

In the ORS 656.248 Medical Fee Dispute of
Chehalem Physical Therapy
Contested Case Nos: 08-167H; 08-168H; 08-169H; 08-170H

FINAL ORDER

January 5, 2011

CITY COUNTY INSURANCE SERVICES, Petitioner
CHEHALEM PHYSICAL THERAPY, Respondent

Before Cory Streisinger, Director, Department of Consumer and Business Services

This is a consolidated matter concerning payment of medical provider fees for four injured workers. The dispute is between Chehalem Physical Therapy (Chehalem), a medical provider, and City County Insurance Services (City County). The injured workers are not participating. The dispute concerns discounts that City County applied to bills Chehalem submitted. These matters were subject to administrative review that resulted in administrative orders issued by the Workers' Compensation Division's Resolution Team (RT).¹ Those orders found the discounts were not permitted under the controlling rules. The matters then proceeded to hearing and were consolidated. Administrative Law Judge (ALJ) Douglas Crummé issued a consolidated Proposed and Final Order on April 19, 2010. That order found the discounts were not authorized under the rules. In addition, the order also required City County to pay penalties and attorney's fees. City County and Chehalem have both filed exceptions to the ALJ's order. City County challenges only that portion of the ALJ's order imposing penalties and attorney's fees. Chehalem challenges only that part of the order stating the Department of Consumer and Business Services (the department) is not statutorily prohibited from enacting rules permitting the application of contractual discounts to medical fee billings.

FACTUAL SUMMARY

Chehalem provided physical therapy services to the four injured workers in these claims between 2006 and 2008. City County was the responsible insurer. At the time it provided the services, Chehalem had a written contract with First Health Group Corporation (First Health), authorizing that certain discounts be applied to the fees Chehalem billed. First Health, in turn, had a contract with the Reny Company (Reny), which reviews bills. City County had an oral agreement with Reny to conduct bill reviews. City County did not have a contract with Chehalem or with First Health. When Chehalem submitted its bills to City County, City County had Reny review the bills. Reny applied a discount to the billed amounts which it based on First Health's contractual discounts. This resulting payment was less than the billed amount. Based on these discounts, City County paid less than the billed amount.

The Proposed and Final Order found there was no basis for the discounts Reny and City County applied, because there was no contract between Chehalem and City County authorizing the discounts. The order held City County was required to pay to Chehalem the withheld

¹ The administrative orders at issue here were all issued on August 22, 2008. They are Administrative Orders on Reconsideration, Nos. MF 08-0923, MF 08-0922, MF 08-0921, and an Administrative Order, No. MF 08-0920. For brevity, they will be referred to collectively as the administrative orders.

amounts. The order also imposed a penalty of \$299.99, and attorney's fees of \$5,000, under ORS 656.262(11)(a), on the basis City County had unreasonably delayed paying compensation.²

CONCLUSIONS OF LAW

In this medical fee dispute, I review de novo. OAR 436-001-0225(1).

On July 8, 2008, the Department of Consumer and Business Services (the department) adopted a temporary rule concerning billing and payment of medical fees for services provided to injured workers. The temporary rule enforced fee discounts in contract if the insurer and provider were parties to a contract containing such discounts. Former OAR 436-009-0040; WCD Admin. Order No. 08-060, July 7, 2008.³ The rule was made applicable to: "[a]ll payments made under a contract with a medical provider, regardless of the date of service." Former temporary OAR 436-009-003(1)(b). WCD Admin. Order No. 08-060, July 7, 2008.

City County is not entitled to apply the fee discounts found in the contract between Chehalem and First Health because there was no contract between City County and Chehalem authorizing the application of those discounts. The temporary rule enforcing discounts did not apply here because there was no contract between Chehalem and City County specifying that discounts could be applied. The temporary rule only applied where payment was made under a contract between the paying and receiving parties and where that contract contained discount provisions. Neither of those conditions was met here. The proper amount of payment is the provider's submitted bill, or the fee schedule amount, whichever is less. Former OAR 436-009-0040(1).

Chehalem asserts in its exceptions that ALJ Crummé erred in finding ". . . ORS 656.248 does not require WCD to prohibit medical fee discounts . . ." As that statement plays no substantive role in the decision stated in the Proposed and Final Order, or in this decision, it is dicta, and need not be addressed. ALJ Crummé found there was no contract on which to base a discount and that the rule authorizing discounts therefore did not apply here. I agree.

City County asserts the penalty and attorney's fees were improperly imposed because Chehalem first raised the issue in written closing arguments that were submitted simultaneously by the parties with no opportunity for rebuttal. City County contends it was improperly denied the opportunity to present argument or evidence on this question.

City County is correct that it was improper for the ALJ to impose attorney's fees and penalties when the request for those payments was first made in the simultaneous closing written

² ORS 656.262(11)(a) provides in part:

If the insurer . . . unreasonably delays or unreasonably refuses to pay compensation . . . the insurer . . . shall be liable for an additional amount of up to 25 percent of the amounts then due plus any attorney fees assessed under this section. The fees assessed . . . under this section shall be proportionate to the benefit of the injured worker. The board shall adopt rules for establishing the amount of the attorney fee, giving primary consideration to the results achieved and to the time devoted to the case.

³ Former temporary OAR 436-009-0040(1) provided: "Unless otherwise provided by contract, insurers must pay providers at the providers' usual fee, or the amount set by the fee schedule, whichever is less.

arguments. Whether an insurer has “unreasonably” delayed payment is a mixed question of fact and law. *Nero v. City of Tualatin*, 142 Or App 383, 387 (1996). If a party is to address allegations of unreasonable behavior, it should have the opportunity to present evidence and argument on that issue. In OAR 436-060-0155, the department has formalized its policy of requiring advance notice and an opportunity to respond when penalties are requested.⁴ That rule establishes a mandatory procedure through which an injured worker must request penalties and attorney’s fees under ORS 656.262(11)(a) by providing written notice and affording the charged party an opportunity to respond. There is no logical reason to require an injured worker to provide notice when asking for penalties, and not to require the same of a medical provider when asking for the same penalties under the same statute. It deprives a party of fundamental fairness to be subjected to penalties without having been given notice or an opportunity to present evidence on the issue. See *In Re Benjamin G. Parker*, 42 Van Natta 2476, 2477 (1990).

Chehalem asserts City County was on notice penalties might be at issue because they are mandatory under ORS 656.262(11)(a) when unreasonable delay in providing compensation has been proved. An allegation that a bill has not been paid in full is not the same as an allegation an insurer has acted unreasonably in not paying. The reasonableness of an insurer’s actions is not put at issue until the medical provider gives notice it intends to raise that issue. City County was not required to put on a defense as to reasonableness when there was no notice that subject would be at issue.

The parties raise a number of issues that I will not resolve here because they would not affect the outcome of this order. It is not appropriate on review to decide issues that are irrelevant to the outcome of the proceeding. See *State v. McDonnell*, 343 Or 557, 567-568 (2007); *Safeway Stores, Inc. v. State Board of Agriculture*, 198 Or 43, 52-53 (1953). For clarity, I will list the issues I do not address in this order. City County argues that ORS 656.262(11) does not authorize awarding penalties or attorney fees to medical providers and that fees and penalties would be inappropriate in this case under ORS 656.390. The Proposed and Final Order also examined whether fees could be awarded under ORS 656.385. This final order does not

⁴ OAR 436-060-0155 provides in part:

(1) Under ORS 656.262(11), the director may require the insurer to pay an additional amount to the worker as a penalty and an attorney fee to the worker’s attorney when the insurer unreasonably delays or unreasonably refuses to pay compensation, or unreasonably delays acceptance or denial of a claim.

(2) Requests for penalties and attorney fees under this section must be in writing, stating what benefits have been delayed or remain unpaid, and mailed or delivered to the division within 180 days of the alleged violation. Attorney fees will be awarded as provided in OAR 436-001-0400 to 436-001-0440.

* * * * *

(4) When notified by the director that additional amounts may be due the worker as a penalty under this rule, the insurer must respond in writing to the division. The response must be mailed or delivered to the division within 21 days of the mailing date of the division’s inquiry letter, with copies of the response, including any attachments, sent simultaneously to the worker and the worker’s attorney (if represented). If an insurer fails to respond or provides an inadequate response (e.g. failing to answer specific questions or provide requested documents), assessment of a civil penalty may occur under OAR 436-060-0200. In addition, failure to provide copies of the response to the worker or attorney timely may result in the assessment of a \$50.00 civil penalty under OAR 436-060-0200.

authorize any penalties or attorney fees. The Proposed and Final Order determined former temporary OAR 436-009-0040 did not apply to this case and that the department had the authority to adopt the prior permanent version of that rule. It is not necessary to address the department's authority to adopt the former temporary rule that was not applied here.

IT IS HEREBY ORDERED The administrative orders are affirmed. The Proposed and Final Order is affirmed in part and modified in part. The parts of the proposed order affirming RT's administrative orders prohibiting City County from applying the discounts at issue here, and requiring City County to pay the disputed portion of Chehalem's fees, is affirmed. The parts of the Proposed and Final Order requiring City County to pay penalties and attorney's fees are modified.