
In the Matter of the ORS 656.248 Medical Fee Dispute of

Reynolds, Scott R., Claimant

Contested Case No: H04-022

PROPOSED & FINAL ORDER

May 17, 2004

THE HALTON COMPANY, Petitioner

SCOTT R. REYNOLDS, Respondent

Before Catherine P. Coburn, Administrative Law Judge, Office of Administrative Hearings

Insurer appeals an administrative order issued on January 9, 2004 by the Medical review Unit (MRU) of the Workers' Compensation Division, Department of Consumer and Business Services (department or director). On March 2, 2004, WCD referred the matter to the Office of Administrative Hearings (OAH). On April 14, 2004, Administrative Law Judge Catherine P. Coburn conducted a contested case hearing. Petitioner, The Halton Company (insurer) was represented by attorney Brad G. Garber. Respondent Scott R. Reynolds (claimant) was represented by attorney Gary Borden.¹ No witnesses testified and the record closed on the date of hearing.

ISSUES

(1) Whether insurer is liable for a deposition fee of \$3,600 for the first hour, an hourly fee of \$1,320 per hour thereafter and pre-deposition preparation billed at \$1,100 per hour requested by V. James Makker, MD.

(2) If not, what is a reasonable deposition fee pursuant to OAR Chap. 436, Div 009?

EVIDENTIARY RULINGS

Workers' Compensation Division (WCD) Exhibits 1 through 10 were received without objection.

FINDINGS OF FACT

(1) On May 5, 1998, claimant suffered a compensable injury by striking his head on an open truck door. Insurer accepted a right forehead laceration. Insurer subsequently denied compensability of a C5-6 disc herniation and that issue is currently pending in litigation. Insurer requested a deposition of attending physician, Dr. Makker, to explore the etiology of the C5-6 disc condition. The deposition is planned to take place in Dr. Makker's office but has not occurred to date. (Stipulation of the parties.)

¹ Insurer objects to claimant's appearance at hearing and asserts that he lacks standing since claimant's attorney does not represent V. James Makker, MD, whose fee is at issue. However, inasmuch as the case involves payment to claimant's attending physician, I find that claimant has an interest in the outcome and he appears as an interested party. OAR 137-003-0535.

(2) Dr. Makker is a Board-certified neurosurgeon who practices in Portland, Oregon. He requested pre-payment of \$3,600 for the first hour, an hourly fee of \$1,320 per hour thereafter in addition to pre-deposition preparation billed at \$1,100 per hour. Dr. Makker noted that the fee amount took into account travel and wait time and the risk of nonpayment. (Ex. 10.)

(3) Board-certified neurosurgeon Bradley Bergquist, MD, who practices in Portland, Oregon, charges \$500 for the first hour of an in-office deposition. (Ex. 1.)

(4) Board-certified neurosurgeon William Smith, MD, who practices in Portland, Oregon, charges \$700 for the first hour of an in-office deposition. (Ex. 1.)

(5) Board-certified neurosurgeon Thomas Rosenbaum, MD, who practices in Portland, Oregon, charges \$800 for the first hour of an in-office deposition. (Ex. 1.)

(6) Board-certified neurosurgeon Michael Liu, MD, who practices in Salem, Oregon, charges \$1,200 per hour for an in-office deposition. (Ex. 6.)

(7) The Neurosurgery Group in Eugene, Oregon charges \$1,000 per hour for an in-office deposition. (Ex. 7-1.)

(8) Oregon Neurosurgery Clinic in Eugene, Oregon charges \$750 per hour for an in-office deposition. (Ex. 7-2.)

(9) The average deposition fee charged by Board-certified neurologists in Oregon is \$825 per hour. ($\$500 + \$700 + \$800 + \$1,200 + \$1,000 + \750 divided by 6 = \$1,600). (Exs. 1, 6, 7-1 and 7-2.)

CONCLUSIONS OF LAW

(1) Insurer is not liable for a deposition fee of \$3,600 for the first hour, an hourly fee of \$1,320 per hour thereafter and pre-deposition preparation billed at \$1,100 per hour requested by Dr. Makker.

(2) Dr. Makker is entitled to a deposition fee of \$825 per hour, including preparation time.

OPINION

This case presents a medical fee dispute concerning the amount of a physician's deposition fee. Inasmuch as the case arises under ORS 656.248, jurisdiction lies with the director. ORS 656.248(12). The statute does not specify a standard of review, and therefore, I review *de novo*. *Archie M. Ulbrich*, 2 WCSR 152 (1997); OAR 436-001-0225(2).

ORS 656.245 requires a self-insured employer to provide medical services for a compensable medical condition for so long as the nature of the injury or the process of recovery requires. By enacting ORS 656.248(1), the legislature delegated to the director the authority to

promulgate administrative rules listing fee schedules for medical services to injured workers. ORS 656.248(1) provides in pertinent part:

The Director of the Department of Consumer and Business Services, in compliance with ORS 183.310 to 183.550 and 656.794, shall promulgate rules for developing and publishing fee schedules for medical services. These schedules shall represent the reimbursement **generally received** for the services provided. Where applicable, and to the extent the director determines practicable, these fee schedules shall be based upon any one or all of the following:

(b) The average rates of fee schedules of the Oregon health insurance industry;

(d) A commonly used and accepted medical service fee schedule;

(e) The actual cost of providing medical services;

(4) If no fee has been established for a given service or procedure the director may, in compliance with ORS 183.310 to 183.550 and 656.794, promulgate **a reasonable rate**, which shall be the same within any given area for all primary health care providers to be paid for that service or procedure.

(Emphasis added.)

OAR 436-009-0040(1) provides:

Medical fees shall be paid at the providers usual and customary fee or in accordance with the fee schedule **whichever is less**. ***** Where there is no maximum payment established by the fee schedule, an insurer may challenge the reasonableness of a provider's billing on a case-by-case basis by asking the director to review the billing under OAR 436-009-0008. If the director determines the amount billed is unreasonable, the director may establish a different fee to be paid to the provider based on at least one, but not limited to, the following: reasonableness, the usual and customary fees of similar providers the services provided in the specific case, fees for similar services in similar geographic regions, and any extenuating circumstances.

(Emphasis added.)

Payment according to the fee schedule is determined by multiplying the assigned relative value unit by the applicable conversion factor. Where, as here, the code is designated by an RVU of “0.00”, fee is paid at the provider’s usual and customary rate. OAR 436-009-0040(3).

OAR 436-009-0070(6) specifically addresses deposition fees and provides:

The fee for a deposition shall be billed under OSC-D0002. This code should include time for preparation, travel and deposition. **Payment of the hourly rate may be limited to a customary fee charged by similar providers.**

(Emphasis added.)

MRU determined that insurer was liable for deposition fees at the rate Dr. Makker requested. Noting that the language of OAR 436-009-0070(6) was discretionary, MRU declined to limit the fee to a customary fee charged by similar medical providers. MRU was persuaded that the fee was reasonable because it took into account Dr. Makker’s travel time and the risk of nonpayment. Insurer contends that MRU abused its discretion by declining to limit the deposition fee. In contrast, claimant contends that the administrative order is correct and should be affirmed.

Abuse of discretion exists when an agency “exercises its discretion to an end or purpose not justified by, and clearly against, reason and evidence.” *Far West Landscaping v. Modern Merchandising*, 287 Or 653, 664 (1979); *Casciato v. Oregon Liquor Control Commission*, 181 Or 707, 717 (1947). Here, MRU declined to limit the deposition fee to the customary fee charged by similar providers because Dr. Makker took into account travel time and the risk of nonpayment. MRU approved the deposition fee requested by Dr. Makker even though it is three times the fee charged by other Board-certified neurologists in Oregon as reflected in the record. I find that this constituted abuse of discretion. Here, travel time and risk of nonpayment are not extenuating circumstances that would justify a fee that exceeds the customary fee of similar providers. First, the deposition was scheduled to take place in Dr. Makker’s office obviating the need for any travel fee. Next, every medical provider faces the risk of nonpayment in the event that the deposition is cancelled on short notice. Claimant argues that Dr. Makker, who is in private practice, is entitled to a fee exceeding that of a physician whose practice consists exclusively of conducting independent medical examinations. However, physicians in both positions are similarly situated *viz.*, if a deposition is cancelled on short notice, they are unable to schedule a patient appointment for the time slot. Furthermore, potential cancellation is properly addressed by a cancellation fee that is commensurate with the customary fee charged by similar providers rather than by an exorbitant hourly rate.

Under OAR 436-009-0040(1), where the director finds an amount billed to be unreasonable, it is authorized to fix a different amount considering reasonableness, the usual and customary fees of similar providers, the services provided in the specific case, fees for similar

services in similar geographic regions, and any extenuating circumstances. Here, I find that the deposition fees requested by Dr. Makker are unreasonable as they are three times that of the highest fee charged by any similar provider. Considering the factors listed in OAR 436-009-0040(1) and based on the record, I find that a reasonable fee is \$825 per hour for an in-office deposition, including pre-deposition preparation time². This is based on an average of the usual and customary fees charged by Board-certified neurologists in Oregon. Accordingly, I reverse.

ATTORNEY FEES

Claimant has not prevailed in a contested case hearing and is, therefore, entitled to no attorney fee. ORS 656.385(1).

ORDER

IT IS HEREBY ORDERED that:

The Administrative Order dated January 9, 2004 is reversed.

² As attending physician, Dr. Makker is familiar with claimant's medical condition. Consequently, his pre-deposition preparation time should be minimal.