

In the ORS 656.248 Medical Fee Dispute of

Debra J. Warren, Claimant

Contested Case No: 09-069H

PROPOSED & FINAL ORDER

September 30, 2009

INTRACTABLE PAIN CENTER, THOMAS PURTZER MD, Petitioner

NATIONAL AMERICAN INS CO OF CALIFORNIA, Respondent

Before Bruce D. Smith, Administrative Law Judge

This matter is before the undersigned Administrative Law Judge (ALJ) pursuant to Workers' Compensation Division's Administrative Order dated April 15, 2009. Claimant was not present, and is not represented. Office manager Regina Purtzer was present on behalf of medical service provider Dr. Purtzer. Employer Americare LLC and its insurer Cambridge are represented by attorney Rodger M. Hepburn. The documentary record consists of Exhibits 1 through 14, as identified in the Division's May 12, 2009 exhibit list (Exs. 1-11), supplemented by exhibits (Ex. 12-1 through -5, -21, -22, -24; and Exs. 13, 14) offered at hearing. The record closed on September 14, 2009, the date of final argument.

ISSUES

Issues are: (1) employer's motion to dismiss; (2) evidence (admissibility of Exs. 12-6 through -20, and -23, and 15); (3) alleged non-payment for dates of service January 3, 2008, November 5, 2008, and December 11, 2008; and (4) provider's entitlement to rebilling fees.

FINDINGS OF FACT

Facts Relevant to Motion to Dismiss

Thomas J. Purtzer, MD and Intractable Pain Centers have appealed from the Administrative Order dated April 15, 2009, which found that Cambridge had correctly paid Dr. Purtzer for certain medical billings for the dates of service January 3, 2008 through December 11, 2008; and that the insurer¹ is not liable for the rebilling fees charged by Dr. Purtzer. (Ex. 10).

On April 21, 2009 Dr. Purtzer appealed the Administrative Order, asserting that his office had no record of receiving payment for dates of service January 3, 2008, November 5, 2008, and December 11, 2008. (Ex. 11-1). The three billings in dispute totaled \$490.00. (Ex. 10-3). Dr. Purtzer further challenges the Division's finding that he is not entitled to administrative rebilling fees. The rebilling fees were charged at the rate of \$50.00 each, for six visits, for a total of \$300.00. (Ex. 10-1). Thus the grand total of the amounts in dispute is \$790.00.

Dr. Purtzer's April 21, 2009 request for hearing is lacking the following information required by OAR 436-001-0019(2): requesting party's phone number; worker's address and

¹ The Administrative Order incorrectly identified the insurer as "Liberty" in the second paragraph of its order.

phone number; date of injury; and insurer's or self-insured employer's claim number. In addition, there is no indication that Dr. Purtzer sent copies of his request for hearing to claimant, or to the insurer.

On May 1, 2009 the Division referred the matter to the Hearings Division, sending copies of its referral notice to the worker, insurer, employer, and medical provider. (Rec.).

On June 12, 2009 a Notice of Hearing was mailed to all interested parties, informing them of the August 5, 2009 hearing at the WCB Hearings Division in Medford, Oregon. (Rec.).

On June 12, 2009 counsel for the employer and its insurer/claims administrator wrote to the Hearings Division, acknowledging receipt of the claimant's (*sic*) request for hearing, and informing the Hearings Division of its representation. (Rec.).

On June 26, 2009 counsel for the employer and its insurer/claims administrator wrote to the Hearings Division, requesting a copy of the request for hearing; and the Hearings Division sent the requested documents. (Rec.).

On July 10, 2009 employer/insurer filed a motion to dismiss the request for hearing, based upon the requesting party's failure to comply with the provisions of OAR 436-001-0019. (Rec.).

On July 14, 2009 the Hearings Division notified Dr. Purtzer of the motion to dismiss, informing him that any response would be due 10 days thereafter. (Rec.). No response was received.

Facts Relevant to Underlying Dispute Concerning Unpaid Medical Bills

At hearing Dr. Purtzer's office manager agreed that the January 3, 2008 bill (in the amount of \$150.67) has been paid. (Stipulation).

On March 27, 2009 employer, in response to a questionnaire from the Medical Review Unit, indicated that bills from January 3, 2008 to December 11, 2008 had not been timely paid due to "unknown clerical error." (Ex. 8-3). Further, at hearing employer agreed that it had not paid the charges for the November 5, 2008 and December 11, 2008 dates of service.² (Stipulation).

Explanation of Review documents do not include information regarding dates of service January 3, 2008; November 5, 2008; or December 11, 2008. (Ex. 9-1 through -7). Further the NAICC Claim Check Inquiry Screen printouts do not include identifiable information regarding dates of service January 3, 2008; November 5, 2008; or December 11, 2008. Although two of the documents cover periods that encompass the January 3, 2008 date of service, the check issue dates of July 28, 2008 (Ex. 9-8), and March 24, 2008 (Ex. 9-13) do not match the (February 3, 2009 and March 10, 2009) dates of payment alleged. (Ex. 10-2). Further, there is no detailed information regarding actual dates of service, and there is no information in the Explanation of

² Prior to conclusion of the hearing employer paid the two remaining charges, at the rate of \$165.00 each. (Ex. 13).

Review documents (Ex. 9-1 through -7) corresponding to the dates of service in question here. There are two inquiry screen pages that show payments made on March 10, 2009, but they cover dates of service September 9, 2008, and March 5, 2008 to June 4, 2008. (Ex. 9-10, and -12). There is also one inquiry screen page that shows a payment made on February 3, 2009, which covers only the date of service October 9, 2008. (Ex. 9-11).

In its April 15, 2009 Administrative Order the director wrote:

“On March 27, 2008 Cambridge responded that payment for dates of service 1/3/08 through 4/9/08 of \$150.67 for each visit was issued on 3/10/09. Payment for dates of service 9/9/08 through 12/11/08 of \$163.93 for each visit was issued on February 3, 2009 and March 10, 2009. Cambridge further responded that non-payment was due to a clerical error.” (Ex. 10-2).

On April 21, 2009 Dr. Purtzer requesting a hearing. (Ex. 11).

Facts Relevant To Underlying Dispute Concerning Rebilling Fees

Employer admitted at hearing that it has not paid the rebilling fees in question. (Stipulation).

Dr. Purtzer’s rebilling policy is set forth in the Billing and Collections portion of his office policy. It reads as follows:

“A rebilling fee of \$50.00 will be charged for all dates of service requiring rebilling due to non payment (*sic*), partial payment, and/or incorrect payment. This fee is to cover administrative cost associated with this issue.” (Ex. 11-4).

Ms. Purtzer testified that Dr. Purtzer’s current office policy is to assess a monthly service charge of \$50.00 on unpaid bills. (Testimony of Regina Purtzer; Ex. 12-3).

CONCLUSIONS OF LAW AND OPINION

Motion to Dismiss

Requests for hearing to challenge decisions of the director under ORS 656.704(2)(a) are governed by OAR 436-001-0019. Technical requirements for the request for hearing are set forth in subsection (2) of that rule. Their obvious purpose is to require sufficient information regarding the matter in dispute so that the Division and the parties can ascertain what the dispute is about.

A party’s failure to observe technical notice requirements does not always require dismissal – the Board’s primary concern seems to be whether the failure has resulted in prejudice to a party. *See, e.g., Michael R. Gallagher*, 50 Van Natta 1488 (1993) (where prejudice not shown failure of appellant to include correct case number and claim number in request for Board review held not fatal to appeal).

Although Dr. Purtzer's request for hearing lacked certain identifying information, it did arguably conform to the minimal requirements set forth under "Notice of Appeal Rights" in the Administrative Order itself: namely, it was in writing, and it stated the reason for the request for hearing. (Ex. 10-4). Further, by including the identifying WCD File and MRU File numbers in his request for hearing Dr. Purtzer made clear which case was at issue.

It might be argued that the "Notice of Appeal Rights," by including a reference to the administrative rule, put the appealing party on notice of all the requirements stated in the rule. The Notice also, however, included a reference to the statute, which does *not* include the technical requirements. In any event, while an attorney would be expected to know that there might be additional requirements for perfecting an appeal embedded within the statute or rules, I am not prepared to hold a lay person to the same standard.

Finally, the rule itself is ambiguous. Because OAR 436-001-0019(2) requires specified information to be included in requests for hearing, "as applicable," it leaves a lay person wondering what is "applicable." Is the requesting party's phone number "applicable" here? What about the worker's address and phone number; are they "applicable" when it is the medical provider who is filing the appeal? If the answer to either of these questions is "yes," does the omission of this collateral information require dismissal of the appeal? Should the appeal be dismissed for lack of the date of injury in the request for hearing, when it is stated in the Administrative Order referenced in the request for hearing? Likewise, where the insurer's or self-insured employer's claim number appear on the face of the decision being appealed, does its absence in the request for hearing require dismissal?

I find that, to the extent any of the missing information here was "applicable" to the request for hearing, dismissal is not required, absent a showing of prejudice.

The other basis for the employer/insurer's motion to dismiss is Dr. Purtzer's failure to send copies of the request for hearing to the parties. Again, the notice section of the Administrative Order here does not include this requirement. Further, although OAR 436-001-0019(4) does require the appealing party to send copies of the hearing request "to all known parties and their legal representatives, if any[.]" this requirement is not found in the statute, ORS 656.704(2)(a).

Even where notice is explicitly required by statute, the court has shown flexibility under appropriate circumstances. In *Nollen v. SAIF*, 23 Or App 420 (1975) the court was asked to decide whether service of notice of appeal on counsel for claimant and employer, rather than the parties themselves (as required by ORS 656.295) vitiated the appeal. The court found that it did not, holding that service on counsel was sufficient, "where no prejudice has been shown." *Id.*, at 423. The court quoted Professor Larson, writing in regard to evidentiary and procedural rules in workers' compensation cases:

"* * * The whole idea is to get away from cumbersome procedures and technicalities of pleading, and to reach a right decision by the shortest and quickest possible route. On the other hand, as every lawyer knows, there is a point beyond which the sweeping-aside of 'technicalities' cannot go, since evidentiary

and procedural rules usually have an irreducible hard core of necessary function that cannot be dispensed with in any orderly investigation of the merits of a case. * * *” (citation omitted). *Id.*

It appears to me that the “irreducible hard core” of the administrative rules in question here is set forth in the “Notice of Appeal Rights” contained in the Administrative Order. I find that Dr. Purtzer adequately complied with the appeal procedure outlined therein.

Employer/insurer has not alleged prejudice here; and none has been shown. The employer/insurer had the request for hearing by June 12, 2009, almost eight weeks prior to hearing. That is enough time for experienced counsel to prepare for hearing in a dispute involving \$790.00. In any event, provision is made in the administrative rules for postponement or continuance of the hearing, under appropriate circumstances.

Evidence

At hearing Ms. Purtzer offered billing records, which I marked Ex. 12-1 through -24. Mr. Hepburn objected to admission of these exhibits on relevance grounds. I admitted Ex. 12-1 through -5, -21, -22 and -24. I did not admit Ex. 12-6 through -20, and -23; but will consider them as offers of proof.

Prior to conclusion of the hearing Ms. Purtzer, by facsimile transmission dated August 26, 2009, offered additional billing records, which I marked Ex. 15-1 through -7. Mr. Hepburn, by letter dated August 31, 2009, objected to admission of these exhibits on grounds that they constituted (irrelevant) evidence on a new issue. I did not admit Ex. 15; but will consider it as an offer of proof.

Scope of ALJ Review

This matter arises under ORS 656.248(12) and OAR 436-009-0008 for resolution of a dispute over payment of fees for medical services, including “rebilling fees.” (Ex. 10-1). The hearing is conducted under OAR 436-01.³ Scope of ALJ review for this medical fee dispute is *de novo*. OAR 436-001-0225(1).

Alleged Non-Payment For Dates of Service November 5, 2008 and December 11, 2008⁴

The director’s finding that the bill for medical services provided on January 3, 2008 remains unpaid is not supported by the record; and Dr. Purtzer admits that the January 3, 2008 had been paid prior to hearing. I find that the January 3, 2008 charges have been paid in full.

At hearing employer agreed that it had not paid the charges for the November 5, 2008 and December 11, 2008 dates of service; and I find that these charges remained unpaid as of April 15, 2009, the date of the director’s Administrative Order.⁵

³ See OAR 436-009-0008(6).

⁴ Dr. Purtzer concedes that he has been paid for the January 3, 2008 date of service.

Provider's Entitlement to Rebilling Fees

At issue is whether Dr. Purtzer is entitled to charge and collect rebilling fees of \$50.00 each for six identified dates of service. (Ex. 10-1). Dr. Purtzer bears the burden of proving that he is entitled to charge a rebilling fee. ORS 40.105; ORS 656.283(7); OAR 436-001-0170(1).

The rule allowing a medical service provider to charge a fee for late payment of a medical bill is found at OAR 436-009-0030(7), which reads as follows:

“(7) Failure to pay for medical services timely may render the insurer liable to pay a reasonable monthly service charge for the period payment was delayed, if the provider customarily levies such a service charge to the general public.”

Dr. Purtzer argues that his “rebilling fee” is in fact an authorized monthly service charge; and that the nomenclature is not important.

Employer responds that Dr. Purtzer's own records refer only to an administrative “rebilling fee” (Ex. 11-1, and -4), or “SRF” (special report fee) (Ex. 3-3 through -7), which is not the same as the monthly service charge allowed by administrative rule. Employer contends that the division correctly found that Dr. Purtzer was not entitled to charge a “rebilling fee.” I agree with employer.

I find that Dr. Purtzer's \$50.00 “rebilling fee” is not the equivalent of the “reasonable monthly service charge” allowed by OAR 436-009-0030(7). Neither do the charges described in Dr. Purtzer's “Office Policies” help the provider here, as there is no evidence that he charged “interest fees” (Ex. 12-2), or “finance charges” (Ex. 12-3) to employer/insurer in the case before me. In any event, the \$50.00 fee that Dr. Purtzer charged constitutes a surcharge in excess of 30 percent of the past due amounts (\$160.00-165.00 per date of service) involved here; and I find that on its face this charge is unreasonable.⁶

The medical service provider is not entitled under existing administrative rules to charge or collect a “rebilling fee” for past due accounts.

ORDER

IT IS THEREFORE ORDERED that employer's motion to dismiss the request for hearing of the above captioned medical dispute matter is denied.

IT IS FURTHER ORDERED that Exs. 12-1 through -5, -21, -22 and -24 are admitted over employer's objections; and Exs. 12-6 through -20, and -23, and Ex. 15 are excluded.

⁵ Prior to conclusion of the hearing employer paid charges on the two remaining dates of service, at the rate of \$165.00 each. (Ex. 13).

⁶ According to *Merriam-Webster's Online Dictionary*, “reasonable” means, “moderate, fair (a reasonable price).”

IT IS FURTHER ORDERED that the director's Administrative Order dated April 15, 2009 is reversed in part and affirmed in part. That part which found that Cambridge had correctly paid Dr. Purtzer for the November 5, 2008 and December 11, 2008 dates of service is reversed; and that part which found that Cambridge had correctly paid Dr. Purtzer for the January 3, 2008 date of service is affirmed.

IT IS FURTHER ORDERED that that part of the director's Administrative Order that held that employer is not liable for the rebilling fees levied by Dr. Purtzer for untimely payment of medical charges is affirmed.