U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB Nos. 16-0521
and 16-0521A

KEVIN STOUFFLET	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
CERES GULF, INCORPORATED	)	DATE ISSUED: Apr. 4, 2017
	)	
Self-Insured	)	
Employer-Respondent	)	
Cross-Petitioner	)	
	)	
OCHSNER CLINIC FOUNDATION	)	
	)	
Non-Party Medical Provider	)	
Petitioner	)	
Cross-Respondent	)	DECISION and ORDER

Appeal of the Ruling on Employer's Motion to Enforce Subpoena, Hold Medical Provider in Contempt, and Deny All Fees for Lack of Section 7 Compliance of Tracy A. Daly, Administrative Law Judge, United States Department of Labor.

Lawrence P. Postol (Seyfarth Shaw LLP), Washington, D.C., for self-insured employer.

Joseph J. Lowenthal and Graham H. Ryan (Jones Walker LLP), New Orleans, Louisiana, for non-party medical provider.

Before: HALL, Chief Administrative Appeals Judge, BOGGS and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Ochsner Clinic Foundation (Ochsner) appeals, and employer cross-appeals, the Ruling on Employer's Motion to Enforce Subpoena, Hold Medical Provider in Contempt, and Deny All Fees for Lack of Section 7 Compliance (2015-LHC-02005) of

Administrative Law Judge Tracy A. Daly rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

During the course of this claim, which claimant and employer have now settled, employer requested and obtained a subpoena commanding Ochsner to produce claimant's medical records. Ochsner forwarded the subpoena to MRO, the company that processes requests for Ochsner's medical records. Prior to complying with the subpoena, MRO sent employer an invoice for $349 to copy and mail 860 pages of medical records. Employer disputed the invoice and, in a letter dated March 1, 2016, offered to pay a lesser amount based on a rate of 20 cents per page plus $15 postage. Employer also filed a motion to enforce its subpoena. Ochsner filed an opposition to the motion on the grounds that it timely notified employer of its intent to comply with the subpoena following prepayment of its expenses and that ordering it to comply at employer's "unilateral cost-schedule" is unjustified.

The administrative law judge issued an order ruling on employer's motion. Acknowledging that the Rules of Practice and Procedure before the Office of Administrative Law Judges (OALJ Rules) require a non-party to be protected from significant expense in complying with a subpoena, 29 C.F.R. §18.56(c)(2)(ii)(B), and that federal law does not mandate the amount to be paid for copying medical documents, the administrative law judge concluded that he "must determine a reasonable amount for copying expenses in this case." Ruling at 3. The administrative law judge also concluded that neither the copying fee charged by the Department of Labor (DOL) for documents provided under the Freedom of Information Act (FOIA), 5 U.S.C. §552(a)(4)(A)(ii); 29 C.F.R. §70.40(e)(2), nor Louisiana law, La. Rev. Stat. Ann. §40.1165.1, is controlling, although both provide guidance on copying fees. The administrative law judge found that Ochsner's itemized charges averaged to an "unreasonable" 40 cents per page, and he assessed what he deemed a reasonable fee for producing copies of the documents. Specifically, the administrative law judge found that 25 cents per page, plus a $25 search and retrieval fee, plus $9.60 for postage (a total of $249.60) is reasonable and protects Ochsner from significant expense. The administrative law judge ordered employer to pay this fee and Ochsner to produce the documents. Ruling at 2-4. The parties complied with the administrative law judge's order.

Ochsner appeals the administrative law judge's order, and employer has filed a cross-appeal. Each also filed a response brief. Ochsner contends the administrative law judge erred in reducing the requested copying fee and in not permitting it to apply its

normal business practices under Louisiana law. BRB No. 16-0521. Employer contends the administrative law judge erred in not applying the government's rate for copying documents under the FOIA, as the DOL has determined it is "the reasonable rate." Employer also contends the administrative law judge should have enforced the portion of the subpoena requiring Ochsner to produce the original documents at employer's counsel's office so that employer could make its own copies. BRB No. 16-0521A.

The subpoena at issue specifically commands Ochsner to produce claimant's medical documents "and permit their inspection, copying, testing, or sampling . . . at your address set forth above" on January 10, 2016, at 10:00 a.m. Motion To Enforce exh. A. The address "above" on the subpoena is Ochsner's address. Alternatively, the subpoena permits Ochsner to deliver copies of the medical records to employer's counsel's office. *Id.* Contrary to employer's contention, there is no subpoena command requiring Ochsner to deliver the original records to employer's counsel's office so that employer may make its own copies; this method was offered in employer's March 2016 letter challenging the invoice and is not part of the subpoena. Therefore, we reject employer's assertion that the administrative law judge erred in not enforcing that option.[1]

At this juncture, with employer having paid the fee and Ochsner having produced the documents, the parties are in compliance with the subpoena and the administrative law judge's order. The issue before the Board is whether the administrative law judge acted within his discretion in setting "reasonable" copying costs.

Pursuant to 29 C.F.R. §18.10, Section 18.56(c) of the OALJ Rules, 29 C.F.R. §18.56(c), applies in administrative law judge proceedings under the Act because it is not inconsistent with the Act or the Act's regulations. *See generally Metropolitan Stevedore Co. v. Brickner*, 11 F.3d 887, 27 BRBS 132(CRT) (9th Cir. 1993). Section 18.56(c) provides:

> (c) Protecting a person subject to a subpoena-
> (1) Avoiding undue burden; sanctions. A party or representative responsible for requesting, issuing, or serving a subpoena must take **reasonable steps to avoid imposing undue burden on a person subject to the subpoena**. The **judge must enforce** this duty and impose an appropriate sanction.
> (2) Command to produce materials or permit inspection- * * *
> (ii) Objections. A person commanded to produce documents or tangible

[1] We decline to address employer's assertion that $25 should be the maximum charge for producing a CD of the subpoenaed records. Although employer claims Ochsner has used this method of compliance in other cases, it has not done so here, and that cost is not at issue before us.

> things or to permit inspection may serve on the party or representative designated in the subpoena a written objection to inspecting, copying, testing or sampling any or all of the materials or to inspecting the premises-or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:
>
> (A) At any time, on notice to the commanded person, the serving party may move the judge for an order compelling production or inspection.
>
> (B) These acts may be required only as directed in the order, and **the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance**.

29 C.F.R. §18.56(c) (emphasis added). Section 18.56 is modeled after Rule 45 of the Federal Rules of Civil Procedure, Fed. R. Civ. P. 45 (2014).[2]

As with the FRCP, the OALJ Rules do not define "undue burden" or "significant expense." Thus, whether the burden is "undue" or the expense is "significant" must be determined on a case-by-case basis. Ochsner and employer each assert that its position on applicable copying rates is controlling and that the administrative law judge does not have the discretion to determine a different rate.

Ochsner does business in Louisiana and contends the Louisiana statute, which addresses the issue of reasonable compensation for copying medical documents, is controlling in the absence of specific statutory or regulatory guidance. Consequently, Ochsner argues it was erroneous for the administrative law judge to dismiss the state statutory rates. Section 13:3715.1 of the Louisiana Revised Statutes, La. Rev. Stat. Ann.

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[2] Rule 45(d)(1) provides that the "party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena." Fed. R. Civ. P. 45(d)(1). If the subpoenaed party objects, any order compelling the production of documents "must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance." Fed. R. Civ. P. 45(d)(2)(B)(ii). Generally, Rule 45(d) cases involve the question of whether the costs of complying with a subpoena should be paid by the subpoenaed party or shifted to the party issuing the subpoena because they are "significant." *Legal Voice v. Stormans, Inc.*, 738 F.3d 1178 (9th Cir. 2013); *Linder v. Calero-Portocarrero*, 251 F.3d 178 (D.C. Cir. 2001); *United States v. McGraw-Hill Companies, Inc.*, 302 F.R.D. 532 (C.D. Cal. 2014). As employer offered payment for copying and mailing costs, this case differs from those involving whether to shift the cost of document production to the party seeking the documents.

§13:3715.1, is titled "Medical or hospital records of a patient; subpoena duces tecum and court order to a health care provider; reimbursement for records produced." Subsection B provides that the exclusive method by which the medical records "may be obtained or disclosed by a health provider" is pursuant to La. Rev. Stat. Ann §40:1299:96 (which has been renumbered 40:1165.1). La. Rev. Stat. Ann. §13:3715.1B. Section 40:1165.1 of the Louisiana Revised Statutes, La. Rev. Stat. Ann. §40:1165.1 (2016), which addresses copies of health care information, states in pertinent part that a person entitled to obtain a patient's medical records:

> shall have a right to obtain a copy of the entirety of the records in the form in which they exist, except microfilm, upon furnishing a signed authorization. If the treatment records exist solely in paper form, paper or digital copies shall be **provided upon payment of a reasonable copying charge**, not to exceed one dollar per page for the first twenty-five pages, fifty cents per page for twenty-six to three hundred fifty pages, and twenty-five cents per page thereafter, a handling charge not to exceed twenty-five dollars for hospitals, nursing homes, and other health care providers, and actual postage.

La. Rev. Stat. Ann. §40:1165.1(A)(1)(b)(i) (all emphasis added).[3] Ochsner asserts that its standard business practice is to charge the rates permitted by the statute and that the tiered statutory scheme accounts for economies of scale and allows the capture of overhead costs such as staff time. Ochsner thus contends that $349 for copying 860 pages is reasonable, and the administrative law judge should not have reduced the

[3] Two federal district court cases in Louisiana, *Broussard v. Lemons*, 186 F.R.D. 396 (W.D. La. 1999); *Gotreaux v. Apache Corp.*, No. 6:13-CV-03235, 2015 WL 3910245 (W.D. La. June 25, 2015), have addressed the Louisiana statute. In *Broussard*, the court determined that the subpoenaed non-party in a personal injury diversity case was entitled to pre-payment of the reasonable cost for making 11 color copies of medical documents to comply with the subpoena. Using the statute as guidance, and beginning its calculations with the $1 per page maximum rate, the court considered the prevailing rates at copy stores for making color copies, increased the rate by noting that medical facilities are not in the business of making copies, and found that $3 per page, plus a $10 handling charge and actual postage costs, was reasonable compensation for the color copies. *Broussard*, 186 F.R.D. at 397-398. In *Gotreaux*, payment for the staff's time for copying, and not the copying rate, was at issue. With regard to the rate, the court merely awarded the $177.50 amount for copying 275 pages that had been calculated by the plaintiff's attorney using the statutory rates, as that amount had already been paid by the plaintiff and accepted by the non-party.

copying fees.[4]

Employer, in its cross-appeal, contends the administrative law judge should not have set a copying fee based on a rate of 25 cents per page because this case arises under the jurisdiction of the DOL, and the DOL has determined that 15 cents per page copied is reasonable. Employer relies on the DOL's guide for copying documents produced under the FOIA, 5 U.S.C. §552, and specifically 5 U.S.C. §552(a)(4)(A)(ii), which allows the government to assess a reasonable charge for copying. The DOL charges, as employer states, 15 cents per page for black-and-white copies made with respect to FOIA requests. 29 C.F.R. §70.40(e)(2). Employer asserts that because the DOL has already determined the reasonable cost for copying, the administrative law judge erred in awarding Ochsner a higher per page rate.

We reject the arguments of both Ochsner and employer. The Act, its implementing regulations, and the OALJ rules are silent on the issue of how to calculate copying costs. Indeed, the administrative law judge accurately stated that "[f]ederal law does not mandate specific costs associated with the production of medical documents." Ruling at 3.[5] Although Ochsner contends state law should be used to fill the void created by the absence of federal law, we conclude that the administrative law judge rationally found that the applicable OALJ regulation leaves it to his discretion to determine a reasonable rate that protects Ochsner from "significant expense." 29 C.F.R. §18.56(c)(2)(ii)(B). Additionally, Section 18.56(c) requires the requesting party to "take reasonable steps to avoid imposing undue burden" on the subpoenaed party, and it requires the administrative law judge to "enforce this duty[.]" 29 C.F.R. §18.56(c)(1). Given those goals, and the absence of a federal statute or regulation setting a specific fee or rate, the administrative law judge resolved the dispute in this case by looking to the state statute and to FOIA law for guidance in reaching a reasonable rate. The administrative law judge selected a rate, 25 cents per page, which falls between the suggested rates presented by employer and Ochsner.

[4] The total fee requested by Ochsner divided by the number of pages copied averages to 40 cents per page. *See* Ruling at 4. Ochsner's invoice followed the maximum amounts permitted by the tiered system of the Louisiana statute.

[5] As an example, the administrative law judge cited the Health Insurance Portability and Accountability Act. Pub. L. No. 104-191, 100 Stat. 1936 (1996). The regulation at 45 C.F.R. §164.524(c)(4) permits the entity providing a copy of "protected health information" to "impose a reasonable, cost-based fee" which covers labor, supplies, postage, and the preparation of a summary if requested.

Neither employer nor Ochsner has established any abuse of discretion by the administrative law judge.[6] *See Verso Paper, LLC v. Hireright, Inc.*, No. 3:11–MC–628, 2012 WL 2376046 at *6 n.1 (S.D. Miss. June 22, 2012) ("On that note, BankPlus's proposed $2 per page copying charge is unreasonable. To the extent anything must be photocopied in our digital era, the Court finds that $0.25 per page is a reasonable charge."); *see generally Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997) (no abuse of discretion shown in exclusion of videotape); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991) (choice among inferences is left to the administrative law judge); *Ezell v. Director Labor, Inc.*, 33 BRBS 19 (1999) (no abuse of discretion shown in excluding post-hearing medical reports). Specifically, employer has not established why the government's charge to a private party under the FOIA regulation should control the amount charged between two private parties complying with a subpoena arising under the Longshore Act. For that matter, it has not shown, nor can it, that the FOIA regulation sets a rate that must be used under all, or any other, federal statutes or that the DOL copying rate is the only possible reasonable rate. Ochsner has not established why employer should have to pay the maximum rate allowed by the Louisiana statute, as the statute sets a ceiling, not a specific rate. La. Rev. Stat. Ann. §40:1165.1(A)(1)(b)(i) (emphasis added) ("payment of a reasonable copying charge, *not to exceed* . . ."). In that vein, Ochsner has not shown that the lesser rate set by the administrative law judge is insufficient to prevent an undue burden from being placed upon it or that the rate set by the administrative law judge would subject it to significant expense in violation of Section 18.56. Thus, absent any abuse of the administrative law judge's discretion, we affirm the copying costs set by the administrative law judge.

[6] Neither party alleges error in the administrative law judge's selection of this rate on the ground that he failed to set forth the basis for this conclusion other than that it falls between the parties' proposed rates. The administrative law judge properly noted that the Louisiana statute provides ceiling rates and, thus, does not preclude the finding that a lower rate will suffice to protect a non-party from significant expense.

Accordingly, the administrative law judge's Ruling on Employer's Motion to Enforce Subpoena, Hold Medical Provider in Contempt, and Deny All Fees for Lack of Section 7 Compliance is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge

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RYAN GILLIGAN
Administrative Appeals Judge