

In the ORS 656.260 Managed Care Dispute of

Loren F. Kruesi, Claimant

Contested Case No: 08-096H

FINAL ORDER

December 17, 2008

SAIF CORPORATION, Petitioner

LOREN F. KRUESI, Respondent

Before Cory Streisinger, Director Department of Consumer and Business Services

Insurer SAIF Corporation filed exceptions to Administrative Law Judge (ALJ) Jenny Ogawa's September 23, 2008 Proposed and Final Order. The only issue insurer raises is the amount of the fees awarded to claimant Loren F. Kruesi's attorney. ORS 656.385; OAR 436-001-0265.¹ Claimant's attorney did not respond to the exceptions. I modify the ALJ's proposed

¹ ORS 656.385(1) provides in part:

"In all cases involving a dispute over compensation benefits pursuant to . . . ORS 656.260 . . . where a claimant finally prevails after a proceeding has commenced . . . the Administrative Law Judge shall require the insurer . . . to pay a reasonable attorney fee to the claimant's attorney The attorney fee must be based on all work the claimant's attorney has done relative to the proceeding at all levels before the department. The attorney fee assessed under this section must be proportionate to the benefit to the injured worker. The director shall adopt rules for establishing the amount of the attorney fee, giving primary consideration to the results achieved and to the time devoted to the case. An attorney fee awarded pursuant to this subsection may not exceed \$2,000 absent a showing of extraordinary circumstances. "

OAR 436-001-0265 provides in part:

"(1) In cases where the director or administrative law judge is required to assess an attorney fee under ORS 656.385(1):

(a) The fee must be based on the factors listed in ORS 656.385(1).

(b) Absent a showing of extraordinary circumstances or unless otherwise agreed by the parties, the fee may not exceed \$2,000 nor fall outside the ranges provided in the following matrix:

Estimated Benefit Achieved	Professional Hours Devoted				
	1-2 hours	2.1-4 hours	4.1-6 hours	6.1-8 hours	Over 8 hours
\$1-\$2000	\$100-400	\$200-700	\$300-750	\$600-1000	\$800-1250
\$2001-\$4000	\$200-500	\$400-800	\$600-900	\$800-1300	\$1050-1500
\$4001-\$6000	\$300-700	\$600-1000	\$800-1250	\$1000-1450	\$1300-1750
Over \$6000	\$400-900	\$800-1300	\$1050-1600	\$1350-1800	\$1550-2000

(c) Extraordinary circumstances are not established by merely exceeding eight hours or exceeding a benefit of \$6000.

(d) In cases under ORS . . . 656.260 . . . the factors listed in OAR 436-010-0008(12) may also be considered.

* * * * *

order by reducing the amount of fees awarded to claimant's attorney to an amount consistent with the controlling rule.

FACTUAL SUMMARY

I adopt the factual findings of the Workers' Compensation Division Resolution Team (RT) as to the underlying events. OAR 436-001-0225(2).² Claimant was compensably injured in an automobile accident in 2006. His accepted injuries included cervical strain. Claimant suffers headaches that some providers believe may also be associated with his accepted injuries. In February 2008 one of claimant's treating physicians referred him for a magnetic resonance angiogram (MRA) in part because of the headaches.

The managed care organization denied the request for the MRA. Insurer asserted the MRA was not directed towards an accepted condition and that it was therefore not a compensable medical service. ORS 656.245. Claimant sought review by the director. The RT issued an administrative order on May 7, 2008 finding insurer liable for the MRA. In connection with that proceeding, claimant's attorney requested fees of \$1,000 based on four hours' work. RT awarded \$572.

Insurer requested a hearing to review the May 7, 2008 administrative order. Neither side presented any testimony at the hearing. The hearing consisted of argument referring to the exhibits. At the hearing, claimant's attorney asked the ALJ to award him fees. However counsel never provided any information about the number of hours or the extent of the work he performed. ALJ Ogawa issued a proposed order on September 23, 2008 affirming the administrative order. The ALJ's order awarded claimant's attorney a fee of \$4,000. ALJ Ogawa stated she considered the factors cited in the relevant rules and based the fee award on the time devoted to the case, the quality of legal representation, noting that both counsel presented well-reasoned arguments, and the value of the interest involved.

CONCLUSIONS OF LAW

ORS 656.385 and OAR 436-001-0265 establish the limits on and the factors to be considered in determining attorney fees. The fee cannot exceed \$2,000 unless there is a showing of extraordinary circumstances. ORS 656.385(1); OAR 436-001-0265(1)(b). Claimant's attorney

(2) . . . [I]n cases where the administrative law judge or director assesses an attorney fee, the following factors may also be considered:

- (a) The complexity of the issue(s) involved;
- (b) The quality of the legal representation;
- (c) The value of the interest involved;
- (d) The nature of the proceedings;
- (e) The risk in a particular case that an attorney's efforts may go uncompensated;
- (f) The assertion of frivolous issues or defenses;
- (g) A statement of services, if submitted before an order is issued; and
- (h) Any other relevant consideration deemed appropriate by the administrative law judge or director. "

² OAR 436-001-0225(2) states in part:

"In . . . managed care disputes under ORS 656.260(16), the administrative law judge may modify the director's order only if it is not supported by substantial evidence in the record or it reflects an error of law. New medical evidence . . . may not be admitted or considered."

never argued or offered evidence that this case presents extraordinary circumstances. ALJ Ogawa did not find that there were extraordinary circumstances. At the outset, then, the rule does not permit awarding more than \$2,000 as an attorney fee.

This segment of this case does not appear to have required a great deal of time from claimant's counsel. In cases brought under ORS 656.260 I can also consider the factors listed in OAR 436-010-0008(12) in setting attorney's fees. OAR 436-001-0265(1)(d). Rule 436-010-0008(12) provides that where, as here, counsel has not filed a statement of hours worked I can assume the attorney spent one to two hours on the case.³ The hearing in this matter lasted just under twenty-seven minutes. No witnesses testified. Claimant's counsel's argument lasted less than six minutes. There was not significant debate at the hearing about the legal principles controlling whether the proposed diagnostic test was compensable. Insurer's counsel conceded at the hearing that the only issue concerned a factual interpretation of several exhibits and that insurer did not contest claimant's legal arguments. (August 28, 2008 Hearing, Recording at 9:26-9:28). See *SAIF Corp. v. Martinez*, 219 Or App 182 (2008); *Counts v. International Paper Co.*, 146 Or App 768 (1997).

The ALJ's order does list a number of factors upon which the ALJ relied in setting the fee. However the order does not recite any facts that relate to these factors other than remarking that counsel's arguments were well-reasoned. The ALJ did not make a finding on the number of hours counsel spent or on the value of the benefit achieved for claimant. Based on the medical fee schedule, the value of the MRA is between one and two thousand dollars. OAR 436-009-0004(1); 436-009-0040(4), (5), (6); Center for Medicare & Medicaid Services 2008 Medicare Resource-Based Relative Value Scale, Addendum B, 72 Federal Register No. 227, November 27, 2007. It is clear from claimant's counsel's argument at the hearing that he had performed significant legal research that supported a clear and persuasive argument. He was also very familiar with the facts and record which helped his client's position and facilitated the ALJ's decision-making. In light of the number of attorney hours I can presume were involved, the value of the benefit received, and the average level of complexity of the legal issues, with reference to the matrix of OAR 436-001-0265, I find a fee of \$750 to be appropriate for the entire proceeding.

IT IS HEREBY ORDERED that the September 23, 2008 proposed and final order is adopted and affirmed except for the attorney fee award. The fee awarded to claimant's attorney is modified to a total amount of \$750 for all proceedings thus far.

DATED this 17th day of December, 2008

³ OAR 436-010-0008(12)(b) states in part: "In the absence of such a statement [of hours submitted by the claimant's attorney], the director will assume the time spent was 1-2 hours."