

# ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

LUCILA RUIZ,	)	
Employee,	)	
Claimant,	)	FINAL DECISION AND ORDER
	)	
v.	)	AWCB Case No. 201218794
	)	
COSTCO WHOLESALE CORPORATION,	)	AWCB Decision No. 14-0028
Employer,	)	
	)	Filed with AWCB Anchorage, Alaska
and	)	on March 4, 2014
	)	
LIBERTY MUTUAL,	)	
Insurer,	)	
Defendants.	)	
	)	

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Dr. John P. Shannon, Jr.'s (Claimant) June 28, 2013 claim was heard on February 26, 2014 in Anchorage, Alaska, a date was selected on December 17, 2013. Lucila Ruiz (Employee) did not participate. Claimant appeared, represented himself, and testified. Attorney Michelle Meshke appeared and represented Costco Wholesale Corporation and Liberty Mutual (collectively Employer). Marilyn McGregor testified for Claimant, and Michael Sladky testified for Employer. The record closed at the hearing's conclusion on February 26, 2014.

## ISSUES

Claimant contends he should be paid 90 percent of his usual, customary and reasonable (UCR) rate for diagnostic testing he performed on February 14, 2013, and therefore he is entitled to

additional fees. Employer contends Claimant was paid 90 percent of the UCR fees for physicians in the community, and therefore is not entitled to further payment.

*Is Claimant entitled to additional medical fees?*

#### FINDINGS OF FACT

The following facts and factual conclusions are either undisputed or established by a preponderance of the evidence:

- 1) On December 26, 2012, Employer reported Employee had injured herself at work on March 1, 2012: “Over the course of time since March, Employee’s arm has been feeling more sore when she runs the oven or lifts something.” (Report of Occupational Injury or Illness, December 26, 2012).
- 2) On February 14, 2013, Claimant performed nerve conduction studies on Employee. Claimant’s billing agent, Marilyn McGregor, billed Employer’s insurance company \$3100.00 for these studies, using 2013 Current Procedural Terminology (CPT) code 95911. (Agreed at hearing).
- 3) The *Official Alaska Workers' Compensation Medical Fee Schedule* effective December 31, 2010 (Fee Schedule) sets UCR fees for medical treatment or service after December 31, 2010. The Fee Schedule is based on 2011 CPT codes. CPT is a registered trademark of the American Medical Association (AMA). In the Fee Schedule, each procedure is identified by a CPT code number and descriptive text, and is assigned a fee representing “the maximum level of medical and surgical reimbursement for the treatment of employment related injuries and/or illnesses that the Alaska Workers’ Compensation Board deems to be reasonable and necessary.” Providers are instructed to bill their normal charge for services, not the values listed in the Fee Schedule. (AS 23.30.097(a)(1); 8 AAC 45.082(m); Fee Schedule, 1-2).
- 4) In 2012, Claimant would have billed the studies performed on Employee using three separate CPT codes: 95900, 95903, and 95904, all of which are included in the Fee Schedule (Shannon, McGregor).
- 5) The AMA issues a new CPT code book annually. (McGregor).
- 6) The 2013 CPT code book rendered the 95900, 95903, and 95904 codes invalid. Instead, physicians were instructed to bundle these services under a single code, 95911, which is not in

the Fee Schedule. The CPT code was new, but the procedure had not changed. (Agreed at hearing).

7) Medical billers are professionally and ethically required to use the most current CPT codes, and insurers will not honor old, invalid codes. (*Id.*).

8) If it had been possible to bill Employee's February 14, 2013 treatment using 2011 CPT codes, the Fee Schedule indicates Claimant would have been owed the following reimbursements:

- a. Three units of CPT 95900 at \$353.60 each, for a total of \$1,060.80;
- b. Two units of CPT 95903 at \$406.64 each, for a total of \$813.28; and
- c. Two units of CPT 95904 at \$318.24 each, for a total of \$636.48;
- d. For a total of \$2,510.56. (Shannon; McGregor; Fee Schedule, 326).

9) On March 14, 2013, Insurer paid Claimant \$1,641.10 for the studies billed under 95911, explaining "the charge for this procedure exceeds the Ingenix Relative Actual Charge Database or Fair Health Benchmark Database Allowance." The Fair Health RV Medical Benchmark database, effective November, 2012, indicates \$1641.10 is the 90<sup>th</sup> percentile fee for CPT 95911 in Anchorage and Fairbanks, Alaska (Explanation of Benefits, March 14, 2013; Fair Health RV Medical Benchmark, copyright 2014).

10) On June 3, 2013, Claimant filed a workers' compensation claim (claim) for \$1,458.90 in medical fees, representing the difference between the \$3100.00 he billed and the \$1,641.10 he was paid. (Claim, May 12, 2013).

11) On July 1, 2013, Claimant filed a claim for \$1,458.90 in medical fees plus a \$364.75 penalty. (Claim, June 28, 2013).

12) On December 26, 2013, Employer filed a controversion denying "fees in excess of Alaska Fee Schedule" and penalties. (Controversion, December 24, 2013).

13) On February 6, 2014, a Compliance Analyst at Coventry Workers' Compensation Services wrote Insurer regarding Claimant's fee dispute:

\$1641.10 represents the 90<sup>th</sup> percentile in the provider's geographical treating location of Anchorage, AK 99508 as billed by the provider on the HCFA billing form, as no fee schedule value exists for CPT 95911. Attached please find the percentile listing provided by Fairhealth. . . . The UCR fee as defined by the state in the fee schedule is determined based on the 90<sup>th</sup> percentile of the range of charges for similar services. **Procedures that are not assigned a maximum allowable fee in the fee schedule should be reimbursed at the 90<sup>th</sup> percentile**

**of usual and customary charges.** No further payment is due. . . (Laurine Skeffington letter, February 6, 2014; Emphasis original).

PRINCIPLES OF LAW

**AS 23.30.001. Intent of the legislature and construction of chapter.** It is the intent of the legislature that

1) this chapter be interpreted . . . to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to . . . employers. . .

...

4) hearings in workers' compensation cases shall be impartial and fair to all parties .

..

The board may base its decision not only on direct testimony and other tangible evidence, but also on the board's "experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from all of the above." *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 533-34 (Alaska 1987).

An adjudicative body must base its decision on the law, whether cited by a party or not. *Barlow v. Thompson*, 221 P.3d 998 (2009).

**AS 23.30.097. Fees for medical treatment and services.**

(a) All fees and other charges for medical treatment or service are subject to regulation by the board consistent with this section. A fee or other charge for medical treatment or service may not exceed the lowest of

(1) the usual, customary, and reasonable fees for the treatment or service in the community in which it is rendered, for treatment or service provided on or after December 31, 2010, not to exceed the fees or other charges as specified in a fee schedule established by the board and adopted by reference in regulation; the fee schedule must be based on statistically credible data, including charges for the most recent category I, II, and III medical services maintained by the American Medical Association and the Health Care Procedure Coding System for medical supplies, injections, emergency transportation, and other medically related services, and must result in a schedule that

(A) reflects the cost in the geographical area where services are provided; and  
(B) is at the 90th percentile;

(2) the fee or charge for the treatment or service when provided to the general public; or

(3) the fee or charge for the treatment or service negotiated by the provider and the employer under (c) of this section.

...

(d) An employer shall pay an employee's bills for medical treatment under this chapter, excluding prescription charges or transportation for medical treatment, within 30 days after the date that the employer receives the provider's bill or a completed report as required by AS 23.30.095(c), whichever is later.

**AS 23.30.155. Payment of compensation.**

(a) Compensation under this chapter shall be paid periodically, promptly, and directly to the person entitled to it, without an award, except where liability to pay compensation is controverted by the employer. . . .

...

(e) If any installment of compensation payable without an award is not paid within seven days after it becomes due, as provided in (b) of this section, there shall be added to the unpaid installment an amount equal to 25 percent of the installment. This additional amount shall be paid at the same time as, and in addition to, the installment, unless notice is filed under (d) of this section or unless the nonpayment is excused by the board after a showing by the employer that owing to conditions over which the employer had no control the installment could not be paid within the period prescribed for the payment. The additional amount shall be paid directly to the recipient to whom the unpaid installment was to be paid.

It has long been recognized §155(e) provides penalties when employers fail to timely pay compensation. *Haile v. Pan Am. World Airways*, 505 P.2d 838 (Alaska 1973). "In circumstances where there is reliance by the insurer on responsible medical opinion or conflicting medical testimony, invocation of penalty provisions is improper. However, when nonpayment results from bad faith reliance on counsel's advice, or mistake of law, the penalty is imposed." *Harp v. ARCO Alaska, Inc.*, 831 P.2d 352, 358 (Alaska 1992), quoting *Stafford v. Westchester Fire Ins. Co. of New York*, 526 P.2d 37 (Alaska 1974).

**8 AAC 45.082. Medical treatment.**

...

(j) If the type of treatment or service the employee received is not included in the board's fee schedule described in (i) or (m) of this section, the amount charged may not exceed the usual, customary, and reasonable fee based on the 90th percentile of the range of charges for similar services reported in the community in which services were rendered to the employee.

...

(k) If the type of treatment or service the employee received is not included in the board's fee schedule described in (i) or (m) of this section, and the employer has evidence that the charged fee exceeds the amount allowed under (j) of this

section, the employer shall pay the physician based on the employer's evidence. In accordance with AS 23.30.110 and 8 AAC 45.070, the physician may request a hearing for a board determination of the usual, customary, and reasonable fee in the community for the treatment or service, and the board will determine and award the usual, customary, and reasonable fee.

...

(m) A fee or other charge for medical treatment or service provided on or after December 31, 2010, may not exceed the board's fees established in the *Official Alaska Workers' Compensation Medical Fee Schedule*, effective December 31, 2010, and adopted by reference.

*Gardner v. State of Alaska*, AWCB 13-0135 at 5-6 (October 29, 2013), held the Fee Schedule is not affected by subsequent changes in CPT codes; the treatment or service a physician provides, not the CPT code, determines the amount an employer or insurer is required to pay.

#### ANALYSIS

*Is Claimant entitled to additional medical fees?*

This is a legal question, as the relevant facts are not disputed. CPT code 95911 is not included in the current Fee Schedule, but the identical nerve studies Claimant provided are listed under three separate CPT codes: 95900, 95903, and 95904. The type of medical treatment or service a physician provides, not the CPT code, determines the amount an employer or insurer is required to pay. *Gardner*. Therefore 8 AAC 45.082(j) and (k), which address payment for treatment or services not included in the Fee Schedule, are irrelevant in this case.

There is no evidence Claimant's billed \$3,100.00 fee is lower than that provided to the general public, or he negotiated a lower fee with Employer. AS 23.30.097(a)(2), (3). Claimant's fees are therefore capped by the Fee Schedule adopted December 31, 2010. AS 23.30.097(a)(1); 8 AAC 45.082(m).

Applying CPT codes 95900, 95903, and 95904, Claimant was owed \$2,510.56 for services provided on February 14, 2013. Employer timely paid Claimant \$1,641.10 under AS 23.30.097(d), leaving a remainder of \$869.46. Because the nonpayment resulted from a

mistake of law, Claimant is also entitled to a 25 percent penalty, or \$217.35, for a total of \$1,086.81 plus interest. *Harp*; AS 23.30.155(e).

CONCLUSIONS OF LAW

1. Claimant is entitled to additional medical fees and a 25 percent penalty totaling \$1,086.81 plus interest for the nerve conduction studies he performed on Employee on February 14, 2013.

ORDER

1. Employer is ordered to pay Claimant \$1,086.81 plus interest.

Dated in Anchorage, Alaska on March 4, 2014.

ALASKA WORKERS' COMPENSATION BOARD

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Margaret Scott, Designated Chair

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Ron Nalikak, Member

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Mark Talbert, Member

If compensation is payable under terms of this decision, it is due on the date of issue. A penalty of 25 percent will accrue if not paid within 14 days of the due date, unless an interlocutory order staying payment is obtained in the Alaska Workers' Compensation Appeals Commission.

If compensation awarded is not paid within 30 days of this decision, the person to whom the awarded compensation is payable may, within one year after the default of payment, request from the board a supplementary order declaring the amount of the default.

APPEAL PROCEDURES

This compensation order is a final decision. It becomes effective when filed in the office of the board unless proceedings to appeal it are instituted. Effective November 7, 2005 proceedings to appeal must be instituted in the Alaska Workers' Compensation Appeals Commission within 30 days of the filing of this decision and be brought by a party in interest against the boards and all other parties to the proceedings before the board. If a request for reconsideration of this final decision is timely filed with the board, any proceedings to appeal must be instituted within 30 days after the reconsideration decision is mailed to the parties or within 30 days after the date the reconsideration request is considered denied due to the absence of any action on the reconsideration request, whichever is earlier. AS 23.30.127.

An appeal may be initiated by filing with the office of the Appeals Commission: 1) a signed notice of appeal specifying the board order appealed from and 2) a statement of the grounds upon which the appeal is taken. A cross-appeal may be initiated by filing with the office of the Appeals Commission a signed notice of cross-appeal within 30 days after the board decision is filed or within 15 days after service of a notice of appeal, whichever is later. The notice of cross-appeal shall specify the board order appealed from and the ground upon which the cross-appeal is taken. AS 23.30.128.

RECONSIDERATION

A party may ask the board to reconsider this decision by filing a petition for reconsideration under AS 44.62.540 and in accord with 8 AAC 45.050. The petition requesting reconsideration must be filed with the board within 15 days after delivery or mailing of this decision.



MODIFICATION

Within one year after the rejection of a claim, or within one year after the last payment of benefits under AS 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215, a party may ask the board to modify this decision under AS 23.30.130 by filing a petition in accord with 8 AAC 45.150 and 8 AAC 45.050.

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Final Decision and Order in the matter of LUCILA RUIZ, employee; v. COSTCO WHOLESALE CORPORATION, employer; and LIBERTY MUTUAL, insurer / defendants; Case No. 201218794; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties on March 4, 2014.

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Anna Subeldia, Office Assistant