In the ORS 656.248 Medical Fee Dispute of

Clackamas Physical Therapy Associates

Contested Case No: 08-185H

PROPOSED & FINAL ORDER

August 23, 2010

CLACKAMAS PHYSICAL THERAPY ASSOCIATES, Petitioner
LIBERTY NORTHWEST INSURANCE CORPORATION, Respondent

Before Monte Marshall, Administrative Law Judge

This matter was submitted on the documentary record before Administrative Law Judge Marshall. Clackamas Physical Therapy Associates (Clackamas) is represented by its attorney, Diana E. Godwin. Liberty Northwest Insurance Corporation, (Liberty) is represented by its attorney, Meg M. Carman. The Workers' Compensation Division is represented by Assistant Attorney General, Carol A. Parks. The record closed on August 5, 2010, following receipt of Clackamas' written reply argument.

EXHIBITS/EVIDENCE

Mark Bunyard, (WCD Case No. 08-185H), Exhibits 1-26 are admitted into evidence. Jamie Castenado, (WCD Case No. 08-186H), Exhibits 1-14 are admitted into evidence. Randolph E. Downing, (WCD Case No. 08-188H), Exhibits 1-21 are admitted into evidence. Patty A. Froke, (WCD Case No. 08-191H), Exhibits 1-23 are admitted into evidence. Cham Dy, (WCD Case No. 08-189H), Exhibits 1-20 are admitted into evidence. Scott W. Hayes, (WCD Case No. 08-193H), Exhibits 1-21 are admitted into evidence. Mary Heflin, (WCD Case No. 08-194H), Exhibits 1-23 are admitted into evidence. Doreen F. Hilferty, (WCD Case No. 08-195H), Exhibits 1-15 are admitted into evidence. Fredy Garcia, (WCD Case No. 08-314H), Exhibits 1-13 are admitted into evidence. Cathy A. Ruska, (WCD Case No. 08-200H), Exhibits 1-22 are admitted into evidence. Bobby R. Sirotek, (WCD Case No. 08-201H), Exhibits 1-20 are admitted into evidence. Kathleen Pingo, (WCD Case No. 08-199H), Exhibits1-23 are admitted into evidence. Ricky S. Kassahn, (WCD Case No. 08-196H), Exhibits 1-24 are admitted into evidence. Judith L. Walters, (WCD Case No. 08-205H), Exhibits 1-21 are admitted into evidence. Diane E. Swanson, (WCD Case No. 08-204H), Exhibits 1-22 are admitted into evidence. Kris A. Sittner, (WCD Case No. 08-202H), Exhibits 1-20 are admitted into evidence. Shannon A. Kelley, (WCD Case No. 08-197H), Exhibits 1-23 are admitted into evidence. Mark H. Miller, (WCD Case No. 08-198H), Exhibits 1-22 are admitted into evidence.

Liberty seeks remand in order generate evidence with regard to Clackamas' billing practices. The evidence is for the purpose of establishing that it could have reimbursed Clackamas at a different rate that was lower than the discounted rate. This new rate has never been at issue in these proceedings and consequently is not relevant to the current dispute. Therefore, I do not find it appropriate to remand this matter for the submission of further evidence at this late date. Accordingly, Liberty's request for remand is denied.

ISSUES

Reimbursement of physical therapy billings. Clackamas has appealed numerous Administrative Orders issued by WCD that found that Liberty had correctly paid the disputed billings at a discounted rate.

Penalties and Attorney Fees. Clackamas seeks penalties and related fees for allegedly unreasonable failure to reimburse at the proper rate.

FINDINGS OF FACT

In 2004, Liberty entered into an agreement with Medrisk, an expert provider organization (EPO). Medrisk has agreements with various employers, insurers and medical providers to arrange for rehabilitative services necessary for the treatment of injuries covered under workers' compensation. The agreement with Liberty provided that Medrisk would arrange for rehabilitative treatment with providers in its network for injured workers covered by Liberty Northwest. This included processing the billings submitted by the providers.

In May 2006, Medrisk entered into an agreement with Clackamas. Under the terms of that contract, Clackamas agreed to accept certain rates of payment for specific treatment rendered to a covered worker.

Mark Bunyard, Jamie Castenado, Randolph E. Downing, Patty A. Froke, Cham Dy, Scott W. Hayes, Mary Heflin, Doreen Hilferty, Fredy Garcia, Cathy A. Ruska, Bobby R. Sirotek, Ricky Kassahn, Kathleen Pingo, Judith L. Walters, Diane E. Swanson, Kris A. Sittner, Shannon A. Kelley, and Mark M. Miller all sustained compensable injuries while working for an employer that had workers' compensation coverage through Liberty. Between June 1, 2006 and August 3, 2007, the workers received treatment from Clackamas for their compensable injuries. Billings for these treatments were forwarded to MedRisk who then paid Clackamas at a discounted rate.

Clackamas disagreed with the amount paid and requested administrative review by WCD. Administrative Orders issued for all of the above-mentioned workers and found that Liberty had correctly reduced payment and was not liable for any additional amounts. Thereafter, Clackamas requested a hearing.

CONCLUSIONS OF LAW AND OPINION

Clackamas asserts that Liberty should be liable for the additional amounts of reimbursement and makes several arguments in support of its assertion. I will address each one separately.

Clackamas first argues that the temporary rule is invalid on the basis it exceeded the Director's authority. ORS 656.248(1) gives the Director authority to promulgate rules for developing and publishing fee schedules for medical services provided under ORS Chapter 656. The statute provides certain guidelines on which to base the rules, "where applicable and to the extent the Director determines practicable." Consistent with this authority, the Director has

promulgated rules regarding the payment of medical services in worker's compensation matters which are set forth in OAR 436, Division 09.

Prior to July 7, 2008, OAR 436-009-0040(1), the rule in question here, provided that an insurer must pay providers at the providers' usual fee or the amount set by the fee schedule, whichever was less. On July 7, 2008, the Director adopted a temporary rule which amended OAR 436-009-0040(1) to read, **"[u]nless provided by contract,** insurer's must pay providers at the providers' usual fee, or the mount set by the fee schedule, whichever is less." (emphasis added). *See* Admin Order 08-060.

ORS 656.248 give the Director broad authority to regulate the payment of medical services in worker's compensation matters. The temporary rule merely provides an additional method to determine the amount of that payment. The temporary rule did not exceed the authority granted the Director in ORS 656.248 or any other provision in ORS Chapter 656. Consequently, I do not find that the temporary rule is invalid.

Clackamas next argues that the temporary rule should not be applicable to this dispute. When the temporary rule was adopted, it was made applicable to "all medical services rendered on or after the effective date of these rules; and all payment made under a contract with a medical provider, regardless of date of service." Former OAR 436-009-00003(1). The effective date of the rule was July 7, 2008. The rule was promulgated under ORS 183.335(6) which allows for the adoption of rules without prior notice or hearing. A rule adopted under this statute may not be effective for more than 180 days. ORS 183.335(6)(a).

The temporary rules adopted in Admin. Order 08-060 were in effect from July 7, 2008 through January 1, 2009, which was 178 days. Consequently, the rule, on it face, did not violate ORS 183.335(6)(a). Application of the rule to medical services rendered after the effective date (July 7, 2008) is straight forward and understandable to those parties that are subject to the rule. However, by extending the rule to "payments made under contract with a medical provider, regardless of the date of service" the application of the rule is potentially retroactive.

Generally, retroactive application of new laws is disfavored and in absence of an indication, statues, or in this case a rule, are not retroactively applied if such application would "impair existing rights, create new obligations or impose additional duties with respect to past transactions." *See* ***Barrett v. Union Oil Distributors***, 60 Or App 483 (1982). Although the applicability language of the temporary rule appears to contemplate retroactive application, because it was adopted under ORS 183.335(6) there are no supporting materials as would be found when a permanent rule is adopted under ORS 183.335. Items such as supporting documents, a transcript of the rulemaking, hearing, and public comments would be helpful in determining a specific intent to make a rule apply retroactively. This is important in this instance where retroactive application of the rule has clearly impaired existing rights. That is, prior to the adoption of the temporary rule, there would be no basis for allowing Liberty to discount medical billings.

In addition, I agree with Clackamas' counsel that application of the temporary rule in this case creates a conflict with ORS 183.335(6)(a). As noted above, the temporary rules at issue

were adopted on July 7, 2008 and expired January 1, 2009. Again, on its face, the rule complies with ORS 183.335(6)(a). However, the retroactive application of the rule to this case, allows the rule to affect matters some 756 days prior to its passage.[1] This time period, in addition to the 178 days that the rule was in effect, give it a life span of over two and a half years. I find this to conflict with the 180 day time limit set forth in ORS 183.355(6)(a) and therefore, retroactive application of the rule would violate that statute.

For the reasons set forth above, I conclude that the temporary rule set forth in Admin. Order 08-060 are not applicable to this case. Rather, the prior version of OAR 436009-0040(1) is applicable. Under that version of the rule, there is no provision for the application of an additional discount to compensable medical services. Therefore, Clackamas is entitled to its usual charge for the medical service or the fee schedule maximum, whichever is less. In light of this conclusion, I do not reach the additional arguments put forth by Clackamas.

Although I have found that Liberty is liable for the additional amounts, I do not find that its failure to pay those amounts to be unreasonable. 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. ***International Paper Co. v. Huntley***, 106 Or App 107 (1991). Here, the amounts that were reimbursed were paid pursuant to a contract that Clackamas had entered into with Medrisk. The existence of that contract, and the fact that Clackamas was a party to the agreement, gave Liberty a legitimate doubt as to its liability. Consequently, neither penalties nor related attorney fees are warranted.

ORDER

IT IS THEREFORE ORDERED that Liberty Northwest Insurance Corporation is liable for an additional payment equal to Clackamas Physical Therapy Associate's usual charge for the medical service or the fee scheduled maximum

IT IS FURTHER ORDERED that Clackamas Physical Therapy Associate's request for penalties and related attorney fees is denied.

[1] The first date of service for medical treatment in this matter was June 1, 2006. (WCD 08-191H-- Ex. 8).