

In the ORS 656.248 Medical Fee Dispute of
Back In Action Physical Therapy, Claimant

Contested Case No: 08-163H

PROPOSED & FINAL ORDER

April 12, 2010

BACK IN ACTION PHYSICAL THERAPY, Petitioner
LIBERTY NORTHWEST INSURANCE CORP., Respondent

Before Monte Marshall, Administrative Law Judge

Pursuant to notice, a hearing was held January 20, 2010 in Salem, Oregon before Administrative Law Judge Marshall. Back in Action Physical Therapy (Back in Action) was represented by its attorney, Diana E. Godwin. Liberty Northwest Insurance Corporation (Liberty Northwest) was represented by its attorney, Meg M. Carman. The Workers' Compensation Division (WCD) was represented by Assistant Attorney General, Carol A. Parks. Exhibits 1-23, submitted by WCD, were admitted into evidence at hearing.¹

ISSUE

Reimbursement of physical therapy billings. Back in Action has appealed an August 8, 2008 Administrative Order, issued by WCD, that found the Liberty Northwest had correctly paid the disputed billings at a discounted rate.

EVIDENTIARY MATTER

Prior to the hearing, a conference call was held to discuss the submission of evidence other than that provided by WCD. I declined to allow the submission of new evidence based on the following reasoning.

Limitations on evidence in WCD hearing is governed by OAR 436-001-0225. Section (2) of the rule provides that in certain types of medical services dispute, WCD's order can only be modified if it is not supported by substantial evidence or contains errors of law. Under that section, no new medical evidence may be admitted or considered. Section (3) of the rule provides the statutory standard of review for vocational disputes and indicates that new evidence may be admitted and considered in those cases.

OAR 436-001-0225(1) is the rule applicable to this dispute. It provides that "the administrative law judge reviews all matters. . . de novo." The rule does not specify whether new evidence is admissible or not in this type of dispute. "De novo" is not defined in the rule. Webster's Third Unabridged Dictionary defines de novo as "anew, afresh, over again." Similarly, Black Law Dictionary (8th Edition) defines appeal de novo as "an appeal in which the appellate court uses the trial court's record but reviews the evidence and law without deference to the trial court's rulings." However, it also defines de novo judicial review as "a court's non-

¹ Exhibit 24 was offered by Liberty Northwest, but was not admitted into evidence. However, Exhibits 24 was retained in the Hearings file.

deferential review of an administrative decision usually through a review of the administrative record plus any additional evidence the parties present.”

In sum, it remains unclear to me whether additional evidence is admissible in matters reviewed under OAR 436-001-0225(1), so I continue to conclude that new evidence is not admissible in this matter.²

Assuming that my conclusion is incorrect, for the reasons set forth in the January 19, 2010 Interim Order, incorporated by reference herein, Exhibit 24, as well as the other new evidence the Liberty Northwest requested pursuant to its subpoena, is not relevant to the current dispute and therefore not admissible on that basis.

FINDINGS OF FACT

In 2004, Liberty Northwest entered into an agreement with Medrisk, and expert provider organization (EPO). Medrisk has agreements with various employers, insurers and medical providers to arrange for the provision of some rehabilitative services necessary for the treatment of injuries covered under workers' compensation. The agreement with Liberty Northwest essentially provided that Medrisk would arrange for rehabilitative treatment with providers in its network for injured workers covered by Liberty Northwest. This included processing the billings submitted by the providers.

In October 2006, Medrisk entered into a contract with Back in Action. Under the terms of that contract, Back in Action agreed to accept certain rates of payment for specific services rendered to a covered worker.

A worker (David Phillips) sustained a compensable injury on November 13, 2006 while working for an employer that had workers' compensation coverage through Liberty Northwest. Between January 23, 2007 and June 17, 2007, the worker received treatment from Back in Action. Billings were sent to Liberty Northwest who forwarded them to Medrisk for re-pricing. Liberty Northwest then paid Back in Action at a discounted rate pursuant to the agreement with Medrisk.

Back in Action disagreed with the amount paid by Liberty Northwest and requested administrative review by WCD. An Administrative Order issued on May 13, 2008 which found that Liberty Northwest had incorrectly reduced payment to Back in Action and found Liberty Northwest liable for the discounted amount. Liberty Northwest requested a hearing.

On July 9, 2008, the May 13, 2008 Administrative Order was abated to consider temporary rules recently adopted by the Director. On August 8, 2008, the Administrative Order was reissued. Applying the new temporary rules, the order found that Liberty Northwest had correctly reduced payment and was liable for the additional amount. Thereafter, Back in Action requested a hearing.

² Counsel for Liberty Northwest correctly points out that it appears the Director has decided that new evidence may be submitted in this type of dispute. See *Michael J. Doud*, 14 CCHR 40 (2009). However, there is no direct statement regarding the issue in that case.

CONCLUSIONS OF LAW AND OPINION

Back in Action asserts that Liberty Northwest should be liable for the additional amounts of reimbursement and makes several arguments in support of its assertion. I will address each one separately.

Back in Action first argues that the temporary rule is invalid on the basis it exceeded the Director's authority. ORS 656.248(1) gives the Director authority to promulgate rules for developing and publishing fee schedules for medical services provided under ORS Chapter 656. The statute provides certain guidelines on which to base the rules, "where applicable and to the extent the Director determines practicable." Consistent with this authority, the Director has promulgated rules regarding the payment of medical services in worker's compensation matters which are set forth in OAR 436, Division 09.

Prior to July 7, 2008, OAR 436-009-0040(1), the rule in question here, provided that an insurer must pay providers at the providers' usual fee or the amount set by the fee schedule, whichever was less. On July 7, 2008, the Director adopted a temporary rule which amended OAR 436-009-0040(1) to read, "[u]nless provided by contract, insurer's must pay providers at the providers' usual fee, or the mount set by the fee schedule, whichever is less." (emphasis added). *See* Admin Order 08-060.

ORS 656.248 give the Director broad authority to regulate the payment of medical services in worker's compensation matters. The temporary rule merely provides an additional method to determine the amount of that payment. The temporary rule did not exceed the authority granted the Director in ORS 656.248 or any other provision in ORS Chapter 656. Consequently, I do not find that the temporary rule is invalid.

Back in Action next argues that the temporary rule should not be applicable to this dispute. When the temporary rule was adopted, it was made applicable to "all medical services rendered on or after the effective date of these rules; and all payment made under a contract with a medical provider, regardless of date of service." Former OAR 436-009-00003(1). The effective date of the rule was July 7, 2008. The rule was promulgated under ORS 183.335(6) which allows for the adoption of rules without prior notice or hearing. A rule adopted under this statute may not be effective for more than 180 days. ORS 183.335(6)(a).

The temporary rules adopted in Admin. Order 08-060 were in effect from July 7, 2008 through January 1, 2009, which was 178 days. Consequently, the rule, on it face, did not violate ORS 183.335(6)(a). Application of the rule to medical services rendered after the effective date (July 7, 2008) is straight forward and understandable to those parties that are subject to the rule. However, by extending the rule to "payments made under contract with a medical provider, regardless of the date of service" the application of the rule is potentially retroactive.

Generally, retroactive application of new laws is disfavored and in absence of an indication, statutes, or in this case a rule, are not retroactively applied if such application would "impair existing rights, create new obligations or impose additional duties with respect to past

transactions.” See *Barrett v. Union Oil Distributors*, 60 Or App 483 (1982). Although the applicability language of the temporary rule appears to contemplate retroactive application, because it was adopted under ORS 183.335(6) there are no supporting materials as would be found when a permanent rule is adopted under ORS 183.335. Items such as supporting documents, a transcript of the rulemaking, hearing, and public comments would be helpful in determining a specific intent to make a rule apply retroactively. This is important in this instance where retroactive application of the rule has clearly impaired existing rights. This is best evidenced by the fact that under the former rule, the Director found no basis for allowing Liberty Northwest to discount medical billings. (Ex. 16). Yet, under the temporary rules, the exact opposite conclusion was reached. (Ex. 20).

In addition, I agree with Back in Action’s counsel that application of the temporary rule in this case creates a conflict with ORS 183.335(6)(a). As noted above, the temporary rules at issue were adopted on July 7, 2008 and expired January 1, 2009. Again, on its face, the rule complies with ORS 183.335(6)(a). However, the retroactive application of the rule to this case, allows the rule to affect matters some 531 days prior to its passage.³ This time period, in addition to the 178 days that the rule was in effect, give it a life span of nearly two years. I find this to conflict with the 180 day time limit set forth in ORS 183.355(6)(a) and therefore, retroactive application of the rule would violate that statute.

For the reasons set forth above, I conclude that the temporary rule set forth in Admin. Order 08-060 are not applicable to this case. Rather, the prior version of OAR 436009-0040(1) is applicable. Under that version of the rule, there is no provision for the application of an additional discount to compensable medical services. Therefore, Back in Action is entitled to its usual charge for the medical service or the fee schedule maximum, whichever is less.⁴ In light of this conclusion, I do not reach the additional arguments put forth by Back in Action.

ORDER

IT IS THEREFORE ORDERED that Liberty Northwest Insurance Corporation is liable for an additional payment equal to the discount taken under the contract between Back in Action and Medrisk.

³ The first billing at issue was submitted January 23, 2007.

⁴ This is the reasoning in the May 13, 2008 Administrative Order which is correct under the prior rule. (Ex. 16).