

In the ORS 656.248 Medical Fee Dispute of
Chehalem Physical Therapy, Claimant
Contested Case No: 08-167H;08-168H; 08-169H;08-170H
PROPOSED & FINAL ORDER

April 19, 2010

CIS WORKERS' COMPENSATION GROUP, Petitioner
CHEHALEM PHYSICAL THERAPY, Respondent
Before Douglas C. Crumme, Administrative Law Judge

Pursuant to stipulation, the parties submitted these matters for a consolidated hearing¹ through written evidence and argument in lieu of an in-person hearing. Diana Godwin, Attorney at Law, represented Chehalem Physical Therapy (Chehalem PT), a medical provider. Howard Nielsen, Attorney at Law, represented CIS Workers' Compensation Group (CIS), an insurer. Carol Parks, Assistant Attorney General, represented the Director of the Department of Consumer and Business Affairs, including the Department's Workers' Compensation Division (WCD). The claimants and employers in the underlying claims did not appear. The Administrative Law Judge is Douglas Crummé. The hearing record closed with the Board's receipt of WCD's Hearing Memorandum on March 17, 2010.²

ISSUES

CIS challenges WCD's August 22, 2008, Administrative Orders on Reconsideration that ordered CIS to pay additional amounts to Chehalem PT for medical services under ORS 656.248 on the grounds that CIS had incorrectly paid discounted amounts. Chehalem PT requests that it be awarded penalties and attorney fees under ORS 656.262(11)(a) and attorney fees under ORS 656.390.

FINDINGS OF FACT

The parties have submitted Stipulated Facts 1 through 19 pertaining to all of these matters as follows:

1. At the time the medical services that are the subject of these fee disputes were provided to the injured workers listed in Exhibit A,³ by Chehalem Physical

¹ Consolidation for hearing was appropriate under OAR 436-001-0170(6) because the four cases involve common issues and the same insurer and medical provider, although the claimant in each case is different and there is more than one employer. Because the issues only involve ORS 656.248 and other statutes directly related to the provision of medical services, there is not a matter concerning a claim under ORS 656.704(3)(a) that requires a separate order under OAR 436-001-0170(8).

² The Exhibits admitted in the different matters are as follows: 00 and 1 through 28, including 1A, in 08-00167H; 00 and 1 through 26, including 1A, in 08-00168H; 00 and 1 through 26, including 1A, in 08-00169H; and 00 and 1 through 29, including 1A, in 08-00170H.

³ The parties did not file the Exhibit A to which the Stipulated Facts refer.

Therapy (Cehalem PT), Cehalem PT had an existing, written contract with First Health Group Corporation (First Health).

2. At the time the medical services that are the subject of these fee disputes were provided by Cehalem PT, First Health had a contract with The Reny Company (Reny), a Texas bill re-pricing entity.
3. At the time the medical services that are the subject of these fee disputes were provided by Cehalem PT, CIS Workers' Compensation Group (CIS) did not have a written contract with Cehalem PT.
4. At the time the medical services that are the subject of these fee disputes were provided by Cehalem PT, CIS did not have a written contract with First Health.
5. At the time the medical services that are the subject of these fee disputes were provided by Cehalem PT, CIS had an oral agreement with Reny to provide bill review and re-pricing services.
6. Cehalem PT provided reasonable and necessary medical services to injured workers on the dates of services specified in Exhibit B.⁴
7. Employers for these workers were insured through CIS.
8. The parties agree that the services referred to in Paragraph 6 above were authorized by qualified physicians, for conditions compensable under workers' compensation law and that Cehalem PT billed its usual and customary fees to CIS.
9. Cehalem PT submitted bills for services provided to these workers to CIS.
10. CIS used Reny as a third party administrator (TPA) for these billings and, through Reny, applied a discount to the bills which resulted in Cehalem PT being paid an amount less than either the lesser of what Cehalem PT billed or the fee schedule amount provided for in OAR 436-009.
11. CIS, through Reny, provided an explanation of reimbursement (EOR) for each date of service indicating a First Health Preferred Provider Organization (PPO) discount had been applied to the payment.
12. CIS applied a discount to the amount allowed by workers' compensation rules and consequently paid Cehalem PT the amounts listed in Exhibit B for the dates of service specified for these workers. For all of the compensable care provided by Cehalem PT to the injured workers, CIS paid a total of \$3,583.80.
13. If CIS had not applied the discount, the amount that should have been paid to

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The parties also did not file the Exhibit B to which the Stipulated Facts refer.

Chehalem PT under Oregon's Workers' Compensation Fee Schedule was \$4,479.74.

14. The total amount in dispute for all four workers involved is \$895.94. All of the medical services that are the subject of these fee disputes were provided, billed and paid prior to July 7, 2008.
15. Chehalem PT filed fee disputes with the Medical Review Unit of the Workers' Compensation Division in March of 2008, contesting the discounts taken for services provided to the injured workers listed in Exhibit A.
16. On May 8, 2008, the Workers' Compensation Division issued Administrative Order MF 08-0490 in the dispute involving worker Dick Barbee, Administrative Order MF 08-0487 in the dispute involving worker Lee Koch, Administrative Order MF 08-0488 in the dispute involving worker Erik Maiorano, and Administrative Order MF 08-0489 in the dispute involving worker John Tish. All of the Orders stated that "under the workers' compensation statute or payment rules there is no provision for either a PPO or a PPO discount applied to compensable medical services." The respective Orders found CIS liable for an additional payment of \$79.23 for care provided to Mr. Barbee, \$518.49 for care provided to Mr. Koch, \$103.33 for care provided to Mr. Maiorano and \$194.89 for care provided to Mr. Tish. CIS filed a Request for Hearing in all of these disputes on May 20, 2008.
17. On July 7, 2008, the director of WCD issued temporary rules amending OAR 436-009 to allow insurers to reimburse medical providers at a contracted rate when the provider has entered into a contract. The temporary rule required insurers to provide a copy of any contract that is the basis for a fee reduction to the director upon request.
18. On July 10, 2008, the Workers' Compensation Division issued an "Administrative Order of Abatement" of MF 08-0490, MF 08-0487, MF 08-0488 and MF 08-0489 to allow "supplementation of the record" under the new temporary rule. The parties had until July 24, 2008 to submit additional evidence for consideration. Both the attorneys for Chehalem PT and CIS submitted additional documentation.
19. On August 22, 2008, the Workers' Compensation Division issued Administrative Order of Reconsideration MF 08-0921 in the dispute involving Mr. Barbee, Administrative Order of Reconsideration MF 08-0923 in the dispute involving Mr. Koch, Administrative Order of Reconsideration MF 08-0922 in the dispute involving Mr. Maiorano and Administrative Order of Reconsideration MF 08-0920 in the dispute involving Mr. Tish. All of these Orders of Reconsideration found that CIS was not entitled to reduce payments to Chehalem PT because CIS did not meet the requirement of the temporary rule of a written contract entitling it to apply a discount. The Division again ordered that CIS is liable for the

additional payments to Chehalem PT. On September 3, 2008, CIS again filed a Request for Hearing in all of these disputes.

In addition to the parties' Stipulated Facts, I make the following findings:

The Chehalem PT treatment that led to the disputed payments here occurred between April 21, 2006, and April 7, 2008.

Under the oral agreement between CIS and Reny, CIS sent medical services bills for workers' compensation claims to Reny. Reny audited the bills based on the Oregon fee schedules established pursuant to ORS 656.248. Reny investigated whether the medical provider had any contracts with PPOs to charge particular prices for services. If there were such contracts that allowed for payments at lower fees than the Oregon Workers' Compensation Law otherwise allowed, Reny informed CIS and sent the necessary paperwork to CIS for CIS to process and pay at the lower price.

The WCD's May 8, 2008, Administrative Orders reasoned, in part, "The statute [ORS 656.248] limits the amount a medical provider can bill to what the provider would bill any person seeking service from that provider. I find the statute infers that the medical provider will be paid what was billed or the fee schedule maximum, whichever is lesser."

CONCLUSIONS OF LAW AND OPINION

CIS challenges WCD's August 22, 2008, Administrative Orders on Reconsideration which ordered CIS to pay additional amounts to Chehalem for medical services under ORS 656.248 on the grounds that CIS had incorrectly paid discounted amounts. Chehalem PT requests the award of penalties and attorney fees under ORS 656.262(11)(a) and attorney fees under ORS 656.390.

As the party challenging WCD's orders, CIS has the burden to prove by a preponderance of the evidence that those orders are incorrect. ORS 183.450(2); *Harris v. SAIF*, 292 Or 683 (1982). A *de novo* standard of review applies here under OAR 436-001-0225(1) and (2). *Charles M. Davis*, 14 CCHR 180 (2009); *Jose A. Aveleigra*, 13 CCHR 298 (2008).

The Temporary Rules Do Not Apply

The temporary amendments to OAR 436-009, adopted in WCD Admin. Order 08-060 effective July 7, 2008, do not apply here. With certain exceptions that are not pertinent here, the applicability provisions of the temporary rules state,

"436-009-0003 Applicability of Rules (Temporary Rule)

"(1) These rules apply to:

"(a) All medical services rendered on or after the effective date of these rules; and

“(b) All payments made under a contract with a medical provider, regardless of the date of service.”

The July 7, 2008, temporary rules do not apply to these cases under OAR 436-009-0003(1)(a) because Chehalem PT rendered all of the medical services in question before July 7, 2008.

The temporary rules also do not apply to these cases under OAR 436-009-0003(1)(b) because CIS did not make the discounted payments to Chehalem PT under a contract between CIS and Chehalem PT. OAR 436-009-0003(1)(b) (Temp.) states, in essence, that the temporary rules applied to medical fee payments made under a contract between a payor and a medical-provider payee, regardless of the date of service. The WCD’s Administrative Orders on Reconsideration did not address OAR 436-009-0003(1)(b) (Temp.) or interpret that rule differently. Rather, WCD interpreted the narrow question of whether the CIS-Reny oral agreement was a contract under OAR 436-009-0040(1) (Temp.).⁵ As a result, the Administrative Orders on Reconsideration do not state a contrary interpretation of OAR 436-009-0003(1)(b) (Temp.) that requires deference here. *See Don’t Waste Or. Comm. v. Energy Facility Siting*, 320 Or 132 (1994); *SAIF v. Donahue-Birran*, 195 Or App 173 (2004). For purposes of whether the temporary rules are applicable under OAR 436-009-0003(1)(b) (Temp.) then, the fundamental issue is whether CIS made the disputed payments to Chehalem PT pursuant to a contract between CIS and Chehalem PT. They did not. While, with Reny’s assistance, CIS determined the amounts that it paid to Chehalem PT by referring to Chehalem PT’s contract with First Health, the CIS payments to Chehalem PT were not made “under a contract” between CIS and Chehalem PT.

The Rules Subsequent to the Temporary Rules Do Not Apply

The amendments to OAR 436-009 after the temporary rules expired on January 2, 2009, do not apply to these fee disputes. Those subsequent rules have only applied to services rendered on and after the effective dates of those rules after January 2, 2009, which was after Chehalem PT rendered the medical services that led to CIS’ discounted payments. *See* WCD Administrative Orders 08-063, 09-050, and 09-054.

The Former Rules Apply and Do Not Allow Fee Discounts

The versions of OAR 436-009 in effect prior to the temporary rules applied to services rendered on and after the effective dates of those former versions, when Chehalem PT

⁵ WCD concluded that there was not a pertinent contract under that section because the CIS-Reny oral agreement did not meet the requirement under OAR 436-009-0030(3)(a) (Temp.) that such contracts be copyable.

Another reason that the CIS-Reny agreement would not have been a contract that made the temporary rules applicable under OAR 436-009-0003(1)(b) (Temp.) is that Reny was not a medical provider. *See Stuart C. Yekel*, 12 CCHR 319, 320 (2007). CIS had simply agreed with Reny that, in return for a fee from CIS, Reny would identify the amounts that CIS should pay to medical providers. As a result, any CIS payments to Reny were not “under a contract with a medical provider.”

provided the medical services in question. *Former* 436-009-0003(1).⁶ Therefore, those rules apply here.

Under the applicable former versions of OAR 436-009, CIS was not allowed to pay a discounted fee to Chehalem PT for the disputed medical services bills.

The most recent former version of OAR 436-009-0040(1) that was in effect when Chehalem PT rendered the medical services in question provided, in pertinent part,

“The insurer must pay for medical services at the provider’s usual fee or in accordance with the fee schedule whichever is less. Insurers must pay for medical services that have no fee schedule at the provider’s usual fee. For all MCO enrolled claims, the insurer must pay for medical services at the provider’s usual fee or according to the fee schedule, whichever is less, unless otherwise provided by MCO contract...”

The earlier applicable former versions of that rule provided essentially the same except for minor changes that are likely inconsequential to the issues here.⁷

The discounted fees that CIS paid Chehalem PT were not Chehalem PT’s “usual fees” under *former* OAR 436-009-0040(1). The applicable former versions of OAR 436-009 did not define the term “usual fee.” OAR 436-009-0005. However, OAR 436-010-0005(37) (WCD Admin Order 07-057) and *former* OAR 436-010-0005(39) (WCD Admin Order 06-054) defined “usual fee” then as “the medical provider’s fee” or “the fee,” respectively, “charged the general public for a given service.” That definition applied to OAR chapter 436, division 009. OAR 436-010-0005(1); *SAIF Corp. v. Eller*, 189 Or App 113, 123 (2003). Further, OAR 436-009-0010(7) provided during those periods that the “general public” did not include persons “who receive medical services subject to specific billing arrangements allowed under the law which require providers to bill other than their usual fee.”⁸ Chehalem PT billed its usual fees to CIS for the medical treatment in question. CIS, though, paid other, lower fees that it calculated according to Chehalem PT’s specific billing arrangements with First Health.

CIS argues that testimony and statements made at WCD meetings pertaining to WCD’s adoption of the temporary rules effective July 7, 2008, and to WCD’s adoption of new rules effective January 1, 2010, as well as WCD’s adoption of those rules, indicate that the former rules did not prohibit such discounts. These arguments are not persuasive. Where an agency has the authority to adopt rules and does so, it must follow those rules and cannot ignore them. *SAIF Corp. v. Eller*, *supra* at 119; *Casualty and Surety Co. v. Sue A. Blanton, D.C.*, 139 Or App 283, 287 (1996). The clear language of the former rules carries more weight as to their interpretation than inferences from the subsequent rulemaking history.

⁶ See WCD Administrative Orders 06-052, 07-051, and 07-055.

⁷ See WCD Administrative Orders 06-052, 07-051, and 07-055.

⁸ See WCD Administrative Orders 06-052, 07-051, and 07-055.

WCD Had Authority to Adopt the Applicable Former Rules

CIS argues that *former* OAR 436-009-0040(1) exceeded WCD's statutory authority and is invalid to the extent that it prohibits an insurer from paying a medical provider for treatment at a discounted rate where the provider has contracted with a third entity to accept such discounts for certain patients. CIS argues that, because ORS 656.248 does not affirmatively prohibit lower medical fee payments than the lesser of the usual fee or the fee schedule, ORS 656.248 has not authorized the WCD to prohibit such discounts. This argument is not persuasive.

Under ORS 656.726(4)(a), WCD may "make and declare all rules and issue orders which are reasonably required in the performance of the director's duties." Those duties include implementing the Workers' Compensation Law's policy objectives. *Roseburg Forest Products v. Humbert*, 212 Or App 285, 291 (2007), *rev den* 343 Or 159 (2007).

ORS 656.248(1) provides that WCD shall promulgate rules for developing and publishing fee schedules for the reimbursement generally received under ORS chapter 656. In addition, ORS 656.248 provides, in pertinent part,

"(2) Medical fees equal to or less than the fee schedules published under this section shall be paid when the vendor submits a billing for medical services. In no event shall that portion of a medical fee be paid that exceeds the schedules.

"(3) In no event shall a provider charge more than the provider charges to the general public.

"(6) Notwithstanding subsection (1) or (2) of this section, such rates or fees provided in subsections (1) and (2) of this section shall be adequate to insure at all times to the injured workers the standard of services and care intended by this chapter."

....."

include, ORS 656.012(2) provides that the objectives of the Workers' Compensation Law

"(a) To provide...sure, prompt and complete medical treatment for injured workers...;

"(c) To restore the injured worker physically and economically to a self-sufficient status in an expeditious manner and to the greatest extent practicable;

"(d)...and

“(e) To provide the sole and exclusive source and means by which subject workers entitled to receive benefits on account of injuries or diseases arising out of and in the course of employment shall seek and qualify for remedies for such conditions.”

The policy objectives under ORS chapter 656 that medical fees be adequate to insure the standard of medical care that the Workers’ Compensation Law intends, including sure, prompt, and complete treatment that physically restores the worker expeditiously and to the greatest extent practicable, are delegative statutory terms. *Springfield Education Assn. v. School Dist.*, 290 Or 217 (1980). Accordingly, WCD’s function is to complete the legislature’s policy decision within the range of discretion that the more general policy of the statute allows. *Id* at 229.

While ORS 656.248 does not require WCD to prohibit medical fee discounts, the general policy provisions of ORS chapter 656 are certainly broad enough to authorize WCD to choose, within its discretion, to do so.

Accordingly, WCD correctly ordered CIS to pay Chehalem PT at the lower of the billed usual fees or the fee schedule as opposed to the still-lower discounted fees that CIS paid.

Prevailing at the contested-case level on the parties’ dispute under ORS 656.248 does not entitle Chehalem PT to an assessed attorney fee pursuant to ORS 656.385(1). That section allows attorney fees for prevailing in a dispute over compensation under certain statutes, but not under ORS 656.248. *Ernest E. Lloyd*, Director’s Final Order (2001).

Penalties and Attorney Fees for Unreasonable Processing/ Hearing Requests

Chehalem PT requests that it be awarded penalties and attorney fees under ORS 656.262(11)(a) and attorney fees under ORS 656.390.⁹ Chehalem PT has the burden of proof under these issues because it is the proponent. ORS 183.450(2); *Harris v. SAIF*.

ORS 656.262(11)(a)

Under ORS 656.262(11)(a), if an insurer unreasonably delays or refuses to pay compensation, the insurer shall be liable for an additional amount up to 25 percent of the “amounts then due” plus attorney fees. The term “amounts then due” refers to the time when the insurer unreasonably delayed compensation. *Beverly J. Hills-Wood*, 58 Van Natta 1058, 1062 (2006). The standard for determining whether the insurer’s processing was unreasonable is whether, from a legal standpoint, the insurer had a legitimate doubt as to its liability.

⁹ In its written argument, Chehalem PT clarified that the relief it seeks under its position that CIS’ discounted payments were too low includes penalties and attorney fees on the grounds that the payments were unreasonable and attorney fees on the grounds that CIS’ challenges to WCD’s Administrative Orders were frivolous. CIS and WCD have not objected. I conclude that these issues should be considered. This is not a case involving a substantial-evidence standard of review under OAR 436-001-0225(2) that would prohibit new issues.

International Paper Co. v. Huntley, 106 Or App 107 (1991). This is determined in light of all of the evidence that was available to the insurer at the time. *Brown v. Argonaut Insurance*, 93 Or App 588 (1988).

CIS's withholding of the discounts from the disputed medical fee payments was unreasonable. CIS lacked legitimate doubt that it could withhold the discounts based on the clear language in the applicable former provisions of OAR 436-009-0010(7) and OAR 436-009-0040(1) and the statutory provisions that authorized the WCD to exercise its discretion to adopt such rules as discussed above. This was not a case where ambiguous language in the rules and statutes created legitimate doubt. *Dawes v. Summers*, 118 Or App 15, 19 (1993).

As a result, CIS is liable for a penalty of up to 25 percent of the \$895.94 in disputed compensation that CIS withheld. Under the circumstances here, a 25 percent penalty is appropriate. The total penalty then should be \$229.99.

CIS should pay the penalty to Chehalem PT because the withheld compensation came out of Chehalem PT's pocket, so to speak. This is the case because, with exceptions that do not apply here, OAR 436-009-0015(1) provides that a claimant is not liable to medical providers for an insurer's reduced medical fee payment. That rule prohibits medical providers from attempting to collect fees for medical services from claimants.

Attorney fees under ORS 656.262(11)(a) should be a reasonable amount that gives primary consideration to the results achieved and the time devoted to the case. Such a fee may not exceed \$3,000¹⁰ absent extraordinary circumstances. ORS 656.262(11)(a). The factors identified in OAR 436-001-0265(2) may also be considered.

Under the circumstances here, including the relatively small amount of compensation in dispute but the extensive time and effort that the record indicates Ms. Godwin likely reasonably devoted to these four matters through the end of the hearing, reasonable assessed fees are \$1,400 in WCB Case No. 08-00168H and \$1,200 in each of the other three matters, for a total fee of \$5,000.

ORS 656.390

ORS 656.390 provides, in pertinent part,

“(1) Notwithstanding ORS 656.236, if either party requests a hearing before the Hearings Division, request review of an Administrative Law Judge's decision before the Workers' Compensation Board, appeals for review of the claim to the Court of Appeals or to the Supreme Court, or files a motion for reconsideration of the decision of the Court of Appeals or the Supreme Court, and the Administrative Law Judge, board, or court

¹⁰ Effective January 1, 2010, the former \$2,000 limit under ORS 656.262(11)(a) has been raised to \$3,000. See *Troy J. Pachano*, 62 Van Natta 509, 513 at footnote 6 (2010).

finds that the appeal or motion for reconsideration was frivolous or was filed in bad faith or for the purpose of harassment, the Administrative Law Judge, board, or court may impose an appropriate sanction upon the attorney who filed the request for hearing, request for review, appeal or motion. The sanction may include an order to pay to the other party the amount of the reasonable expenses incurred by reason of the request for hearing, request for review, appeal or motion, including a reasonable attorney fee.

“(2) As used in this section, ‘frivolous’ means the matter is not supported by substantial evidence or the matter is initiated without reasonable prospect of prevailing.”

There is a question whether ORS 656.390 applies here because that section pertains where a party requests a hearing before the “Hearings Division.” The term “Hearings Division” refers to the Hearings Division of the Workers’ Compensation Board. *See* OAR 436-001-0004(3). Review of the WCD’s administrative orders under ORS 656.248 is conducted under ORS 656.704. ORS 656.248(12). Under ORS 656.704(2)(a), a party requests a hearing with the WCD regarding a WCD administrative order, although the WCD refers the request to the Workers’ Compensation Board for a hearing before a Board Administrative Law Judge. ORS 656.704(2)(a).

In any case, if ORS 656.390 does apply to this proceeding, a sanction should not be awarded under that section. The record does not prove that CIS filed its requests for these hearings for purposes of harassment or delay. There is not a question of a lack of substantial evidence. CIS’ requests for hearing challenging the Administrative Orders and Administrative Orders on Reconsideration were not frivolous. CIS had a reasonable prospect of setting aside the original Administrative Orders based on those Orders’ arguable conclusion that ORS 656.248 affirmatively prohibits an insurer from paying a medical provider less than the lesser of the fee schedule or the provider’s usual fee. CIS had a reasonable prospect of setting aside the Administrative Orders on Reconsideration under the new provisions in the temporary rules.¹¹

ORDER

IT IS THEREFORE ORDERED that the WCD’s August 22, 2008, Administrative Orders on Reconsideration are affirmed. CIS shall pay Chehalem PT the disputed portion of the medical fess. CIS shall pay Chehalem PT a penalty of \$223.99. CIS shall pay Ms. Godwin attorney fees in these four matters totaling \$5,000 as described above. Chehalem PT’s request for a sanction under ORS 656.390 is denied.

¹¹ ORS 656.385(4) provides for the award of a penalty to the claimant under a standard similar to ORS 656.390. However, that section does not provide for the award of attorney fees to the provider’s attorney, which is the relief that Chehalem PT sought under ORS 656.390.