

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. G700777

LOUIS J. JACOBS, Employee	CLAIMANT
GERDAU MACSTEEL, INC., Employer	RESPONDENT
AMERICAN ZURICH INSURANCE CO., Carrier	RESPONDENT

OPINION FILED JANUARY 9, 2023

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Fort Smith, Sebastian County, Arkansas.

Claimant represented by EDDIE H. WALKER, JR., Attorney, Fort Smith, Arkansas.

Respondents represented by LEE J. MULDROW, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On November 21, 2022, the above captioned claim came on for hearing at Fort Smith, Arkansas. A pre-hearing conference was conducted on October 5, 2022 and a pre-hearing order was filed on that same date. A copy of the pre-hearing order has been marked as Commission's Exhibit #1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The prior Opinion of February 7, 2022 is final.
3. The claimant was earning sufficient wages to entitle him to compensation at the weekly rates of \$621.00 for total disability benefits and \$496.00 for permanent partial disability benefits.

4. Claimant reached maximum medical improvement on February 1, 2021.

5. Respondent has accepted liability for permanent partial disability benefits based on a 30% rating to the body as a whole. Respondent has paid an attorney fee on these benefits.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Whether respondent is liable for payment for Linda Lay's services at a rate greater than the maximum allowable rate permitted in the fee schedule. Alternatively, whether respondent is obligated to find someone to treat claimant's post-traumatic stress disorder at the fee schedule rate.

2. Whether respondent should be held in contempt for failing to comply with the Opinion of February 7, 2022.

3. The date respondent is to begin paying claimant's attorney the claimant's portion of the attorney fee.

At the time of the hearing the parties agreed to stipulate that respondent would begin paying claimant's attorney the claimant's portion of the attorney fee on January 23, 2023.

The claimant's contentions are set forth in his pre-hearing questionnaire attached to Commission's Exhibit #1 as Exhibit #1 and #2.

The respondent's contentions are set forth in its pre-hearing questionnaire attached to Commission's Exhibit #1 as Exhibit #3.

From a review of the record as a whole, to include medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witness and to observe his demeanor, the following findings of fact

and conclusions of law are made in accordance with A.C.A. §11-9-704:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at a pre-hearing conference conducted on October 5, 2022 and contained in a pre-hearing order filed that same date are hereby accepted as fact.

2. The parties' stipulation that respondent will begin paying claimant's attorney the claimant's portion of the attorney fee on January 23, 2023, is also hereby accepted as fact.

3. Respondent is not in contempt for failing to comply with the Opinion of February 7, 2022.

4. Claimant has failed to prove by a preponderance of the evidence that respondent is liable for paying for Linda Lay's services at a rate greater than the maximum allowable rate permitted in the Commission's fee schedule.

5. Respondent has an affirmative duty to provide claimant with medical services for his post-traumatic stress disorder.

FACTUAL BACKGROUND

Claimant suffered a compensable injury to various parts of his body while working for respondent on January 26, 2017. As a result of that injury claimant has undergone numerous medical treatments and surgeries. Claimant was assigned a combined impairment rating of 30% to the body as a whole for his compensable injuries which was accepted and paid by respondent. Claimant underwent a functional capacities evaluation

on April 28, 2021, which showed a consistent and reliable effort and determined that while claimant had the ability to perform some work in the sedentary category of work, “He did not perform work at a level that would allow him to work over the course of a normal workday in a competitive work environment.”

Claimant had previously requested a hearing on his entitlement to permanent total disability benefits as well as a controverted attorney fee and lump sum payment of the attorney fee. Prior to the hearing the parties agreed to stipulate that claimant is permanently totally disabled. In an opinion filed February 7, 2022, this administrative law judge found that respondent had controverted claimant’s entitlement to permanent total disability benefits and awarded claimant’s attorney a fee on all indemnity benefits in excess of the 30% impairment rating. Claimant’s attorney was also awarded payment of his fee in a lump sum. The February 8, 2022 opinion was not appealed and the parties have stipulated that it is final.

Following the claimant’s injury he has undergone counseling treatment from Linda Lay for post-traumatic stress disorder. At the time of the January 10, 2022 hearing the following discussion took place.

MR. WALKER: I think there is also a stipulation that the respondents have indicated that they accept liability for payment of treatment by Linda Lay for psychological services. Is that right, Mr. Muldrow?

MR. MULDROW: Yes. And that has been paid.

MR. WALKER: So we would like that included in the stipulations so we don’t have to revisit that issue again, Judge.

THE COURT: He is entitled to treatment from who, Dr. Linda Lay?

MR. MULDROW: Dr. Linda Lay for PTSD. Mr. Walker is absolutely right. Linda Lay's treatment was approved early on, a couple years ago. Inexcusably the insurance company paid part of it and then stopped paying and did not get it paid in time. We finally have gotten that corrected, but the bottom line is Linda Lay is entitled to payment for her time. It is not challenged by the insurance company or by Gerdau. And it is my understanding that she has been paid in full and I have provided documentation to Mr. Walker to that effect.

THE COURT: Okay. So a stipulation with regard to that medical treatment and that claimant is permanently and totally disabled leaving as the only issue the attorney fee issues.

Since the time of the January 10, 2022 hearing, an issue has arisen as to whether respondent is liable for payment of services provided by Linda Lay at a rate greater than the maximum allowable rate permitted in the fee schedule.

ADJUDICATION

Respondent acknowledges that claimant is entitled to treatment for his post-traumatic stress disorder resulting from his compensable injury. Counseling for post-traumatic stress disorder has been provided by Linda Lay. Lay has apparently billed for her counseling services at the rate of \$160.00 per hour, which exceeds the fee schedule rate. At issue is whether respondent is liable for payment for Lay's services at a rate that is greater than the maximum allowable rate in the fee schedule.

After my review of the evidence and the applicable law, I find that respondent is not liable for payment for Lay's services at a rate in excess of the maximum allowable rate permitted by the fee schedule.

Initially, claimant contends that respondent has already agreed to pay Lay for services at a rate greater than that permitted under Rule 30 and that respondent is in

contempt for failing to comply with the prior opinion of February 7, 2022. After claimant's injury, Lay provided counseling services to the claimant and apparently a portion of those services were paid by the respondent. At the prior hearing in this claim on January 10, 2022, respondent acknowledged that Lay was entitled to payment for her services and Attorney Muldrow indicated that Lay had been paid in full. This agreement that Lay was entitled to payment for services rendered was Finding of Fact & Conclusion of Law number 3 in the prior opinion filed on February 7, 2022.

3. The parties' stipulation that Linda Lay is entitled to payment for services provided to claimant is also hereby accepted as fact.

Claimant contends that the stipulation was to pay for Lay's services at her billing rate as opposed to the fee schedule. I do not agree. While respondent agreed at the prior hearing that Lay was entitled to payment for her services, respondent did not indicate that those services would be paid at a rate greater than the fee schedule. Nor did the opinion of February 7 make a finding or order respondent to make payment at a rate in excess of the fee schedule. Accordingly, I do not find that the respondent has previously stipulated to pay Lay at a rate greater than that permitted under Rule 30 or that respondent is in contempt for failing to comply with the opinion of February 7, 2022.

Claimant also contends that respondent waived any claim that it might have to limit payment to Lay to payment under Rule 30 by paying for services at the billed rate and by agreeing to continue to do so at the hearing on January 10, 2022. For reasons previously discussed, I do not find that respondent agreed to pay at a rate greater than that allowed under Rule 30 at the prior hearing.

In addition, I do not find that respondent waived its right to make payment under Rule 30 based on payment for any prior services. First, as correctly noted by respondent in its brief, Attorney Davis in a letter to Attorney Walker dated March 25, 2020 indicated that respondent was willing to pay for additional services performed by Lay “provided that the rate per session is based on the Arkansas WC Medical Fee Schedule.” While respondent subsequently agreed that Lay was entitled to payment for her services, respondent did not agree to pay for those services at a rate greater than that allowed under Rule 30.

Finally, with respect to this issue, I note that Rule 30 addresses the issue of payment in excess of the maximum allowable payment by authorizing recovery of payment for amounts which exceed the maximum allowable payment. See Rule 30, Section 1 K. While recovery is not an issue here, the language in Rule 30 would indicate that payment of the bill in excess of the maximum allowable rate does not constitute a waiver.

Having found that respondent has not previously stipulated to pay at a rate in excess of the fee schedule or that respondent waived its right to make payment pursuant to Rule 30, a discussion of relevant portions of Rule 30 is necessary.

The Arkansas Workers’ Compensation Fee Schedule was authorized by A.C.A. §11-9-517 which states:

The Workers’ Compensation Commission is authorized to establish rules, including schedules of maximum allowable fees for specified medical services rendered with respect to compensable injuries, for the purpose of controlling the cost of medical and hospital services and supplies provided pursuant to §§ 11-9-508 – 11-9-516. (Emphasis added.)

In accordance with A.C.A. §11-9-517, the Commission adopted Commission Rule 099.30 [hereinafter Rule 30]. In the General Provisions, Rule 30 indicates that its scope includes:

A. Scope.

1. This rule does all of the following:

....

(b) Establishes schedules of maximum fees by a health facility or health care provider for such treatment or attendance, service, device, apparatus, or medicine.

(c) Establishes procedures by which a health care provider shall be paid the lesser of (1) the provider's usual charge, or (2) the maximum fee established under this rule, or (3) the MCO/PPO contracted price, where applicable.

Rule 30 also contains the following relevant definitions:

F. Definitions.

....

34. "Maximum allowable payment" means the maximum fee for a procedure established by this rule or the provider's usual and customary charge, whichever is less, except as otherwise might be specified.

35. "Maximum fee" means the maximum allowable fee for a procedure established by this rule.

....

51. "Practitioner" means a person licensed, registered or certified as an audiologist, doctor of chiropractic, doctor of dental surgery, doctor of medicine, doctor of osteopathy, doctor of podiatry, doctor of optometry, nurse, nurse anesthetist, nurse practitioner, occupational therapist, orthotist, pharmacist, physical therapist, physician's assistant, prosthetist, psychologist, or other person licensed, registered, or certified as a health care professional.

....

58. “Provider” means a facility, health care organization, or a practitioner.

According to the documentary evidence, Lay is a LPC-Licensed Professional Counselor and a NCC-National Certified Counselor. Therefore, she is licensed and certified as a health care professional and is subject to payment for services under Rule 30. Rule 30 provides the following with respect to payment for services:

1. Payment.

1. Reimbursement for health care services shall be the Lesser of (a) the provider’s usual charge, or (b) the maximum fee calculated according to the AWCC Official Fee Schedule (and/or any amendments to that fee schedule) or (c) the MCO/PPO contracted price, where applicable. A licensed provider shall receive no more than the maximum allowable payment, in accordance with this rule, for appropriate health care services rendered to a person who is entitled to health care service.

Rule 30 is clear that Lay is limited to the lesser of her usual charge; the maximum fee calculated according to the AWCC Official Fee Schedule or the MCO/PPO contracted price. No evidence has been submitted indicating that Lay should be paid pursuant to the MCO/PPO contracted price. Therefore, payment for her services is limited by law to the lesser of her usual charge or the AWCC Fee Schedule.

I also note that Rule 30 prohibits a provider from billing a carrier any amount that exceeds the maximum allowable payment. Section 1 L. states:

L. Amounts in Excess of Fees.

The provider shall not bill the employee, employer, or carrier for any amount for health care services provided for the treatment of a covered injury or illness when that amount exceeds the maximum allowable payment established by this rule.

In finding that Lay is limited to the lesser of her usual charge or the AWCC Fee Schedule, I note that claimant has cited no authority in support of his contention that the Commission has any authority to order payment of medical expenses in excess of the rates set forth in Rule 30. To the contrary, the Courts have recognized that the provisions of Rule 30 are mandatory. In *Burlington Industries v. Pickett*, 336 Ark. 515, 988 S.W. 2d 3 (1999), the Arkansas Supreme Court discussed Rule 30 in connection with an issue regarding payment of medical bills that had not been properly submitted pursuant to Rule 30. In doing so, the Court stated:

It is obvious that the design of the Rule is to control medical costs for the benefit of all affected by workers' compensation laws. In the instant case the full Commission rejected appellant's argument that Rule 30's procedures for submission of medical bills are prerequisite to a carrier's payment obligation. However, there is nothing in Rule 30 which implies its requirements are discretionary. (Emphasis added.)

Subsequently, in *ABF Freight Systems v. Dugger*, 219 Ark. App. 176, 564 S.W. 3d 670, the Court of Appeals discussed Rule 30 and preauthorization requirements. In its opinion, the Court cited the Supreme Court's language quoted above and stated:

While noting that a different section is at issue in Burlington – section (I)(F) – our supreme court's broad language states that the entire rule, unless expressly stated otherwise, is mandatory.

Likewise, in this case, there is no language in Rule 30 indicating that payment of the maximum fee is discretionary. Rule 30 specifically states that payment is to be the lesser of the providers usual charge; the maximum fee according to the AWCC Official

Fee Schedule; or the MCO/PPO contracted price. This language is not discretionary.

Accordingly, I find that respondent is not liable for payment of Lay's services at a rate greater than that permitted pursuant to Rule 30.

Claimant contends that if respondent is not ordered to make payment at Lay's billed rate she will most likely decline to continue treating claimant. At this point, this contention is speculative. However, I do note that if Lay were to chose not to continue to treat claimant for his post-traumatic stress disorder, that respondent would still be responsible for providing all reasonable and necessary medical treatment for his compensable injury.

At the time of the hearing Attorney Muldrow indicated that if Lay chose not to continue treating claimant that claimant could file for a change of physician and the Commission would be responsible for finding a new provider to provide counseling. First, I note that pursuant to A.C.A. §11-9-508(a) respondent has the duty to "promptly provide" medical treatment as may be necessary in connection with the injury received by the employee. Respondent has not contended that claimant is not entitled to continued counseling for his post-traumatic stress disorder as a result of his compensable injury. Respondent cannot abdicate its responsibility for promptly providing treatment to the claimant by sitting by idly and relying upon the Commission to find a provider willing to treat claimant pursuant to the rate set forth in the fee schedule. Respondent has an affirmative duty to provide prompt medical treatment that is reasonable and necessary.

ORDER

Claimant has failed to prove by a preponderance of the evidence that respondent

should be held in contempt for failing to comply with the opinion of February 7, 2022. In addition, claimant has failed to prove by a preponderance of the evidence that respondent is liable for paying for Linda Lay's services at a rate greater than the maximum allowable rate permitted in the Commission's fee schedule.

The respondent is liable for payment of the court reporter's charges for preparation of the hearing transcript in the amount of \$486.38.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE