

In the ORS 656.248 Medical Fee Dispute of

Fermin Hernandez, Claimant

Contested Case No: 08-084H

PROPOSED & FINAL ORDER

July 18, 2008

SAIF CORPORATION, Petitioner
SACRED HEART MEDICAL CENTER, Respondent
Before , Chuck Mundorff Administrative Law Judge

SAIF Corporation appealed the Director's Administrative Order MF 08-416 on May 14, 2008. Pursuant to notice, a hearing convened in Eugene, Oregon on June 18, 2008 before Administrative Law Judge (ALJ) Chuck Mundorff. This matter was consolidated with 19 other appeals by SAIF Corporation of Administrative Orders concerning the same legal dispute, and the matters were heard together. Claimant was not present nor did he appear by counsel. SAIF Corporation appeared through its trial counsel, Dennis Ulsted, the Workers' Compensation Division (WCD) was represented by Carol Parks from the Oregon Department of Justice (DOJ), Peace Health dba Sacred Heart Medical Center, were represented by Win Calkins. The hearing was recorded by ALJ Mundorff. Exhibits were admitted, testimony taken and the record was closed following argument by the parties' representatives.

EXHIBITS

The evidentiary record consists of the May 29, 2008 submission by WCD numbered 1-15, the May 30, 2008 submission by the DOJ marked as A-I, the June 6, 2008 submission by Peace Health marked as WCD/DRS 1-21, the June 6, submission by Peace Health marked as WCD/DRS 1-16, and finally SAIF Corporation's submission of June 11, 2008 numbered 17, 18, & 19. The above exhibits were admitted in each of the consolidated contested case hearings without objection.

ISSUES

SAIF appeals WCD's Administrative Orders that concluded that SAIF had incorrectly reduced payments to Peace Health for radiological services provided by Sacred Heart Medical Center. The dispute centers on whether radiological services are properly paid applying the Current Procedural Terminology Code and a RBRVS value when a value is assigned as SAIF contends, or rather, whether they should be paid under a cost/charge ratio as contended by Peace Health.¹ SAIF stipulated at hearing that payment of these services were the sole issue to be determined under each case and that any other issues raised were waived for purposes of this hearing.

¹ CPT is a coding system for medical procedures which is published yearly by the American Medical Association. The CPT is used by numerous entities including the Federal Government in medical billings for Medicaid and Medicare. Oregon has adopted it for use in billing workers' compensation claims.

JURISDICTION AND STANDARD OF REVIEW

ORS 656.248(12) provides for administrative review of disputes regarding medical fees in workers' compensation claims. The decision of WCD is subject to review pursuant to ORS 656.704 which provides that the contested case be referred to an ALJ. OAR 436-001-0225(1) provides "the administrative law judge reviews all matters within the director's jurisdiction de novo, unless otherwise provided by statute or administrative rule. As there are no restrictions provided by statute or rule, my review of this dispute is de novo.

FINDING OF FACT

Claimant sustained a compensable injury for which he sought medical services. (Ex. WCD 13). Diagnostic treatment included radiological studies performed by Sacred Heart which billed SAIF Corporation, the responsible carrier for the claim, using a revenue code under the Current Procedural Terminology (CPT) Code. SAIF Corporation paid a reduced amount of the radiology bill noting on its Explanation of Benefits (EOB) that the "Fee adjusted per Oregon Medical Fee and Payment Rules." (Ex. WCD 13).

Sacred Heart disputed the reduction and requested Administrative Review with WCD. The Resolution Team (RT), under the director's authority, reviewed the matter and held that SAIF Corporation had incorrectly reduced the payment for radiological services and ordered additional payment for those services. SAIF timely appealed each WCD Order resulting in this hearing. (WCD Ex. 14).

ORS 183.450(2) provides, among other things, "[T]he burden of presenting evidence to support a fact or position in a contested case rests on the proponent of the fact or position." SAIF, as petitioner in this matter, presented the initial testimony.

SAIF called Kathy Loretz, medical program manager for SAIF. She testified that her duties included auditing bills and paying medical service providers for service on workers' compensation claims. She stated that during her tenure SAIF Corporation had paid radiological services using the CPT Code and applying the Relative Value Unit multiplier. She noted that this had been the standard under a former version of OAR 436-090-0020 until this rule was changed in April of 2006². Ms. Loretz testified that the change was intended to be fiscally

² The purpose statement of the Medical Fee Schedule rules reads: The purpose of these rules is to establish uniform guidelines for administering the payment for medical services to injured workers within the workers' compensation system.

As amended in 2006, OAR 436-009-0020(2) reads: (2) Hospital outpatient charges billed to insurers must include revenue codes, ICD-9-CM diagnostic and procedural codes, CPT® codes, HCPCS codes, and National Drug Codes (NDC), where applicable. Hospitals must include their NPI on all bills. Unless otherwise provided for by a governing MCO contract, insurers must pay hospitals for outpatient services according to the following: the insurer must first separate out and pay charges for services by physicians and other licensed medical service providers assigned a code under the CPT® and assigned a value in RBRVS for physician fees as identified by the revenue codes indicating professional services. These charges must be subtracted from the total bill and the adjusted cost/charge ratio applied only to the balance. For all outpatient therapy services (physical therapy, occupational therapy, and speech language pathology), use the Physician work RVUs, Year 2008 transitional non-facility PE

neutral but that her evaluation into the change in billing method would have a significant impact to SAIF and other carriers of workers' compensation insurance. She stated that in her experience other similar providers of services were properly paid under the CPT code such as physical, occupational and speech therapists.

SAIF called radiologic technologist instructor Barbara Smith to testify. She described the training that her students received and the nature of the practice itself. She said that radiologic technologists must be licensed by taking a national exam and that there are practice standards that must be observed. She testified that patients are referred for imaging by an M.D. The technologist then takes a patient history, may deliver contrast media or medication, monitor the patient's vital signs and obtain the proper image. She also noted that post-care instructions are given to patients and that technologists are trained in emergency medical care. On cross-examination she acknowledged that patient history is not taken for diagnosis or treatment purposes, any administered medication or contrast was only performed on physician order. She finally agreed that technologists do not read or interpret x-rays, do not prescribe care, do not give prognosis and overall are generally supervised by the ordering M.D.

In response to SAIF's witnesses, Peace Health called Cliff Hendargo, Hospital Finance director. He described the difference between billing under a CPT code with a RV multiplier and the cost to charge ratio. Mr. Hendargo stated that a key component in determining how a service is charged is whether it is classified as a "professional" versus a "technical" service.

Peace Health next called Carol Doyle the Director of Radiology at Sacred Heart Medical Center. She testified that she had been in radiology for 36 years. In response to the testimony of Barbara Smith, she noted that taking a patient history is limited to identifying the body part to be imaged. She testified that radiologic technologists are not healthcare providers. She noted that they do not diagnose, interpret images or order treatment.

The DOJ called Deborah Buchanan, a former manager for the medical revue unit (MRU) of the WCD. Ms. Buchanan was at WCD at the time of the time of the amendment of OAR 436-009-0020 and participated in the Advisory Committee that drafted the rules. She testified that the change in the rule was purposeful to separate professional billings from technical billings and that in particular, the committee want to separate billings for practitioners

RVUs, and Malpractice RVUs columns. All other charges billed using both the hospital name and tax identification number will be paid as if provided by the hospital.

The rule prior to amendment read: (2) Hospital outpatient charges billed to insurers shall include ICD-9-CM diagnostic and procedural codes, CPT® codes, HCPCS codes, and National Drug Codes (NDC), where applicable. Unless otherwise provided for by a governing MCO contract, insurers shall pay hospitals for outpatient services according to the following: the insurer shall first separate out and pay charges for services covered under the CPT® and RBRVS. These charges should be subtracted from the total bill and the adjusted cost/charge ratio should be applied only to the balance. For all outpatient therapy services (physical therapy, occupational therapy, and speech language pathology), use the non-facility total column. All other charges billed using both the hospital name and tax identification number will be paid as if provided by the hospital.

of the “Healing Arts” in her experience, a term of art. She testified that SAIF participated in the public hearing on the proposed rule change and that there were no concerns raised by the stakeholders regarding the fiscal impact of the rule change.

In rebuttal to Ms. Buchanan’s testimony, SAIF recalled Kathy Loretz who testified that the fiscal impact statement attached to the rule at the time of adoption indicated a slightly positive fiscal impact to the carriers as it was intended to eliminate duplication of billings and to streamline and expedite payment. She testified that her calculation of the difference in amounts paid for services under WCD’s interpretation of the rule would result in a significant detrimental impact for the carriers.

CONCLUSIONS AND OPINION

As noted above, in Oregon workers’ compensation claims, a hospital separates billings for services from “medical service providers” from other outpatient or facility services. The parties agree that the ultimate determinative factor in this case is whether or not a radiologic technologist is a “medical service provider” as that term is defined by Oregon law.

ORS 656.260(12) defines “medical service provider” as “a person duly licensed to practice one or more the healing arts in any country or in any state or territory or possession of the United States.” “Medical service provider” is also defined in OAR 436-10-0005(29) as “a person duly licensed in one or more of the healing arts.” For a person to be a medical service provider under workers’ compensation law that person must be licensed and in an area of practice within the “healing arts.” As noted in testimony and SAIF’s exhibits 17, 18, 19, radiologic technologists are required to be licensed by the Oregon Board of Radiologic Technology and as such meet the first criteria of the definition. ORS 688.415(1). The dispositive analysis in this case is whether a radiologic technologist practices one of the “healing arts.”

The term “healing arts” is not defined by statute or rule but Oregon courts have had occasion review the definition and use of the term in the Oregon Revised Statutes. In *Cook v. Workers’ Compensation Division*, 360 Or 134 (1988), the Oregon Supreme Court analyzed whether a nurse practitioner constituted a “doctor” or “physician” under workers’ compensation law and in making that determination considered whether they practiced in one of the healing arts. The court noted

The term “healing arts” is not a static concept, capable of only one definition, now and forever. Instead, it is an example of the familiar legislative penchant for using general terms like a bucket, allowing various concepts to fall in (or out) with the passage of time....the general terms are broad and flexible enough to adjust to changing circumstances. The question therefore is, do “nurse practitioners” do things that make them practitioners of the healing arts.” *Cook*, 306 Or 134, 142 (1988).

The court then looked at what exactly nurse practitioners did in the course of their practice. They looked at the administrative rules pertaining to the licensing and regulation of nurse

practitioners and noted that they are licensed to provide “primary health care” and that they are independently responsible and accountable for the continuous and comprehensive management of personal health services. The court further stated that “healing arts” should be given its literal meaning unless to do so would bring about an absurd result. In reviewing a dictionary definition of “healing” the court held that “healing art” would commonly be understood as “the skill to treat disease or disability, and where the nature of the problem permits, to restore health. *Cook*, 306 Or 134, 143 (1988).

SAIF argues that the *Cook* definition of “healing arts” is broad and flexible and that the evidence presented of the practice of radiologic technologist fits into this definition. Peace Health and WCD argue that there is significant difference in the activities performed by nurse practitioners and radiologic technologists. I find that the evidence supports the latter view that radiologic technologists do not practice “healing arts.”

As noted by both of the radiologic technologist’s testimony at hearing, in practice they do not perform independently in either diagnosing, treating, or examining patient’s medical conditions. They take patient history for the primary purpose of identifying the proper body part to be imaged, but not for diagnostic or treatment purposes. Although they may administer contrast media or, on a rare occasion, medication, this is done at the direction and under the supervision of a physician or nurse practitioner. They do not read or interpret the images that they produce, do not proscribe care and do not provide patients with prognosis concerning medical conditions.

SAIF argues that subsequent case law utilizes the *Cook* analysis to expand the definition of medical services provider to physical therapists, occupational therapist and audiologists. SAIF relies upon *SAIF v. Johnson*, 198 Or App 504 (2005), and notes that a hearing aid specialist who performed a hearing test and fitted claimant with a hearing aid had performed “medical services” and was a practitioner of the “healing arts.” The *Johnson* court, citing to *Raytheon Constructors v. Tobola*, 195 Or App 396, 97 P3d 1278 (2004), held that the audiologist had taken action “designed to alleviate or cure a disease or injury.” I find that there was no evidence presented that radiologic technologist diagnose or treat injury or disease.

Additionally, Peace Health and WCD argue that radiologic technologists are statutorily defined as persons “other than a licensed practitioner who practices radiologic technology as either a diagnostic radiologist or a radiation therapist. ORS 688.405(12). Noting that “licensed practitioner” is defined as “a person licensed or otherwise authorized by Oregon law to practice one of the healing arts” they argue that radiologic technologists are statutorily excluded by definition of being a practitioner of the “healing arts.” SAIF argues that the definitions in ORS chapter 688 are not applicable to any other part of the ORS and in particular, workers’ compensation law. Contrary to SAIF’s argument there are no provisions in the definition section of Chapter 688 which limits the applicability of those definitions to that chapter alone. As such, I find that Peace Health and WCD’s argument is well taken.

Finally, I note the director, as well as Peace Health and WCD, have relied upon case law which holds that an agency is entitled to deference in interpreting its own rules if the interpretation is plausible and not inconsistent with the wording of the rule itself. (WCD Ex. 13 at 4). Based upon the testimony of Ms. Buchanan, and exhibit E submitted by WCD, I find that

not only is the director's interpretation of the rule consistent with its wording, but that the director's interpretation of the application of the rule was the purpose of the 2006 amendments.

ORDER

IT IS THEREFORE ORDERED that the April 23, 2008 Administrative Order in case number MF 08-416 is affirmed.