
In the ORS 656.245 Medical Fee Dispute of

John Wensorski, Claimant

Contested Case No: 06-173H

PROPOSED & FINAL ORDER

April 25, 2006

RLC INDUSTRIES CO., Petitioner

JOHN WENSORSKI, Respondent

Before G Duff Bloom, Administrative Law Judge, Workers' Compensation Board

Hearing convened from employer's request for hearing and the record closed in Medford, Oregon on March 31, 2006 before Administrative Law Judge Bloom. The claimant was not present and is unrepresented by counsel.¹ The self-insured employer, Roseburg Forest Products, was represented by Attorney R Ray Heysell. The record consists of Exhibits 1 through 12, including Exhibits 13 and 14.² ALJ Bloom of WCB recorded.

ISSUE

Medical fee dispute.

EVIDENTIARY ISSUE

Employer offered, and at hearing, I admitted, Exhibits 13 and 14. In the majority of medical-issue cases referred by the Director to Board ALJs for review, the ALJ is strictly limited to a "substantial evidence" review of the extant record, with no new evidence allowed at the Board hearing. *See generally* OAR 436-001-0225; *Liberty Northwest v Kraft*, 205 Or App ___ (4/5/06).

Nevertheless, OAR 436-001-0225(1) provides:

"Except for the matters listed in sections (2) and (3),³ the administrative law judge reviews all matters within the director's jurisdiction *de novo*, unless otherwise provided by statute or administrative rule." *See also Archie M. Ulrich*, 2 WCSR 152, 153 (1997).

¹ Because claimant is unrepresented, he may wish to consult the Workers' Compensation Ombudsman, whose job it is to assist injured workers in such matters. He may contact the Workers' Compensation Ombudsman, free of charge, at 1-800-927-1271, or write to:

WORKERS' COMPENSATION OMBUDSMAN
DEPT OF CONSUMER & BUSINESS SERVICES
PO BOX 14480
SALEM, OR 97309-0405

² *See* "Evidentiary Issue" discussion.

³ Subsections concerning issues unrelated to this litigation.

Accordingly, I admit and rely on employer's Exhibits 13 and 14 in deciding this dispute.

FINDINGS OF FACT

Claimant, a 55-year-old gentleman, injured his right elbow in the course and scope of his employment on or about November 5, 2004. (See Exs 1, 2).

Employer accepted a nondisabling right lateral epicondylitis condition claim. (Ex 3).

On April 27, 2005, employer directed claimant to a May 11, 2005 examination with orthopedic surgeon Brian Hayes, MD. (Ex 4).

On May 11, 2005 Dr Hayes performed an examination and prepared a report. (Ex 5).

Dr Hayes billed \$500 for his May 11, 2005 examination and report, and employer reimbursed Dr Hayes \$199.93 for the same. (See Exs 6, 7, 8, 10).

Dr Hayes requested MRU of WCD intervene and order employer to remit the \$300.07 difference between what it billed for Dr Hayes's May 11, 2005 services and what employer paid him. (Ex 7).

On November 4, 2005, MRU issued an Administrative Order ordering employer to submit to Dr Hayes the disputed \$300.07. (Ex 11). MRU relied solely on Dr Hayes's assertion that he performed services consistent with CPT® 2005 99455 and an application of the corresponding RVU conversion factor. (Exs 7, 11-1 through 11-2).

Employer requested this hearing contesting MRU's November 4, 2005 order.

CONCLUSIONS AND OPINION

This hearing convened March 31, 2006, and the medical service in dispute was provided May 1, 2005; accordingly I decide the parties' dispute using the Director's rules set forth in WCD Administrative Orders 06-050 (hearing rules) and 05-051 (medical service fee rules). OAR 436-001-0003; *former* OAR 436-009-003 (WCD Admin Order 06-051).

The burden of proving a fact or position rests with the proponent. ORS 183.450(2); *Salem Decorating v. National Council on Comp. Ins.*, 116 Or App 170 (1992), *rev den* 315 Or 643 (1993). As the proponent of its position, employer bears the burden of proving by a preponderance of evidence that MRU's administrative order is incorrect. *Harris v. SAIF*, 292 Or 683 (1982) (general rule regarding allocation of burden of proof is that burden is on the proponent of the fact or position.); *Cook v. Employment Div.*, 47 Or 437 (1982) (in the absence of legislation adopting a different standard of proof, the standard in an administrative hearing is preponderance of evidence.) Proof by a preponderance of evidence means that the fact finder is persuaded that the facts asserted are more likely true than false. *Riley Hill General Contractors v. Tandy Corp.*, 303 Or 390 (1989).

Employer argues that MRU erred in holding employer improperly unilaterally reduced a medical reimbursement to Brain Hayes, MD for his May 11, 2005 closing examination. For the following reasons, I agree with employer.

MRU determined that employer improperly reduced Dr Hayes's billing because of the interplay between (a) the CPT® billing codes set forth in OAR 436-009-0004(3)⁴ and OAR 436-009-0010(4),⁵ and (b) the relative value unit (RVU) fee-schedule calculation set forth in OAR 436-009-0004(1)⁶. (Ex 11-2).

Employer agrees MRU utilized the correct administrative rules; the kernel of employer's argument is that MRU used an incorrect CPT® code and RVU conversion factor in arriving at an appropriate fee. Employer's argument is persuasive.

Employer directed claimant to Dr Hayes's office for the purposes of an examination to "evaluate[claimant's] claim for any residual impairment." (Ex 4).

On May 11, 2005, claimant attended that examination. (Ex 5). Dr Hayes purported to address his report to an April 28, 2005 directed inquiry submitted by employer, but that inquiry, if it exists, is not in the record. *Id.* The May 11, 2005 report documents Dr Hayes (1) reiterated a concise history of the injury, diagnosis and his treatment; (2) stated claimant had returned to full-duty, unrestricted work; (3) performed a bilateral upper-extremity range-of-motion examination; (4) declared claimant medically stationary; and (5) predicted claimant may need future palliative attention for his accepted condition. *Id.*

Dr Hayes billed employer for a May 11, 2005 "closing examination," self-assigning it CPT® code 99455, which was billed at his "usual and customary" rate of \$500, and which code is assigned a 0.0 RVU multiplier/conversion factor. (*See* Exs 7, 11-2).

⁴ Former OAR 436-009-0004(3) (WCD Order 05-051) provided:

"The director adopts *The Physicians' Current Procedural Terminology (CPT® 2005)*, Fourth Edition Revised, 2005, for billing by medical providers except as otherwise provided in these rules. The guidelines are adopted as the basis for determining level of service."

⁵ Former OAR 436-009-0010(4) (WCD Order 05-051) provided:

"Codes listed in CPT® 2005 or Oregon Specific Codes (OSC) shall be used when billing medical services. All billings shall be fully itemized and include ICD-9-CM codes. Services shall be identified by the code numbers and descriptions provided in these rules. A "zz" qualifier shall be used when billing electronically for services that use Oregon Specific Codes.

"(a) If there is no specific code for the medical service, the medical provider shall use the appropriate unlisted code at the end of each medical service section of CPT® 2005 and provide a description of the service provided. Providers may use the appropriate HCPCS code in the description.

"(b) Any service not identifiable with a code number shall be adequately described by report."

⁶ Former OAR 436-009-0004(1) (WCD Order 05-051) provided:

"(1) The director adopts, by reference, the Centers for Medicare & Medicaid Services (CMS) 2006 Medicare Resource-Based Relative Value Scale (RBRVS) Addendum B "Relative Value Units (RVUs) and Related Information" except the "status indicators," and Addendum C "Codes with Interim RVUs," * * * as the basis for the fee schedule for payment of medical service providers except as otherwise provided in these rules."

The CPT® 2005 code 99455 requires *all*⁷ of the following elements of service: the doctor must (1) complete a medical history commensurate with the patient's condition; (2) perform a medical examination commensurate with the patient's condition; (3)(a) formulate a diagnosis, (3)(b) assess the patients' capabilities and stability, *and* (3)(b) calculate impairment; (4) develop a future medical treatment plan; *and* (5) complete the necessary documentation or certification and report. (*See eg* Ex 13-2)⁸.

I hold Dr Hayes's May 11, 2005 report did not comply with the CPT® 2005 code 994555 in that it failed to meet the conditions of (a) *calculating* impairment, (b) *developing* a future medical treatment *plan*, or (c) *completing any documentation or certification above and beyond the report itself*.⁹ (*See* Ex 5).

All MRU did was accept at face value Dr Hayes's assertion that he performed an examination in compliance with the CPT® 2005 90455 code; it performed no analysis of Dr Hayes's May 11, 2005 examination and report in light of the CPT® 2005 requirements. I hold employer has proved Department error.

Incidentally, employer has also persuasively proved to me that under the more appropriate CPT® 2005 codes and RVU multiplier/conversion factors, it in fact *overpaid* Dr Hayes for his May 11, 2005 services, anywhere from \$50.82 to \$104.85.¹⁰ (*See* Ex 14). Employer granted at hearing it does not pray for an order requiring Dr Hayes to reimburse it for that overpayment.

ORDER

IT IS THEREFORE ORDERED that MRU's November 4, 2005 Administrative Order is reversed.

⁷ The required services are set forth in the conjunctive, rather than disjunctive, thus all are required.

⁸ With Exhibit 13, employer submitted the CPT® 2006 requirements, not the pertinent CPT® 2005 requirements, but I rely on the CPT® 2005 codes cited by the Department in WCD Administrative Order 05-051, as an extra-record source intended to be relied upon, as a fact-finder would rely on a US DOT definition to decide an issue of adaptability in a permanent partial disability dispute.

⁹ As the CPT® requires either documentation or certification, *and* a report, the report itself cannot constitute the required "documentation" or "certification."

¹⁰ I find Dr Hayes's May 11, 2005 examination and report to have been more consistent with CPT® 2005 codes 99213 or 99215.