

FINAL AWARD
(Modifying Award on Medical Fee Dispute)

Injury No. 13-004105
Medical Fee Dispute No. 13-00712

Employee: Michael S. Phillips
Employer: Allied Systems LTD d/b/a Georgia Allied
Insurer: Self-Insured
Health Care Provider: Rockhill Orthopaedic Specialists, Inc.

This matter is pending before the Labor and Industrial Relations Commission on employer's application for review of the administrative law judge's award of additional reimbursement of medical fees to health care provider (HCP). We have read the parties' briefs, reviewed the evidence, and considered the whole record. Pursuant to § 286.090 RSMo,¹ we modify the award and decision of the administrative law judge dated February 5, 2015.

Preliminaries

The administrative law judge found the medical charges HCP billed employer for employee's October 22, 2013, surgery are fair and reasonable. The administrative law judge awarded additional reimbursement from employer to HCP of \$1,090.90. The administrative law judge's decision to award additional reimbursement of \$1,090.90 is correct and we affirm it. The administrative law judge's findings regarding the medical charges HCP billed employer and the amount employer paid to HCP are erroneous so we do not adopt them. Further, we agree with the administrative law judge's evidentiary ruling regarding Dr. Frevert's affidavit but for different reasons.

Findings of Fact

HCP offered into evidence Exhibit 1 consisting of the following:

The affidavit of employee's treating physician at HCP, Larry F. Frevert, M.D, wherein Dr. Frevert attests, in relevant part:

It is my opinion, within a reasonable degree of medical certainty, that Michael S Phillips Jr's injury/condition was work related. By work related I mean that employment was the prevailing factor that caused the injury resulting in medical care we provided.

I have reviewed the medical bills attached to this affidavit as Exhibit "B". It is my belief within a reasonable degree of medical certainty that these bills were incurred because of injuries that were necessary to treat the work related injury which occurred on 01/15/2013, and are fair and reasonable charges.

The affidavit of Paula Kempf, records custodian for HCP wherein Ms. Kempf attests, in relevant part:

¹ Statutory references are to the Revised Statutes of Missouri 2014 (eff. 8/28/2014), unless otherwise indicated.

Employee: Michael S. Phillips

- 2 -

Rockhill Orthopaedic Specialists, Inc., treated Michael Phillips Jr as a patient and provided the medical treatment on the dates reflected on the medical records attached hereto as Exhibit "A".

Rockhill Orthopaedic Specialists, Inc., made billing statements reflecting the charges for this medical care in the amounts reflected in the attached Exhibit "B".

A medical record on the letterhead of Concentra Medical Centers documenting a January 28, 2013, medical appointment at which employee was evaluated by Dr. Daniel Purdom. Dr. Purdom's record recites: "PATIENT REFERRED TO: General Orthopedic Surgeon for further evaluation as soon as possible."

A patient referral record on the letterhead of Concentra Medical Centers documenting a referral for treatment to Dr. Frevert. The referral identifies the employee as the patient and Allied Systems – Liberty as the employer. The referral record instructs that bills are to be submitted to AIG.

A September 24, 2013, letter on the letterhead of Health Direct, Inc., purporting to certify as medically necessary an open patellar tendon repair and arthroscopy of employee's left knee.

Dr. Frevert's operative note regarding the left knee surgery he performed on employee on October 22, 2013.

A Health Insurance Claim form submitted by HCP to AIG Claims, Inc. (AIG Claims).

A document entitled Explanation of Bill Review on the letterhead of AIG Claims revealing that AIG Claims approved payment of only \$759.10 of the \$1,850.00 bill submitted by HCP for procedure code 27830. AIG Claims approved payment of the \$1,731.00 billed for procedure code 29875.

Based upon the foregoing, we find that employer (or its agent) referred employee to HCP and authorized Dr. Frevert to perform the October 22, 2013, knee surgery. Dr. Frevert's operative note confirms that the procedure Dr. Frevert performed was the procedure employer (or its agent) authorized. We further find that HCP billed AIG Claims for the surgery in the total amount of \$3,581.00 but employer has paid only \$2,490.10 towards that bill. Our findings in this regard modify the administrative law judge's findings wherein he erroneously found that HCP billed employer \$2,490.10 and employer paid HCP \$1,731.00.

Law

Section 287.140 RSMo governs medical fee disputes and provides, in relevant part, as follows:

3. All fees and charges under this chapter shall be fair and reasonable, shall be subject to regulation by the division or the commission, or the board of rehabilitation in rehabilitation cases. A health care provider shall not charge a fee for treatment and care which is governed by the provisions of this chapter greater than the usual and customary fee the

Employee: Michael S. Phillips

- 3 -

provider receives for the same treatment or service when the payor for such treatment or service is a private individual or a private health insurance carrier. The division or the commission, or the board of rehabilitation in rehabilitation cases, shall also have jurisdiction to hear and determine all disputes as to such charges. A health care provider is bound by the determination upon the reasonableness of health care bills.

4. The division shall, by regulation, establish methods to resolve disputes concerning the reasonableness of medical charges, services, or aids. This regulation shall govern resolution of disputes between employers and medical providers over fees charged, whether or not paid, and **shall be in lieu of any other administrative procedure under this chapter.**

...

13.

...

(5) If an employer or insurer fails to make payment for authorized services provided to the employee by a hospital, physician or other health care provider pursuant to this chapter, the hospital, physician or other health care provider may proceed pursuant to subsection 4 of this section with a dispute against the employer or insurer for any fees or other charges for services provided.

(6) A hospital, physician or other health care provider whose services have been authorized in advance by the employer or insurer may give notice to the division of any claim for fees or other charges for services provided for a work-related injury that is covered by this chapter, with copies of the notice to the employee, employer and the employer's insurer. Where such notice has been filed, the administrative law judge may order direct payment from the proceeds of any settlement or award to the hospital, physician or other health care provider for such fees as are determined by the division. The notice shall be on a form prescribed by the division.

(Emphasis added).

Section 287.210 RSMo provides:

3. The testimony of any physician who treated or examined the injured employee shall be admissible in evidence **in any proceedings for compensation under this chapter**, but only if the medical report of the physician has been made available to all parties as in this section provided...

...

7. The testimony of a treating or examining physician may be submitted in evidence on the issues in controversy by a complete medical report and shall be admissible without other foundational evidence subject to

Employee: Michael S. Phillips

- 4 -

compliance with the following procedures. The party intending to submit a complete medical report in evidence shall give notice at least sixty days prior to the hearing to all parties and shall provide reasonable opportunity to all parties to obtain cross-examination testimony of the physician by deposition...

(Emphasis added).

Discussion

The administrative law judge admitted HCP's Exhibit No. 1 over employer's objection to the affidavit of Dr. Frevert. The administrative law judge ruled the affidavit admissible under § 287.210.3 RSMo. Employer argues that the affidavit is inadmissible because the HCP did not provide it to employer at least 60 days prior to the hearing via a "complete medical report" as permitted by § 287.210.7. Both the administrative law judge and employer overlook that § 287.210 is inapplicable to proceedings to resolve medical fee disputes.² Instead, § 287.140.4 directs that the methods set forth in the Division's regulation governing the resolution of medical fee disputes shall be followed "in lieu of any other administrative procedure under this chapter." The Division's regulation states only that "the rules of evidence in civil proceedings shall apply."³ We overrule employer's objection to admission of Dr. Frevert's affidavit on the basis that it fails to comply with § 287.210.

Employer also objects to Dr. Frevert's affidavit on the ground that no foundation has been laid to establish Dr. Frevert is qualified to give an opinion that the medical charges in issue are fair and reasonable charges.⁴ Dr. Frevert attests that he has been practicing as an orthopedic surgeon in the Kansas City area for 24 years. His long history of providing surgical services convinces us he possesses the qualifications to opine about the reasonableness of charges for surgical services. We overrule employer's foundational objection.

Our evidentiary analysis is largely academic because even if we were to disregard Dr. Frevert's affidavit entirely, we would rule in HCP's favor in this matter. Employer referred employee to HCP for treatment and authorized Dr. Frevert to perform the patellar tendon repair and arthroscopy. Having done so, employer is obligated to pay fair and reasonable medical charges for the treatment employer asked Dr. Frevert to provide.

[W]here a health care provider presents testimony and evidence relating medical bills to an injury and places in evidence the accompanying medical bills and records, the burden of going forward with the evidence shifts to the employer or insurance carrier to prove that such medical bills were unreasonable and unfair. See generally *Martin*, 769 S.W.2d at 111-12; *Metcalf*, 946 S.W.2d at 287-88. Here, Appellants failed to produce any

² See *Glickert v. Soundolier, Inc.*, 687 S.W.2d 674, 677 (Mo. App. 1985) ("The seven-day rule simply is inapplicable to testimony concerning fees."). See also, *Meyer v. Superior Insulating Tape*, 882 S.W.2d 735, 738 (Mo. App. 1994). Both *Glickert* and *Meyer* were overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003).

³ See 8 CSR 50-2.030(1)(K).

⁴ Dr. Frevert's opinion in this regard is not an expert *medical* opinion but is an expert *professional* opinion based upon his experience as a fee-for-service provider.

Employee: Michael S. Phillips

- 5 -

evidence or testimony to establish that Respondent's medical bill was unreasonable and unfair.⁵

HCP presented the medical records (operative note) documenting the treatment for which HCP billed employer. HCP presented testimony (affidavit of Paula Kempf) and other evidence (operative note, referral record, certification that surgery was medically necessary) relating the billed medical charges to employee's knee injury. The burden shifted to employer to prove the billed charges were unreasonable and unfair. Employer offered no evidence at the hearing.

We find that the full amount billed by HCP – \$3,581.00 – is fair and reasonable. HCP is entitled to the full amount it billed.

Award

We direct employer to pay to HCP the sum of \$1,090.90⁶ as additional reimbursement of medical fees.

We attach the award and decision of Administrative Law Judge Lawrence G. Rebman hereto and we incorporate its provisions by this reference, to the extent they are not inconsistent with our findings, conclusions, award, or decision herein.

Given at Jefferson City, State of Missouri, this 25th day of June 2015.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Attest:

Curtis E. Chick, Jr., Member

Secretary

⁵ *Esquivel v. Day's Inn*, 959 S.W.2d 486, 489 (Mo. App. 1998), citing *Martin v. Mid-America Farm Lines, Inc.*, 769 S.W.2d 105 (Mo. 1989) and *Metcalf v. Castle Studios*, 946 S.W.2d 282 (Mo. App. 1997). Both *Esquivel* and *Martin* were overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003). Further, a different holding in *Martin* was superseded by statute.

⁶ \$3,581.00 - \$2,490.10 = \$1,090.90.

FINAL AWARD ON MEDICAL FEE DISPUTE HEARING

Employee: Michael S. Phillips Injury No. 13-004105
Employer: Allied Systems LTD d/b/a Georgia Allied MFD No. 13-00712
Insurer: Allied Systems LTD c/o AIG Claims, Inc.
Health Care Provider: Rockhill Orthopaedic Specialists, Inc.
Hearing Date: January 28, 2015 Checked by: LGR/pd

An evidentiary hearing was held on January 28, 2015 in Kansas City on this medical fee dispute. Rockhill Orthopaedic Specialists, Inc., of Lee's Summit (Health Care Provider) appeared by conference call through counsel David Moen. Employer and Insurer appear by counsel Randall Schroer.

EXHIBITS

The Health Care Provider offered Exhibit 1 which is the Affidavit of Dr. Larry Frevert, MD and Paula Kempf records custodian of Rockhill Orthopaedics. These Exhibits were mailed to the Division on December 30, 2014 with copies to opposing counsel. The Employer/Insurer objected to the admission of the exhibits on the grounds that exhibits lacked foundation for Dr. Frevert to testify regarding the fairness and reasonableness of the medical fees and that the accompanying medical records were not admissible as they had not been provided more than 60 days prior to the hearing pursuant to statute. At the hearing the Exhibits were received their admissibility pending further review by the court. Having reviewed the affidavits, relevant statutes and case law, the objections are overruled. The Division takes judicial notice of its files.

FINDINGS OF FACT

Based upon the evidence, I find the following facts:

1. Rockhill Orthopaedic Specialists, Inc., of Lee's Summit (hereinafter sometimes referred to as "Health Care Provider") rendered certain services to the injured employee, Michael Phillips, due to injuries he received in the work-related accident of January 15, 2013. Operative services were rendered on October 22, 2013. Insurer was billed for these services in a timely fashion with an itemized billing statement.
2. The total charges billed were \$2,490.10, of which, \$1,731.00 was paid by the Insurer. The amount not yet paid by Insurer (\$1,090.90) is the subject of Health Care Provider's APPLICATION FOR PAYMENT OF

ADDITIONAL REIMBURSEMENTS OF MEDICAL FEES, which was filed with the Division of Workers' Compensation on July 30, 2014.

3. On September 17, 2014, Health Care Provider filed with the Missouri Division of Workers' Compensation, a request for evidentiary hearing in this medical fee dispute proceeding.

CONCLUSIONS OF LAW

The Court of Appeals has found that neither the regulation nor statute address which party bears the burden of proof in disputes regarding medical fees. Accordingly, it has stated that where the Health Care provider provides testimony which relates the medical treatment to the work-related injury and the medical bills and records produces a sufficient factual basis for the payment the employer or insurance carrier must demonstrate that such bills were not reasonable and fair. *Esquivel v. Days Inn*, 959 S.W. 2d 486 (Mo. App. S.D. 1998)(overruled on other grounds) Citing *Martin v. Mid-America Farm Lines, Inc.*, 769 S.W.2d 105, 111-12 (Mo. banc 1989) and *Metcalf v. Castle Studios*, 946 S.W.2d 282 (Mo.App.1997).

The medical records, bills and affidavit of Rockhill Orthopedicas and Dr. Frevert where offered into evidence and are admissible pursuant to §287.140 RSMo which states: "The testimony of any physician or chiropractic physician who treated the employee shall be admissible in evidence in any proceedings for compensation under this chapter, subject to all of the provisions of section [287.210](#)." RSMO. §287.210.3 RSMo states: "The exchange of medical reports shall be made at least seven days before the date set for the hearing and failure of any party to comply may be grounds for asking for and receiving a continuance, upon proper showing by the party to whom the medical reports were not furnished."

The Employer/Insurer do not dispute that the medical records were furnished more than seven days before the hearing nor did they ask for a continuance. As such, Exhibit 1 is admitted into evidence. The Health Care Provider's Exhibit 1 presents sufficient factual basis for payment of medical bills through affidavit and evidence relating medical bills or treatment to employee's work-related injury, and places in evidence accompanying medical bills and records. The Employer/Insurer did not dispute that the medical treatment referred to in the records was provided, therefore the burden of going forward with evidence shifts to employer or workers' compensation carrier to prove that such medical bills are unreasonable and unfair. *Esquivel v. Days Inn*, 959 S.W. 2d 486 (Mo. App. S.D. 1998). The Employer/Insurer did not submit any evidence or testimony and therefore failed to carry its burden.

Therefore, I find Health Care provider's charges of \$2,490.10, to be fair and reasonable. I find that Insurer has paid \$1,731.00 toward those charges, leaving the amount of unpaid. As the charges are fair and reasonable, and finding no other factual or legal basis for denying the charges, Allied Systems LTD d/b/a Georgia AL

Issued by Division of Workers' Compensation
Employee: Michael S. Phillips

Injury No. 13-004105

(Employer) Allied Systems LTD c/o AIG Claims, Inc. (Insurer) are ordered to pay Rockhill Orthopedics Specialists, Inc., the sum of \$1,090.90.

Made by: _____
LAWRENCE G. REBMAN
Administrative Law Judge
Division of Workers' Compensation