

In the Matter of the Monetary Adjustment Involving the Claim of

Jean R. Maue, Claimant

Contested Case No: 11-075H

PROPOSED & FINAL ORDER

September 22, 2011

LIBERTY NORTHWEST INSURANCE CORPORATION, Petitioner

SENTRY INSURANCE, Respondent

Before Steve Rissberger, Administrative Law Judge

Pursuant to notice, a hearing was held in Portland, Oregon, on August 22, 2011, before Administrative Law Judge Rissberger. Since this is essentially a dispute between two insurers, neither claimant nor claimant's attorney appeared at the hearing. Sentry Insurance and Intermountain Claims were represented by Robert J. Radler, attorney at law. Liberty Northwest was represented by Barbara Woodford, attorney at law. Exhibits 1-16, A and 4A were admitted at the time of hearing. Recorded final argument was held on the date of hearing. The record closed on August 30, 2011 following the submission of Intermountain's payment summary and Liberty's review of that document.

ISSUES

Monetary Adjustment—Whether WCD erred in that portion of the agency's Proposed and Final Order of Monetary Adjustment where it ordered Liberty to reimburse Sentry/Intermountain for temporary disability and interim compensation that Sentry/Intermountain paid during the period May 20, 2010 through July 16, 2010, even though Liberty had already paid claimant interim compensation during the same period?

FINDINGS OF FACT

Claimant filed claims for right and left epicondylitis while he worked for the employer, Triquint. Liberty Northwest insured Triquint from July 1, 2003 through May 31, 2009. Sentry Insurance insured the employer beginning on June 1, 2009. Intermountain acted as Sentry's processing agent. Claimant initially sought treatment for right epicondylitis while the employer was insured by Liberty. He subsequently sought treatment for his left epicondylitis while Sentry/Intermountain was providing *coverage*.

Liberty paid claimant interim compensation from May 20, 2010 until July 16, 2010, when it issued a responsibility denial. Sentry/Intermountain paid claimant interim compensation from May 7, 2010 through June 30, 2010. Sentry/Intermountain issued its own responsibility denial on June 29, 2010. Claimant appealed both denials.

On August 13, 2010, the Workers' Compensation Division (WCD) issued an order (308 order) designating Sentry/Intermountain *as* the interim processing agent for claimant's claim, pending final resolution of the responsibility issues. On August 24, 2010, pursuant to

WCD's 308 order, Sentry/Intermountain paid claimant temporary disability for the period July 1, 2010 through August 18, 2010.

Liberty and Sentry/Intermountain agreed to a settlement prior to hearing. The settlement was approved by ALJ Fulsher on November 2, 2010. By stipulation, Sentry/Intermountain accepted claimant's claim for left lateral epicondylitis as a non-disabling condition. Liberty accepted claimant's claim for right epicondylitis as a disabling condition.

On November 23, 2010, Sentry/Intermountain requested reimbursement from Liberty for temporary disability payments it made for claimant's right epicondylitis during the time that it was the processing agent for that condition.

Liberty provided only partial reimbursement in response. It did not provide reimbursement for the period May 20, 2010 through July 16, 2010 because Liberty had already paid claimant interim compensation for this period.

On May 2, 2011, WCD's Benefits and Certification Unit issued a Proposed and Final Order of Monetary Adjustment. The Order required Liberty to fully reimburse Sentry/Intermountain for its payment of temporary disability benefits prior to the date of settlement, including the period May 20, 2010 through July 16, 2010.¹ Liberty requested a hearing.

CONCLUSIONS OF LAW AND OPINION

At issue is Intermountain's right to reimbursement for interim and temporary disability benefits it paid to claimant for the period May 20, 2010 through July 16, 2010. Intermountain argues that WCD's Proposed and Final Order of Monetary Adjustment, requiring Liberty to fully reimburse Intermountain for all temporary disability benefits paid prior to the date of settlement, including the period May 20 through July 16, 2010, should be upheld. Liberty contends, in part, that Intermountain "unduly compensated" claimant within the meaning of OAR 436-060-0195(3) by paying temporary disability for a period for which Liberty had already paid interim compensation.

As both parties pointed out at hearing, the period of temporary disability benefits in question here is best analyzed in two parts, because different factual and legal considerations apply to each segment of time. The first segment of time, May 20 through June 29, 2010, is the period during which both Liberty and Intermountain paid interim compensation, prior to either party issuing a denial. The second segment of time, June 30 through July 16, 2010, addresses that period after which Sentry/Intermountain had issued its June 29, 2010 responsibility denial. Sentry/Intermountain eventually paid claimant temporary disability pursuant to the 308 order, even though Liberty had continued to pay interim compensation until it eventually issued its' responsibility denial on July 16, 2010.

¹ The findings of fact in this case are based on an oral stipulation reached by the parties during the hearing as well as the written exhibits admitted into evidence.

With regard to the first period at issue, May 20 through June 29, 2010, both parties noted that each insurer had an identical obligation to pay interim compensation until such time as each insurer issued an acceptance or denial of claimant's claim. However, the parties disagreed about Sentry/Intermountain's right to seek reimbursement for the interim compensation that it paid during this period.

Both parties cited to subpart (3) of OAR 436-060-0195 in constructing their arguments. It provides, in relevant part:

(3) The division may direct any necessary monetary adjustment between parties, but shall not order an insurer to pay compensation over and beyond that required by law, as it relates to the insurer's claim, except where an insurer *unduly* compensates a *claimant* while having knowledge such compensation has already been paid by another insurer. Notwithstanding, each insurer has its own independent obligation to process its claim and pay interim compensation due until the claim is either accepted or denied.

As Intermountain's representative pointed out at hearing, OAR 436-0600195(3) is not a model of clarity. However, the second sentence of the rule which refers to "each insurer" having "its own independent obligation * * * to pay interim compensation" contemplates circumstances under which two insurers simultaneously pay interim compensation. Further, the term "notwithstanding" at the beginning of this sentence appears to set this situation apart from those circumstances under which the division can order a monetary adjustment between parties.

This is exactly the kind of situation presented here. As each party appeared to agree during final argument, both insurers—Liberty and Sentry/Intermountain—incurred an independent obligation to simultaneously pay interim compensation to claimant from May 20 through June 29. *See Petshow v. Ptld Bottling Co.*, 62 Or App 614 (1983). In other words, the mere fact that Liberty was eventually found responsible for the payment of temporary disability through its acceptance of a disabling injury does not give Sentry/Intermountain the right to seek reimbursement from Liberty for the period in question, because both insurers had an "independent obligation" to pay interim compensation within the meaning of the rule.

Further, the opening sentence of subsection (3) of the rule provides that WCD "shall not order an insurer to pay compensation over and beyond that required by law." Here, like Sentry/Intermountain, Liberty had its own independent legal obligation to pay interim compensation during the period of May 20 through June 29. However, it did not have an obligation to do so twice. If Liberty were required to reimburse Sentry/Intermountain for Sentry/Intermountain's own obligation to pay interim compensation, then—in effect—Liberty would be required to pay double the amount of interim compensation required of it by law. In my view, this is a fairly clear violation of the prohibition in OAR 436-060-0195(3) against an order requiring an insurer "to pay compensation over and beyond that required by law." Accordingly, I find that WCD erred when it ordered Liberty to reimburse Sentry/Intermountain for the interim compensation that Sentry/Intermountain paid between May 20, 2010 and June 29, 2010.

The dispute involving the second period at issue, June 30 through July 16, 2010, also turns, in part, on the language contained in OAR 436-060-0195(3). The rule creates an exception to WCD's authority to order a monetary adjustment where an "insurer unduly compensates a claimant while having knowledge such compensation has already been paid by another insurer." Here, Liberty argues that even if Sentry/Intermountain didn't have actual knowledge that Liberty had paid interim compensation for the period in question, it still had a duty to investigate whether prior payments had been made before paying temporary disability for this period.

In addition to the rule, Liberty points to language contained in the 308 order that appointed Sentry/Intermountain as paying agent. The order provided that Sentry/Intermountain should begin payment of any benefits due under Chapter 656 within 14 days, and provided further that: "[b]enefits shall include any temporary disability benefits due for periods subsequent to any periods of disability already paid by any party." This language required Sentry/Intermountain to pay temporary disability benefits only for those periods for which claimant had not already been compensated. Thus, implicitly, at least, the 308 order suggested that Sentry/Intermountain conduct a reasonable investigation to determine whether temporary disability benefits or interim benefits had already been paid by other insurers.

In this case, even a cursory investigation would have revealed the existence or prior payments by Liberty during the period in question. The 308 order specifically referenced Liberty and noted that Liberty, like Sentry/Intermountain, had denied responsibility. Liberty issued its responsibility denial on July 16, 2010. Thus, if Sentry/Intermountain employees had taken the limited precaution of determining the date of Liberty's denial, they would have been aware that Liberty had a legal obligation to continue to pay interim compensation between June 30, 2010 and July 16, 2010.

Moreover, in considering this dispute, I once again reference the language in OAR 436-060-0195(3) that prohibits WCD from ordering an insurer "to pay compensation over and beyond that required by law." Here, as both parties acknowledge, Liberty has already paid interim compensation for the period June 30, 2010 and July 16, 2010. Thus, Liberty cannot be required to provide duplicate interim compensation benefits—in the form of reimbursement payments to Sentry/Intermountain—for this same period.

At hearing, Intermountain/Sentry argued that WCD necessarily interpreted OAR 436-060-0195(3) in its favor in ordering Liberty to reimburse it for the temporary disability and interim benefits it paid during the entire period at issue, May 20, 2010 through July 16, 2010. Intermountain noted further that an ALJ has a legal obligation to defer to a state agency's reasonable interpretation of its own rule. *See Don't Waste Oregon Comm. v. Energy Facility Siting Council*, 320 Or 132, 142, (1994). However, I am not persuaded that WCD's May 2, 2011 Order of Monetary Adjustment contains either a discernable legal interpretation of OAR 436-060-0195(3), or a reference to prior agency precedent interpreting this rule. WCD's order mentions OAR 436-060-0190 and OAR 436-060-0195(2), but it contains no reference to OAR 436-060-0195(3), the subsection both parties focused their arguments on at hearing. Further, the order contains no detailed discussion of the specific language contained in either OAR 436-060-0190 or OAR 436-060-0195(2), the legal impact of either of these rules, or more

importantly, how the language of either rule applies to the particular circumstances of this case. Finally, the order is signed by a "benefit consultant" of WCD's Benefit and Certification Unit. The order contains no indication that the benefit consultant has the authority to interpret administrative rules on behalf of the entire agency.

In sum, I am persuaded that WCD erred in its Proposed and Final Order of Monetary Adjustment when it required Liberty to reimburse Sentry/Intermountain for the interim compensation and temporary total disability benefits that Sentry/Intermountain paid between May 20, 2010 and July 16, 2010. WCD's monetary adjustment order should be modified to eliminate the requirement that Liberty reimburse Sentry/Intermountain for this period.

ORDER

IT IS THEREFORE ORDERED

WCD's Proposed and Final Order of Monetary Adjustment, issued on May 2, 2011, is modified. That portion of the order that required Liberty to reimburse Sentry/Intermountain for temporary disability benefits during the period May 20, 2010 through July 16, 2010 is set aside.