

In the Matter of the Medical Treatment Dispute of

**McDowell, Durwood, Claimant**

Contested Case No: H00-057

**PROPOSED & FINAL ORDER**

January 22, 2002

SAIF CORPORATION, Petitioner

DURWOOD MCDOWELL, Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

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The Petitioner, SAIF Corporation (SAIF or insurer), appeals an administrative order of the Workers' Compensation Division (WCD), Medical Review Unit (MRU) finding SAIF liable for certain medical services. On August 3, 2000 a hearing was held in this matter and the parties agreed that they would proceed through written argument. Petitioner appeared through and was represented by its attorney, Rick Dawson. Respondent, Durwood McDowell (claimant), appeared through his attorney, Roland Johnson. WCD waived appearance. No testimony was taken. On August 2, 2000, claimant filed a Hearing Memorandum. On August 3, 2001, SAIF filed a Hearing Memorandum. On August 31, 2000, claimant filed a timely response. On September 15, 2000, SAIF filed a timely reply.

The record of this proceeding, consisting of a tape recording of the hearing, all evidence received, and all hearing papers filed, has been considered. The findings of fact and conclusions of law are based upon the entire record.

**ISSUES**

1. Whether MRU erred when it found that SAIF had accepted lumbar strain/sprain with L4-5 and L5-S1 degenerative disc disease.
2. Whether MRU erred when it ruled that claimant's noncompliance with pain center treatment makes claimant's narcotic use reasonable.
3. Whether MRU failed to make the necessary findings based upon the record as a whole.
4. Whether MRU erred when it deferred to the opinion of Dr. Euhus and other physicians.
5. Whether SAIF's submission of this dispute was timely.
6. Whether SAIF should be penalized.

**EVIDENTIARY RULING**

WCD Exhibits 1 through 374 are received without objection.

## FINDINGS OF FACT

I adopt the findings of fact in the Administrative Order below (TX 00-287), with the following supplementary finding:

The accepted condition is a lumbar sprain/strain as determined compensable by a September 1998 Opinion and Order. (Ex. 273).<sup>1</sup>

## OPINION AND CONCLUSIONS OF LAW

I may modify the director's administrative order in this matter only if it is not supported by substantial evidence in the record, or reflects an error of law. ORS 656.327(2).

### **Whether MRU erred when it found that SAIF had accepted lumbar sprain/strain with L4-5 and L5-S1 degenerative disc disease.**

SAIF argues that MRU erred in its finding concerning the condition that was accepted. MRU's factual findings are reviewed for substantial evidence. ORS 656.327(2). MRU made the following finding:

"SAIF accepted the condition of lumbar strain/sprain with L4-5 and L5-S1 degenerative disc disease (DDD)." (Ex. 368-1)

As SAIF points out, this explicit finding is not supported by the evidence. *See* Ex. 273. Rather, the Opinion and Order of September 28, 1998 resolved insurer's current condition denial by finding 1) claimant's condition has combined with a psychological condition, which combination has prolonged claimant's disability and need for treatment; 2) claimant's industrial back injury remains the major contributing cause of claimant's disability and need for treatment; and 3) the insurer had a legitimate doubt about the compensability of claimant's current condition.

However, as pointed out by both claimant and SAIF, even if wrongly characterized as the "accepted condition," the characterization is not material to the issues in this proceeding. The scope of acceptance is simply not within the director's jurisdiction. ORS 656.704 (delineating the jurisdiction of the Workers' Compensation Board and Workers' Compensation Division respectively).

### **Whether MRU erred when it ruled that claimant's noncompliance with pain center treatment makes claimant's narcotic use reasonable.**

SAIF argues that MRU failed to establish a rational relationship between its factual findings and its legal conclusions. MRU found that the claimant was noncompliant with the recommended pain management programs, but ruled that noncompliance was excused and that noncompliance permitted claimant's continued narcotic use:

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<sup>1</sup> Aside from the issue of whether SAIF has accepted the condition of lumbar sprain/strain with L4-5 and L5-S1 degenerative disc disease, the parties did not challenge the findings of fact below.

“In this case, all attempts to date have been unsuccessful and Mr. McDowell has been non-compliant to the more commonly recommended pain management programs and medical regimens. Consequently, as agreed by Drs. Kemple and Dordevich withdrawal from all narcotic use would most likely fail until Mr. McDowell is more compliant with optional treatments, and in such instances where the patient will not cooperate or cope with their disability, narcotic use is reasonable.” (Ex. 368-10).

Claimant contends that SAIF is raising the issue of non-compliance for the first time at the contested case level, and should therefore be precluded from arguing this “issue.” However, I agree with SAIF that MRU raised the issue of non-compliance in its order “when it made the finding that claimant was noncompliant and then used that finding to reason that the medical services must be compensable.” *SAIF Reply Memo* at 2. Accordingly, as an issue that arises out of the order on appeal, it is properly raised in this forum. See *McCarty v. Oregon Freeze Dry, Inc.*, 327 Or 185, n6 (1998).

SAIF argues that MRU’s rationale is faulty:

“Substantial evidence review includes review for “substantial reason.” *Drew v. Psychiatric Security Review Board*, 322 Or 491 (1996); *City of Roseburg v. Roseburg Firefighters*, 292 Or 266, 271 (1981); *Furnish v. Montilla Lumber Co.*, 124 Or App 622 (1993) (Substantial evidence review includes a review for the existence and soundness of rationale to determine whether the order is supported by substantial reason); *Erne v. Employment Division*, 109 Or App 629 (1991); *Pruett v. Employment Division*, 86 Or App 516, 521 (1987)(There must be a rationale relationship between the findings and the legal conclusions that an agency makes).

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“MRU’s rationale is, quite simply, non-sensical and contrary to law. It is not supported by substantial reason. Claimant has the duty to mitigate the effects of his injury. *Nelson v. EBI Companies*, 296 Or 246 (1984)(A claimant who unreasonably fails to mitigate the extent of his injury is not entitled to compensation for that portion attributable to the unreasonable failure or refusal). An unreasonable failure to follow needed medical advice is a form of such failure. *Id.* at 252. A refusal to mitigate an injury can result in nonpayment of medical services. *C.f. West v. SAIF Corp.*, 74 Or App 317 (1985)(Claimant made a reasonable attempt to do exercise and there was no evidence of functional overlay or malingering).” *SAIF Hearing Memorandum* at 2.

However, I agree with claimant that the Administrative Order provided a measured examination of the issues involved in this case, including the availability of alternative pain management programs, stating:

“Drs. Jones, Dordevich, Dickerman and pharmacist, Mr. Schnabel, report that the amount of narcotics prescribed and taken by Mr. McDowell exceed recommended doses and even reach toxic levels. Moreover, they believe that there is a lack of physical evidence to support the need for such large doses of medication and that narcotic habituation should be addressed. While Dr. Dordevich and Jones both recommend narcotic detoxification for Mr. McDowell, both physicians expected a poor prognosis with any treatment provided and don’t offer viable options for managing Mr. McDowell’s pain symptoms. It can not be assumed that if treatment is halted, that Mr. McDowell will cease having symptoms.

“It is true that the quantity and frequency of narcotic administration prescribed for Mr. McDowell is not usually seen in most cases of low back pain, and that the amount occasionally reaches past suggested limits. In fact, Dr. Euhus and other reviewers, including Dr. Kemple, do not disagree. Dr. Kemple diagnosed a central pain problem that had not been completely addressed, and Dr. Schoenfelder opined that further causes for Mr. McDowell’s incapacitating symptoms need to be explored. However, Dr. Euhus has repeatedly referred Mr. McDowell for evaluation and recommendations of alternative pain treatment. In this case, all attempts to date have been unsuccessful and Mr. McDowell has been non-compliant to the more commonly recommended pain management programs and medical regimens. Consequently, as agreed by Drs. Kemple and Dordevich withdrawal from all narcotic use would most likely fail until Mr. McDowell is more compliant with optional treatments, and in such instances where the patient will not cooperate or cope with their disability, narcotic use is reasonable.

“The dilemma of what to do for Mr. McDowell’s pain is faced every day by Dr. Euhus. As supported by Mr. Foster’s opinion, knowledge of dosage and frequency is commonly understood by all medical providers. This is particularly true of attending physicians, who are in the best position to know the patient’s singular responses and the precise treatment necessary for effective results. The director is persuaded this reasoning is applicable to Dr. Euhus’s management of Mr. McDowell’s medication regimen. Given the above discussion, the director is persuaded the disputed medical services provided by Dr. Euhus are appropriate.” (Ex. 368-9).

When read in conjunction with the six single-spaced pages of fact-findings that support this discussion, I find that MRU’s rationale is supported by substantial reason. The basis of SAIF’s argument is that if claimant had simply pursued treatment at a pain center, no emergency room, hospitalization, or other medical expenses would have been incurred. While this is a conclusion that *could* be reached on this record, it is not the only reasonable conclusion that is supported with substantial evidence on this record. MRU essentially agreed with claimant that his prior treatments at pain centers had not been successful and neither the medical arbiter nor the treating physicians believed that additional pain center treatment would be effective or a requisite alternative or precursor to the use of pain controlling drugs for this patient. (Ex. 44, 204-14).

To determine whether substantial evidence exists, an Administrative Law Judge is required to:

"look at the whole record with respect to the issue being decided, rather than one piece of evidence in isolation. If an agency's finding is reasonable, keeping in mind the evidence against the finding as well as the evidence supporting it, there is substantial evidence. \* \* \* For instance, and in the context which is likely frequently to occur in workers' compensation cases, if there are doctors on both sides of a medical issue, whichever way the [director] finds the facts will probably have substantial evidentiary support. [The Hearings Judge] would not need to choose sides. The difference between the 'any evidence' rule and the substantial evidence test \* \* \* will be decisive only when the credible evidence apparently weighs overwhelmingly in favor of the finding and the [director] finds the other without giving a persuasive explanation." *Armstrong v. Asten-Hill Co.*, 90 Or App 200, 206 (1988).

Substantial evidence does not mean "any evidence"; instead, both the evidence for and against an issue must be considered. *Everett Wells*, 1 WCSR 355 (1996). Moreover, to constitute substantial evidence, the evidence must be credible. *Armstrong v. Asten-Hill Co.*, *supra*.

Had this been a case where MRU concluded that another course of alternative pain management was a *required or mandatory* precursor to the course of pain management actually pursued, this would be a much different case and SAIF's reliance on *Nelson*, *supra*, would be more apt. And again, were this a case of *de novo* review I might reach a different conclusion than that reached by MRU on this record. On substantial evidence review, however, I cannot conclude otherwise where substantial, albeit conflicting, evidence supports MRU's decision to the contrary.

Finally, in regards to SAIF's argument that claimant's failure to complete an alternative pain management program amounts to a "break in compensability," I agree with claimant that SAIF is essentially asking me to examine the causal relationship between the symptoms under treatment and the accepted injury. Such an inquiry is not within the jurisdiction of this forum. ORS 656.704.

### **Whether MRU failed to make the necessary findings based upon the record as a whole.**

SAIF argues that because MRU erroneously ruled that claimant's noncompliance does not affect the compensability of medical services, MRU did not make other factual findings required by this record. In *SAIF v. January*, 166 Or App 620, 626 (2000), the court stated that the requirements for a written decision under substantial evidence review include:

"In addition to the requirement that findings be supported by substantial evidence, the Board must provide a "sufficient explanation to allow a reviewing court to examine the agency's action." *Schoch v. Leupold & Stevens*, 325 Or 112, 118, 934 P2d 410 (1997); *see also Drew v. PSRB*, 322 Or 491, 500-01, 909 P2d 1211

(1996) (agency must provide "reasoning that leads [it] from the facts that it has found to the conclusions that it draws from those facts." (Emphasis in original))."

In arguing that MRU has failed to meet this standard, SAIF requests that various "additional fact findings" be made, including that "claimant's pain medications are not efficacious," that "claimant has psychological overlay," that "claimant is addicted to pain medication," that "claimant is over utilizing emergency room and hospital services," that "[e]ach billed emergency room service, each ambulance service, each hospitalization, each prescription, each bill in dispute is related to claimant's pain and narcotic addiction," and that "claimant has unreasonably failed to mitigate his injury, has unreasonably failed to manage his pain and has unreasonably failed to manage his addiction to narcotics and pain medication." *SAIF's Hearing Memo* at 7-8.

Again, while on *de novo* review SAIF's requested findings might be significant, on a substantial evidence review of a voluminous record, I agree with claimant that MRU's administrative order contained "exhaustive findings and extensive reasons" that provide "a sufficient explanation of the decision." *Response of Claimant* at 30. No additional findings are required. The Administrative Order provided a measured examination and discussion of the issues involved in this case, including the availability of alternative pain management programs and the conflicting evidence. That the order did not use the phrases requested by SAIF does not lead to the conclusion that substantial evidence is not present in the record.

### **Whether MRU erred when it deferred to the opinion of Dr. Euhus and other physicians.**

SAIF argues that MRU erred by deferring to the opinion of Dr. Euhus:

"The MRU order must also be supported by substantial reason. *Drew, supra; City of Roseburg, supra; Furnish, supra; Erne, supra*. In this case, MRU deferred to the opinion of Dr. Euhus reasoning that he has had "an extended time and numerous opportunities to assess the treatment plan and patient response." (Ex. 368-9). The MRU nurse cited to *Weiland v. SAIF*, 64 Or App 810, 814 (1983). This deference was legal error." *SAIF's Hearing Memo* at 8.

MRU's order does not give an excessive deference to the opinions of the treating physicians in the absence of objective evidence to support those opinions. The director has previously looked at a similar issue in *John E. Mayfield*, 2 WCSR 176 (1997)

"It is a well settled principle of law that absent persuasive reasons to do otherwise, generally greater weight is given to the opinion of the attending physician because of his or her opportunity to observe the claimant over an extended period of time. See *Weiland v. SAIF*, 64 Or App 810, 814 (1983). Nevertheless, MRU was not required to defer to the attending physician, only to articulate a reason for not giving the attending physician deference. This is especially important in medical treatment disputes pursuant to ORS 656.260 because the subsequent scope of review is substantial evidence. Therefore, if MRU's order does not demonstrate the proper weighing of the evidence, the

weighing process can not be done at later legal proceedings. \*\*\*\*\* That's all that *Weiland, supra*, requires; if the attending physician's opinion is not given deference there must be a persuasive reason that is articulated for the lack of deference." *Mayfield, supra*, at 176-177.

A review of the relevant case law leads me to conclude that *Mayfield* accurately and persuasively explained how and why *Weiland* applies to MRU treatment disputes and that MRU has applied it appropriately in this case. *Abbott v. SAIF*, 45 Or App 657, 660-661 (1980) was the cited precedent for *Weiland*. The *Abbot* court noted that a treating physician's opinion is more persuasive where he "has more experience with claimant's particular condition, since he is the treating physician, and more expertise in the cause and treatment of multiple sclerosis. See *Hamlin v. Roseburg Lumber*, 30 Or App 615, 567 P2d 612 (1977). This expertise tips the balance in favor of the compensability of this claim."

The *Weiland* court stated that "[w]hen the medical evidence is divided, we have tended to give greater weight to the conclusions of a claimant's treating physician, absent persuasive reasons not to do so" However, the court specifically went on to note that "the claimant's treating physician had the opportunity to see him 80 to 90 times over a period of two years" and "had a much better opportunity to evaluate claimant's condition" than insurer's examining doctors, "who examined him on a very limited basis." The court thus implied that the greater weight given to the opinion of a treating physician is accorded due to the treating physician's greater familiarity with the claimant's "particular condition," but only if the greater familiarity with the claimant's condition is relevant to the opinion.

Here, the treating physician has provided treatment to claimant since 1991. As noted by MRU, Dr. Euhus and his partner, Dr. Siebe, evaluate and treat Mr. McDowell's chronic back pain on an average of three to ten times per month. (Ex. 368 -2). In isolation from any medical opinions that echoed Dr. Euhus analysis, SAIF's argument could have merit. However, MRU's opinion specifically noted that the medical record is divided on different aspects of the claimant's course of treatment and specifically documented the support of Drs. Siebe, Boyd, Kemple, and Schoenfelder for various aspects of claimant's treatment. (Ex. 368 at 8-10). MRU properly gave a greater weight given to the opinion of a treating physician in this case due to his greater familiarity with the claimant's "particular condition."<sup>2</sup>

### **Whether SAIF's submission of this dispute was timely.**

Claimant asserts that SAIF was required to comply with *former* OAR 436-009-0030(5) and object to the necessity of medical services within 45 days of receipt of a bill or waive its right to contest a bill on that ground. MRU, however, found that *former* OAR 436-010-0008(3), with its 30 day time period, controls and made the request for review timely.

*Former* OAR 436-009-0030(5) was in effect until July 1, 1999, and states:

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<sup>2</sup> Notably, in this same order MRU found that the medical record did **not** support a December 4, 1998, L4-5 and L5-S1 spinal fusion provided by Dr. Merrel and did not require a deferral to his opinion.

“When there is a dispute over the amount of a bill or the appropriateness of services rendered, the insurer shall, within 45 days, pay the undisputed portion of the bill and at the same time provide specific reasons for non-payment or reduction of each medical service code. Resolution of disputes shall be made in accordance with OAR 436-009-0008 and OAR 436-015.”

*Former* OAR 436-009-0030(3) was in effect until July 1, 1999, and states:

“Payment of medical bills is required within 14 days of any action causing the service to be payable, or within 45 days, of the insurer’s receipt of the bill, whichever is later.”

*Former* OAR 436-010-0008(3) was in effect until July 1, 1999, and states in part:

“After the compensability of the underlying claim or condition is finally decided before another adjudicatory body, any party may request director review of appropriate medical issues within 30 days after the date compensability of the underlying claim or condition has been adjudicated and that decision becomes final by operation of law.”

Agency interpretations of their own rules are appropriately given a degree of assumptive validity if the agency has expertise based upon qualifications of its personnel because of its experience in the application of the statute to varying facts. *Springfield Education Association v. Springfield School District No. 19*, 290 Or 217, 227-228 (1980). Here, the rule is being interpreted by the agency that adopted it and the interpretation is a plausible one. Accordingly, I defer to the Agency on this issue.

### **PENALTIES**

Claimant asserts that SAIF’s actions are unreasonable and that SAIF should be assessed penalties pursuant to ORS 656.385(4). Claimant is correct that these issues were not dealt with in MRU’s order, nor does the record reflect any action by WCD to examine the request for penalties. However, the WCD Compliance Section, Sanctions Unit is the appropriate unit within WCD to examine requests for sanctions based on the inappropriate conduct of an insurer, claimant, claimant’s attorney or medical provider. The director’s practice is to refer the initial determination of sanction requests to the Sanctions Unit. *Jaymie Reynolds*, 2 WCSR 332 (1997); *John Reid*, 2 WCSR 209 (1997).

### **Attorney Fees**

Claimant has prevailed in a contested case hearing, and therefore, is entitled to a reasonable attorney fee. ORS 656.385(1). Claimant’s attorney has submitted a fee request and affidavit requesting a fee of \$9,894.50 based on a fee of \$110 per hour and 89.95 hours worked.

SAIF objects that approximately 25% of the reimbursement requested is for legal work at the administrative level before MRU for which no fee may be awarded. ORS 656.388(1); ORS

656.388(3). SAIF objects to fees for services that are considered clerical in nature, and cites 2.5 hours of time attributable to clerical activity. *Dale L. Haskins*, 42 Van Natta 1538 (2000)(no reimbursement for clerical tasks that the attorney performs). SAIF objects to 5 hours billed for hearing and another 5 hours billed for preparation for the same hearing as excessive. Finally, SAIF objects to reimbursement for 2.75 hours of time devoted to preparation of attorneys fees. *See Dotson v. Bohemia, Inc.*, 80 Or App 233, *rev den* 302 Or 35 (1986)(Claimant not entitled to an attorney fee for services devoted to the ALJ's attorney fee award).

Considering SAIF's objections and the factors listed in OAR 436-001-0265, I find that \$6,250 is a reasonable fee for claimant's attorney in this matter.

### **ORDER**

IT IS HEREBY ORDERED that the Medical Review Unit Order TX 00-287, dated April 28, 2000 is affirmed.

SAIF shall pay claimant's attorney a fee of \$6,250.

DATED this 22<sup>nd</sup> day of January, 2002.

By: \_\_\_\_\_  
Paul Vincent, Administrative Law Judge  
Hearing Officer Panel