

In the Matter of the ORS 656.245 Medical Services Dispute and the ORS
656.327 Medical Treatment Dispute of

Ross, Paul E. , Claimant

Contested Case No: HH00-111, H01-041

FINAL ORDER

June 13, 2002

SAIF CORPORATION, Petitioner

PAUL E. ROSS, Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

The Medical Review Unit (MRU) of the Department of Consumer and Business Services, Workers' Compensation Division (WCD) issued administrative orders on October 24, 2000 (H00-111), which found petitioner liable for chiropractic treatment, and on March 15, 2001 (H01-041), which determined that chiropractic treatment was appropriate.

These cases were combined for hearing on July 18, 2001 before Hearing Officer Paul Vincent. The hearing was conducted by telephone. Attorney Debra Ehrman represented petitioner, SAIF Corporation (insurer). Respondent Paul E. Ross (claimant) was represented by attorney Nelson Hall. WCD waived appearance. No witnesses testified. At hearing, petitioner SAIF Corporation withdrew its appeal in H01-041.

The respondent filed exceptions to Hearings Officer Vincent's February 26, 2002 Proposed and Final Contested Case Hearing Order, which reversed MRU's October 24, 2000 administrative order. The petitioner timely responded to the exceptions. Before the Director, the issue is chiropractic medical services. 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 accepts the hearing officer's findings of fact with the following supplementations.

After moving to Arizona, claimant began receiving chiropractic treatment from William Watts, DC, in January 1992. In January 2000, the insurer notified Dr. Lindow, internal medicine, that it recognized him as claimant's attending physician. The insurer stopped payment of the chiropractic treatments on November 1, 1999 because of the lack of a treatment plan and legible chart notes. The insurer subsequently agreed to pay for the chiropractic treatment between November 1, 1999 and March 3, 2000.

In May 2000, Dr. Watts submitted a treatment plan for claimant to be adjusted every other week and for x-rays to document any changes. He also submitted the letter to Dr. Lindow for his approval. (Ex. 80). Dr. Lindow signed a prescription, on June 13, 2000, for a chiropractic referral to Dr. Watts. (Ex. 85).

In response to the insurer's inquiry, Dr. Lindow reported on January 31, 2001, that he was not treating claimant for his back problem nor did he feel competent to give a specific chiropractic therapy order. He deferred to Dr. Watts for the treatment plan. Dr. Lindow, however, prescribed continued chiropractic treatment for claimant on an every two week basis as outlined by Dr. Watts. (Ex. 104). Dr. Watts reported that the modality he used was hands-on adjustments and that Dr. Lindow had left the mode of adjusting up to him. (Ex. 106).

Conclusions of Law and Opinion

Based on the records, including chart notes and letters from Drs. Watts and Lindow and claimant's September 28, 2000 letter, MRU concluded that the criteria for a treatment plan had been satisfied. MRU therefore found the insurer liable for chiropractic treatment.

Relying on *Aetna Casualty & Surety Co. v. Blanton*, 139 Or App 283 (1996), the hearing officer determined that no written treatment plan was prepared in strict compliance with the administrative rules. In particular, the hearing officer found that the required elements of "objectives, modalities, frequency of treatment and duration" were lacking. He, therefore, found the insurer not liable for the chiropractic treatment.

In his exceptions, claimant disagreed with the hearing officer's interpretation of *Blanton*, because the hearing officer placed form over substance and because the case was distinguishable. Claimant further argued that before March 3, 2000, the attending physician had given written approval for continued chiropractic treatment in the same regimen that had been provided for 8 years. Lastly, claimant argued that letters and chart notes from Dr. Lindow and Dr. Watts, in particular, exhibits 70, 71, 72, evidenced a current treatment plan.

The insurer countered that the documents did not identify the duration of the current plan of treatment or identify the treatment modalities and, thus, did not constitute a treatment plan under the rules.

In *Aetna Casualty & Surety Co. v. Blanton*, 139 Or App 283 (1996), the court held that the administrative rule requiring a treatment plan was to be strictly applied, even when the attending physician had approved the ancillary care. If there was no treatment plan signed by the attending physician, the care was not reimbursable. *Id.*

OAR 436-010-0230 requires that the treatment plan shall include "objectives, modalities, frequency of treatment and duration." Here, the hearing officer found that there was no document present that was "both signed by the attending physician and contain[ed] all of the required elements of 'objectives, modalities, frequency of treatment and duration.'" Since the *Blanton* decision, the director has issued several opinions regarding whether the mandatory rule requirements have been met. The analysis in *Stephanie Pearson*, 2 WCSR 30 (1997) is instructive in this case.

In *Pearson*, the director found that the attending physician's records contained all the required elements of a treatment plan. The 'objective' of the chiropractic treatment was pain management, based on chart notes that were replete with notations about working to decrease the

claimant's back pain. The 'modalities' requirement was met based on the doctor's statements of the specific modalities to be used (manipulation, electrical stimulation, and traction with heat or ice) or the statement "continue the same modalities." The 'frequency' requirement was met because each chart note indicated the number of treatments per week and the duration of treatment.

Here, claimant moved to Arizona in September 1991 and began treating with Dr. Watts in 1992. Dr. Watts' chart notes from January 1992 to April 2000 listed the dates of service and the segments adjusted (such as sacral apex, pelvis, and lumbar). Beginning in November 1999, the chart notes included claimant's pain level. (Ex. 11). When, in January 2001, the insurer requested a treatment plan, both Drs. Lindow and Watts stated that the goal of chiropractic treatment was ongoing pain control. Dr. Lindow also noted that claimant obtained relief from his chronic back condition from the chiropractic treatment. (Exs. 70, 71, 72). Thus, the 'objective' of the chiropractic treatment was pain control. Although a simple prescription for "chiropractic treatment" is insufficient to satisfy the modalities requirement, *see Ingrid Clark*, 2 WCSR 10, 12 n.1 (1997), Dr. Watts' chart notes and letters stated that the modalities were hands-on adjustments. (Exs. 11, 80, 106). Dr. Watts further stated that the treatment had been the same regimen for eight years. The chart notes provided sufficient evidence to meet the modalities requirement.¹ The frequency and duration requirements were met based on Dr. Watts' statement that treatment was and has been twice per month since 1992 and based on Dr. Lindow's statement that the chiropractic treatment was necessary to manage claimant's ongoing pain.² (Exs. 11, 70, 71, 72, 104, 106). Dr. Lindow approved Dr. Watts' treatment plan on February 22, 2000, on June 13, 2000 and again on January 31, 2001. (Exs. 71, 85, 104). Thus, chiropractic treatment provided after March 2000 is reimbursable.

Claimant has prevailed in this contested case hearing and is entitled to a reasonable attorney fee. ORS 656.385(1). Claimant's counsel stated he expended approximately 19.8 hours, about equally split between the appropriateness issue and the treatment plan issue, and requested a \$3,000 fee on each matter at the hearing level. The hearing officer awarded a \$3,000 assessed fee in contested case H01-041. Claimant's counsel expended approximately 2.9 hours at the exceptions process. Factors to be considered in assessing a fee are: time devoted to the case, complexity of the issue(s), quality of legal representation, value of the interest involved, nature of the proceedings, benefit secured for the claimant, risk that an attorney's efforts may go uncompensated, assertion of frivolous issues or defenses, a statement of services, and any other relevant consideration deemed appropriate. OAR 436-001-0265. Considering the factors under OAR 436-001-0265, claimant's attorney is entitled to a reasonable assessed fee in the amount of \$3,500 in contested case H00-111.

¹ Dorland's Medical Dictionary defines "modality" as "a method of application of, or the employment of, any therapeutic agent; limited usually to physical agent." In this case, the modalities were chiropractic adjustments to the specified body parts.

² OAR 436-010-0230a(3)(c) provides that the "usual range for therapy visits does not exceed 20 visits in the first 60 days, and 4 visits thereafter." This is a guideline for reviewing treatment, but the attending physician is required to document the need for services in excess of these guidelines when submitting a treatment plan. *Id.* The insurer, however, did not contest the appropriateness of the longevity of Dr. Watt's treatment.

IT IS HEREBY ORDERED that the February 26, 2002 Proposed and Final Contested Case Hearing Order is affirmed in part and reversed in part. That portion of the order which reversed administrative order dated October 24, 2000 (H00-111) is reversed. SAIF is liable for chiropractic treatment provided by Dr. Watts after March 3, 2000. In contested case H00-111, the insurer is ordered to pay claimant's attorney an assessed fee of \$3,500. The remainder of the order is affirmed.

DATED this _____ day of June, 2002.

**MARY NEIDIG, DIRECTOR
DEPARTMENT OF CONSUMER
AND BUSINESS SERVICES**

By: _____
John Shilts, Administrator
Workers' Compensation Division