

In the Matter of Assessment of a Penalty Pursuant to ORS 656.262(11) of

Walling, Rhonda, Claimant

Contested Case No: H02-072

PROPOSED & FINAL ORDER

December 23, 2002

RHONDA WALLING, Petitioner

LIBERTY NORTHWEST INSURANCE, Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

HISTORY OF THE CASE

On November 1, 2002, Hearings Officer Paul Vincent conducted an in-person hearing in this matter. The petitioner, claimant Rhonda Walling, appeared with her attorney, Richard F. McGinty. The respondent, employer Café Today, appeared through its insurer Liberty Northwest Insurance Corporation and its attorney, Kathryn Riccardelli. The Workers' Compensation Division (WCD) did not appear. Testifying witnesses include claimant Rhonda Walling and insurer's claims manager, Tracey Young. The record closed after hearing.

The entire record of this proceeding, consisting of a tape recording of the hearing, all evidence received, and all hearing papers filed, has been considered.

ISSUE

Whether claimant is entitled to a penalty, pursuant to ORS 656.262(11), for the insurer's unreasonable resistance to the payment of compensation.

EVIDENTIARY RULING

Exhibits 1-6, submitted by the Workers' Compensation Division, were admitted without objection. Petitioner's Exhibits P1-7, and P9-P10 were admitted without objection. Petitioner's Exhibits P8, P11, P12 and P13 were admitted over insurer's objection to relevancy. These documents were relevant to the claims examiner's awareness of the actions being taken on the claimant's file and therefore admissible. Respondent's Exhibit R1 was admitted without objection.

FINDINGS OF FACT

Claimant was compensably injured on May 2, 2001. The claim was accepted for left carpal tunnel syndrome. The claim was closed by Notice of Closure on December 5, 2001. (Ex. 4, Testimony of Tracey Young).

Tracey Young is a case manager employed by insurer. As part of her duties, she has been responsible for and is familiar with claimant's file. (Testimony of Tracey Young).

On January 2, 2002, claimant sought treatment from Jeffrey S. Stoessel, MD, for her compensable carpal tunnel syndrome. (Ex. P6-1). Dr. Stoessel's chartnotes of January 2, 2002 were received by insurer on February 6, 2002. Young reviewed the document upon receipt by insurer. The chart notes showed that Dr. Stoessel found a positive Tinel's sign and equivocal Phlalen's test. Young is aware that Tinel's sign is indicative of carpal tunnel syndrome. Dr. Stoessel's plan in the chart notes show that he believed claimant should get an orthopedic consultation and then possibly go back to physiatry. Young knows that nerve conduction studies are diagnostic in nature. (Exs. 6, 7; Testimony of Tracey Young).

On January 23, 2002, a nerve conduction study was performed at Salem Rehabilitation Associates, Inc. by Erik Blake, MD. The study report shows that the referring doctor was "Thorsett." (Ex. P7). The nerve conduction studies report and bill were received by insurer on January 31, 2002. Young reviewed the report and billing upon receipt by insurer and determined that it was not reimbursable. Young knew that the claim was closed and did not find any palliative care request or aggravation request. Young believed claimant's last treating physician to be Dr. Farrell. On February 28, 2002, insurer denied payment for the billing on the grounds that "Payment can not be processed as bill is for services which do not appear to be related to the claimed conditions." Insurer did not provide a copy of the denial to the claimant. (Ex. P9; Testimony of Tracey Young). Before deciding that the bill should not be paid, Young did not contact Drs. Stoessel or Blake in regard to the bill, or request any further information. She didn't contact anyone in regard to whether the bill should be paid. (Testimony of Tracey Young).

On March 14, 2002, insurer received a copy of a report from David Thorsett, MD, to Dr. Stoessel, dated March 1, 2002. The report states "As you know I recently saw your patient, Rhonda M. Walling, in my office for a second opinion consultation regarding her left wrist pain." The report refers to claimant's left carpal tunnel syndrome and notes that claimant "had repeat electrical studies done 1/23/02, by Dr. Erik Blake." In his recommendations, Dr. Thorsett states that he believes the claimant "would be better served by physiatry referral back to Dr. Blake with emphasis on therapy and a return to work type hardening program if he feels this applicable." (Ex. P10; Testimony of Tracey Young).

On March 22, 2002, insurer received a March 14, 2002 medial arbiters report that found claimant's "chief complaint" to be "residual left carpal tunnel syndrome, status post carpal tunnel release, with numbness and tingling." (Ex. P11; Testimony of Tracey Young). The report refers to repeat nerve conduction studies performed "approximately one month ago." (Ex. P11-3).

On May 9, 2002, claimant's attorney sent a letter to the Workers' Compensation Division, Sanctions Unit (WCD), requesting that a penalty be assessed against insurer for failure to pay a medical service claim in a timely manner. (Ex. 1). In response to an inquiry from WCD regarding the penalty request, insurer notified WCD on June 4, 2002 that they had denied the requested billing because "Ms. Walling is now treating for a condition that is not related and/or an accepted portion of this claim. It was felt after initial review of the medical bill that it was unrelated to her accepted condition." (Ex. 2). On June 26, 2002, insurer notified WCD that the bill was paid on June 1, 2002, and further explained the delay in payment:

"There was a delay in payment of the bill as it appeared to be unrelated to

her accepted conditions. The chart notes from Dr. Thorsett did not arrive until March 14, 2002. At the time the studies were ordered, I was unaware why they were needed as Ms. Walling's claim had already been closed by Notice of Closure on December 5, 2001. At the time of claim closure Ms. Walling's attending physician was Dr. Farnell. The bill was paid on June 1, 2002 after review of Dr. Thorsett's chart notes. Please be advised that Ms. Walling is currently treating with Dr. Blake for a condition that is unrelated/and or not an accepted portion of this claim." (Ex. 4).

On July 10, 2002, WCD issued an order denying assessment of a penalty pursuant to ORS 656.262(11). The order found that it was "not apparent to the insurer that Dr. Blake's bill was related to the worker's accepted condition" and concluded that the delay in bill payment was reasonable. (Ex. 5). On July 13, 2002, insurer requested a contested case hearing on the matter. (Ex. 6).

CONCLUSIONS OF LAW

Claimant is entitled to a penalty, pursuant to ORS 656.262(11), for the insurer's unreasonable resistance to the payment of compensation.

REASONING

ORS 656.262(11) states that a penalty may be assessed when an insurer "unreasonably delays or unreasonably refuses to pay compensation." A denial is reasonable if at the time of the denial the insurer had a legitimate doubt. "Unreasonableness and 'legitimate doubt' are to be considered in the light of all the evidence available to the insurer." *Brown v. Argonaut Ins. Co.*, 93 Or App 588, 591 (1988)(citations omitted). This principle is applicable to a disapproval of medical bills. *Rickey A. Sutherland*, 1 WCSR 57 (1996).

Claimant points out that both the Workers' Compensation Board and the director have previously held that an insurer has an affirmative duty to investigate and cannot simply make a decision on evidence received. *Connie Circle*, 2 WCSR 536 (1997). Claimant argues that applying this principle to the facts of this case requires me to find that insurer should be assessed a penalty. I agree with claimant.

Insurer received Dr. Stoessel's chartnotes of January 2, 2002 on February 6, 2002 and Young either reviewed the document upon receipt or should be charged with knowledge of its content as insurer's employee. The chart notes showed that Dr. Stoessel had found a positive Tinel's sign and equivocal Phalen's test and explicitly refers to her status "post left carpal tunnel release." Insurer was aware that a Tinel's sign is often considered significant for possible carpal tunnel syndrome and that Dr. Stoessel's plan in the chart notes showed that he believed claimant should get an orthopedic consultation and then possibly go to physiatry. Insurer knew that nerve conduction studies are considered diagnostic tests. (Exs. 6, 7; Testimony of Tracey Young). As would be expected upon a review of Dr. Stoessel's note, the disputed nerve conduction study was performed on January 23, 2002 by Dr. Blake. (Ex. P7). The nerve conduction studies report and bill were received by insurer on January 31, 2002. (Ex. P9; Testimony of Tracey

Young). While insurer knew that the claim was closed and did not find any palliative care request or aggravation request, claimant correctly points out that no request is required for diagnostic treatment and that insurer had already received Dr. Stoessel's chartnotes indicating that further diagnostic studies were necessary in regard to the compensable left wrist claim. Despite the multiple indications present in both the disputed report and Dr. Stoessel's report that the diagnostic treatment was related to claimant's compensable injury, Insurer did not contact Drs. Stoessel or Blake in regard to the bill, or request any further information. (Testimony of Tracey Young).

As pointed out by the director in *Circle*, an insurer has an obligation to investigate its claim:

“[A]bsent a reasonable investigation, a wrong decision is unreasonable. At hearing, [insurer's claim adjuster] conceded she did not conduct any investigation. She did not even make a call to Dr. Ellison's office. [Insurer's claim adjuster] had the responsibility of investigating whether Dr. Ellison's billing was for compensable medical services, and she failed to conduct any investigation. Therefore, her action in denying payment of Dr. Ellison's bill was unreasonable.” *Connie Circle* at 538.

This case is indistinguishable from *Circle*. The claims adjuster conceded at hearing she conducted no investigation of the bill. A mere phone call to Dr. Blake's office would have cleared any doubts that the test were diagnostic of the accepted compensable condition. Insurer's reliance on the fact that the claim was closed is particularly unpersuasive in regard to diagnostic testing, which remains compensable following claim closure pursuant to ORS 656.245. A simple review of the insurer's own file would have revealed the January 2, 2002 note from Dr. Stoessel indicating that claimant continued to suffer pain that appeared to be related to her left carpal tunnel release. Under these circumstances, it was unreasonable for insurer to conclude without investigation that claimant was treating for a condition that was not related to the accepted portion of this claim or to deny payment “after initial review of the medical bill” without considering the other knowledge in insurer's possession at that time.

Insurer delayed paying Salem Rehabilitation Associates' bill in excess of 22 days; therefore, pursuant to the penalty matrix, insurer is assessed a penalty equal to 25% of Salem Rehabilitation Associates' bill. OAR 436-060-0017.

ATTORNEY FEES

Pursuant to OAR 436-001-0265(1), claimant's attorney has requested an attorney fee of \$4000. However, in a contested case involving a penalty under ORS 656.262(11)(a), I am statutorily constrained from granting the requested penalty. ORS 656.262(11)(a) provides:

“If the insurer or self-insured employer unreasonably delays or unreasonably refuses to pay compensation, or unreasonably

delays acceptance or denial of a claim, the insurer or self-insured employer shall be liable for an additional amount up to 25 percent of the amounts then due. Notwithstanding any other provisions of this chapter, the director shall have exclusive jurisdiction over proceedings regarding solely the assessment and payment of the additional amount described in this subsection. The entire additional amount shall be paid to the worker if the worker is not represented by an attorney. **If the worker is represented by an attorney, the worker shall be paid one-half the additional amount and the worker's attorney shall receive one-half the additional amount in lieu of an attorney fee.** The director's action and review thereof shall be subject to ORS 183.310 and 183.550 and such other procedural rules as the director may prescribe." [Emphasis added].

Accordingly, I find that the worker's attorney shall receive one-half the additional amount in lieu of an attorney fee.

ORDER

IT IS HEREBY ORDERED that:

The Compliance Section's Order Denying Assessment of a Penalty, dated July 10, 2002, is reversed. Insurer is assessed a penalty equal to 25% of Salem Rehabilitation Associates' bill; the worker's attorney shall receive one-half the additional amount in lieu of an attorney fee.

DATED this 23rd day of December, 2002.

Paul Vincent, Hearing Officer
Hearing Officer Panel