

In the Matter of ORS 656.245

**Claude B. Rodgers, Claimant**

Contested Case No: 05-185H

**AMENDED PROPOSED & FINAL ORDER**

June 15, 2006

CIS WORKERS' COMP GROUP, Petitioner

CLAUDE B. RODGERS, Respondent

Before Kate Donnelly, Administrative Law Judge

---

**HISTORY OF THE CASE**

The employer, Klamath County, and its insurer, City County Insurance Services (CCIS), appeals a November 16, 2005 Administrative Order issued by the Medical Review Unit (MRU) of the Workers' Compensation Division (WCD), Department of Consumer and Business Services (DCBS). In the Order, MRU concluded that Dr. Corson had performed a file review and that he was entitled to payment for his time. Consequently, the director ordered that CCIS was liable for the file review done by Dr. Corson and billed on August 25, 2006. CCIS's appeal was referred to the Workers' Compensation Board, Hearings Division, under ORS 656.704(2)(a) and OAR 436-001-0019.

A hearing was scheduled to convene on April 11, 2006, in Klamath Falls, Oregon before Administrative Law Judge Kate Donnelly. Claimant is represented by Robert Chapman. The employer, Klamath County, and its insurer, CCIS, are represented by H. Scott Plouse. The hearing did not take place after the parties agreed that the matter be decided upon the documentary record in lieu of hearing. Claimant waived appearance in this matter. There were no recorded proceedings. The record closed on May 10, 2006, following receipt of the insurer's closing argument.

A Proposed and Final Order was issued on June 5, 2006 with the incorrect year. Therefore, it is necessary to amend the Proposed and Final Order with respect to the date of issuance. The Proposed and Final Order is hereby republished with such amendment. Appeal rights, as set forth below, regarding the amended Proposed and Final Order shall commence to run from the date of this amended Proposed and Final Order.

**ISSUE**

Whether CCIS is liable for payment of Dr. Corson's billing for a medical arbiter file review.

**EVIDENTIARY RULINGS**

On March 22, 2006, the Workers' Compensation Division (WCD) submitted Exhibits 1 through 21. On May 8, 2006, the insurer submitted supplemental Exhibits 6A, 6B, 6C, and 7A-1. No new medical evidence or issues not considered by MRU may be considered on review of the Administrative Order. *See* OAR 436-0001-0225(2). However, the insurer's submission of

these documents did not bring up any new issues or new medical evidence, so they will be admitted.<sup>1</sup> Accordingly, Exhibits 1 through 21, 6A, 6B, 6C and 7A are admitted into the documentary record.

### **FINDINGS OF FACT**

The Findings of Fact in the November 16, 2005 Administrative Order are accepted and incorporated in this Proposed and Final Order, with the following corrections and supplementation:

1) Page 1, paragraph 3 of the Findings of Fact is corrected to read as follows: “On July 11, 2005, claimant’s attending physician, Dr. Breitenstein, reported that claimant was too sick to travel to Medford, Oregon for his Workers’ Compensation Hearing scheduled for August 31, 2005” (*See* Ex. 6A).

2) The Findings of Fact are supplemented as follows:

“On August 16, 2005, an Appellate Service Representative for WCD received a telephone call from claimant’s attorney’s office. The WCD representative was informed that claimant was very ill with cancer, which was not getting any better and couldn’t travel to the medical arbiter exams. The worker’s attorney said they would consider trying to settle and/or withdrawing the request for reconsideration. The Appellate Service Representative cancelled the medical arbiter examinations scheduled with Drs. Conway, Lowengart, and Corson. She also talked to the Appellate Reviewer to notify her of the situation” (Ex. 8-2).

3) Claimant did not attend the medical arbiter examinations with Drs. Lowengart, Conway, and Corson, because they had been cancelled on August 16, 2005, at his request (Ex. 8-1). Dr. Corson’s office received verbal notice of the cancellation on August 16, 2005 from the WCD Appellate Service Representative (Ex. 8-2).

4) On August 25, 2005, the WCD Appellate Service Representative received a call from Erica at Dr. Corson’s office asking if Dr. Corson could bill for a file review because he had already reviewed the record because it was so large. The WCD Appellate Service Representative told Erica that she could bill for the file review (Ex. 8-2).

5) On August 25, 2005, Dr. Corson submitted a bill to CCIS for \$819 under code A0025. The date of service was recorded as August 25, 2005 (Ex. 9).

### **CONCLUSIONS OF LAW AND OPINION**

---

<sup>1</sup> Exhibits 6B, 6C and 7A are documents generated by WCD relating to the issue at hand. Ex. 6A is a July 11, 2005 letter from claimant’s attending physician that is discussed in the Administrative Order but was not included in the Notification of Record Contents, that accompanied the November 16, 2005 Order (*See* Exs. 19-1; 20-1).

CCIS has the burden of showing that the Administrative Order is not supported by substantial evidence or that it reflects an error of law. OAR 436-001-0225(2).

“Substantial evidence exists to support a finding of fact when the record viewed as a whole, would permit a reasonable person to make that finding.” ORS 183.482(8)(c). A finding is supported by substantial evidence if it is reasonable in light of countervailing as well as supporting evidence. *Garcia v. SAIF*, 187 Or App 51, 57 (2003); *Garcia v. Boise Cascade Corp.*, 309 Or 292, 295 (1990). To determine whether substantial evidence exists, a reviewer must:

“[I]ook at the whole record with respect to the issue being decided, rather than one piece of evidence in isolation. If an agency’s finding is reasonable, keeping in mind the evidence against the finding as well as the evidence supporting it, there is substantial evidence.” *Armstrong v. Asten-Hill Co.*, 90 Or App 200 (1988).

Here, CCIS’s appeal involves a medical fee dispute that arises under the director’s authority to appoint medical arbiters in a reconsideration proceeding pursuant to ORS 656.268(7)(a). ORS 656.268(7)(f) provides:

“The costs of examination and review by the medical arbiter or panel of medical arbiters shall be paid by the insurer or self-insured employer.”

OAR 436-009-0070(9) provides:

“Fees for all arbiters and panel of arbiters used for director reviews pursuant to OAR 436-030-0165 shall be established by the director. This fee determination will be based on the complexity of the examination, the report requirements and the extent of the record review. The level of each category is determined by the director based on the individual complexities of each case as compared to the universe of claims in the medical arbiter process. When the examination is scheduled, the director shall notify the medical arbiter and the parties of the authorized fee for that medical arbiter review based on a combination of separate components.”

OAR 436-009-0070(9)(d) provides:

“The director will notify the medical arbiter and the insurer of the approved code for each component to establish the total fee for the medical arbiter review. If a worker fails to appear for a medical arbiter examination without giving each medical arbiter at least 48 hours notice, each medical arbiter shall be paid at 50 percent of the examination or testing fee. A medical arbiter may also receive payment for a file review as determined by the director.”

In reaching its conclusion that CCIS was liable for payment of Dr. Corson’s file review, MRU did not find the insurer’s argument persuasive that neither Drs. Lowengart or Conway

billed for any services (Ex. 19-2). Additionally, MRU found that the DCS agreed to by the parties on August 18, 2005 related to denied conditions, rather than the conditions to be addressed by Dr. Corson in his medical arbiter examination (Ex. 19-2). Furthermore, MRU noted that, although a CDA was signed for the accepted conditions, it was not approved until October 28, 2005 (Ex. 19-2).

The basis for MRU's decision was expressed as follows:

“Despite C[C]IS's contentions, there is no persuasive documentation to show that Dr. Corson did not perform review of the medical record prior to the scheduled examination of August 25, 2005. Further, his office contacted ARU on the date of that examination, reporting that file review had already been done and ARU authorized Dr. Corson to bill for his file review. ARU has the authority to authorize payment for a review done by an arbiter. Accordingly, the director finds Dr. Corson performed the file review of Mr. Rodgers' file and he is entitled to payment for his time. For these reasons, the director concludes Dr. Corson is entitled to payment for the file review he performed prior to August 25, 2005. The director finds C[C]IS is liable for that service” (Ex. 19-3).

On appeal, CCIS continues to argue, among other things, that the other medical arbiters, Drs. Lowengart and Conway, did not charge for services, thereby supporting the conclusion that they received timely notice of the cancellation of the arbiter examinations. I agree with MRU that this is not persuasive regarding whether Dr. Corson performed a medical arbiter file review. Additionally, I agree with MRU that the DCS related to denied conditions, rather than those accepted conditions to be addressed by Dr. Corson. Furthermore, contrary to the insurer's argument, the CDA approved by the Workers' Compensation Board on October 28, 2005 did not stay the reconsideration proceeding on the date agreement was reached, but rather on the date of submission of the CDA to the Board.<sup>2</sup> See ORS 656.236(1)(a); 436-030-0145(6)(c).

Nevertheless, I conclude that MRU did not have “substantial evidence” to support its conclusion that CCIS is liable for payment of Dr. Corson's purported medical arbiter file review. Additionally, I find that MRU made errors of law. I reach these conclusions based on the following reasoning.

First, although relying on the August 25, 2005 notation by the Appellate Service Representative memorializing a conversation with Dr. Corson's office staff reporting that he had already performed a file review, MRU ignored that same memorandum showing that, on August 16, 2005, the Appellate Service Representative had cancelled Dr. Corson's August 25, 2005 medical arbiter exam (*See* Ex. 8-2). A notice of cancellation was sent to all parties on that same date (Ex. 8-1). Although the August 16, 2005 letter canceling the examinations scheduled for August 17, August 22, and August 25, 2005, was not copied to the individual medical arbiters, the WCD internal memorandum makes it clear that the individual medical arbiters were given verbal notice of cancellation. In Dr. Corson's case, this occurred fully nine days prior to the scheduled examination.

---

<sup>2</sup> The date stamp on the CDA shows that the Board received it on October 21, 2005 (Ex. 18-1).

Additionally, the internal memorandum notation of August 16, 2005 does not reflect that Dr. Corson had performed a file review prior to that date. Consequently, I conclude that there is no evidence that Dr. Corson performed the file review prior to cancellation of the examination. The only evidence in this record regarding when Dr. Corson performed the alleged file review is the August 25, 2005 notation reflecting that Dr. Corson had already reviewed the record because it was so large (Ex. 8-2). The internal memorandum did not indicate when Dr. Corson performed the file review. However, Dr. Corson's billing showed the date of service for this file review as occurring on August 25, 2005 (Ex. 9). The record establishes that at the time he performed this file review, the examination had been cancelled for nine days.

OAR 436-009-0070(9)(d) provides, in relevant part:

“If a worker fails to appear for a medical arbiter examination without giving each medical arbiter at least 48 hours notice, each medical arbiter shall be paid at 50 percent of the examination or testing fee. A medical arbiter may also receive payment for a file review as determined by the director.”

When read in context, I interpret this rule as allowing for payment of one-half of the examination or testing fee, or potentially, a file review fee, in those situations where a claimant has failed to appear for a medical arbiter examination without giving each medical arbiter at least 48 hours notice.

Here, claimant gave nine days notice to the WCD that he wished to cancel his arbiter examination with Dr. Corson. He did not simply “fail to appear” for a scheduled arbiter examination. Moreover, WCD gave verbal notice of the cancellation to the individual medical arbiters, including Dr. Corson, on August 16, 2005, the same day that ARU sent out the cancellation notice to the parties. In other words, there was no scheduled arbiter examination with Dr. Corson as of August 16, 2005.

Under such circumstances, I find that Dr. Corson's apparent lack of knowledge that the exam had been cancelled was not due to claimant's failure to timely cancel the exam, nor was it due to ARU's failure to notify his office of the cancellation prior to the scheduled exam, but rather to his own internal office communication problems. Furthermore, I find that ARU's August 25, 2005 authorization for Dr. Corson to bill CCIS for his unnecessary file review was arbitrary and not supported by the applicable Administrative Rules, especially in light of ARU's prior cancellation of the arbiter examination and notification to Dr. Corson's office that it had been cancelled.

In summary, I conclude that MRU lacked substantial evidence and erred as a matter of law in finding CCIS liable for payment of Dr. Corson's file review. Consequently, the Administrative Order dated November 16, 2005 will be reversed.

### **ORDER**

**IT IS THEREFORE ORDERED** that MRU's November 16, 2005 Administrative Order is reversed.