

In the ORS 656.248 Medical Fee Dispute of

**Jackson County Physical Therapy**

Contested Case No: 08-162H

**FINAL ORDER**

January 28, 2011

JACKSON COUNTY PHYSICAL THERAPY, Petitioner  
LIBERTY NORTHWEST INSURANCE CORPORATION, Respondent  
Before John Shilts, Workers' Compensation Division Administrator

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This is a medical fee payment dispute between medical provider Jackson County Physical Therapy (provider) and insurer Liberty Northwest Insurance Corporation (insurer). The injured workers are not participating in the dispute. The dispute is whether insurer was authorized to discount its payments to provider for billed fees based on a fee discount contract between provider and Medrisk (TPA). The parties addressed the dispute as though it involved the application of former temporary rule OAR 436-009-0040.<sup>1</sup> That was only partially correct. As one of the administrative orders here was issued after the temporary rule expired, the decision concerning that order requires a different analysis. As to that order, the controlling rule is the preceding, permanent version of that rule. Former OAR 436-009-0040<sup>2</sup> I find the discounts were permitted under both rules.

**FACTUAL SUMMARY**

On July 7, 2008 the Department of Consumer and Business Services adopted a temporary rule concerning billing and payment of medical fees for services provided to injured workers. The temporary rule permitted fee discount contracts between medical providers and insurers. Former OAR 436-009-0040; WCD Admin. Order No. 08-060, July 7, 2008.

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<sup>1</sup> Insurer's written argument submitted for the hearing correctly points out the Administrative Order was issued after January 1, 2009, so that the preceding, permanent version of the rule should be controlling. The Hartford Closing Argument, p. 8. The Proposed and Final Order does not address this point.

<sup>2</sup> The current version of OAR 436-009-0040 only applies to disputes where the services were provided on or after the rule took effect on January 1, 2009. OAR 436-009-0003(1). The rule now states: "Insurers must pay for medical services at the provider's usual fee, or according to the fee schedule, whichever is less, unless otherwise provided by contract . . ." OAR 436-009-0040(1).

The former temporary rule stated in part: "(1) These rules apply to: . . . (b) all payments made under a contract with a medical provider, regardless of the date of service . . ." Former Temporary OAR 436-009-0003(1); WCD Admin. Order No. 08-060, July 7, 2008. Former Temporary OAR 436-009-0040(1) stated: "Unless otherwise provided by contract, insurers must pay providers at the providers' usual fee, or the amount set by fee schedule, whichever is less." WCD Admin. Order No. 08-060, July 7, 2008.

The permanent rule that preceded the temporary rule stated:

"The insurer must pay for medical services at the provider's usual fee or in accordance with the fee schedule whichever is less. Insurers must pay for medical services that have no fee schedule at the provider's usual fee. For all MCO enrolled claims, the insurer must pay for medical services at the provider's usual fee or according to the fee schedule, whichever is less, unless otherwise provided by MCO contract."

Former OAR 436-009-0040(1); WCD Admin. Order No. No. 07-055, November 1, 2007

Provider performed medical services for injured workers between November 13, 2006, and February 6, 2008. At that time, provider had a contract with TPA under which provider agreed to accept discounted fees for specified services. Insurer also had a contract with TPA under which insurer was entitled to apply the fee discounts in the provider/TPA contract. Applying that contract, insurer paid provider less than the full billed amount for provider's services. Provider brought this dispute.

On August 7 and 8, and November 5, 2008, and February 11, 2009, the Workers' Compensation Division's (WCD) Resolution Team (RT) issued administrative orders resolving the disputes. The orders found provider and insurer were both parties to the discount agreement and that insurer had properly applied the discounts stated in the contract. Insurer therefore did not owe any additional payment.

Provider requested a hearing. Administrative Law Judge (ALJ) Marshall held the hearing and issued a Proposed and Final Order on August 23, 2010. The ALJ concluded the provision in the temporary rule that authorized fee discount contracts, former OAR 436-009-0040(1), could not be applied in this case. The Proposed and Final Order notes that a temporary rule can only be in effect for 180 days. ORS 183.335(6)(a).<sup>3</sup> The ALJ reasoned that, since the original treatment and billing in this case occurred before the temporary rule was enacted, applying the temporary rule to those events would extend the operation of the rule beyond the permitted 180 days. The ALJ therefore applied the previous permanent rule which he concluded did not authorize fee discount agreements. Former OAR 436-009-0040(1); WCD Admin. Order No. 08-051; June 12, 2008.

## CONCLUSIONS OF LAW

In this medical fee dispute, I review de novo. OAR 436-001-0225(1). This order addresses four issues: admissibility of evidence; correctness of administrative orders issued before January 1, 2009; correctness of administrative orders issued on or after January 1, 2009; and penalties and attorney fees.

### I. Admissibility of Evidence

Insurer attempted to subpoena records from provider concerning its charging, billing, and receipts and sought a remand to obtain this evidence and have it admitted. ALJ Marshall concluded that this was new evidence that had not been offered during the administrative review, and that new evidence was not admissible at hearing. OAR 436-001-0225(1), (2).<sup>4</sup> He also found

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<sup>3</sup> ORS 183.335 provides in part:

“(5) Notwithstanding subsections (1) to (4) of this section, an agency may adopt, amend or suspend a rule without prior notice or hearing or upon any abbreviated notice and hearing that it finds practicable . . . .

\* \* \* \* \*

(6)(a) A rule adopted [or] amended . . . under subsection (5) of this section is temporary and may be effective for a period of not longer than 180 days.”

<sup>4</sup> OAR 436-001-0225 provides in part:

the evidence was irrelevant. ALJ Marshall declined to enforce the subpoena or to admit this evidence and refused to remand. Insurer contends ALJ Marshall's ruling is erroneous.

Insurer's subpoena requested any and all discounted fee agreements, contracts, and/or Preferred Provider Organization (PPO) contracts entered into by provider for therapy services; documentation of provider's usual and customary rates from 1/23/02 to 1/23/07 for physical therapy for specified CPT codes; billing records from 1/23/02 to 1/23/07 showing the amounts provider billed under those CPT codes; and accounts receivable records showing the amounts provider was paid under those CPT codes.

Insurer cites *Michael J. Doud*, 14 CCHR 40 (2009) as authority for the position that new evidence is admissible in a hearing on a medical fee dispute. That decision is not persuasive authority. The issue of whether new evidence can be admitted at the hearing on a medical fee dispute was not raised, addressed, or decided in *Doud*. The order merely refers to the rule that review is de novo in such a case. OAR 436-001-0225(1), (2). A legal decision is only authority for issues that are actually raised and decided in that decision. *State v. McDonnell*, 343 Or 557, 567 (2007).

Even if *Doud* was entitled to precedential weight, it is irrelevant here because the disputed contractual discounts are proper and provider's usual fee is therefore irrelevant. Insurer contends this evidence supports its position that it paid provider's "usual fee" regardless of the validity of the temporary rule and the existence of the TPR contract. Because I find the discounts proper under both the temporary rule and the preceding permanent rule, I need not address whether this evidence should have been admitted.

## II. Pre-January 1, 2009 Administrative Orders

RT applied the temporary rule, found the contract between TPA and provider was enforceable under that rule, and found the discounted payments were proper under the contract. ALJ Marshall found the temporary rule had been improperly retroactively applied, and that its application in this case improperly allowed the temporary rule to operate beyond 180 days. I find that the rule can properly be applied retroactively, and that its application to the events in this case does not improperly extend its life.

A rule is being applied retroactively when it affects existing rights or obligations that arise from prior transactions or occurrences. *U.S. Bancorp v. Dept. of Revenue*, 337 OR 625, 636-637 (2004). Given that the rule here was enacted in 2008, and the services were provided and billed for prior to the rule's enactment, applying the temporary rule would be a retroactive application.

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"1) Except for the matters listed in sections (2) and (3), the administrative law judge reviews all matters within the director's jurisdiction de novo, unless otherwise provided by statute or administrative rule.  
(2) In medical service and medical treatment disputes under ORS 656.245, 656.247(3)(a), and 656.327, and managed care disputes under ORS 656.260(16), the administrative law judge may modify the director's order only if it is not supported by substantial evidence in the record or if it reflects an error of law. New medical evidence or issues may not be admitted or considered."

An agency is allowed to apply a rule retroactively if that was the agency's intent in enacting the rule. *U.S. Bancorp v. Dept. of Revenue*, 337 Or 625, 637-638 (2004); *Delehant v. Board on Police Standards and Training*, 317 Or 273, 278-279 (1993); *May Trucking Co. v. DOT*, 203 Or App 564, 573-574 (2006); see also *Whipple v. Howser*, 291 Or 475, 480-481 (1981). There is some authority that suggests that, in determining whether to apply a rule retroactively, it must be determined whether doing so would impair existing rights. *May, supra*, *Joseph v. Lowery*, 261 Or 545, 547 (1972).

Temporary OAR 436-009-0003(1) stated, in part: "(1) These rules apply to: . . . (b) all payments made under a contract with a medical provider, regardless of the date of service . . . ." WCD Admin. Order No. 08-060, July 7, 2008. This is an express, overt, and intentional expression by the department that the temporary rule would operate retroactively and be applied to payments that were made before the rule was enacted.

In addition, enforcing fee discount agreements under the temporary rule does not prejudicially impair provider's pre-existing rights. Applying the rule here results in enforcing the terms of a contract that provider signed. Provider's rights are not harmed by the enforcement of a contract to which provider agreed. It is therefore permissible under the legal precedent cited above to apply the temporary rule to events that occurred before the rule's enactment.

Provider contends applying the rule retroactively violates its due process rights because it reasonably expected to be paid the amount it billed. I disagree. Retroactively applying the rule does not prejudicially affect provider's rights because the rule simply provides for the enforcement of a contract to which provider had already agreed. Provider should have reasonably expected to be paid the amounts it had agreed to in the fee discount contract.

ALJ Marshall also found applying the temporary rule retroactively would improperly extend its operation beyond the 180 days that are permitted for a temporary rule. ORS 183.335(6)(a). ORS 183.335(6)(a) does establish a limited life for a temporary rule. However, the statute provides that a temporary rule "may be effective for a period of not longer than 180 days." The temporary rule was in effect from July 1, 2008, through January 1, 2009. WCD Admin. Order No. 08-060, July 7, 2008; WCD Admin. Order No. 08-063, December 15, 2008. The administrative orders here issued during the 180 days in which the temporary rule was properly in effect and therefore did not improperly extend the life of the rule.

The temporary rule can properly be applied retroactively, and it was in effect at the time RT issued some of the orders here. RT was therefore correct in applying the temporary rule to resolve this dispute, and was correct in finding the discounts insurer applied were valid and permissible.

Provider also asserts the temporary rule is invalid because the department exceeded its statutory authority by adopting a rule that permitted payment to medical providers under a contractual discount, rather than according to the amount billed or the fee schedule. An administrative rule is invalid if it exceeds the agency's statutory authority. ORS 183.400(4); *Planned Parenthood Association v. Department of Human Resources*, 297 Or 562, 565 (1984).

The temporary rule was adopted under the authority of ORS 656.012; 656.248; and 656.726(4)(a). WCD Admin. Order No. 08-060, July 7, 2008. ORS 656.726(4) states in part:

“The director hereby is charged with the duties of administration, regulation and enforcement of . . . this chapter. To that end the director may:  
(a) Make and declare all rules . . . which are reasonably required in the performance of the director’s duties. “

ORS 656.012 provides in part:

“(2) . . . [T]he objectives of the Workers’ Compensation Law are declared to be as follows:  
(a) To provide, regardless of fault, sure, prompt and complete medical treatment for injured workers . . . ;  
(b) To provide a fair and just administrative system for delivery of medical . . . benefits . . . .”

ORS 656.248 provides in part:

“(1) The Director of the Department of Consumer and Business Services . . . shall promulgate rules for developing and publishing fee schedules for medical services provided under this chapter . . . .  
\* \* \* \* \*  
(2) Medical fees equal to or less than the fees schedules published under this section shall be paid when the vendor submits a billing for medical services. In no event shall that portion of a medical fee be paid that exceeds the schedules.  
\* \* \* \* \*  
(6) Notwithstanding subsection (1) or (2) of this section, such rates or fees provided in subsections (1) and (2) of this section shall be adequate to insure at all times to the injured workers the standard of services and care intended by this chapter.  
\* \* \* \* \*  
(11) Notwithstanding any other provision of this section, fee schedules for medical services and hospital services shall apply to those services performed by a managed care organization certified pursuant to ORS 656.260, unless otherwise provided in the managed care contract.”

Provider contends the controlling statutes permit the department to authorize only three methods of calculating payments to medical providers: the fee schedule; the amount billed; or amounts specified by Managed Care Organization (MCO) contracts. Provider contends the statutory language cited above sets both a ceiling and a floor for payments. Provider’s argument seems to be that, since the statute expressly mentions fee schedules, provider bills, and MCO contracts, but not individual provider discount agreements, the statute does not authorize individual contracts between medical providers and insurers. Adopting this interpretation would require adding restrictive language to the statute that is not present.

The statute need not expressly authorize the use of discount contracts for them to be permissible. The statute expressly permits payments of amounts less than the fee schedule. It does not specify how those reduced amounts are to be determined. The statute does not state it has set out the only permitted methods of calculating fees, as long as there is not an attempt to charge more than the fee schedule allows. The language of the statute does not prohibit the parties from agreeing to rates less than the fee schedule. If a provider is permitted to voluntarily bill an amount lower than the fee schedule, there is not a logical reason to prohibit providers and insurers from agreeing in advance that the provider will accept a payment that is also less than the fee schedule. The statute therefore also does not prohibit the director from adopting rules that enforce fee discount contracts.

ORS 656.248(2) expressly permits payment of amounts lower than the fee schedule. “Medical fees equal to or less than the fee schedules . . . shall be paid when the vendor submits a billing . . . .” ORS 656.248(2) (emphasis added). The statute also explicitly sets the fee schedule as a maximum, or ceiling. “In no event shall that portion of a medical fee to be paid that exceeds the schedules.” *Id.* On its face, the statute sets a ceiling but not a floor.

This interpretation is consistent with the policies of the workers’ compensation system stated in ORS 656.012. Setting the fee schedule as a maximum helps maintain the system’s economic viability. Allowing the parties to voluntarily agree to fees that are lower than the fee schedule also supports the system by helping to contain costs. If providers agree to contractual discounts, they should have determined they can provide proper care at that price. The use of contractual discounts does not inherently conflict with maintaining an acceptable quality of care.

In its exceptions, provider cites legislative discussions during the drafting of this statute that purportedly show the legislature intended or chose not to allow discount contracts. The matter under discussion in the text provider cites concerns the development of PPO’s and MCO’s, and their role in the workers’ compensation system. The issue was primarily about who would be allowed to manage care. This is a different subject than the one under examination here, individual discount contracts between providers and insurers. An agreement under which a provider accepts specific discounts is not the same as a provider agreeing to allow the insurer to act as an MCO and manage care. The legislative discussions referred to do not support provider’s position.

Provider cites to the same legislative debate to assert the legislature intended ORS 656.248 to establish a floor for payments. The legislative statements that provider refers to address topics having absolutely nothing to do with the present issue of fee discount contracts. One reference is to benefit payments to disabled workers, another is to workplace safety, and the third concerns cost issues related to MCO’s. (Ex. 10. pp. 3, 8-9, 10, 12-13, 16).

Provider next argues allowing fee discount contracts between providers and insurers violates the exclusive remedy concept of the workers’ compensation system. ORS 656.012(2) provides:

“[T]he objectives of the Workers’ Compensation Law are declared to be as follows:

\* \* \* \* \*

(e) To provide the sole and exclusive source and means by which subject workers, their beneficiaries and anyone otherwise entitled to receive benefits on account of injuries or diseases arising out of and in the course of employment shall seek and qualify for remedies for such conditions.”

ORS 656.018(1)(a) states in part:

“The liability of every employer who satisfies the duty required by ORS 656.017(1) is exclusive and in place of all other liability arising out of injuries, diseases, symptom complexes or similar conditions arising out of and in the course of employment that are sustained by subject workers . . . .”

The argument seems to be that allowing providers and insurers to set fees by contract is somehow setting up a compensation system outside of the workers’ compensation laws and rules. This is a misconstruction of the exclusive remedy principle. That rule means that, in exchange for receiving guaranteed benefits for work-related conditions, workers can obtain remedies for work-related conditions only through the workers’ compensation system. In exchange, employers who properly insure their workers are shielded from other liability for their workers’ work-related conditions. Allowing providers and insurers to mutually agree on medical fees less than the fee schedule does not alter the fact the injured worker is obtaining medical treatment, and any other benefits, through the regulated structure of the workers’ compensation system.

It is true, as provider states, that the workers’ compensation system is tightly regulated. But, as discussed above, the controlling statutes permit fee discount contracts, and doing so is consistent with the goals and policies of the workers’ compensation system. The authorizing statute permits providers to charge less than the fee schedule. Fee discount contracts are one way of doing this. Fee discount agreements are not inconsistent with or outside of the structure of the workers’ compensation system.

Alternatively, if provider is arguing allowing fee discount contracts permits the parties to operate outside of the regulated parameters of the workers’ compensation system, this is incorrect. Allowing providers and insurers to negotiate payment levels does not remove their interactions from the regulated structure of the workers’ compensation system, because that structure permits payment equal to or less than the amounts the fee schedule specifies.

Provider contends fee discount agreements are unregulated insurance products within the workers’ compensation system. A fee agreement between an insurer and provider is not an insurance product. The statutes define insurance as “a contract whereby one undertakes to indemnify another or pay or allow a specified or ascertainable amount or benefit upon determinable risk contingencies.” ORS 731.102(1). Fee discount agreements are not agreements

that concern indemnification or paying benefits upon the occurrence of specified contingencies. A fee discount contract is an agreement to pay a specified price for a specified service.

Provider also contends the rules concerning MCO's prohibit fee discount contracts outside of MCO's. The rules and statutes that establish parameters for MCO's address the operation of MCO's. They do not set the limits or requirements for care within the workers' compensation system outside of the MCO setting. It appears that provider is arguing that because ORS 656.248(11) specifically authorizes the use of contracts in the MCO context, but does not use the word "contract" outside of the MCO setting, fee discount agreements are not permitted anywhere else. This argument fails because there cannot be an MCO without a care contract. An MCO is a contractual structure that defines how an enrolled worker will receive care. As an MCO cannot exist or provide worker care without being based in a contract, workers' compensation statutes and rules that address MCO's necessarily must address the issue of contracts. That contracts are addressed in the section of the statute concerning MCO's therefore says nothing about whether fee discount contracts are permitted elsewhere in the workers' compensation system.

Provider argues allowing fee discount agreements is comparable to improperly allowing insurers to act as PPO's or MCO's. Provider similarly argues TPA was improperly acting as an MCO without certification. A contract that sets a price for services does not create a PPO or MCO. MCO's and PPO's regulate the provision of care beyond simply setting the price for services. See ORS 656.245(4)(a); 656.260. There has been no proof here that insurer or TPA actually is regulating care rather than simply bargaining over the price of services.

Provider contends that the contract between itself and TPA is not valid because TPA was acting as an uncertified MCO. The only evidence in this case concerns the payment of fees. Regardless of the terms of the contract, there is no proof in this case that TPA attempted to manage care concerning the patient treatment that gave rise to this fee dispute.

For the reasons stated above, I find the Proposed and Final Order contains legal errors. Applying the temporary rule to this dispute is a retroactive application. However, that is permitted because the rule clearly manifests the intent of the department that the rule should be applied retroactively and because retroactive application does not prejudicially affect provider's rights. Applying the temporary rule also does not extend the effective period of the rule beyond 180 days. The rule was only in effect for the authorized period and the orders discussed in this section of this order were issued during the time the temporary rule was in effect. The temporary rule therefore does validly apply to the administrative orders issued in 2008.

### **III. Post-January 1, 2009 Administrative Order**

Although it appears RT, the ALJ, and the parties focused on the applicability of the former, temporary version of OAR 436-009-0040(1), that version of the rule is not relevant in reviewing the February 11, 2009 order. The temporary rule had expired at the time RT issued this order. By its own terms, the current, permanent rule does not apply where the services were provided before the rule took effect. The controlling version of the rule is therefore the former, permanent version that preceded the temporary rule. The discussion above, finding the

department did have the authority to adopt rules concerning fee discount agreements, applies equally here.

In determining the meaning of the former rule, it is important to bear in mind that DCBS promulgated the rule and that when an agency interprets its own rules, the court will defer to that interpretation if it is plausible, and not inconsistent with the rule, the rule's context, or other sources of the law. *Coffey v. Board of Geologist Examiners*, 348 Or 494, 509 (2010); *Tualatin Riverkeepers v. Oregon Department of Environmental Quality*, 235 Or App 132, 144 (2010). The courts should interpret rules so as to give effect to the intent of the agency that established the rule. *Safeway Stores, Inc. v. Martinez*, 239 Or App 224, 230 (2010).

I conclude fee discount contracts between providers and insurers were permitted under the prior, permanent version of OAR 436-009-0040(1). That rule stated:

“The insurer must pay for medical services at the provider's usual fee or in accordance with the fee schedule whichever is less. Insurers must pay for medical services that have no fee schedule at the provider's usual fee. For all MCO enrolled claims, the insurer must pay for medical services at the provider's usual fee or according to the fee schedule, whichever is less, unless otherwise provided by MCO contract.”

Former OAR 436-009-0040(1); WCD Admin. Order No. No. 07-055, November 1, 2007. I reach this conclusion for several reasons.

First, the rule does not expressly prohibit fee discount contracts. Nor does it include exclusive language, such as the word “only.” In interpreting rules, it is not proper to add language the rule does not actually contain. ORS 174.010; *Michels v. Hodges*, 326 Or 538, 544 (1998).

Second, the rule must be read in the context of its authorizing statute, ORS 656.248(2). That sub-section provides:

“Medical fees equal to or less than the fee schedules published under this section shall be paid when the vendor submits a billing for medical services. In no event shall that portion of a medical fee be paid that exceeds the schedules.”

The clear intent of this provision is to set an upper limit on what medical fees may be paid, the fee schedule. But the statute expressly states that “. . . [m]edical fees . . . less than the fee schedules . . .” may be paid. Thus, the statute deliberately does not set a minimum or a floor for medical fee payments. This is consistent with the policy of the workers' compensation system to:

“. . . provide . . . sure, prompt, and complete medical treatment for injured workers . . . [and]

\* \* \* \* \*

. . . [a] fair and just administrative system for delivery of medical and financial benefits to injured workers that reduces litigation and eliminates the adversarial

nature of the compensation proceedings, to the greatest extent practicable . . . .”

ORS 656.012(2)(a), (b).

Setting maximum fees contains costs. Not setting a floor also helps to contain costs, by allowing insurers and providers to negotiate fees less than the fee schedule. Permitting discount contracts allows providers to determine how much less than the fee schedule they can charge while still providing quality medical services. Enforcing fee discount contracts is consistent with the wording of the rule and the statute, and with the policies of the workers’ compensation system.

Permitting discount contracts also serves the purposes of the workers’ compensation system to reduce litigation and the adversarial nature of the proceedings. If providers and insurers agree in advance what a provider will be paid for a given service through a valid, enforceable agreement, there should be fewer payment disputes.

#### **IV. Penalties and Attorney Fees**

At the hearing, provider asked for penalties and attorney fees. As insurer properly paid the amounts it owed, there is no basis to award penalties or attorney fees.

**IT IS HEREBY ORDERED** administrative orders Nos. MF 08-0897, 08-646, 08-0888, 08-0898, 08-0901, 08-1182, 08-0900, 08-0867, 08-0899 are affirmed. Administrative Order 09-0163 is affirmed, but modified in that former permanent OAR 436-09-0040 is the proper basis for that order. The August 23, 2010, Proposed and Final Order is modified. Former temporary OAR 436-009-0040 is controlling as to the administrative orders issued during 2008. Former permanent OAR 436-009-0040 is controlling as to the administrative order issued in 2009. In all cases, the contested discounts are permitted and insurer has paid all amounts it owes and is not required to pay any additional amounts for the bills at issue in this matter.