In the ORS 656.248 Medical Fee Dispute of

Chehalem Physical Therapy

Contested Case No: 09-016H

PROPOSED & FINAL ORDER

August 3, 2010

CHEHALEM PHYSICAL THERAPY, Petitioner
HARTFORD CASUALTY INS. CO., Respondent

Before Monte Marshall, Administrative Law Judge

This matter was submitted on the documentary record before Administrative Law Judge Marshall. Chehalem Physical Therapy (Chehalem) is represented by its attorney, Diana E. Godwin. Hartford Casualty Insurance Company (Hartford) is represented by its attorney, John E. Snarskis. Specialty Risk Services, (SRS) is represented by its attorney Neil W. Jones. The Workers Compensation Division (WCD) was represented by Assistant Attorney General, Carol A. Parks.

EXHIBITS

Exhibits 1-32, submitted by WCD, are admitted into evidence. The record closed on June 4, 2010, following receipt of Chehalem's written reply argument.

ISSUE

Reimbursement of physical therapy billings. Chehalem has appealed a January 29, 2009 Administrative Order, issued by WCD, that found that Hartford and correctly paid the dispute billing at a discounted rate.

FINDINGS OF FACT

The parties have submitted Stipulated Facts pertaining to this matter as follows[1]:

At the time the medical services that are the subject of these fee disputes were provided by Clinics (Cascade PT, **Chehalem PT**, Erhardt PT, Impact PT, Laurelhurst PT, and Therapeutic Associates), each clinic had an existing contract with First Health Group Corporation (and/or its successor, Conventry Health Care)(the PPO contract), under the terms of which the Clinics agreed to accept a reduction in their usual and customary fees for clients of First Health/Coventry.

At the time the medical services that are the subject of this dispute were provided by Clinics, The Hartford and its wholly owned subsidiaries, including Specialty Risk Services, had a valid contract with First Health/Coventry under the terms of which a percentage of, or all of, the discounted fees agreed to by Clinics and First Health noted in Paragraph 1 above were made available to The Hartford.

[1] The Stipulated Findings of Fact include references to other medical providers whose issues will be addressed in separate orders.

The PPO contract included language which stated that the First Health intended to market its agreements with Clinics to various health insurance plans, indemnity insurers and workers' compensation insurers, which it did.

At the time the medical services that are the subject of this dispute were provided by Clinics, First Health was not a Managed Care Organization in Oregon.

Clinics provided reasonable and necessary medical services to injured workers on the dates of services specified, as set out in the exhibits previously transmitted to the Administrative Law Judge.

The parties agree that the services referred to in Paragraph 5 above were authorized by qualified physicians, for conditions compensable under workers' compensation law, that Clinics billed their usual and customary fees to Hartford and Specialty Risk Services, and that the bills were paid at a lesser amount in accordance with the contracts described in Paragraphs 1 and 2 above. Differences exist for each provided between the payments actually made and the amounts allowable under the lesser of the Oregon fee schedule or the amounts billed. The parties agree that the differences listed below are approximations and are not to be considered final claims by Clinics or final admissions by The Hartford and Specialty Risk Services, but are included for the purpose of illustration of the dispute. If the ALJ determines that Hartford and/or Special Risk Services owes additional sums to the Clinics, the parties shall attempt to agree on the additional amounts owed and it the event of disagreement, the matter shall be resolved by the ALJ acting on behalf of the Director. Currently, the following approximate differences are the subject of this dispute as to The Hartford:

a) For Cascade PT---the sum of $1064.71
b) For **Chehalem PT**---the sum of 1193.16
c) For Impact PT---the sum of $6187.49
d) For Laurelhurst PT---the sum of $3557.13
e) For Therapeutic Associates—the sum of $20,271.41

Currently, the following approximate differences are the subject of this dispute as to Specialty Risk Services:

a) For **Chehalem PT**---the sum of $1,364.03
b) For Erhardt PT---the sum of $2,237.64
c) For Impact PT---the sum of $8,859.36
d) For Laurelhurst PT---the sum of $457.41
e) For Therapeutic Associates---the sum of $32,083.03

With regard to the disputed Therapeutic Associates bills, Specialty Risk Services has separately agreed to voluntarily pay to Therapeutic Associates the difference between the payments actually made and the provider's usual fee or the amount set by the fee schedule, whichever is less for the following claims: YNP00649, YNP01241, YNP00176, YNP00717,

YNP00219, YNP01389, YNP00438, YNP00806, YNP00399, YNP01072, YNP00396, YKJ11306, YKJ10569, and YKJ09631.

Specialty Risks Services' agreement to voluntarily pay bills detailed in Paragraph 7 above does not constitute and shall not be construed as an admission or concession of liability as to any billing, fee or matter in dispute between Special Risk Service and the Clinics.

None of the Explanation of Reimbursements that Hartford and Specialty Risk Services sent to Clinics informed the clinic that it had 90 days within which to request administrative review of the medical payment as specified by OAR 436-009-0008 as it existed at the time the payments were made.

The Hartford and Specialty Risk Services did not seek Director review of the amounts billed by the Clinics within the period of time contained in OAR 436-009-0008(2)(b) because Clinics were required to bill their usual and customary amounts, although the PPO contracts provided for a lesser reimbursement in the amounts paid by Hartford and Specialty Risk Services.

All of the medical services that are the subject of these fee disputes were provided, billed and paid prior to July 7, 2008, except for those few exceptions otherwise noted in the record transmitted to the Administrative Law Judge.

In addition to the parties' Stipulated Facts, I make the following findings:

Chehalem disagreed with the amounts paid by Hartford/SRS under the contract and requested administrative review by WCD. The medical services in dispute were provided between December 2005 and July 2007. The billings for these services were submitted prior to July 1, 2008.

On January 29, 2009, an Administrative Order issued which found that Hartford/SRS had correctly reimbursed Chehalem pursuant to the contract with First Health/Coventry and was not liable for any additional payment.

CONCLUSIONS OF LAW AND OPINION

Chehalem asserts that Hartford/SRS should be liable for the additional amounts of reimbursement and makes several arguments in support of its assertion. I will address each one separately.

Chehalem first argues that the temporary rule is invalid on the basis it exceeded the Director's authority. ORS 656.248(1) gives the Director authority to promulgate rules for developing and publishing fee schedules for medical services provided under ORS Chapter 656. The statute provides certain guidelines on which to base the rules, "where applicable and to the extent the Director determines practicable." Consistent with this authority, the Director has promulgated rules regarding the payment of medical services in worker's compensation matters which are set forth in OAR 436, Division 09.

Prior to July 7, 2008, OAR 436-009-0040(1), the rule in question here, provided that an insurer must pay providers at the providers' usual fee or the amount set by the fee schedule, whichever was less. On July 7, 2008, the Director adopted a temporary rule which amended OAR 436-009-0040(1) to read, **"[u]nless provided by contract,** insurer's must pay providers at the providers' usual fee, or the mount set by the fee schedule, whichever is less." (emphasis added). *See* Admin Order 08-060.

ORS 656.248 give the Director broad authority to regulate the payment of medical services in worker's compensation matters. The temporary rule merely provides an additional method to determine the amount of that payment. The temporary rule did not exceed the authority granted the Director in ORS 656.248 or any other provision in ORS Chapter 656. Consequently, I do not find that the temporary rule is invalid.

Chehalem next argues that the temporary rule should not be applicable to this dispute. When the temporary rule was adopted, it was made applicable to "all medical services rendered on or after the effective date of these rules; and all payment made under a contract with a medical provider, regardless of date of service." Former OAR 436-009-00003(1). The effective date of the rule was July 7, 2008. The rule was promulgated under ORS 183.335(6) which allows for the adoption of rules without prior notice or hearing. A rule adopted under this statute may not be effective for more than 180 days. ORS 183.335(6)(a).

The temporary rules adopted in Admin. Order 08-060 were in effect from July 7, 2008 through January 1, 2009, which was 178 days. Consequently, the rule, on it face, did not violate ORS 183.335(6)(a). Application of the rule to medical services rendered after the effective date (July 7, 2008) is straight forward and understandable to those parties that are subject to the rule. However, by extending the rule to "payments made under contract with a medical provider, regardless of the date of service" the application of the rule is potentially retroactive.

Generally, retroactive application of new laws is disfavored and in absence of an indication, statues, or in this case a rule, are not retroactively applied if such application would "impair existing rights, create new obligations or impose additional duties with respect to past transactions." *See* ***Barrett v. Union Oil Distributors***, 60 Or App 483 (1982). Although the applicability language of the temporary rule appears to contemplate retroactive application, because it was adopted under ORS 183.335(6) there are no supporting materials as would be found when a permanent rule is adopted under ORS 183.335. Items such as supporting documents, a transcript of the rulemaking, hearing, and public comments would be helpful in determining a specific intent to make a rule apply retroactively. This is important in this instance where retroactive application of the rule has clearly impaired existing rights. That is, prior to the adoption of the temporary rule, there would be no basis for allowing Hartford/SRS to discount medical billings.

In addition, I agree with Chehalem's counsel that application of the temporary rule in this case creates a conflict with ORS 183.335(6)(a). As noted above, the temporary rules at issue were adopted on July 7, 2008 and expired January 1, 2009. Again, on its face, the rule complies with ORS 183.335(6)(a). However, the retroactive application of the rule to this case, allows the

rule to affect matters some 1,027 days prior to its passage.[2] This time period, in addition to the 178 days that the rule was in effect, give it a life span of nearly three years. I find this to conflict with the 180 day time limit set forth in ORS 183.355(6)(a) and therefore, retroactive application of the rule would violate that statute.

For the reasons set forth above, I conclude that the temporary rule set forth in Admin. Order 08-060 are not applicable to this case. Rather, the prior version of OAR 436009-0040(1) is applicable. Under that version of the rule, there is no provision for the application of an additional discount to compensable medical services. Therefore, Chehalem is entitled to its usual charge for the medical service or the fee schedule maximum, whichever is less. In light of this conclusion, I do not reach the additional arguments put forth by Chehalem.

ORDER

IT IS THEREFORE ORDERED that Hartford/SRS liable for an additional payment equal to Chehalem's usual charge for the medical service or the fee scheduled maximum.

[2] The first date of service for medical treatment in this matter was December 22, 2005 (Ex. 31-2).