

In the ORS 656.245 Medical Services of

Glen D. Babcock, Claimant

Contested Case No: 14-046H

Administrative Order No: MF 14-0420

FINAL ORDER

March 22, 2016

GLEN D. BABCOCK, Petitioner
SAIF CORPORATION, Respondent

Before Sally Coen, Workers' Compensation Division Deputy Administrator

This matter comes before the director for review under ORS 656.704(2)(a). The worker, Glen D. Babcock, by and through his attorney Dale C. Johnson, timely submitted exceptions to the March 9, 2015, Proposed and Final Order. The insurer, SAIF Corporation, by and through its attorney Allison B. Lesh, submitted a response.¹

The issue is whether insurer is liable for additional reimbursement for mileage expenses incurred for the worker to receive medical services from June 16, 2011, through September 5, 2012. More specifically, the issue is whether substantial evidence supports the July 2, 2014, Administrative Order finding insurer not liable for additional reimbursement. I affirm.

FACTUAL AND PROCEDURAL SUMMARY

I adopt the findings of fact as stated in the July 2, 2014, Administrative Order and adopted in the March 9, 2015, Proposed and Final Order. *Liberty Northwest Ins. Corp. v. Kraft*, 205 Or App 59 (2006). I provide the following summary for context. The worker was injured on May 12, 2011.

Between June 16, 2011, and September 5, 2012, the worker obtained medical services from three different providers located in Eugene. During that time period, the worker worked in Newport; had residence addresses in South Beach, Elmira, and La Pine; had a post office box in Noti; and used a pharmacy in Veneta. In 2013, the worker requested reimbursement for mileage expenses for travel between the providers in Eugene and the La Pine or South Beach addresses. Insurer paid the worker less than he requested, using the Elmira address as the starting and ending location. The parties dispute which starting and ending location should be used to calculate the amount insurer must reimburse the worker for mileage expenses.

In its July 2, 2014, Administrative Order, the division's Medical Resolution Team (MRT) found insurer not liable for additional reimbursement. MRT found that the worker prevented the insurer from offering a list of providers that were geographically closer to his new address (in La

¹ Insurer's response has not been considered as it was not submitted timely. A response to exceptions must be filed within 20 days of the date the exceptions were filed. OAR 436-001-0246(2)(b)(effective March 28, 2014, WCD Admin. Order 14-051); see OAR 436-001-0003(2)(c). The worker's exceptions were filed on April 7, 2015. To be timely, the response must have been filed by April 27, 2015. Insurer's response is dated May 7, 2015, and is therefore not timely.

Pine) by failing to provide a change of address, and that it was reasonable for insurer to calculate mileage expenses from the worker's residence of record in Elmira.

The worker requested a hearing. Workers' Compensation Board Administrative Law Judge Monte Marshall issued a Proposed and Final Order on March 9, 2015, affirming the July 2, 2014, Administrative Order. ALJ Marshall found MRT's conclusion that insurer was not responsible for additional mileage reimbursement reasonable and supported by substantial evidence in the context of this case.

The worker requests that the Proposed and Final Order be reversed, contending he should be reimbursed for his actual mileage expenses and it was unreasonable for insurer to limit reimbursement from the closest location (Elmira to Eugene) when he did not actually travel from that location. The worker further disputes MRT's and the ALJ's application of OAR 436-010-0270² when no rule required him to notify the insurer where he was living.

CONCLUSIONS OF LAW

Standard of Review

Medical service disputes under ORS 656.245 are reviewed for substantial evidence and errors of law. OAR 436-001-0225(2). In a substantial evidence review, the reviewer is limited to evaluating the evidence in the record to determine whether, based on that evidence, a reasonable factfinder in MRT's position could have made the findings that MRT actually made. The reviewer does not determine whether the record could support different findings than those made by MRT, nor does the reviewer reweigh the evidence and substitute its view for that of MRT. *Liberty Northwest Ins. Corp. v. Mundell*, 219 Or App 358, 363 (2008); ORS 183.482(8)(c).

Applicable Statute and Rules

ORS 656.245(1)(e) provides:

“Except for services provided under a managed care contract, out-of-pocket expense reimbursement to receive care from the attending physician *** shall not exceed the amount required to seek care from an appropriate *** attending physician of the same specialty who is in a medical community geographically closer to the worker's home. For the purposes of this paragraph, all physicians *** within a metropolitan area are considered to be part of the same medical community.”

MRT referred to two administrative rules in its order, OAR 436-009-0025(4) and 436-010-0270(8). It appears MRT referred to the versions of the rules that became effective April 1, 2014. MRT erred in not applying the rules that were in effect at the time the worker incurred the expenses. However, MRT's error does not change the outcome of this matter. The only difference in the relevant section of OAR 436-010-0270 between the relevant time period in 2011-2012 and April 1, 2014, is the internal numbering – what MRT cited as section (8) was

² The rule is discussed further below.

previously numbered as section (7) – but the substantive content of the rule did not change. OAR 436-009-0025 was amended to a greater extent effective April 1, 2014, but the underlying requirements related to reimbursement for mileage expenses did not change. The rule excerpts below were those in effect at the time the worker incurred the expenses.

Former OAR 436-009-0025³ provided, in relevant part:

“(1) The insurer shall notify the worker in writing at the time of claim acceptance that claim-related services, not otherwise addressed by these rules, paid by the worker will be reimbursed by the insurer as provided in this rule. The notification must include notice to the worker of the two year time limitation to request reimbursement.

“(a) The worker must request reimbursement from the insurer in writing.

“(b) The insurer may require reasonable documentation to support the request. Insurers shall date stamp requests for reimbursement upon receipt and shall reimburse the costs within 30 days of receiving the request and supporting documentation, if the request clearly shows the costs are related to the accepted compensable injury or disease. ***

* * * * *

“(2) Reimbursement of the costs of meals, lodging, public transportation and use of a private vehicle shall be reimbursed as provided in this section. The maximum rate of reimbursement is limited to the rate published in Bulletin 112. When a worker has documentation of the expense which includes the date of the expense, he or she may be entitled to reimbursement for:

* * * * *

“(c) Mileage when using a personal vehicle based on the beginning and ending addresses. Reimbursement may exceed the maximum if special transportation is required. Public transportation will be reimbursed based on actual cost.

“(3) Requests for reimbursement of claim-related services costs must be received by the insurer within two years of the date the costs were incurred or within two years of the date the claim or medical condition is finally determined compensable, whichever date is later. The insurer may disapprove requests for reimbursement received beyond the two year period as being untimely requested.

“(4) Requests for reimbursement denied as unreasonable or not related to the accepted compensable injury or disease shall be returned to the worker within 30 days of the date of receipt by the insurer. The insurer shall provide the worker an explanation of the reason for nonpayment and advise the worker of the right to

³ Effective April 1, 2011 (WCD Admin. Order 11-050).

appeal the insurer's decision by requesting administrative review before the director, under OAR 436-009-0008.”

* * * * *

And *former* OAR 436-010-0270(7)⁴ provided, in relevant part:

“Insurers must reimburse workers for actual and reasonable costs for travel, prescriptions, and other claim related services paid by a worker in accordance with ORS 656.245(1)(e), 656.325, and 656.327.

“(a) Reimbursement by the insurer to the worker for transportation costs to visit his or her attending physician may be limited to the theoretical distance required to realistically seek out and receive care from an appropriate attending physician of the same specialty who is in a geographically closer medical community in relationship to the worker's home. *** All medical practitioners within a metropolitan area are considered part of the same medical community and therefore are not considered geographically closer than any other physician in that metropolitan medical community for purposes of travel reimbursement.

“(b) A worker who relocates within the State of Oregon may continue treating with the established attending physician *** and be reimbursed transportation costs.

“(c) Prior to limiting reimbursement under subsection (7)(a) of this rule, the insurer must provide the worker a written explanation and a list of providers who can timely provide similar medical services within a reasonable traveling distance for the worker. The insurer must inform the worker that medical services may continue with the established attending physician ***; however, reimbursement of transportation costs may be limited as described.

“(d) When the director decides travel reimbursement disputes the determination will be based on principles of reasonableness and fairness within the context of the specific case circumstances as well as the spirit and intent of the law.”

Application to this Case

MRT found that the worker, on multiple occasions when asked by insurer where he resided, stated he resided in the “Eugene area” and provided his address on Knight Road in Elmira. MRT found the worker failed to notify the insurer that he had moved to La Pine until after he requested travel expenses from that location. By failing to provide a change of address to insurer, MRT found, the worker prevented insurer from offering him a list of providers that were geographically closer to his new address under OAR 436-010-0270. MRT found it reasonable for insurer to calculate mileage from the address in Elmira. Finally, MRT found insurer's

⁴ Effective April 1, 2011 (WCD Admin. Order 11-051).

reimbursement utilizing the Elmira address to be within the principles and spirit of the rule, and insurer was not liable for additional reimbursement.

I find, based on my review of the record, that it was reasonable for MRT to make the findings and conclusions it made.

It was reasonable for insurer to assume the worker lived in the Eugene area during the time he was seeking medical services from the providers in Eugene. All claim-related correspondence in the record before, during, and after the relevant time period lists the worker's address as a post office box in Noti.⁵ (Exs. 4-11; 1-9 thru 1-14; 8-8 thru 8-19.) In the June 6, 2011, recorded telephone interview, the worker made the following statements:

"I live down in the Eugene area."

"I went over to Riverbend over here, ... you know, I call it Eugene ***."

"*** some kind of neuro institute down here, the Eugene Neuro Institute ***."

(Ex. 4-20, 4-21, 4-23.) The August 24, 2011, Report of Investigation states,

"IW [injured worker] also provided his residence addresses as:

"11688 SE Buckthorne, South Beach, OR

"89288 Knight Rd, ~~Simmons~~ Elmira, OR"

(Ex. 7-5.) Between June 2, 2011, and September 20, 2011, the worker filled his prescriptions at a pharmacy in Veneta. (Ex. 10-29.)

The first references in the record to an address in La Pine⁶ are the February 1, 2013, Requests for Reimbursement of Expenses, which list the "start location" on several dates as La Pine, OR. (Ex. 4-98 thru 4-103). It is reasonable to conclude that insurer had no knowledge the worker lived in La Pine prior to early 2013, nearly five months after the last appointment in Eugene for which he seeks reimbursement.

The worker says he was living in Eugene when he purchased the La Pine home in April 2011, and he moved into that home during the time he initially sought treatment for his injury in Eugene after unsuccessfully seeking treatment in Newport. He says he sold the La Pine home to his daughter in August 2012 but continues (as of September 2013) to live there and to maintain the post office box in Noti. The worker points out that insurer asked for his mailing address but never asked where he lived. (Ex. 6-1 thru 6-3.)

⁵ The record indicates that Noti is a little more than two miles from the worker's address in Elmira (Ex. 4-223), which is 21-24 miles from the providers in Eugene (Ex. 4-210, 4-211, 4-212).

⁶ The record indicates that the worker's address in La Pine is 116-117 miles from the providers in Eugene (Ex. 4-213, 4-214, 4-215).

However, based on the information insurer did have, it had no reason to inquire as to the location of the worker's residence, or to know the worker was traveling from La Pine to Eugene to obtain medical care, or to foresee that the worker would request reimbursement for multiple round trips between Eugene and La Pine. OAR 436-010-0270(7)(c) requires an insurer, before limiting reimbursement to that required to seek care from a geographically-closer provider, to give the worker a list of geographically-closer providers. The insurer can only do so if it has reason to believe the worker does not live in close proximity to the worker's provider. As stated above, the insurer had no reason to believe the worker did not live in the Eugene area; the insurer had no opportunity to comply with the requirement in the rule. Even if no rule required the worker to provide insurer with his current residence address, that fact does not obligate insurer to pay for travel anywhere in the state for the worker to seek care. Principles of reasonableness and fairness within the context of the specific case circumstances and the spirit and intent of the law still must be considered under OAR 436-010-0270(7)(d). As he had an active workers' compensation claim, it would have been reasonable for the worker to provide insurer with updated information, particularly in light of the fact that he had clearly given insurer the impression that he lived in the Eugene area.

The worker could have sought care closer to La Pine, perhaps in Bend, rather than making round trips between La Pine and Eugene. There is no indication that it was medically necessary for the worker to receive care in Eugene. The majority of the appointments were for physical therapy, and the record does not indicate that Dr. Ackerman or Dr. Stowell is uniquely specialized. The worker says he scheduled his appointments around his work schedule so as not to lose work or be a burden to others who would have had to fill in for him. (Ex. 6-2.) The record shows that the majority of his appointments were scheduled on days when he did not work (Exs. 4-167 thru 4-173), so rather than stop in Eugene for appointments on his way between Newport and La Pine, he made the trip from La Pine to Eugene and back again.

The facts of this case are unique in that the worker works in Newport, has several connections in the Eugene area, and lives in La Pine. While the worker's circumstances may not be unreasonable, these "specific case circumstances" are those contemplated by OAR 436-010-0270(7)(d). Moreover, ORS 656.245(1)(e) exhibits a clear legislative intent that the insurer should not bear the cost of a worker's choice of a distant attending physician.

Based on the evidence in the record, and based on principles of reasonableness and fairness within the context of the specific case circumstances as well as the spirit and intent of the law, I agree with MRT that insurer's calculation of mileage using the Elmira address as the starting and ending location was reasonable. Insurer did not arbitrarily pick a location; the worker has an address in Elmira. I acknowledge the worker's position that he did not actually travel from Elmira. OAR 436-010-0270(7) provides for reimbursement of "actual and reasonable" costs. Actual costs are not necessarily reasonable. Under OAR 436-010-0270(7)(d), principles of reasonableness and fairness may allow reimbursement to be limited to a theoretical distance, consistent with the intent of ORS 656.245(1)(e), if specific case circumstances preclude strict compliance with the procedural requirements of the rule. MRT's findings are supported by substantial evidence in the record and do not reflect an error of law.

Mileage Calculation

Reimbursement rates are published in Bulletin 112, “Reimbursement of injured workers’ travel, food, and lodging costs.”⁷ See OAR 436-009-0025(2). The mileage rate for travel between January 1, 2011, and April 16, 2012, was 51.0 cents per mile; for travel between April 17, 2012 and December 31, 2012, the rate was 55.5 cents per mile.

The worker’s December 4, 2013, request for reimbursement encompasses the following medical appointments:

Provider	Dates
Dr. Ackerman	6/16/11, 7/14/11, 8/10/11, 9/16/11, 10/14/11, 7/6/12, 8/3/12
Physical Therapy Services	6/4/12, 6/6/12, 6/13/12, 6/15/12, 6/19/12, 6/21/12, 6/28/12, 7/11/12, 7/13/12, 7/16/12, 7/19/12, 7/25/12, 7/27/12, 7/30/12, 8/2/12, 8/8/12, 8/10/12, 8/13/12, 8/16/12, 8/27/12, 8/30/12, 9/5/12
Dr. Stowell	5/12/12, ⁸ 7/2/12

(Ex. 8-8 thru 8-19.) In its reimbursement, insurer included an additional appointment with Dr. Stowell on August 28, 2012, that is not included in the worker’s request.⁹

Insurer calculated the mileage between the respective providers’ addresses in Eugene and the worker’s address in Elmira. For the trips to Dr. Ackerman and Physical Therapy Services, the insurer reimbursed the worker for a 48-mile round trip. For the trips to Dr. Stowell, the insurer reimbursed the worker for a 41-mile round trip. (Ex. 4-226 thru 4-229.)

Based on the number of trips, the mileage used by insurer, and the applicable mileage rate, the total comes to \$830.025.¹⁰ The insurer paid the worker \$830.04. I do not find insurer’s calculations or reimbursement amount to be unreasonable. I find that a reasonable factfinder in MRT’s position could have made the findings that MRT made. MRT’s findings and conclusion are supported by substantial evidence in the record. MRT’s resolution is consistent with ORS 656.245(1)(e) and OAR 436-010-0270(7)(d), and is not based on an error of law.

⁷ Available on the division’s web site: http://www.cbs.state.or.us/wcd/policy/bulletins/ab_index.html

⁸ The worker requested reimbursement for an appointment dated 5/12/12, Ex. 8-19, insurer paid for an appointment dated 5/31/12, Ex. 4-226.

⁹ I also note some unexplained discrepancies in the worker’s request. For example, for travel on July 13, 2012, the request form lists travel from Dorrance Meadow Road in La Pine to Coburg Road in Eugene at 146.56 miles, but the return trip from Coburg Road in Eugene to Dorrance Meadow Road in La Pine is listed as 125.4 miles. The trips for July 16, 19, 27, 30, and August 2, 10, 13, 16, 27, 30 all list the same difference in trip miles between the same two locations – 146.56 miles from La Pine to Eugene, and 125.4 (or 125.55) miles from Eugene back to La Pine. (Ex. 8-13, 8-14, 8-16, 8-17). The requests for June 4, 6, 15, 19, 21, and 28, 2012, list the trip miles between the same two addresses as 125.55 miles each way. (Ex. 8-11).

¹⁰ The equation includes: five trips to Dr. Ackerman in 2011 at 51 cents per mile; and at 55.5 cents per mile, two trips to Dr. Ackerman, 22 trips to Physical Therapy Services, and three trips (including 8/28/12) to Dr. Stowell:
 $5 \times 48 \times .51 = 122.40$; $2 \times 48 \times .555 = 53.28$; $22 \times 48 \times .555 = 586.08$; $3 \times 41 \times .555 = 68.265$

As the worker has not prevailed, no attorney fee is awarded. ORS 656.385(1).

IT IS HEREBY ORDERED the July 2, 2014, Administrative Order and the March 9, 2015, Proposed and Final Order are affirmed. Insurer is not liable for additional reimbursement for mileage expenses incurred for the worker to receive medical services from June 16, 2011, through September 5, 2012.