

In the ORS 656.245 Medical Services Dispute of

Monforton, Stephen P., Claimant

Contested Case No: H03-026

PROPOSED AND FINAL ORDER

August 13, 2003

TIMOTHY GROTHMAN, DC, Petitioner

FIRST NATIONAL INSURANCE COMPANY, Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

HISTORY OF THE CASE

Provider appeals an Administrative Order issued on February 7, 2003 by the Medical Review Unit (MRU) of the Workers' Compensation Division (WCD), Department of Consumer and Business Services (director or department). The matter was referred to the Hearing Officer Panel¹ on March 13, 2003. On May 15, 2003, Administrative Law Judge² (ALJ) Ella D. Johnson conducted a hearing in this matter. Petitioner Timothy Grothman, DC appeared *pro se*. Respondent First National Insurance Company of America³ (FNICA or insurer) was represented by attorney Neil Jones. Dr. Grothman testified on his own behalf. FNICA called Claims Examiner Lynette Jaumotte as a witness. The record closed on the date of hearing.

ISSUE

Whether insurer is liable for medical services provided by Timothy Grothman, DC from March 13, 2001 through August 7, 2002.

EVIDENTIARY RULINGS

WCD Exhibits 1 through 36 were admitted into the record without objection.

FINDINGS OF FACT

(1) On April 9, 1992, claimant suffered a compensable injury in a work-related head on automobile accident. (Ex. 28; test. of Grothman.) His claim was subsequently accepted for left cervical strain and then closed by Notice of Closure dated November 25, 1992 awarding

¹ House Bill 2526 changed the name of the Hearing Officer Panel to the Office of Administrative Hearings (OAH), which became effective with the Governor's signature on May 22, 2003.

² HB 2526 also changed the statutory title of the presiding officer from hearing officer to OAH Administrative Law Judge.

³ FNIC is a subsidiary of SAFECO Corporation. (Test. of Jaumotte.)

temporary disability and five percent permanent partial disability. (Exs. 1, 25, 34.)

(2) On November 11, 1998, Dr. Grothman with Health Within Chiropractic Center requested that insurer authorize chiropractic care for claimant who now lived in Idaho. Dr. Grothman's office is located in Post Falls, Idaho. On January 20, 1999, insurer approved Dr. Grothman's request and authorized chiropractic care three times a week for four weeks, two times a week for four weeks and one time a week for four weeks. The treatment was to start on September 15, 1998 and end on February 15, 1999. Insurer noted that, if claimant's condition changed during this period or treatment outside the period authorized was required, Dr. Grothman was required to submit a new treatment plan. (Ex. 2; test. of Grothman.)

(3) Dr. Grothman subsequently submitted a new treatment plan, which insurer authorized on March 9, 1999. The new treatment plan was for 16 weeks of chiropractic care to begin on February 16, 1999 and end on June 9, 1999. (Ex. 3.) Dr. Grothman's billings were timely submitted to FNICA on a monthly basis and approved by Accumed, a third party Idaho workers' compensation review company. (Ex. 7; test. of Grothman.)

(4) On July 8, 1999, Dr. Grothman notified insurer that claimant was scheduled to treat two times a month due to ongoing aches and spasm in the left upper back and neck. Insurer directed Dr. Grothman to submit a palliative care request. (Ex. 4.) On July 28, 2000, Dr. Grothman submitted a palliative care request. (Ex. 5.) On September 11, 2000, insurer authorized chiropractic care bi-weekly from September 9, 2000 to March 1, 2001. (Ex. 6.)

(5) Dr. Grothman treated claimant every two weeks from March 13, 2001 to August 2, 2002. (Ex. 7.) On August 17, 2001, Dr. Grothman submitted an "Attending Physician's Palliative Care Request" Form proposing treatment one time per week for two to three weeks to address claimant's recent flare-up of neck, shoulder and rib pain and then two times a month for four to six months. Dr. Grothman assumed that the request had been approved since all of the other requests had been approved. Ms. Jaumotte was difficult to contact and did not return telephone calls from Dr. Grothman or his office staff. (Ex. 8; test. of Grothman.)

(6) On January 1, 2002, Dr. Grothman spoke to FNICA Claims Examiner Lynette Jaumotte by telephone and explained claimant's current condition. In a note memorializing the conversation authored by Dr. Grothman contemporaneous with the telephone conversation, Dr. Grothman wrote that Ms. Jaumotte assured him that all of his billings would be paid until the independent medical examiner's (IME's) report had been received.⁴ Ms. Jaumotte stated that

⁴ Ms. Jaumotte testified that she never promised to pay Dr. Grothman's bills. She stated that it was not her regular practice to tell someone that bills would or would not be paid before she received the IME report. She stated that she apologized to Dr. Grothman for being rude to him on May 7, 2002 and stated at hearing that being rude was also not her regular practice. She refuted Dr. Grothman's statement that she wanted to get the IME to better manage claimant's claim. She testified that she told him that she needed the IME to determine whether the treatment was for the compensable condition. However, I do not find Ms. Jaumotte's testimony to be credible in light of Dr. Grothman's note that memorialized the substance of and was written contemporaneously with the January 1, 2002 telephone conversation and her failure to document the conversation.

purpose of the IME was to assist her in better managing claimant's claim. Dr. Grothman relied on Ms. Jaumotte's promise to pay his billings and continued to treat claimant. If he had been told that the palliative care was not authorized or that his billings would not be paid, he would not have continued to treat claimant with the expectation that FNICA would pay the billings. (Ex. 9; test. of Grothman.)

(7) On December 4, 2001, Ms. Jaumotte scheduled an IME appointment for claimant with J. Nicholas Fax, MD (Orthopedist) for January 11, 2002 in Ontario, Oregon (Ex. 10.) Claimant requested that the appointment be conducted in location closer to his home in Idaho. He had some concerns about his ability to travel to the IME because he had no money for gas and lodging, would be missing work and icy condition of the roads. Ms. Jaumotte refused to reschedule the appointment with an out-of-state IME in Idaho because she opined that the out-of-state IME's did not understand Oregon workers' compensation law, but did offer to pay for claimant's mileage and expenses. Because claimant did not quickly respond to her request, Ms. Jaumotte rescheduled the IME with Dr. Fax for March 11, 2002. Claimant was unable to attend the IME due to a new unrelated workers' compensation injury to his spine, which occurred on March 4, 2002. Ms. Jaumotte arranged for claimant to fly from his home in Idaho to Portland, Oregon and rescheduled the IME for May 2, 2002 with John Thompson, MD (Orthopedic Surgery) with Impartial Medical Opinions, Inc. in Lake Oswego. (Exs. 11-16, 19-20.)

(8) By letter dated April 1, 2002, Dr. Grothman notified Ms. Jaumotte that, although she had assured him that the billings from March 13, 2001 to the present would be paid, none of the bills had been paid. He clarified that the chiropractic treatment he rendered to claimant was directed to claimant's upper back, neck and shoulder which were injured as a result of the 1992 automobile accident. (Ex. 19.)

(9) On May 2, 2002, claimant was examined by Dr. Thompson who noted that claimant had no real objective findings on examination except a very minor limitation of motion of his cervical spine and diagnosed cervical strain by history. Dr. Thompson also concurred with a 1992 IME which diagnosed claimant with chronic pain syndrome and noted functional involvement in claimant's pain complaints. Dr. Thompson disagreed with Dr. Grothman's assessment that the 1992 injury caused a scarring to the cervical, thoracic spine, ribs and left shoulder and opined that there did not appear to be any substantive evidence to support Dr. Grothman's assessment that claimant's symptoms were the direct result of the 1992 injury. He further opined that claimant's need for treatment was due to his chronic pain syndrome, migraine diathesis, and functional overlay which were not related to the 1992 injury. (Ex. 22.) Ms. Jaumotte sent Dr. Grothman a copy of Dr. Thompson's IME report on May 21, 2002. He did not concur with Dr. Thompson's opinion. Dr. Grothman wrote a lengthy response to Dr. Thompson's opinion but his letter went unanswered by FNICA. (Exs. 23, 24; test. of Grothman.)

(10) In a note memorializing a conversation with Ms. Jaumotte on May 7, 2002, Dr. Grothman wrote that Ms. Jaumotte was very irritated with claimant for missing his IME appointment and some rude e-mails he had sent her and that she was going to request that the state cancel all future benefits. Dr. Grothman noted that he asked her during the conversation to take care of 2001 billings and "pend" the billings from 2002 until the issues were resolved and

that Ms. Jaumotte replied that she would get back to him the next day. She did not say that the billings would not be paid. He later noted that he had not heard from her and realized that there was a greater risk that he would not be paid. (Ex. 9; test. of Grothman.)

(11) On June 11, 2002, FNICA issued a current condition denial. Dr. Grothman was not copied on the insurer's denial.⁵ (Ex. 25.) Claimant did not appeal the denial and it became final by operation of law. Sixty-one days after the denial, Ms. Jaumotte notified Dr. Grothman by letter dated August 12, 2002 that claimant's claim had been denied and not appealed and directed Dr. Grothman to seek payment for his services from March 13, 2001 through August 7, 2002 from claimant or claimant's private health care provider. (Ex. 26.) On September 23, 2002, Dr. Grothman requested review of the medical services dispute with FNICA. (Exs. 28, 29.) Thereafter, FNICA claimed that the treatment provided by Dr. Grothman was excessive, inappropriate, ineffectual, or in violation of the medical service rules. (Ex. 33.)

(12) If Dr. Grothman had known that the compensability of the current condition claim was at issue, he still would have continued to treat claimant but would have made arrangements for claimant to pay for the treatment. After receiving the denial, Dr. Grothman continued to treat claimant and claimant paid for the chiropractic care himself. (Test. of Grothman.)

CONCLUSION OF LAW

Insurer is liable for medical services provided by Dr. Grothman from March 13, 2001 through May 21, 2002.

OPINION

This dispute arises under ORS 656.245, and therefore, jurisdiction lies with the director. ORS 656.245(6) (c) (J). The statute states that the decision of the department is subject to a contested case and review provisions of ORS 183.310 to 183.550. Matters reviewed under the Administrative Procedures act are reviewed *de novo*. OAR 436-001-0225(1). *See Archie M. Ulbrich*, 2 WCSR 152 (1997). The burden of proving a fact or position falls upon the proponent. ORS 183.450(2). As petitioner, claimant bears the burden of proving by a preponderance of evidence that the administrative order is incorrect. *Cook v. Employment Div.*, 47 Or 437 (1982) (In the absence of legislation adopting a different standard, the standard of proof in an administrative hearing is preponderance of evidence).

⁵ Ms. Jaumotte testified that she copied Dr. Grothman on the June 11, 2002 current condition denial but Dr. Grothman testified that his office never received a copy of the denial. The copy of the denial in the record does not indicate that a copy was sent to Dr. Grothman. In addition, Ms. Jaumotte also stated that she called Dr. Grothman to tell him that the claim had been denied and claimant had 60 days to appeal the denial. However, Dr. Grothman testified that he was not aware that the claim had been denied until after the 60 day appeal period had run. Dr. Grothman's testimony is consistent with the handwritten notation on a copy of Ms. Jaumotte's August 12, 2002 letter informing him that claimant had not appealed the denial. (Ex. 27.)

In the administrative order, MRU determined that FNICA was not liable for payment of the chiropractic care provided by Dr. Grothman from March 13, 2001 through August 7, 2002 because Dr. Grothman was not qualified to be an attending physician beyond the 30 day or 12 visit limit. MRU also determined that the care did not meet the definition of palliative care because claimant was medically stationary and his need for treatment was not the result of an acute exacerbation of his compensable condition.

Dr. Grothman argues that FNICA should be required to pay him for the chiropractic care rendered to claimant because Ms. Jaumotte misrepresented or lead him to believe that the billings for the chiropractic care from March 2001 until she received the IME report would be paid. He further argues that he relied on her representations in continuing to treat claimant over a period of a year and a half. Notwithstanding the limitations on palliative care and qualifications for attending physician, I construe Dr. Grothman's argument to be that FNICA should be equitably estopped from denying payment.

The doctrine of equitable estoppel "is that a person may be precluded by his act or conduct *** when it was his duty to speak, from asserting a right which he otherwise would have had." *Meier & Frank v. Smith-Sanders*, 115 Or App 159, 163 (1992), *rev den* 316 Or 142 (1993), quoting *Marshall v. Wilson*, 175 Or 506, 518 (1944). Estoppel only protects a person who materially changes a position in reliance on another's act or representation. *SAIF Corp. v. Jensen*, 183 Or App 439 (2002). Moreover, the doctrine of equitable estoppel is applicable when conduct is misleading, even if it is innocent. *Swift & McCormick Metal Processors Association v. Durbin*, 117 Or App 605 (1993). The doctrine of equitable estoppel is properly applied in the workers' compensation area. *Meier & Frank, supra*.

WCD has previously applied this doctrine in [Jean M. Lewis](#), 2 WCSR 33 (1997), stating:

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Lewis at 34.

In *Lewis*, WCD found that because the insurer had made representations to the treating physician that his bills would be paid, equitable estoppel prevented the insurer from raising failure to meet the ancillary treatment rules as a defense to payment. This case is similar to *Lewis*. In this case, insurer had repeated notice that claimant was receiving chiropractic treatment from Dr. Grothman beyond the 30 day or 12 visit limit. In addition, insurer's claims examiner, Ms. Jaumotte, assured him that all of his billings would be paid until she received the

IME report.⁶ Ms. Jaumotte also misrepresented to Dr. Grothman that the purpose of the IME was to assist her in better managing claimant's claim. Dr. Grothman relied on Ms. Jaumotte's misrepresentations and promise to pay his billings and continued to treat claimant.

At hearing, FNICA argued that equitable estoppel is inapplicable here because Dr. Grothman did not materially change his position in reliance on the Ms. Jaumotte's alleged misrepresentations. In support of its argument FNICA relies on *SAIF Corporation v. Jensen*, *supra*. There, the court found that there was no evidence that the insurer ever represented that it would pay the provider's bills and that the provider did not materially change his position in reliance on the insurer's silence. 183 Or App at 446-47. The facts in this case are inapposite to the *Jensen* case. Here, there was an express representation by Ms. Jaumotte that Dr. Grothman's bills would be paid and Dr. Grothman materially changed his position because, although he would still have continued to treat claimant but not with the expectation that FNICA would pay the billings and not without making arrangements with claimant to pay his own bills. Consequently, I conclude that FNICA is equitably estopped from denying payment of the billings. However, I find that because Dr. Grothman was notified that the IME report had been received by Ms. Jaumotte on May 21, 2002, FNICA is liable only for the billings from March 13, 2001 through May 21, 2002.

ORDER

IT IS HEREBY ORDERED that:

The Administrative Order dated February 7, 2003 is reversed. FNICA is liable for payment of Dr. Grothman's billings from March 13, 2001 through May 21, 2002.

DATED this 13th day of August 2002.

Ella D. Johnson
Administrative Law Judge
Office of Administrative Hearings

⁶ As noted above Ms. Jaumotte denied that she told Dr. Grothman that his bills would be paid. However, for the reasons stated in FN 4, I do not find her testimony to be credible in light of the contemporaneous proof offered by Dr. Grothman.