to ORS 656.245, 656.247, 656.260, 656.327, or 656.340.

⁵ OAR 436-010-0005(27) defines a "medical service provider" as "a person duly licensed to practice one or more of the healing arts."

⁶ Mrs. Peterson credibly testified about her difficulties in finding competent home health care providers for her husband after the provider she'd been using stopped providing services in the Klamath Falls region. In doing so, she testified that she telephoned Mrs. Jackson and informed her that she had found some new caregivers, but they were not CNAs. Mrs. Jackson told her that "they don't have to be."

Inasmuch as I have concluded above that this case is a dispute under ORS 656.248, I am unable to award an attorney fee.⁷

Claimant also raises an issue of entitlement to a penalty under ORS 656.262(11)(a) for alleged unreasonable refusal to pay compensation. I conclude that on these facts SAIF did not act unreasonably. SAIF did not refuse payment. Rather, after an audit and a nursing evaluation, SAIF concluded that the *full amount* of reimbursement requested by claimant (for money that he had actually paid expended for his home health care) was excessive.

ORDER

IT IS THEREFORE ORDERED that SAIF shall fully reimburse claimant for his claimed home health care expenses for the month of February 2011.

IT IS FURTHER ORDERED that claimant's attorney is not entitled to an attorney fee under ORS 656.385.

IT IS FURTHER ORDERED that claimant's request for the assessment of penalty under ORS 656.262(11)(a) is denied.

⁷ ORS 656.247 (3) (b) states: "Disputes about the amount of the fee or nonpayment of bills for medical treatment and services *pursuant to this section* shall be resolved pursuant to ORS 656.248." (Emphasis added). Thus, an alternative argument is that this case is governed by ORS 656.247(3)(b), and that ORS 656.248 is merely the structure from which to resolve the dispute. If that analysis is correct, then claimant's attorney could potentially receive an attorney fee, but the case would not be subject to de novo review or any new medical evidence or issues. OAR 436-001-0225 (1) & (2). On balance, however, I have concluded that the facts of this case establish that it is a pure fee or billing dispute and has nothing to do with any allegation of excessive, inappropriate, or ineffectual medical services pursuant to ORS 656.247(3)(a). Rather, the facts of this case place it squarely within ORS 656.248 (12), which states: "When a dispute exists between an injured worker, the insurer or self-insured employer and a medical service provider regarding either the amount of the fee or nonpayment of bills for compensable medical services, notwithstanding any other provision of this chapter, the injured worker, the insurer, self-insured employer or medical service provider may request administrative review by the director. The decision of the director is subject to review under ORS 656.704."

That being said, it is grossly unfair that under the present statutory scheme I am precluded from awarding claimant's attorney a well-deserved insurer-paid fee. She has secured a great benefit for claimant and has devoted considerable time and effort to do so. This apparent "loophole" needs to be remedied by the legislature so that an attorney's services in obtaining compensation for an injured worker under ORS 656.248 do not go uncompensated.