
In the ORS 656.245 Medical Services Dispute of

Todd B. Beatty, Claimant

Contested Case No: 06-003H

PROPOSED & FINAL ORDER

December 6, 2006

SAIF CORPORATION, Petitioner

BI-MART PHARMACY, Respondent

Before Keith Kekauoha, Administrative Law Judge

Hearing was scheduled for September 19, 2006 before Keith Kekauoha, Administrative Law Judge (ALJ). However, the parties agreed to submit this matter on the documentary record, and the hearing was therefore canceled. Claimant is represented by his attorney, James Dodge. Employer, Pepsi Cola Bottling Company, and its insurer, SAIF Corporation, are represented by their attorney, Chad Kosieracki. Exhibits 1-18 were admitted into evidence. After receipt of written closing arguments, the record closed on November 7, 2006.¹

ISSUE

Medical Services. SAIF appealed the Workers' Compensation Division's Medical Review Unit's (MRU's) Administrative Order that ordered SAIF to pay medical bills for medications prescribed for the compensable injury.

SUMMARY OF FACTS

MRU made the following findings of facts in its order.²

Claimant experienced back pain while at work and sought medical treatment. He came under the care of Dr. Peterson, who prescribed medications for the back condition. Bi-Mart Pharmacy dispensed the prescription medications in December 2003 and February 2004.

Claimant was referred to Dr. Zimmerman, who diagnosed L4-5 and L5-S1 disc herniations and recommended surgery.

¹ After SAIF filed its Reply Closing Argument, claimant's attorney filed an additional argument by letter dated November 8, 2006. SAIF objected to the letter and moved to strike it on the grounds that claimant had already filed his closing argument (by letter dated October 30, 2006) and is not entitled to submit additional argument. SAIF's motion is granted. Under the briefing schedule established by my letter dated September 14, 2006, SAIF, as the party requesting the hearing in this matter, has the right to file the final argument in this matter; consequently, no additional argument from claimant is permitted.

² OAR 436-001-0225, promulgated by the Workers' Compensation Division, prescribes the standard of review governing an ALJ's review of an appeal of an MRU order in a proceeding under ORS 656.245. Subsection (2) of the rule provides that "[i]n medical service and medical treatment disputes under ORS 656.245 * * * the [ALJ] may modify the director's order only if it is not supported by substantial evidence in the record or if it reflects an error of law." The Court of Appeals has held that under the "substantial evidence" standard of review, an ALJ is not permitted to render findings of fact supplementing the factual findings made by MRU. *Liberty Northwest Ins. Corp. v. Kraft*, 205 Or App 59, 62-63 (2006).

SAIF denied the claim, and claimant appealed the denial.

In April 2004, Dr. Zimmerman performed L4-5 and L5-S1 laminotomies and microdiscectomies. Claimant subsequently experienced symptom relief.

On January 17, 2005, following litigation, SAIF accepted the claim for disabling herniated L5-S1 disc.

On February 23, 2005, Bi-Mart faxed an invoice for the December 2003 and February 2004 prescriptions to SAIF. SAIF refused to pay for the prescriptions as they were billed late.

Bi-Mart requested administrative review of SAIF's refusal to pay for the prescriptions.

On December 27, 2005, MRU issued an Administrative Order that ordered SAIF to pay Bi-Mart for the prescriptions.

CONCLUSIONS OF LAW AND OPINION

SAIF contends that MRU erred in finding it liable for the prescriptions, arguing that the prescriptions were billed late to SAIF and are therefore subject to discounts under OAR 436-009-0010(5). Claimant responds that the bills were timely submitted to SAIF after it accepted the claim on January 17, 2005 and that there was no requirement to submit the bills to SAIF before claim acceptance. Based on my review of the record, I conclude that the bills were late but that SAIF remains liable for the prescriptions.

SAIF relies on *former* OAR 436-009-0010(5) (WCD Admin. Order 05-051),³ which provides:

“Billings for treatment shall be rendered at reasonable intervals not to exceed 60 days following treatment. Late billings may be subject to discounts, not to exceed 10 percent for each 30 day period or fraction thereof, beyond 60 days, provided the medical provider has notice or knowledge of the responsible workers' compensation insurer or processing agent.”

SAIF does not dispute that the prescription medications at issue in this case were rendered for a condition caused in material part by claimant's compensable injury. *See* ORS 656.245(1). The only disputed issue is whether the prescription medications were billed late to SAIF and are subject to discounts under *former* OAR 436-009-0010(5).

It is undisputed that the prescription medications were dispensed to claimant in December 2003 and February 2004 and that the bills for those medications were not submitted to SAIF until

³ OAR 436-009-0010(5) was amended by WCD Administrative Order 06-052, which became effective on April 1, 2006. The amended rule applies only to services rendered on or after the effective date of the rule. *See* OAR 436-009-0003. Because the services at issue in this case were rendered before the effective date of the amended rule, the amended rule does not apply in this case.

February 23, 2005, more than a year after the medications were dispensed.

MRU did not address *former* OAR 436-009-0010(5) in the Administrative Order. Rather, MRU cited OAR 436-009-0030(4), which prescribes the time periods within which payment of medical bills must be made. Reasoning that the medical bills did not become payable until the claim was accepted on January 17, 2005, MRU concluded that Bi-Mart's submission of the bills after claim acceptance was timely.

SAIF correctly asserts, however, that *former* OAR 436-009-0010(5) unambiguously provides that billings for treatment "shall" be rendered at reasonable intervals not to exceed 60 days following treatment. In other words, the rule requires that billings for treatment, including prescription medications, be submitted to the insurer within 60 days after treatment.

SAIF also correctly asserts that the rule contains no language making the 60-day billing requirement contingent on the claim being in accepted status. It would therefore be improper to insert such a qualification into the rule. *See* ORS 174.010 (setting forth rule of statutory construction "not to insert what has been omitted, or to omit what has been inserted"); *Perlenfein and Perlenfein*, 316 Or 16, 22-23 (1993); *Liberty Northwest Ins. Corp. v. Jensen*, 150 Or App 548, 552 (1997) (in construing an administrative rule, courts may not omit what has been inserted or insert what has been omitted).

The billings in this case were submitted significantly more than 60 days after treatment, in violation of the first sentence of OAR 436-009-0010(5). However, the inquiry does not end here. The next question is whether the late billings may be discounted under the rule. Discounts are authorized under the second sentence of the rule, which provides that late billings may be discounted up to 10 percent for each 30 day period, or fraction thereof, beyond the 60-day period allowed for timely billing, "provided the medical provider has notice or knowledge of the responsible workers' compensation insurer or processing agent."

Thus, discounts are expressly made contingent on the medical provider having notice or knowledge of the responsible workers' compensation insurer or processing agent. SAIF was the workers' compensation insurer responsible for processing the medical billings in this case. However, there is no evidence in this record to establish that Bi-Mart had any notice or knowledge that SAIF was the responsible insurer more than 30 days before the billings were submitted to SAIF on February 23, 2005.

There is, on the other hand, some evidence in the record to suggest that Bi-Mart did not know the identity of the responsible insurer. In a July 12, 2005 letter to a representative at MRU, SAIF's claims adjuster, Bruce Fletcher, wrote:

"When the [Bi-Mart] pharmacy called [in response to SAIF's refusal to pay for the prescriptions] they stated that [claimant] indicated that he did not know his claim number or who his carrier was. This was not the case as all correspondence that went to [claimant] clearly had the claim number and carrier on the documents. It appears that you will need to contact the Pharmacy

and clarify what the worker told them and if this was the case decide what action to take on the part of the Pharmacy or

[claimant] being ultimately responsible for the bills.” (Ex. 11).

According to this letter, Bi-Mart defended its late billing by asserting that it was told by claimant that he did not know the identity of the responsible insurer. Although Mr. Fletcher may be correct in asserting that claimant in fact knew SAIF was the responsible insurer, there is still no evidence to establish that Bi-Mart also knew, or had notice, of this fact.

In the absence of evidence establishing that Bi-Mart had notice or knowledge that SAIF was the responsible insurer more than 30 days before the billings were submitted on February 23, 2005, I conclude that a discount was not authorized under *former* OAR 436-009-0010(5). Accordingly, MRU’s Administrative Order shall be affirmed.

Claimant’s attorney is entitled to an insurer-paid attorney fee for prevailing in this matter. ORS 656.385(1). After considering the factors in ORS 656.385(1) and OAR 436-001-0265(1) and (2) and the matrix in OAR 436-001-0265(1)(b), giving primary consideration to the results achieved (\$320 in prescription bills) and to the time devoted to the case (as represented by the record, which included no in-person hearing and the submission of a one-page argument by claimant’s attorney), I find that a reasonable attorney fee is \$200.

ORDER

1. SAIF’s request for relief is denied, and MRU’s Administrative Order dated December 27, 2005 is affirmed.
2. Claimant’s attorney is awarded an assessed attorney fee of \$200, to be paid by SAIF.