

In the Managed Care Dispute of

**Randall B. Smith, Claimant**

Contested Case No: 06-116H

**FINAL ORDER**

June 2, 2006

SAIF CORPORATION, Petitioner

RANDALL B. SMITH, Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

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Petitioner insurer, represented by attorney David L. Runner, timely filed exceptions to Office of Administrative Hearings Administrative Law Judge (ALJ) Catherine P. Coburn's January 9, 2006 Proposed and Final Order. Respondent claimant, represented by attorney Christine Jensen, responded. This matter comes before the director for a final order. The issues are emergency room visits and attorney fees. I affirm in part and modify in part.

I adopt the ALJ's findings of fact with the following modifications. The record, as a whole, shows that claimant had telephone contact with Dr. Weller's office on the afternoon of December 28, 2004 and also on December 29, 2004. Findings of fact (6) and (7) are modified accordingly, as follows:

(6) On the afternoon of December 28, 2004, claimant telephoned Dr. Weller's office,<sup>1</sup> was informed that Dr. Weller was on vacation and advised to call Dr. Dunn, whose office is in Eugene. (Ex. 15; testimony of claimant.) He telephoned Dr. Dunn's office and learned that Dr. Dunn was on vacation. (Ex. 15; testimony of claimant.) He telephoned Dr. Weller's office back and was advised to go to the emergency room if the pain became intolerable. (Ex. 15; testimony of claimant.) Claimant slept fitfully due to lumbar pain and awoke in extreme pain early in the morning on Wednesday, December 29, 2004. (Testimony of claimant.) His wife assisted him in dressing, walking to the car and drove him to the emergency room (ER) at Mercy Medical Center in Roseburg. (Ex. 4; testimony of Diane Smith.) He was examined by Charles S. Ross, D.O., at 10:00 a.m. and reported to Dr. Ross that he had suffered low back pain for several years, it had become significantly worse over the preceding week and had become intolerable at home. (Ex. 5-1; testimony of claimant.) He also reported that he had some blood in his urine that day. Dr. Ross attributed the bloody urine to an external hemorrhoid and rendered no treatment for that condition. (*Id.*) The ER note reads, "He has had this chronic back pain. \* \* \* Because of his uncontrolled pain, he presents today." (Ex. 5-1.) Dr. Ross' assessment was 1. Low back pain, recurrent and 2. Chronic pain syndrome. (Ex. 5-2.) Dr. Ross discussed chronic pain with claimant, administered oral medication and advised claimant to follow up with Dr. Weller. (Ex. 5-2.) Dr. Ross told claimant to return to the ER if the pain became intolerable at home. (Testimony of claimant.)

(7) Claimant returned home and telephoned Dr. Weller's office. (Ex. 5A.) Dr. Lin returned claimant's call. (Ex. 5B, 17A, 24-12.) Claimant was confined to the couch that day and

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<sup>1</sup> Claimant mistakenly remembered that the person he spoke to in Dr. Weller's office was named "Adam." (Exs. 15, 17A and 24-22.)

slept fitfully. (Testimony of claimant and Diane Smith.) Early in the morning on December 30, 2004, claimant awoke in excruciating pain. (*Id.*) Again, his wife assisted him in dressing, walking to the car and drove him to the ER. Claimant arrived at 4:30 a.m. and reported to Jennifer M. Soyke, M.D. that he had been unable to sleep for four days due to low back pain and that he had developed a migraine headache with nausea as a result of fatigue. (Ex. 6-1.) Dr. Soyke listed her impressions: 1. Acute exacerbation of lumbosacral pain 2. Reported history of herniated disk 3. Chronic heavy use of narcotic use without relief of his symptoms. Dr. Soyke administered intravenous pain medication and wrote, “\* \* \* clearly [claimant] is not doing well on the current treatment plan. \* \* \* He just needed to get control of his pain.” (Ex. 6-3.)

I adopt the remainder of the ALJ’s findings of fact.

I adopt and affirm the ALJ’s order on the issue of the compensability of the emergency room visits.

I modify the attorney fee awarded by the ALJ. The ALJ awarded \$2,500, finding that \$2,500 is a reasonable fee, and that an extraordinary fee is warranted in this case because the case preparation included a deposition of Dr. Weller. Insurer objects to the ALJ’s fee award, contending that absent a statement of hours, OAR 436-010-0008(13)(a)(B) requires the presumption that the time spent on the case was one to two hours. Further, insurer argues, an extraordinary fee is not warranted in this case.

Attorney fees in medical disputes must be proportionate to the benefit to the injured worker, and primary consideration must be given to the results achieved and the time devoted to the case. ORS 656.385(1). Accordingly, the director has adopted a matrix. OAR 436-001-0265, 436-010-0008(13). The total attorney fee award for services at all levels may not fall outside the ranges in the matrix nor exceed \$2,000 absent a showing of extraordinary circumstances or agreement of the parties. Extraordinary circumstances are not established by merely exceeding the values in the matrix. OAR 436-001-0265(1)(c).

Applying the matrix here, the estimated benefit achieved to claimant is \$5282. Claimant’s attorney has not specified the total number of hours she has devoted to this matter. A statement of services submitted to the Medical Review Unit indicates that she spent 3.45 on this matter at administrative review. However, no statement of the number of hours has been provided for the hearing or exceptions processes. Insurer argues that in the absence of a statement of hours, I am to presume that claimant’s attorney spent one to two hours at each level of review, under OAR 436-010-0008(13)(a)(B). OAR 436-010-0008(13), however, applies to attorney fee awards at administrative review in medical service disputes before the Medical Review Unit. OAR 436-010-0265 is the rule that applies to attorney fee awards in the hearing and exceptions processes. Although I am left to estimate the number of hours claimant’s attorney has devoted subsequent to administrative review of this matter, I am not bound by OAR 436-010-0008(13) at this stage.<sup>2</sup>

Claimant’s attorney devoted 3.45 hours at administrative review. There were two hearings in this matter, the first was 1.25 hours long, the second 0.75 hours. The deposition of

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<sup>2</sup> See OAR 436-001-0265(1)(d) (“In cases under ORS 656.245, 656.247, 656.260, or 656.327, the factors listed in OAR 436-010-0008(13) *may* also be considered.”). (Emphasis added.)

Dr. Weller took 30 minutes. Accounting for preparation time, as well as time reviewing and responding to the exceptions, I find that ten to twelve hours is not an unreasonable amount of time to have devoted to this matter as a whole.

Attorney fees may not exceed \$2,000 absent a showing of extraordinary circumstances. The fact that a deposition took place, by itself, is not sufficient to show extraordinary circumstances. Giving primary consideration to the benefit to claimant and the time devoted, and remaining within the ranges provided in the matrix, I find that claimant's attorney is entitled to a total of \$1,750, for services at all levels of review.

**IT IS HEREBY ORDERED** the January 9, 2006 Proposed and Final Order is affirmed in part and modified in part. Insurer is liable for emergency room visits on December 29, 2004 and December 30, 2004. Insurer shall pay to claimant's attorney a total attorney fee in the amount of \$1,750.