Harrington, David

SANCTIONS

Civil Rule 11

A motion for terms pursuant to CR 11 may be considered before a Board order has become final. **….*In re David Harrington*, BIIA Dec., 97 A033 (1999)**

TREATMENT

Failure to obtain prior authorization

A self-insured employer may be required to pay for surgery even if the provider did not obtain prior authorization if the procedure was medically necessary and proper. *Citing Boise Cascade v. Huizar*, 76 Wn. App. 676 (1994). **….*In re David Harrington*, BIIA Dec., 97 A033 (1999)**

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: DAVID J. HARRINGTON	**)**	**DOCKET NO. 97 A033**
	)	
CLAIM NO. T-969826	**)**	**DECISION AND ORDER**

APPEARANCES:

Claimant, David J. Harrington, by
Leggett & Kram, per
James F. Leggett

Self-Insured Employer, Ivy Hi-Lift, by
Reinisch, MacKenzie, Healy, Wilson & Clark, P.C., per
James L. Gress

Department of Labor and Industries, by
The Office of the Attorney General, per
James S. Kallmer, Assistant

The self-insured employer, Ivy Hi-Lift, filed an appeal with the Board of Industrial Insurance Appeals on December 10, 1997, from an order of the Department of Labor and Industries dated October 17, 1997. The order affirmed a prior order allowing the claim and directing the self-insured employer to accept responsibility for an October 7, 1996 Magnetic Resonance Imaging (MRI) and October 22, 1996 surgery and related services. **AFFIRMED.**

PROCEDURAL AND EVIDENTIARY MATTERS

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on timely Petitions for Review filed by the claimant and the self-insured employer to a Proposed Decision and Order issued on May 12, 1999, in which the order of the Department dated October 17, 1997, was affirmed.

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed and the rulings are affirmed.

The claimant seeks sanctions against the self-insured employer, alleging that the appeal was frivolous and pursued solely for purposes of delay. On review, we find that the underlying Department order was correct, but that the status of the law was not so obvious that the

self-insured employer's appeal was totally without merit. The claimant's request for sanctions was filed in the form of a motion, but the Executive Secretary of the Board elected to treat it as a Petition for Review of the Proposed Decision and Order. We elected not to schedule oral argument.

In support of his motion for sanctions, the claimant cites WAC 263-12-125, CR 54(d), RCW 4.84.185 and CR 11. WAC 263-12-125 directs that unless otherwise indicated all court rules apply to Board proceedings. CR 54(d) provides for allowance of costs upon entry of a judgment and references RCW 4.84. RCW 4.84.185 provides for payment of expenses for opposing a frivolous lawsuit. The Board has already determined that sanctions are not available to parties under RCW 4.84.185 until after the period for appealing a Decision and Order to Superior Court has expired. *In re Don Eerkes*, BIIA Dec., 90 2532 (1992). By filing the motion within the appeal period, thus causing it to be treated as a Petition for Review, the claimant has delayed the finality of the Board order. Therefore, the motion for RCW 4.84.185 sanctions is premature and the Board lacks jurisdiction to rule on it.

Motions for CR 11 sanctions may be put forward at any point in the proceeding where the violation becomes obvious. CR 11 sanctions apply: where an action is not well grounded in fact, an action is not warranted by existing law, and the attorney filing the pleadings has not made reasonable inquiry into the law and facts, or where the action is filed or defended solely for the purpose of imposing delays. We find none of those conditions exist in this case.

The self-insured employer's position on appeal was that the principles set out in *Boise Cascade v. Huizar,* 76 Wn. App. 676 (1994) did not apply to Mr. Harrington. As discussed below, we disagree. However, testing the limits of the existing law is not unconscionable. The extent of the reach of the *Huizar* decision was not so rigidly established that the self-insured employer's appeal was sanctionable under CR 11.

With respect to whether the self-insured employer filed the appeal solely for delay, the Department took nine months to issue an allowance order in Mr. Harrington's claim. It was reasonable for the self-insured employer to await that decision before paying the medical bills that are the subject of this appeal. Having determined that the Department's decision was adverse, the self-insured employer had a statutory right to appeal the decision. The self-insured employer's appeal took 16 months from filing to issuance of a Proposed Decision and Order, but there is no indication that the self-insured employer caused any part of that delay. There is some correspondence between Mr. Leggett (claimant's attorney) and Mr. Gress (self-insured employer's attorney) during that time regarding claim closure in which each attorney displays considerably more temper than tact. Apparently the claimant felt that the Department was reluctant to close the claim while an appeal was pending. The claimant asks that the self-insured employer be penalized for pursuing the appeal and "holding up" claim closure. Other than Mr. Leggett's opinion expressed in his letters to Mr. Gress, there is no evidence of the Department's position on the matter.[1]

Finally, we note that it is not at all clear the claimant has any standing to pursue sanctions. The parties directly affected by the self-insured employer's appeal were the unpaid medical providers. They did not participate in the appeal. Neither did they submit any authorization for the claimant and his attorney to act in their behalf. If the medical aid rules applied, the providers could not bill Mr. Harrington for their error. Although he may have found that scenario repugnant, Mr. Harrington's rights were not affected by the self-insured employer's appeal. He was under no obligation to defend. The Department had the duty to defend its order that the self-insured employer pay the providers. The Department duly appeared and fulfilled that responsibility through the Office of the Attorney General. Mr. Harrington was a statutory party to the appeal, but his active

[1] The self-insured employer expresses concern that in revealing the contents of this correspondence, Mr. Legget has violated the sanction against revealing the contents of settlement negotiations. That was not the purpose of submission and, in fact, the settlement negotiations appear to deal with claim closure with a permanent disability award. As that is beyond the scope of the current appeal, no untoward disclosure has occurred.

participation was gratuitous. He voluntarily incurred the attorneys' fees for which he now complains. Parties are expected to attempt to mitigate their costs in CR 11 situations, i.e., by not incurring needless attorney fees in excess of those required to bring the frivolous nature of the proceeding to the attention of the court. *MacDonald vs. Korum Ford*, 80 Wn. App. 877 (1996). Mr. Harrington had no obligation to incur *any* attorney fees in this appeal at all. The Department, which had the obligation to defend the appeal, has neither filed its own motion for CR 11 sanctions nor joined in Mr. Harrington's motion.

The claimant's motion for CR 11 sanctions against the self-insured employer is denied.

DECISION

The self-insured employer seeks review on the merits of this appeal from a Department order directing it to pay for medical procedures performed without permission and without a second opinion as required under the medical aid rules. The appeal was tried on stipulated facts and exhibits submitted by the parties in a stipulation dated February 23, 1999. Reference to exhibits is by document title and/or date.

The Proposed Decision and Order contains a complete summary of the facts. The following chronology will serve to illustrate our discussion. On October 2, 1996, David Harrington injured his right knee in the course of his employment with Ivy Hi-Lift. On October 3, 1996, Dr. Hendrickson examined Mr. Harrington's right knee and reviewed x-rays. Dr. Hendrickson concluded that an MRI should be obtained early to decide the course of treatment. On October 4, 1996, Valley Medical Center MRI (Valley MRI) contacted Ivy Hi-Lift's service provider, AIG Claim Services (AIG), seeking authorization to perform an MRI requested by Dr. Hendrickson. AIG withheld authorization because it did not have the file. AIG did not request further medical information from Valley MRI or Dr. Hendrickson. Valley MRI performed the MRI on October 4, 1996, without prior authorization of AIG or the self-insured employer. The MRI scan revealed grade 4 arthritis of the knee. AIG

received Mr. Harrington's file from the employer on October 8, 1996, and learned that Ivy Hi-Lift was contemplating a challenge to the claim. There was no medical information in the claim file. On October 14, 1996, Dr. Hendrickson re-checked Mr. Harrington's right knee, found he could no longer work, and recommended surgery. On October 15, 1996, Dr. Hendrickson's office sent a surgical request to AIG, by facsimile, indicating that surgery was scheduled for October 22, 1996, pending authorization by AIG. The doctor's office was informed by AIG that Mr. Harrington's file did not include any medical chart notes. The office then provided October 3, 1996, October 7, 1996, and October 14, 1996 chart notes to AIG by facsimile on October 15, 1996. On October 21, 1996, Dr. Hendrickson's office again sought surgery authorization from AIG. AIG denied authorization because it had not finished evaluating the claim. Dr. Hendrickson performed arthroscopic surgery of the right knee on October 22, 1996, without authorization from AIG or the self-insured employer. Dr. Hendrickson did not obtain a second opinion regarding the need for surgery.

The self-insured employer does not contest the Department's determination that the unpaid tests and surgery were medically necessary for the effects of the industrial injury. The question is one of timing. The attending physician provided treatment in record time, only 21 days from date of injury to date of arthroscopic surgery. However, when the application for benefits was filed, the self-insured employer requested an investigation into the claim. It denied immediate permission for an MRI and for surgery based on the need for further investigation. The investigation could not be completed as quickly as the claimant needed to be treated in order to return to work. Indeed, it took the Department 9 months from the date of injury to direct allowance of the claim. By then, Mr. Harrington had already recovered from surgery and been back to work for 7 months.

Boise Cascade v. Huizar, 76 Wn. App. 676 (1994), the Court of Appeals case cited in the Proposed Decision and Order contains court-created exceptions to the medical aid rules that require prior authorization for certain medical procedures. The appeal actually consolidated two cases, that of Mr. Huizar and that of Mr. Wentz. Mr. Huizar's reopening application was initially denied, so permission

could not reasonably be expected pending resolution of the application to reopen. In the case of Mr. Wentz, the claim was open, but there was an active dispute as to the necessity for treatment. The claimant elected to have the contested treatment without submitting to a second opinion. The Department decided there was no causal relationship between the injury and the condition for which treatment was provided. The claimant ultimately won allowance of the condition on review before the Board of Industrial Insurance Appeals. Again, the self-insured employer was directed to pay the medical providers because there had been no practical way to get approval of medically necessary treatment in a reasonable time pending administrative resolution of the causation dispute.

In the present case, Mr. Harrington's claim had not yet even been allowed when the request for tests and surgery were submitted. The self-insured employer requested an investigation before the allowance determination was made. Unlike the claims in *Huizar*, there was no written determinative order from which an appeal could be taken. The claimant had no recourse to the appeal process absent such a written determination.

The *Huizar* decision discusses the conflicting interests between the medical aid rules requiring prior authorization and the public policy behind liberally construing the Industrial Insurance Act "for the purpose of reducing to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment." Admittedly, Mr. Harrington's injury was not life threatening. The fact stipulation, however, establishes that absent the surgery he could not work. The speedy surgical response resulted in minimal time lost from the job. Had Mr. Harrington awaited the conclusion of the Department's deliberative process to have his surgery, he would have been out of work for 9 months before the surgery, plus the additional recovery period. Furthermore, the initial delay in authorizing testing and treatment does not appear to have been based on medical concerns. As the hearing judge notes at page two of the Proposed Decision and Order, the claim services representative did not even request that the medical records be faxed before denying the MRI request. Clearly, the self-insured employer was questioning the claim for other

than medical reasons. (See AIG claims notes October 15, 1996.) Even with medical records from Dr. Hendrickson, the claims services company continued to request that the claim be investigated.

The MRI scan revealed significant arthritis, a condition that requires a second opinion before surgery per WAC 296-20-245. However, obtaining a second opinion in light of the self-insured employer's refusal to concede the allowance of the claim or to authorize any treatment pending the completion of the investigation would essentially be requiring the claimant engaged in a futile act that delayed his treatment and exposed him to personal expense for the cost of the second opinion.

The law concerning exceptions to prior approval is such that each case must be evaluated on its own merits. In this case, speedy medical intervention returned Mr. Harrington to work, limiting the self-insured employer's obligation for time loss compensation costs and reducing the claimant's physical and economic suffering to about one sixth of the time that would have been required if the parties waited out the Department's investigation process. The self-insured employer's frustration that the medical aid rules have no weight if the *Huizar* decision controls in this circumstance is understandable. However, the court in *Huizar* made it clear that the policy considerations behind the Act outweigh the mechanical language of the medical aid rules. The Department correctly required the self-insured employer to pay for the MRI scan and the surgery performed by Dr. Hendrickson.

FINDINGS OF FACT

1. The claimant, David J. Harrington, filed an application for industrial insurance benefits on November 12, 1996, alleging an injury to his right knee on October 2, 1996, while in the course of employment with Ivy Hi-Lift. On November 18, 1996, the Department of Labor and Industries issued an order allowing the claim on an interlocutory basis because the self-insured employer had shown a need for further investigation. On July 16, 1997, the Department issued a determinative order allowing the claim and directing the self-insured employer to pay all medical and time loss compensation as may be indicated in accordance with Industrial Insurance Laws and to accept responsibility for the October 7, 1996 Magnetic Resonance Imaging (MRI), October 22, 1996 surgery, and related services. On August 11, 1997,

the self-insured employer filed with the Department, a Protest and Request for Reconsideration of the July 16, 1997 Department order. The Department affirmed the July 16, 1997 decision by its order of October 17, 1997.

On December 10, 1997, the self-insured employer filed, with the Board of Industrial Insurance Appeals, a Notice of Appeal to the October 17, 1997 Department order. On January 8, 1998, the Board issued an order granting the appeal, assigning it Docket No. 97 A033, and directing that proceedings be held.

2. On October 2, 1996, David Harrington sustained an injury to his right knee in the course of his employment with Ivy Hi-Lift, which caused him to seek medical treatment, including an MRI, arthroscopic surgery, and physical therapy.

3. On October 3, 1996, Mr. Harrington was examined by Cynthia Schneble, M.D., who referred him to John Hendrickson, M.D. Dr. Hendrickson examined Mr. Harrington's right knee on October 3, 1996, and reviewed x-rays. Dr. Hendrickson concluded that an MRI should be obtained early to decide the course of treatment.

4. On October 4, 1996, Valley Medical Center MRI (Valley MRI) contacted Ivy Hi-Lift's service provider, AIG Claim Services (AIG) seeking authorization to perform an MRI requested by Dr. Hendrickson. AIG withheld authorization because it did not have the file. AIG did not request further medical information from Valley MRI or Dr. Hendrickson. Valley MRI performed the MRI on October 4, 1996, without prior authorization of AIG or the self-insured employer.

5. AIG received Mr. Harrington's file from the employer on October 8, 1996, and learned that Ivy Hi-Lift was contemplating a challenge to the claim. There was no medical information in the claim file.

6. On October 14, 1996, Dr. Hendrickson re-checked Mr. Harrington's right knee, found he could no longer work, and recommended surgery.

7. On October 15, 1996, Dr. Hendrickson's office sent a surgical request to AIG, by facsimile, indicating that surgery was scheduled for October 22, 1996, pending authorization by AIG. The doctor's office was informed by AIG that Mr. Harrington's file did not include any medical chart notes. The office then provided October 3, 1996, October 7, 1996, and October 14, 1996 chart notes to AIG by facsimile on October 15, 1996.

On October 21, 1996, Dr. Hendrickson's office again sought surgery authorization from AIG. Authorization was denied because AIG had not completed the evaluation of the claim. On that day, Dr. Hendrickson

spoke with Curtis Montgomery of AIG and was told that although surgery could not be authorized at that time, AIG would accept responsibility for bills if the claim was eventually allowed.

8. Arthroscopic surgery of the right knee was performed by Dr. Hendrickson on October 22, 1996, without authorization from AIG or the self-insured employer. Dr. Hendrickson did not obtain a second opinion regarding the need for surgery.

9. Mr. Harrington began outpatient physical therapy on November 1, 1996, and was released to light duty work by Dr. Hendrickson on November 11, 1996. Mr. Harrington was released for full duty on November 26, 1996.

10. The treatment provided or prescribed by Dr. Hendrickson, including the October 4, 1996 MRI, October 22, 1996 arthroscopic surgery, and physical therapy, was reasonably necessary and proper treatment of the industrial injury of October 2, 1996.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and the subject matter of this appeal.

2. The Department order of October 17, 1997, directing the self-insured employer to accept responsibility for an October 7, 1996 MRI, October 22, 1996 surgery and related services, is correct and is affirmed.

It is so ORDERED.

Dated this 26th day of August, 1999.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
THOMAS E. EGAN Chairperson

/s/_____
FRANK E. FENNERTY, JR. Member

/s/_____
JUDITH E. SCHURKE Member