
In the Matter of the Medical Fee Dispute of

Olson, Patricia Y., Claimant

Contested Case No: H02-105

FINAL ORDER

April 18, 2003

SAIF CORPORATION, Petitioner

PATRICIA Y. OLSON, Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

Pursuant to administrative order dated September 23, 2002, the Medical Review Unit of the Workers' Compensation Division determined that SAIF was liable for the record review and March 6, 2002 report by Eric Long, MD. Hearing Officer Catherine P. Coburn conducted a telephone hearing on December 12, 2002. Trial Counsel Mary Goebel Adams represented petitioner, insurer SAIF Corporation. Respondent, claimant Patricia Y. Olson, was represented by attorney Floyd H. Shebley. The Department of Consumer and Business Services, Workers' Compensation Division waived appearance. Suzanne Ryan, SAIF Disabling Claims Manager, and Charles Edelson, SAIF Trial Counsel, testified for SAIF. Eric W. Long, MD participated as an interested party and testified.

SAIF filed exceptions to Hearings Officer Coburn's January 16, 2003 Proposed and Final Contested Case Hearing Order, which affirmed the September 23, 2002 administrative order. Claimant timely responded. Before the director, the issue is whether SAIF is liable for Dr. Long's March 6, 2002 report. The entire record, consisting of a tape recording of the hearing, all evidence received, and all documents filed, has been considered.

Findings of Fact

The director adopts the hearing officer's findings of fact.

Conclusions of Law and Opinion

Medical fee disputes arising under ORS 656.248 are reviewed *de novo*. OAR 436-001-0225(2).

The Medical Review Unit was not persuaded by the fact that claimant's attorney knew about and was expecting a report from Dr. Long at the time of the March 7, 2002 board hearing. The unit commended Dr. Long for obtaining additional records in order to respond to Dr. Parsons' report. The unit also noted that SAIF failed to follow up on obtaining Dr. Long's specific comments. Lastly, the unit determined that the passage of time between Dr. Long's initial November 2001 response and his March 6, 2002 report was unimportant because no rules placed a time limit for a response. Therefore, the unit concluded that Dr. Long had submitted the March 6, 2002 report at SAIF's request and that SAIF was liable for Dr. Long's fee.

In affirming, the hearing officer impliedly found that Dr. Long's report was not solicited by claimant in preparation for litigation. She reasoned that since Dr. Long had not yet responded

to SAIF's request for his comments regarding an October 2001 IME report, Dr. Long's March 6, 2002 report was in response to SAIF's request. The hearing officer also noted that Dr. Long's report was addressed to SAIF.

SAIF argues that Dr. Long's March 26, 2002 report was prepared at claimant's request rather than at its request (4 months earlier). As such, it was prepared for purposes of litigation. The director agrees.

Medical reports prepared to aid in litigation do not constitute medical services. *Julie Kromer*, 5 WCSR 233, *aff'd*, 5 WCSR 330 (2000) (relied on board cases which distinguished between reports generated as a part of treatment and reports generated for purposes of litigation). In *Kromer*, an IME issued in May 1998, which was the basis of a July 1998 denial. Thereafter, the claimant's attorney asked the claimant's consulting physician to review and respond to the insurer's IME report. The doctor's fee for the record review and report was \$500. Approximately eight months later, an Administrative Law Judge of the Workers' Compensation Board's Hearings Division set aside the insurer's denial. The claimant's attorney then sought reimbursement for the doctor's fee. The hearing officer determined that the report was not included within ORS 656.245(1)'s definition of medical services and that the report was obtained for the purpose of litigation. Therefore, the insurer was not liable for the fee.

Claimant sustained a compensable injury in February 1994. SAIF accepted the claim as a nondisabling left shoulder strain and cervical strain. On March 24, 1994, SAIF informed claimant that her injury had been determined medically stationary and that her claim had been closed. SAIF also informed claimant that she was subject to a managed care organization and that Dr. Keith Klatt could remain her attending physician. There is no record of treatment from 1994 until 1998. In 1998 and 1999, claimant treated with Dr. Steven Nicholson, who referred her to Dr. Kirk Weller for a neurological evaluation and to Dr. Curtis Hill. Dr. Hill referred claimant to Dr. Eric Long. Dr. Long referred claimant to Dr. Roy Slack for epidural steroid injections and for discography, and to Dr. Francisco Soldevilla for surgical consultation. Dr. Soldevilla performed surgery on June 20, 2001. Dr. William Parsons, neurosurgeon, examined claimant on October 22, 2001 at SAIF's request (IME). Dr. Long saw claimant from August 2000 through January 2002.

Dr. Parsons' impressions were that claimant's compensable cervical strain had resolved and that she had preexisting degenerative cervical disc disease unrelated to the compensable injury. He felt that claimant's pre-injury neck treatment, the mechanism of injury, and her subsequent findings failed to establish a correlation between the compensable injury and her degenerative condition.

On November 7, 2001, SAIF sent Dr. Parsons' IME to Dr. Long for his concurrence. He checked the box that he did not concur and indicated that "report with specific comments to follow." Dr. Long signed the form on November 20, 2001. On November 15, 2001, SAIF sent Dr. Parsons' IME to Dr. Soldevilla for his concurrence. Dr. Soldevilla marked that he concurred

and signed the form on November 20, 2001. SAIF, on November 19, 2001 (before Dr. Long's and Dr. Soldevilla's response), issued a denial of claimant's current cervical condition.

Claimant's attorney wrote Dr. Long on February 19, 2002 inquiring into the status, and asking for a copy, of his comments to the IME. The attorney also asked for additional information, in particular, Dr. Long's opinion regarding Dr. Soldevilla's response to the IME. The next day, claimant's attorney provided Dr. Long with Dr. Nicholson's chart notes, which preceded the work injury and which the attorney indicated might be helpful in the doctor's review of the IME report. The attorney also reminded Dr. Long of the impending board hearing.

On March 7, 2002, Dr. Long's office faxed his March 6, 2002 report and his March 7, 2002 letter to the board's Hearings Division. Those reports were marked as exhibit 42 for the board's hearing. In the March 7 letter, Dr. Long responded to claimant's attorney's February 19 questions regarding Dr. Soldevilla and noted that additional reports were enclosed. In the March 6 letter to SAIF, Dr. Long noted that he had carefully reviewed Dr. Parsons' report, his own records, and Dr. Nicholson's records. Dr. Long provided a detailed discussion of claimant's history, as reflected in the medical records. Dr. Long, thereon, expressed his disagreement with Dr. Parsons' report. Relying on the Dr. Long's opinion and on Dr. Soldevilla's deposition testimony, the Administrative Law Judge found claimant's current cervical condition compensable.

In this case, claimant's attorney was not merely asking for a copy of Dr. Long's response to Dr. Parson's IME. When he provided Dr. Long with additional medical records to review in preparation of his response to the IME report, he was seeking Dr. Long's opinion for the purpose of litigation. Dr. Long also did not prepare the report as part of his treatment since he had not seen claimant since January 2002. Thus, claimant's attorney could not have been inquiring into claimant's current treatment.

After receiving Dr. Long's November 20, 2001 response, the insurer could have, but failed to, inform Dr. Long that it did not wish or require further comment. That fact alone is insufficient to find that Dr. Long's March 6, 2002 report was in response to the insurer's November 7, 2001 request. Rather, it requires finding to the contrary, particularly in light of OAR 436-010-0240(10)'s requirement that medical providers must respond within 14 days to the request for relevant medical records, progress reports, narrative reports, and any and all necessary records needed to review the efficacy of treatment, frequency, and necessity of care.

It is inconsequential that Dr. Long addressed the March report to the insurer. To hold form over substance would open a Pandora's box of inviting claimants to ask physicians for their written opinion but to address the report to the insurer in the hopes that the insurer would be liable for the cost of preparing the report.

SAIF raises other contentions; however, because the director concludes that Dr. Long's March 6, 2002 report was prepared for purposes of litigation and, therefore, SAIF is not liable for Dr. Long's fee, the remainder of SAIF's arguments are not addressed.

IT IS HEREBY ORDERED that January 16, 2003 Proposed and Final Contested Case Hearing

Order is reversed.

DATED this 18th day of April, 2003.

**CORY STREISINGER, DIRECTOR
DEPARTMENT OF CONSUMER
AND BUSINESS SERVICES**

By: _____
John Shilts, Administrator
Workers' Compensation Division