

In the Matter of the Medical Fee Dispute of
Tommy H. Dorcy, Claimant

Contested Case No: 06-030H

PROPOSED & FINAL ORDER

August 28, 2006

AMERICAN HOME ASSURANCE CO, Petitioner
TOMMY H. DORCY, Respondent

Before Darren L. Otto, Administrative Law Judge

A hearing was convened in the above entitled matter on May 23, 2006 in Portland, Oregon before Administrative Law Judge Darren L. Otto of the Workers' Compensation Board. Claimant was not present but was represented by his attorney Scott Supperstein.¹ The employer, American Airlines, and its processing agent, Specialty Risk Services, were represented by their attorney Brad Garber. Robert McGechie was also present on behalf of the employer. Exhibits 1 through 30 were received into evidence, but proposed Exhibits A and B were not received into evidence nor was any testimony allowed at that time because both parties agreed that the Hearings Division was limited to a substantial evidence review of the Director's Administrative Order which was the subject of the employer's Request for Hearing.

On May 25, 2006, the employer filed a Motion to Reopen Record, contending that the Hearings Division had *de novo*, rather than substantial evidence, review of the medical fee dispute pursuant to OAR 436-001-0225.² On June 9, 2006, the employer's motion was granted and a new hearing was scheduled. On August 10, 2006, the hearing was reconvened and concluded. At that time, testimony was taken and Exhibits A and B were also received into evidence. Previously admitted Exhibits 1 through 5 were withdrawn from evidence.

ISSUES

The employer challenges the Director's February 6, 2006 Administrative Order which found the employer liable for Dr. Long's June 24, 2005 report billing for \$2160.00. The issue is whether Dr. Long's fee was excessive.

FINDINGS OF FACT

On September 24, 2004, claimant was working for the employer as a service worker when he injured his low back while loading a surfboard onto an airplane (Ex. 6-1). He sought medical treatment from Frances Verzosa, M.D., who diagnosed a moderate to severe

¹ The employer's objection to Mr. Supperstein's presence on the grounds that claimant did not have standing in this proceeding was overruled.

² OAR 436-001-0225(1) provides that "[e]xcept for the matters listed in sections (2) and (3), the administrative law judge reviews all matters within the director's jurisdiction *de novo*, unless otherwise provided by statute or administrative rule." Section (2) creates a substantial evidence review for "medical service and medical treatment disputes under ORS 656.245, 65.247(3)(a), and 656.327, and managed care disputes under ORS 656.260(16)." Section (3) describes the standard of review for vocational disputes under ORS 656.340.

lumbosacral sprain and left leg sciatica with a history of an L5-S1 lumbar disc and microdiscectomy in January 1999 (Ex. 6-3).

On November 10, 2004, the employer accepted claimant's lumbosacral strain as a disabling industrial injury (Ex. 9).

On November 22, 2004, an MRI scan of claimant's lumbar spine showed the presence of a left-sided recurrent disc herniation at L5-S1 (Ex. 10). On January 12, 2005, Dr. Verzosa concluded that the industrial injury was the major contributing cause of that disc herniation (Ex. 11). She also referred claimant to Dr. Mason for a surgical consultation and to Eric Long, M.D., for nerve conduction studies and an EMG (Ex. 11, pgs. 5 & 7).

Previously, claimant was examined by the insurer-arranged medical examiners Jeffery Hawkins, D.C., and Anthony Woodward, M.D. (Ex. 7). On February 7, 2005, Dr. Hawkins concluded that the L5-S1 disc herniation was not related to the industrial injury (Ex. 14).

On March 30, 2005, Dr. Long examined claimant and performed the requested diagnostic studies (Ex. 16).

On April 22, 2005, the employer denied compensability of claimant's L5-S1 disc herniation (Ex. 17).

On May 23, 2005, claimant was examined by the insurer-arranged medical examiner Thomas Jay Rosenbaum, M.D., who wrote a comprehensive eight page report in which he answered nine questions posed to him by the employer (Ex. 18). Ultimately, he concluded that claimant's preexisting L5-S1 disc herniation was the major contributing cause of his need for treatment of the combined low back condition (Ex. 18-7). On June 13, 2005, Dr. Rosenbaum was provided with additional medical records and wrote a two-page supplemental report (Ex. 19).

On June 24, 2005, the employer provided a copy of Dr. Rosenbaum's May 23, 2005 eight-page report to Dr. Long and asked for his concurrence or non-concurrence (Ex. 20). If Dr. Long did not concur with the IME report, he was required to attach a "written response specifying your reason for disagreement." *Id.* Dr. Long did not concur. *Id.* Therefore, he spent three hours reviewing the medical records and preparing a four-page report on June 24, 2005 which outlined his disagreement with Dr. Rosenbaum's various opinions (Ex. 21).

Dr. Long charges the general public \$720.00 per hour for trial, deposition, conferences and record reviews and reports (Exs. A & B). Because it took him three hours to review the medical records and write the June 24, 2005 non-concurrence report, he charged the employer \$2160.00 (Ex. 22). On July 7, 2005, the employer filed a Medical Fee Dispute Resolution Request with the Director, alleging that Dr. Long's fee of \$2160.00 was excessive and should be "drastically reduced." (Ex. 23-3).

On February 6, 2005, the Director issued an Administrative Order finding that the employer was liable as billed for the June 24, 2005 report Dr. Long provided primarily because

there was “no showing that the charge [was] different from what Dr. Long charges the ‘general public’ for like services.” (Ex. 27-4).

FINDINGS OF ULTIMATE FACT

Dr. Long charged the employer the usual and customary fee he charged to the general public for his June 24, 2005 report.

CONCLUSIONS OF LAW AND OPINIONS

The employer contends that it is Dr. Long’s burden of proof to establish that his fee was not excessive, the Director improperly failed to develop the record and the case should be remanded, and the fee is excessive because the employer did not ask for a comprehensive report from Dr. Long. Claimant asserts that all of the evidence established that Dr. Long charged the employer the usual and customary fee he charges to the general public and there is absolutely no evidence or law to support any of the employer’s positions.

OAR 436-009-0010(7) outlines the requirements for a medical provider’s billing and the procedures for challenging those fees. It states:

The medical provider shall bill their usual and customary fee charged to the general public. The submission of the bill by the medical provider shall serve as a warrant that the fee submitted is the usual fee of the medical provider for the services rendered. The department shall have the right to require documentation from the medical provider establishing that the fee under question is the medical provider’s usual fee charged to the general public. For purposes of this rule, “general public” means any person who received medical services, except those persons who receive medical services subject to specific billing arrangements allowed under the law which require providers to bill other than their usual fee.

As a general proposition, the party requesting a hearing to challenge an order bears the burden of proof that the order was incorrect. *See Marvin Wood Products v. Callow*, 171 Or App 175 (2000); *Larry J. Morgan*, 51 Van Natta 1448 (1999); *Roberto Rodriguez*, 46 Van Natta 1722 (1994). Since the employer requested a hearing to challenge the Director’s February 6, 2005 Administrative Order, the employer bears the burden of proving that the Director’s order was incorrect. As claimant noted at hearing, however, it doesn’t really matter whose burden it is because all of the evidence supported the Director’s decision. In fact, there is not a scintilla of evidence in this record that Dr. Long charged the employer a higher fee than he usually charges the general public for similar services.

The employer’s allegation that the Director improperly failed to develop the record in that regard is without merit. Although OAR 436-009-0010(7) provides that “[t]he department shall have the right to require documentation from the medical provider establishing that the fee under question is the medical provider’s usual fee charged to the general public,” that right is neither exclusive nor mandatory. The Director is not required to obtain additional evidence and either claimant or the employer could supplement the record as was done at the current hearing.

The employer simply chose not to present additional evidence to support its assertion that Dr. Long's fee was greater than the usual fee he charged to the general public. The employer's request that I remand this matter to the Director for further development of the record is denied.

The employer's assertion that Dr. Long's billing was limited by the requirements of OAR 436-009-0015(1) was not persuasive because that rule applies to a worker seeking treatment from an attending physician, Dr. Long was not claimant's attending physician, and he did not offer any treatment.

The submission of Dr. Long's \$2160.00 bill constituted a "warrant that the fee submitted [was] the usual fee of the medical provider for the services rendered." OAR 436-009-0010(7). In other words, the submission of the bill established a rebuttable presumption that it was the usual fee. In a letter introduced at hearing, Dr. Long explained that he charged \$720.00 per hour for trials and depositions and \$12.00 per minute for record reviews and reports (Ex. A). 60 minutes multiplied by \$12.00 per minute equals \$720.00 per hour. 95 pages of billings for similar services to other organizations established that Dr. Long consistently billed \$720.00 per hour to everyone who contracted for his services (Ex. B). There was no contrary evidence.

The employer was upset because it did not want a four-page report from Dr. Long in response to Dr. Rosenbaum's eight-page IME report. The claims examiner, Robert McGechie, however, testified at hearing that he did not limit the amount of time or the length of the response he wanted from Dr. Long and all Dr. Long did was respond to the request for a non-concurrence report. Mr. McGechie conceded that if Dr. Long was confronted with a detailed report with a comprehensive medical history, it was not unreasonable for him to respond to every point of disagreement. Dr. Long was required to provide the employer with a written response specifying his reasons for disagreement. The employer may not have gotten what it wanted, but it got what it asked for. The Director's order will be approved.

ORDER

IT IS HEREBY ORDERED that the February 6, 2006 Administrative Order is approved.