WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

KENNETH HOADLEY, *Applicant*

vs.

AMERICAN AIRLINES;
NEW HAMPSHIRE INSURANCE COMPANY, *Defendants*

Adjudication Number: ADJ8117286
Santa Ana District Office

OPINION AND DECISION
AFTER RECONSIDERATION

The Appeals Board granted reconsideration on March 2, 2020, in order to further study the factual and legal issues in this case. This is our decision after reconsideration.

Defendant seeks reconsideration of the December 6, 2019 Findings and Award wherein the workers' compensation administrative law judge (WCJ) found that applicant sustained an injury arising out of and in the course of employment on November 2, 2011 to his left knee that caused 4% permanent disability. The WCJ also found that applicant was entitled to recover reimbursement for self-procured medical treatment in the amount of $20,049.35 including $18,353.49 for expenses related to the April 28, 2016 surgery performed by Dr. Stone.

Defendant contends that applicant is not entitled to additional reimbursement for self-procured medical expenses related the April 28, 2016 surgery, because applicant is only entitled to the amount the surgeon could have obtained under the Official Medical Fee Schedule (OMFS) adopted pursuant to Labor Code section 5307.1.1

We have reviewed the record in this matter. Applicant filed an Answer, requesting that defendant's petition be denied. The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report) recommending that defendant's petition be denied. For the reasons discussed below, as our Decision after Reconsideration, we amend the Findings and Award to clarify that applicant is entitled to reimbursement for reasonable charges related to the surgery, and return this matter to the trial level for the WCJ to determine a reasonable charge in accordance with the OMFS and take such further actions as are deemed necessary.

BACKGROUND

Applicant sustained an industrial injury to his left knee on November 2, 2011. Pursuant to the parties' stipulation, permanent disability indemnity was awarded in accordance with the findings of an Agreed Medical Evaluator Dr. Wood. The sole issue raised by defendant in its Petition for Reconsideration was reimbursement of applicant's medical expenses related to an authorized surgery performed by Dr. Stone on April 27, 2016.

On February 9, 2016, Dr. Wood opined that a procedure recommended by Dr. Stone, "including left knee medial meniscal allograft with microfracture stem cell release, and bone marrow aspiration is medically reasonable." (Exh. Y, February 9, 2016, Richard I. Woods, M.D., Agreed Medical Evaluation Report, p.16.) Defendant authorized the surgery.

Because applicant resided in Oregon, defendant made travel arrangements for applicant's surgery including hotel and airline reservations. (Exh. F, April 15, 2016, Jessica Springer, Letter to Jan Mark Dudman.) According to the Minutes of Hearing and Summary of Evidence, at trial, the applicant testified as follows: "On the day of the surgery, Applicant was told he had to pay $9,056. There was no mention of this until the day of surgery. He was surprised. It was his understanding that the defendants had authorized the surgery and that they had therefore paid Dr. Stone." (October 24, 2019 Minutes of Hearing and Summary of Evidence (MOH/SOE), p. 6:22-23.)

Applicant paid for expenses associated with the surgery on his credit card. He paid a total of $17,263.00 ($9,056.00 on April 28, 2016, $7701.00 on May 3, 2016, and $526.00 on May 6, 2016). (MOH/SOE. p.7:1-5, 7:8-11.) After conducting bill review, defendant initially reimbursed applicant $3,733.48 based on the OMFS. Defendant's bill review expert, Sue Choi, testified at trial that the reimbursable amount pursuant to the OMFS was $4,307.43. (MOH/SOE, p. 10:18-19.)

The WCJ found that applicant was entitled to recover self-procured medical expenses in excess of the OMFS because defendant failed to make payment arrangements with applicant's surgeon prior to the surgery. (Report, p. 6.) Because the WCJ awarded fees in excess of the OMFS, the WCJ did not issue a funding on the amount that would be payable under the OMFS.

ANALYSIS

An employer must provide an injured worker with medical treatment to cure or relieve the injured worker from the effects of an industrial injury. (Lab. Code, §4600.) Timely provision of

reasonable medical treatment is an essential element of workers' compensation. (Cal. Const., Article XIV, § 4; *McCoy v. Industrial Acc. Com.* (1966) 64 Cal.2d 82, 87 [31 Cal.Comp.Cases 93]; *Zeeb v. Workmen's Comp. Appeals Bd.* (1967) 67 Cal.2d 496, 501 [32 Cal.Comp.Cases 441]; *Braewood Convalescent Hosp. v. Workers' Comp. Appeals Bd. (Bolton)* (1983) 34 Cal.3d 159, 165 [48 Cal.Comp.Cases 566]; see also, Lab. Code, §4600.) If the employer neglects or refuses to provide reasonable medical care, "the employer is liable for reasonable expense incurred by or on behalf of the employee in providing treatment." (Lab. Code, §4600(a).)

A defendant is not required to pay in advance for medical treatment. (*Murphy v. Workers' Comp. Appeals Bd.* (2015) [writ den.] 80 Cal.Comp.Cases 1093.) Labor Code section 4603.2(b)(2) states: ". . .payment for medical treatment provided or prescribed by the treating physician selected by the employee or designated by the employer shall be made at reasonable maximum amounts in the official medical fee schedule, pursuant to Section 5307.1, in effect on the date of service. Payments shall be made by the employer with an explanation of review pursuant to Section 4603.3 within 45 days after receipt of each separate, itemization of medical services provided, together with any required reports and any written authorization for services that may have been received by the physician. . . . Any properly documented list of services provided and not paid at the rates then in effect under Section 5307.1 within the 45-day period shall be paid at the rates then in effect and increased by 15 percent, together with interest at the same rate as judgments in civil actions retroactive to the date of receipt of the itemization." Given the use of the past tense, Labor Code section 4603.2 makes clear that a defendant has no obligation to provide payment for medical services until after medical services have been "provided."

In cases where an applicant self-procures treatment, the party seeking reimbursement for medical treatment is typically a medical provider rather than an injured worker. The process for resolving billing disputes between a medical provider and a defendant is found in Section 4603.2. A defendant is required to pay a properly submitted bill at the rates established by the OMFS within 45 days of submission of the bill and may face a penalty if it fails to do so. Section 4603.2(b)(2) states: "Except as provided in subdivision (d) of section 4603.4, or under contracts authorized under Section 5307.11, payment for medical treatment provided or prescribed by the treating physician selected by the employee or designated by the employer shall be made at reasonable maximum amounts in the official medical fee schedule, pursuant to section 5307.1, in

effect on the date of service." If the medical provider and employer do not agree on the amount due under the OMFS, a medical provider may seek resolution of the dispute through the independent bill review process outlined in section 4603.6.

Section 5307.1 requires the administrative director to adopt and revise the OMFS for "medical services other than physician services…and all other treatment, care, services and goods described in Section 4600." (Lab. Code, § 5307.1.) Effective January 1, 2014, the administrative director added a rule outlining how to calculate reimbursement for unlisted procedures. (Cal. Code Regs., § 9789.12.4.) While the process for determining whether a fee is reasonable differs depending on whether an applicant or provider is seeking reimbursement, the fee allowed by the OMFS remains the same. Neither section 5307.1 nor section 4600 provides that the reasonableness of a fee is determined differently if an applicant rather than a medical provider is seeking reimbursement.

A physician cannot recover medical treatment expenses for treatment for an industrial injury from the injured employee. (*Workmen's Comp. Appeals Bd. v. Small Claims Court (Shans)* (1973) 35 Cal.App.3d 643 [38 Cal.Comp.Cases 748].) In 1990, the Legislature amended Labor Code section 3751 to provide as follows:

> (b) If an employee has filed a claim form pursuant to Section 5401, a provider of medical services shall not, with actual knowledge that a claim is pending, collect money directly from the employee for services to cure or relieve the effects of the injury for which the claim form was filed, unless the medical provider has received written notice that liability for the injury has been rejected by the employer and the medical provider has provided a copy of this notice to the employee. Any medical provider who violates this subdivision shall be liable for three times the amount unlawfully collected, plus reasonable attorney's fees and costs.

The WCAB does not have authority to determine the reasonableness of a fee under a different standard when an applicant procures their own medical care. (*Adventist Health v. Workers' Comp. Appeals Bd. (Fletcher)* (2012) 211 Cal.App.4th 376 [77 Cal.Comp.Cases 935].) In *Fletcher*, applicant sought reimbursement for treatment she obtained from physicians who were not properly designated treating physicians and who did not provide treatment plans to enable the insurer to conduct utilization review prior to authorizing treatment. In *Fletcher,* the Court stated: "[T]the Legislature has created a highly regulated compensation system for injured workers with the twin goals of providing prompt medical treatment and containing costs. To achieve these

statutory objectives, the WCAB must enforce the rules established by the Legislature; indeed, it is without authority to exercise discretion in the name of compassion or expediency" (*Fletcher, supra* at 385.)

In this case, defendant was not required to pay for the surgery in excess of the OMFS or pre-pay the surgeon before the medical treatment was provided. Therefore, defendant did not neglect or refuse to provide medical treatment. Furthermore, if defendant had neglected applicant's medical treatment, that neglect would enable applicant to treat outside of defendant's medical provider network and would not necessarily allow applicant (or a provider) to be reimbursed in excess of the OMFS. Given that defendant authorized the surgery with Dr. Stone who was a non-MPN doctor, applicant's ability to treat outside the MPN was not at issue in this case. While defendant authorized the treatment, defendant did not have the opportunity to dispute the bill with the provider or engage in the IBR process. While applicant has articulated public policy arguments regarding the ability of injured workers to obtain medical treatment that the Legislature may wish to consider, as in *Fletcher, supra* we are constrained by the statutory scheme.

Therefore, we will find that applicant is entitled to reimbursement of medical treatment expenses in accordance with the OMFS and return the matter to the trial level for the WCJ to determine the amount due under the OMFS. In addition, we note that defendant does not dispute applicant's entitlement to travel expenses awarded by the WCJ, and although we have rescinded Finding of Fact No. 6 to allow the WCJ to recalculate the award, defendant should immediately pay the undisputed amount if it has not already done so.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the November 6, 2019 Findings and Award is **AFFIRMED, EXCEPT** Finding or Fact Number 6 and the Award are **AMENDED** as follows:

FINDINGS OF FACT

6. Applicant is entitled to reimbursement for self-procured medical treatment at the amount provided by the Official Medical Fee Schedule. The issue of reimbursement for self-procured care is deferred with jurisdiction reserved at the trial level.

AWARD

AWARD IS MADE in favor of KENNETH HOADLEY against AMERICAN AIRLINES; NEW HAMPSHIRE INSURANCE COMPANY c/o SEDGWICK CMS, INC. of:

A] Permanent partial disability of 4% payable at $230 a week, in the total amount of $2,760, less 15% attorney fees owed to Applicant attorney, Jan Mark Dudman. Applicant attorney fees are $414.00;

B] Future medical care reasonably required to cure or relieve applicant from the effects of the industrial injury.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ DEIDRA E. LOWE, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 7, 2021

SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.

JAN DUDMAN
KENNETH HOADLEY
WAI CONNOR

MWH/oo

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date. *o.o*