

In the ORS 656.248 Medical Fee Dispute of

David A. Patterson, Claimant

Contested Case No: 08-119H

ORDER REMANDING TO DIRECTOR

September 30, 2008

Georgia-Pacific Corporation, Petitioner

David A. Patterson, Respondent

Before Geoffrey G. Wren, Administrative Law Judge

Pursuant to notice, a hearing was convened in Portland, Oregon, on September 23, 2008. Neither claimant nor counsel on claimant's behalf appeared.¹ Neither Dr. Long nor counsel on Dr. Long's behalf appeared.² The employer, Georgia Pacific Corp., and its insurer, Sedgwick CMS, appeared by Brian M. Solodky. The record closed on September 23, 2008.

EXHIBITS

The employer submitted 54 exhibits in the proceeding before the Director below. The Director prepared an exhibit file consisting of 16 exhibits. The administrative file contains no explanation why the Director did not include proffered exhibits in its exhibit file. On review, the employer offers Exhibits 1 through 65. Those exhibits include the 54 exhibits submitted below and exhibits developed thereafter and in the administrative file. As the exhibits were before the Director below, and as there is no objection to their admission in this proceeding, they are admitted.

ISSUE

The self-insured employer contends that the Director's May 22, 2008 Administrative Order ordering payment of bills for reports authored by Dr. Long is defective.

STATEMENT OF FACTS

Claimant injured his low back on January 8, 2006. The employer ultimately accepted a claim for lumbar strain combined with preexisting back conditions for which claimant had sought treatment, including degenerative lumbar spondylosis and arthritic/degenerative changes throughout claimant's lumbar spine.

In connection with an independent medical examination ("IME"), Dr. Rosenbaum wrote a medical report on September 18, 2006. The employer sent the IME report to Dr. Long,

¹ Prior to hearing, claimant's counsel advised that the matter did not concern claimant and that neither claimant nor counsel would appear.

² Neither the record nor the administrative file discloses the reason for Dr. Long's nonappearance. I find that the doctor waived appearance. However, as the insurer requested the hearing, I proceed to determine this case on the merits. See *Kenneth F. Plummer*, 51 Van Natta 1239, 1241 (1999), *on recon* 52 Van Natta 19 (2000) ("[I]f the employer's failure to attend the hearing was unjustified, the ALJ proceeds to determine the merits of the issues raised by claimant based on the record as developed.")

claimant's treating physician, asking him whether he concurred. On November 22, 2006, Dr. Long wrote a four-page report. The doctor stated that he did not concur and explained his reasons.

Dr. Long billed the employer \$1,800 for two hours spent reviewing records and writing the November 22, 2006 report. The employer declined to pay the charge. Dr. Long sought administrative review. The employer responded that the doctor's charge was excessive. By Administrative Order dated April 20, 2007, the Director found that \$1,800 was Dr. Long's usual charge for spending two hours to review records and write a report. The Director ordered the employer to pay Dr. Long the \$1,800 charge. The order became final by operation of law.

On March 12, 2007, the claimant requested inclusion of L5-S1 radiculitis in his claim. The employer denied that claim on May 14, 2007. The employer further contended that the January 8, 2006 injury had ceased being the major contributing cause for claimant's disability and need for treatment.

Claimant saw Dr. Williams for an IME on May 15, 2007. Dr. Williams opined that there was no longer evidence of lumbar strain and no evidence of lumbar radiculitis. Any orthopedic symptoms claimant had resulted from his preexisting back condition.

On May 29, 2007, the employer sent Dr. Long a copy of Dr. Williams' report and asked if Dr. Long concurred. If not, the employer asked that he forward his "comments and suggestions in a narrative report." The employer did not state how long the report should be.

Dr. Long reviewed Dr. Williams' report and other medical records. In a five-page report dated June 6, 2007, he stated that he did not concur with Dr. Williams and explained his reasons.

Dr. Long billed the employer \$3,600 for four hours to review claimant's records and write the June 6, 2007 report. The employer responded on June 21, 2007 that it needed documentation of the doctor's billing practices and procedures. Dr. Long responded by letter dated June 25, 2007 that he charged \$15 per minute for records reviews and writing reports. The employer responded on July 31, 2007 that the doctor's response was insufficient. The employer demanded that Dr. Long produce documents showing what he charged the "general public" for his services, specifically "[c]opies of all bills for reports, for reviewing medical records or for medical research relating to medical issues/concerns pertaining to [his] care and treatment of [his] patients that [he] or [his] staff sent to members of the general public for the six months preceding [his] June 21, 2007 report." The employer asserted that it was requesting "documentation required by OAR 436-009-0010(7)." The employer did not explain how Dr. Long could provide copies of patient billings consistently with HIPAA or other patient privacy law.

The employer, meanwhile, closed claimant's accepted claim without award of permanent disability benefits. By Order on Reconsideration dated June 12, 2007, the Appellate Review Unit ("ARU") rescinded the closure. The ARU reasoned that the file lacked adequate closing information from Dr. Long, specifically opinion sufficient to determine whether claimant had ratable impairment.

By letter dated June 21, 2007, the employer sent Dr. Long the Order on Reconsideration and asked him to write a “brief report” regarding whether claimant had impairment from his accepted lumbar strain condition. If Dr. Long felt that claimant had impairment, the employer asked him to comment specifically regarding aspects of Dr. Williams’ May 15, 2007 report.

Dr. Long responded by a three-page letter dated July 11, 2007. He discussed the meaning of “lumbar strain” and concluded that claimant sustained permanent impairment as a result of his January 8, 2006 lumbar strain. He further stated that Dr. Williams’ lumbar range of motion findings accurately represented the extent of that permanent impairment.

Dr. Long billed the employer \$2,700 for three hours to review records and write the July 11, 2007 report.

Dr. Long did not receive payment for the June 6, 2007 records review and report. On August 7, 2007, he requested review by the Director. The employer, by counsel, responded on August 27, 2007. In a Specification of Disputed Medical Issues, the employer asserted several grounds for disputing Dr. Long’s charge, including compensability and that the service was excessive, inappropriate, and/or ineffectual.

On November 9, 2007, claimant and the employer entered into a Disputed Claims Settlement (“DCS”). The DCS recited in part:

IT IS FURTHER STIPULATED AND AGREED that the parties agreed upon the terms of this settlement on September 27, 2007. At that time, the employer/claims administrator had received billings from medical providers, which remain unpaid as listed below and the employer/insurer agrees to pay each medical provider at the direction of the claimant as follows:

MEDICAL SERVICE PROVIDER	AMOUNT PAYABLE TO MEDICAL SERVICE PROVIDER
Spinal Diagnostics	\$2283.09
On Site Anesthesia Services	\$504.00
Eric Long M.D.	\$1800.00

The DCS did not specify to what service the \$1,800 pertained. The DCS further provided that claimant would hold the employer harmless from “any and all other medical expenses incurred as a result of this claim.” Dr. Long was not a party to the DCS.

Dr. Long did not receive payment for the July 11, 2007 records review and report. On February 22, 2008, he requested review by the Director of nonpayment of both the \$3,600 charge for the June 6, 2007 records review and report and the \$2,700 charge for the July 11, 2007 records review and report. The employer itself responded on March 14, 2008 that the charges were not paid because the DCS showed “who was paid & what amount was paid.” In a separate

Specification of Disputed Medical Issues, the employer did not contend that the services at issue were excessive, inappropriate, and/or ineffectual.

On May 22, 2008, the Director ordered the employer to pay both the \$3,600 charge for the June 6, 2007 records review and report and the \$2,700 charge for the July 11, 2007 records review and report. The Director reasoned that it did not matter that the claimant and the employer had entered into a DCS. The Director did not address the issue whether the charges were excessive and/or inappropriate.

CONCLUSIONS OF LAW AND OPINION

The employer contends that the Director's May 22, 2008 Administrative Order is defective in several respects:

- 1) Dr. Long's reports were "litigation reports," not simple check-box responses to requests from the employer.
- 2) The Director did not consider whether Dr. Long's charges were excessive and/or inappropriate.
- 3) The Director did not copy employer's counsel with critical documents.
- 4) The insurer demanded additional documentation from Dr. Long, but it never received that documentation. The employer contends that it would have 45 days from the date it received the documentation to determine whether it would pay the disputed charges.
- 5) The July 11, 2007 bill was included in the DCS.

I consider each defense in turn.

Excessive and/or Inappropriate Charges

I understand the defense that Dr. Long's reports were "litigation reports" to be that the reports were inappropriate responses to the employer's May 29, 2007 and June 21, 2007 requests for information. So understood, the employer's first and second defenses effectively are the same, i.e., that Dr. Long's charges were excessive and/or inappropriate.³

The employer did not raise this defense before the Director with regard to the \$2,700 charge for the July 11, 2007 records review and report. As discussed below, this may have resulted from the Director's failure to copy employer's counsel with certain documents. Remand is necessary for the Director to determine in the first instance whether its actions so prejudiced the employer that the employer should be permitted to raise the issue anew.

³ The employer cites no alternative authority for the proposition that it does not have to pay a provider for a solicited report on the ground that a party might use the report in litigation.

When Dr. Long sought Director's review with regard to the \$3,600 charge for his June 6, 2007 records review and report, the employer, by counsel, initially responded on August 27, 2007 that Dr. Long's service was excessive, inappropriate, and/or ineffectual. When Dr. Long later sought Director's review with respect to charges for both the June 6, 2007 and July 11, 2007 services, the employer, responding directly on March 14, 2008, did not raise the defense that the services were excessive, inappropriate, and/or ineffectual. This raises the question whether the employer waived that defense with respect to the June 6, 2007 service. Again, as discussed below, this situation may have resulted from the Director's failure to copy employer's counsel with certain correspondence. Remand is necessary for the Director to determine in the first instance whether its actions so prejudiced the employer that the employer should be permitted to revise its March 14, 2008 response and, if not, whether the employer waived this defense.

Should the Director reach the issue whether Dr. Long's charges were excessive and/or inappropriate, the Director should consider whether its April 20, 2007 Administrative Order has preclusive effect. *See Nelson v. Emerald People's Utility Dist.*, 318 Or 99, 103 (1993) (elements of issue preclusion); *Ronald G. Rogerson*, 55 Van Natta 1842 (2003) (Board did not decide whether Director's review was type of proceeding to which a court would give preclusive effect). In that order, the Director found that \$1,800 was Dr. Long's usual charge for spending two hours to review records and write a report.

Director's Failure to Provide Employer's Counsel with Copies of Correspondence

The Director did not provide employer's counsel with copies of certain documents. Most important, the Director did not provide counsel with a copy of its February 28, 2008 Notice of Required Action on a Medical Dispute.⁴ The Director's failure to do so is not explicable by the record before me, as counsel previously had responded regarding Dr. Long's first request for administrative review.

The employer itself responded to the February 28, 2008 Notice of Required Action on a Medical Dispute. On review, the employer contends that it did so without benefit of legal representation. The Director's failure to copy counsel with this critical notice may have prejudiced the employer. Remand is necessary for the Director to determine whether its action caused prejudice and whether to give effect to the employer's March 14, 2008 response to the February 28, 2008 notice. *See ORS 9.320* (in any proceeding, a corporation appears by attorney unless otherwise specifically provided by law). The Director thereafter should proceed in a manner that achieves substantial justice.

Employer's Demand for Additional Documentation / 45 Days to Respond

Citing OAR 436-009-0010(7), the employer demanded of Dr. Long that he provide copies of patient billings to justify his charge of \$15 a minute for review of records and writing

⁴ The record does not show whether the Director copied counsel with an August 15, 2007 Notice of Required Action on a Medical Dispute referenced in counsel's August 27, 2007 cover letter for specification of disputed medical issues.

reports. As the doctor did not provide that documentation, the employer contends that the time for it to determine whether to pay the doctor's charges has not yet elapsed.

Employer's counsel did not raise this defense in its August 27, 2007 response to Dr. Long's request for administrative review regarding the \$3,600 charge for his June 6, 2007 records review and report. The Director appropriately did not address it. I will not consider it on review.

Employer's counsel may have been prejudiced with respect to raising this issue with regard to the \$2,700 charge for the July 11, 2007 records review and report, as counsel was not copied with the February 28, 2008 Notice of Required Action on a Medical Dispute. As I am remanding this case, the Director should decide whether the employer should be permitted to raise the issue on remand. If so, the Director should determine in the first instance whether OAR 436-009-0010(7) permitted the employer to demand copies of patient billings and, if so, how Dr. Long could have complied without compromising patient privacy. Only then will there be a record sufficient for review.

Effect of DCS

The employer contends that the Director erred in holding that it did not matter whether claimant and the employer entered into the November 9, 2007 DCS. The Director did not err. I reach this conclusion for the following reasons.

The DCS would bear on the outcome in this case if its terms established that Dr. Long in fact was paid for his June 6, 2007 and July 11, 2007 services or if it otherwise established satisfaction of the doctor's claims. The DCS had neither effect. Although the DCS provided for payment of \$1,800 to Dr. Long, it did not identify what service that \$1,800 represented. The context indicates that the \$1,800 payment did not pertain to the two amounts at issue. Neither of those amounts are \$1,800. The DCS, moreover, includes a hold harmless clause. That language suggests that the amount identified was for a medical service claimant otherwise might be obligated to pay, not for a report issued at the employer's request. *See* 436-009-0030(7) (bills for medical services rendered at the employer's request must be paid even if the claim is denied). The DCS is insufficient evidence to establish payment in fact. The DCS could not operate as a satisfaction otherwise of Dr. Long's claims because the doctor was not a party to the agreement. There is no evidence that the doctor agreed to discharge of the claimed \$6,300 debt by payment of \$1,800.

ORDER

IT IS HEREBY ORDERED that the Director's May 22, 2008 Administrative Order is affirmed with respect to effect of the DCS between employer and claimant. The Order otherwise is reversed and remanded for further proceedings consistent with this opinion.