

WCCA Cases on Surgical Implants and Prevailing Charge

Payment for Surgical Implants

- Buck-Ulrick v. Tri City Enterprises
 - Workers' Compensation Court of Appeals
 - Issued May 13, 2008

FACTS of CASE

- An artificial disc was implanted during surgery in 2003 at a hospital of more than 100 beds
- Hospital did not keep disc implants in stock; it was specifically ordered for the employee from the manufacturer
- Testimony: surgeon selects the disc and the hospital procures it directly from manufacturer
- Hospital billed insurer \$14,926.00, which included an undisclosed hospital markup

Insurer Argument

- Insurer agreed surgery was necessary and hospital submitted its usual and customary charge
- But argued that, based on statutes and rules:
 - Hospital could not bill for the implant
 - Manufacturer was a health care provider
 - Manufacturer must bill insurer directly

Rule at Issue

MN Rules 5221.0700 Subp. 2A(2):

A. Charges for services, articles, and supplies must be submitted to the payer directly by the health care provider actually furnishing the service, article, or supply. This includes, but is not limited to the following: ...

(2) equipment, supplies, and medication not ordinarily kept in stock by the hospital or health care provider facility, purchased from a supplier for a specific employee ...

Definition of Health Care Provider

Minn. Stat. 176.011 Subd. 24:

“ ... a physician, podiatrist, chiropractor, dentist, optometrist, osteopath, psychologist, psychiatric social workers, or any other person who furnishes a medical or health service to an employee under this chapter.”

Definition of Service or Treatment

MN Rules 5221.0100 Subp. 15:

“Service” or “treatment” means any procedure, operation, consultation, supply, product, or other thing performed or provided for the purpose of curing or relieving an injured worker from the effects of a compensable injury under Minnesota Statutes, section 176.135, subdivision 1.

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WCCA Decision

- Rule must be read as a whole; first paragraph specifies charges are to be submitted by “health care provider actually furnishing the service.”
- One purpose of rule: to avoid markup by preventing a referring provider from billing for services provided by another provider.

WCCA Decision

- Manufacturer of implant did not furnish any independent medical or health service to the employee
- Hospital did not refer employee to manufacturer
- Manufacturer had no contact with the employee
- The implant had no value to the employee apart from surgery

WCCA Decision

- The hospital, not the manufacturer, was “the health care provider actually furnishing the service.”
- To decide otherwise “would transform virtually every manufacturer of custom medical devices into health care providers, subject to the rules and responsibilities of the workers’ compensation system.”

The Rule in Light of Buck-Ulrick

- Consider who actually furnishes the health service, article or supply in light of WCCA factors:
 - Was there an independent medical or health service provided to the employee?
 - The nature of the relationship between the primary provider and the other provider?
 - Was there any contact between the employee and other provider?
 - Did the service have value to the employee apart from the primary service?

The Rule in Light of Buck-Ulrick

- Examples to consider:
 - A lab drawing blood in a separate facility on order from the treating doctor
 - A provider coming to a clinic or hospital to fit a patient with a prosthesis or brace
 - Rare medication ordered from a pharmacy but dispensed by the treating provider

Payment Based on Prevailing Charge

- Lehto v. Community Memorial Hospital
 - Workers' Compensation Court of Appeals
 - Issued on January 30, 2008
 - Summarily Affirmed by the Minnesota Supreme Court (751 N.W.2d 585, Minn., June 25, 2008 (NO. A08-379))

Facts of Case

- Three consolidated cases: Lehto, Spawn, & Stemper
- The disputes involved payment for services provided by an ambulatory surgical center (ASC).
- Each case presented a different issue on application of the rule governing prevailing charges by a bill review company for the workers' compensation insurer.

What is a Prevailing Charge?

Minn. Stat. 176.136 Subd. 1b(b):

The liability of the employer for the treatment, articles and supplies that are not limited by subdivision 1a or 1c or paragraph (a) shall be limited to 85 percent of the provider's usual and customary charge, or 85 percent of the prevailing charges for similar treatment, articles, and supplies furnished to an injured person when paid for by the injured person, whichever is lower ...

What is a Prevailing Charge?

- Prevailing charge cannot be applied to services that are:
 - limited by the fee schedule (“subd. 1a”);
 - provided at a hospital with 100 or fewer licensed beds (“paragraph a”); or
 - provided at a nursing home for which rates are established by the MN Department of Human Services (“ubd. 1c”).

What is a Prevailing Charge?

MN Rules 5221.0500 Subp. 2B(2) sets out the requirements for establishing a prevailing charge.

- Prevailing charge is the 75th percentile of the usual and customary charges as defined in subitem 1 in the previous calendar year for each service, article, or supply if the database for the service meets all of the following criteria:

What is a Prevailing Charge?

- The database includes only Minnesota providers;
- At least three different, identifiable providers of the same provider type;
- Distinguished by whether the service is an inpatient hospital service, or an outpatient physician, pathology, laboratory, chiropractic, physical therapy or occupational therapy service, or provider of other similar service, article or supply;

What is a Prevailing Charge?

- There must be at least 20 billings for the service, article or supply; and
 - The standard deviation must be less than or equal to 50 percent of the mean of the billings in the data base; or
 - The value of the 75th percentile must not be greater than or equal to three times the value of the 25th percentile of the billings.

Issues in Lehto

- ASC claimed payment should be 85% of ASC's usual and customary charge.
- Insurer claimed payment should be 85% of prevailing charge.
- WCCA considered whether Insurer's database satisfied the requirements of the prevailing charge rule.

Database Issues in Lehto

The database must include:

- At least 20 billings in the previous calendar year for the service, article or supply;
- From at least three different Minnesota providers of the same provider type;
- For same (or perhaps similar) services; and
- Documentation of the bill.

Charges in Previous Calendar Year

Rule:

A prevailing charge is the 75th percentile of the usual and customary charges **in the previous calendar year** for each service, article, or supply [if the other requirements are also satisfied].

Charges in Previous Calendar Year

WCCA:

- Insurer agreed that the database contained billings from before 12 months prior to the date of service. On this basis alone, the insurer failed to establish a prevailing charge.
- A concurring judge (of three judge panel) opined that this made the appeal moot.

Billings from Same Provider Type

Rule: Database must include:

- 20 billings in the previous calendar year from at least three different Minnesota providers **of the same provider type.**
 - “Distinguished by whether the service is an inpatient hospital service, or an outpatient physician, pathology, laboratory, chiropractic, physical therapy or occupational therapy service, or provider of other similar service, article or supply.”

Billings from Same Provider Type

WCCA:

- Database included ASC and hospital bills. Evidence did not support that hospital outpatient facilities and ASCs were equivalent provider types.
 - MN Rules 5221.4033 specifies which services provided in an “ambulatory surgical center and hospital outpatient surgical center” may be paid separately and which services are included in the facility fee.

Billings from Same Provider Type

- Ambulatory surgical center: “A distinct entity that operates exclusively for the purpose of providing surgical services to patients not requiring hospitalization and accredited by Medicare or an outpatient surgical center as defined in part 4675.0100, subpart 8 and licensed by the Minnesota Department of Health.” MN Rules 5221.0100 Subp. 1a
- Outpatient surgical center: “A freestanding facility organized for the specific purpose of providing elective outpatient surgery for pre-examined, prediagnosed, low-risk patients ...” MN Rules 4675.0100 Subp. 8

Billings from Same Provider Type

- The WCCA found no evidence that the hospitals in the database met either of these requirements.
- Even if the facilities were hospital-based day surgery centers, hospitals bill separately for services and supplies that are included in the facility fee for ASCs.
- Therefore, without the hospital billings, there were not 20 billings of the same provider type in the database.

Billings for Same or Similar Service

Rule:

- Database must contain at least 20 billings for **the service, article or supply.**

Statute:

- Minn. Stat. 176.136 Subd. 1b refers to 85% of “prevailing charge for **similar treatment, articles and supplies ...**”

Billings for Same or Similar Service

WCCA:

- Insurer has the burden of establishing by preponderance of evidence that services in the database were the same or at least similar or equivalent to services provided to the employees.

Billings for Same or Similar Service

WCCA: Rule was not satisfied:

- Database included injections to the spine, but there was no evidence that the injections were similar.
- Not all had the same CPT code.
- Injections vary by location and type.
- Similarity of injections is a subject for expert testimony, which was not present.
- The WCCA did not decide whether “similar” services would satisfy the rule.

Documentation of Billings

Rule:

The database must contain at least 20 **billings** for **the** service, article or supply.

Documentation of Billings

WCCA:

- Documentation of each charge consisted of a one page summary of bills with 20 entries and a computer print screen.
- Copies of original bills were provided for only some entries.
- For other charges, there was an abstract of the bill captured on a computer print screen.

Documentation of Billings

WCCA:

- The computer print screen captured the state, provider type, diagnostic codes, date of service, CPT code and amount charged for procedure.
- The database did not comply with the rule. “The word bill is unequivocal and does not include a summary or abstract of the bill.”

What Prevailing Charge Issues Remain

WCCA: The burden of proving prevailing charge is on the insurer.

- What evidence will support that billings are from the “same provider type”?
- Will 20 billings for “similar services” satisfy the rule?
- What evidence will support that the services in the database are the “same” or “similar”?
- Can something other than an exact duplicate of the bill satisfy the rule? What about bills submitted electronically after July 15, 2009?

Other Issues in Lehto

- Insurers also asserted:
 - Charges for facility fees were duplicative under MN Rules 5221.0500 Subp.1A in light of a \$6000 markup for an infusion pump.
 - Charges for certain services should be “unbundled.”
- The WCCA determined that the insurer has the burden of establishing excessiveness under MN Rules 5221.0500 Subp. 1A or 2B.
- The WCCA affirmed the compensation judge’s finding that the evidence did not establish excessiveness under the rules.