

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

Ross, Paul E., Claimant

Contested Case No: H00-111, H01-041

PROPOSED & FINAL ORDER

February 26, 2002

SAIF CORPORATION, Petitioner

PAUL E. ROSS, Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

SAIF Corporation (SAIF or insurer) appeals administrative orders finding that SAIF Corporation was liable for certain medical services and that the disputed treatment was medically appropriate. On July 18, 2001, Hearings Officer Paul Vincent conducted a telephone hearing in this matter. Petitioner SAIF was represented by attorney Debra Ehrman. Respondent Paul E. Ross (claimant) was represented by attorney Nelson Hall. The Workers' Compensation Division (WCD) waived appearance. No witnesses testified. At hearing, SAIF withdrew its appeal in H01-041, thereby conceding the appropriateness of treatment.

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 set out below are based on the entire record.

ISSUE

The issue is whether the insurer is liable for chiropractic treatments rendered by Dr. Watts after March 3, 2000.

EVIDENTIARY RULING

WCD Exhibits 1 through 97 were received into the record without objection. The record was closed on the date of hearing. SAIF Exhibits 58A, 67A, 75A, 92A, 92B, 98, 99, 100, 101, 102, 103, 104, 107, 108 and 109 were received into the record without objection.

FINDINGS OF FACT

The parties have not raised objection to any particular findings of the Administrative Order that I review. Having reviewed the record in its entirety, and the argument of counsel, I make the following fact findings:

Claimant injured his back on June 23, 1983 while lifting a hide-a-bed. SAIF accepted the claim for low back strain. An L4-5, L5-S1 foraminotomy was performed in 1984. Claimant's medical condition was found medically stationary on January 8, 1985. Claimant was declared permanently and totally disabled by an Opinion and Order dated July 22, 1987.

Claimant moved to Arizona in 1991. He began treating with Thomas Lindow, MD

(Internal Medicine) as his attending physician. In January 1992 he sought chiropractic treatment for back pain from William Watts, DC on a twice-monthly basis. SAIF paid for these treatments until November 1, 1999, when they stopped paying due to a lack of a treatment plan and legible chart notes.

In a letter dated January 31, 2000, SAIF notified Dr. Lindow that it recognized Dr. Lindow as claimant's treating physician and notified him that he must comply with the requirements of the Oregon Workers' Compensation Law. SAIF enclosed a summary of regulations.

In a letter dated February 15, 2000, SAIF requested that Dr. Lindow provide an updated condition report and provide answers to their questions regarding treatment. The letter also notified Dr. Lindow "If Chiropractic treatment is to be continued as part of your treatment plan, please indicate specifically for which condition(s) the treatment is to be provided and provide a treatment plan which includes: specific modalities, frequency, duration, the anticipated goal(s) of the treatment and explain how the worker's progress is to be measured."

Dr. Watts wrote SAIF on February 15, 2000. He discussed claimant's chronic lumbo-pelvic spine condition and discussed his limitation of "adjustments" that "are limited to the Lumbo/Pelvic Area so that is what we work on." He further stated that "[t]he treatment plan is and has been since Mr. Ross started here on January 17, 1992 that he comes in twice a month and at other times as needed if he is more pain than usual."

On February 22, 2000, Dr. Lindow provided SAIF with a chart note that discussed claimant's current condition and then referenced a plan, stating: "P. cont. chiropr. Rx's." In an accompanying letter he stated that "[c]hiropractic treatment is being provided for his chronic back condition twice per month. Not having any familiarity with the specifics of chiropractic, I cannot provide you with the chosen modalities of his chiropractic care. The goal, however, is ongoing pain control."

On March 3, 2000, SAIF wrote Dr. Lindow a letter acknowledging receipt of his narrative report and notifying him of Oregon's requirement that a treatment plan be prepared prior to chiropractic treatment that is signed by the attending physician and containing "modalities, frequency of treatment, duration of treatment and the objectives."

On April 18, 2000, Dr. Watts sent a letter to MRU requesting their review of the conflict between SAIF and his treating physicians. The letter noted that SAIF's adjuster "seems to think thatthis care must be over seen by a medical doctor."

On April 26, 2000, SAIF requested that MRU review the appropriateness of chiropractic treatment.

During the MRU review, SAIF agreed to pay for treatments between November 1, 1999 and March 3, 2000 and withdrew its request for appropriateness review at that time. SAIF continued to challenge the reimbursement of chiropractic after March 3, 2000 on the grounds that there was no signed treatment plan in place. On October 24, 2000, MRU issued an

administrative order, MS 00-656, ordering that SAIF is liable for chiropractic treatments prescribed by Dr. Lindow after March 3, 2000.

CONCLUSIONS OF LAW AND REASONING

Reimbursement of Chiropractic Care

Jurisdiction lies with the director. ORS 656.245(6) and ORS 656.704(3)(a). In hearings before the director, “the scope of review shall be de novo unless otherwise prescribed by statute or administrative rule.” OAR 436-001-0225(1). The issues raised in this medical treatment dispute concern the application of ORS 656.245, which does not specify any other standard of review. Accordingly, my review of this matter is de novo. See Archie M. Ulbrich, 2 WCSR 152, 153 (1997). The burden of proving any fact or position falls upon the proponent. ORS 183.450(2).

In the administrative order, the Medical Review Unit (MRU) found that the insurer was liable for the chiropractic services delivered by Dr. Watt despite the absence of a treatment plan as requested by SAIF because “although provided in various documents before and after the March 3, 2000 notification, the components of a treatment plan are present to meet the requirements of the rule.” The claimant supports MRU’s position that because all the elements of a valid plan are present in the record as a whole, the requirements of OAR 436-010-0230 are met.

Insurer contends that it is not liable for the disputed medical services because they were rendered without a valid treatment plan in place. The insurer argued unsuccessfully to MRU that the chiropractic treatment with Dr. Watts was not reimbursable because there was no signed treatment plan in place at the time the services were rendered. The insurer argues that OAR 436-010-0230(3)(a)-(b) require medical services prescribed by an attending physician and provided by a chiropractor to be provided after preparation of a single, integrated and written treatment plan signed by the attending physician prior to the beginning of treatment. Judith A. Beaty, 2 WCSR 23 (1997); Richard W. King, 2 WCSR 88 (1997). I conclude that the agency has erred in finding that this record demonstrates compliance with the treatment plan requirements of former OAR 436-010-0230(3)(a)-(b).

Pursuant to former OAR 436-010-0230(3)(a), an ancillary medical service such as chiropractic treatment is reimbursable only if it is carried out under a written treatment plan prescribed by the attending physician prior to the commencement of treatment¹. Former OAR

¹ Former OAR 436-010-0230(3)(a)-(b) has been revised and renumbered to OAR 436-010-0230(4)(a)-(b). It remains substantially similar to former OAR 436-010-0230(3)(a)-(b): “(a) Except as otherwise provided by the MCO, ancillary services including but not limited to physical therapy or occupational therapy, by a medical service provider other than the attending physician or specialist physician shall not be reimbursed unless prescribed by the attending physician or specialist physician and carried out under a treatment plan prepared prior to the commencement of treatment and signed by the attending physician or specialist physician within 30 days of beginning treatment. The medical service provider shall provide an initial copy of the treatment plan to the attending physician or specialist physician and the insurer within seven days of beginning treatment. A copy of the treatment plan signed by the attending

436-010-0230 (3) (a) – (b) states:

“(3)(a) Except as otherwise provided by the MCO, ancillary services including but not limited to physical therapy or occupational therapy, by a medical service provider other than the attending physician shall not be reimbursed unless prescribed by the attending physician and carried out under a treatment plan prepared prior to the commencement of treatment and signed by the attending physician within thirty days of beginning of treatment. The medical service provider shall provide an initial copy of the treatment plan to the attending physician and the insurer within seven days of beginning treatment. A copy of the treatment plan signed by the attending physician shall be provided to the insurer by the medical service provider within 30 days of beginning treatment. The treatment plan shall include objectives, modalities, frequency of treatment and duration. The treatment plan may be recorded in any legible format including, but not limited to, signed chart notes. Treatment plans required under this subsection do not apply to services provided pursuant to ORS 656.245(2)(b)(A).

“(b) Medical services prescribed by an attending physician and provided by a chiropractor, naturopath, acupuncturist, or podiatrist shall be subject to the treatment plan requirement set forth in (3)(a) of this rule.”

The Court of Appeals has instructed that the administrative rule requiring a written treatment plan is to be strictly applied, even when in those situations where it is apparent that the attending physician has approved the ancillary care. If there is no written treatment plan prepared within the rules requirements, the care is not reimbursable. *Aetna Casualty & Surety Co. v. Blanton*, 139 Or App 283, 911 P.2d 363 (1996)².

In *Blanton*, claimant's attending physician verbally approved a chiropractor's treatment plan, but failed to sign the plan for several weeks. The Court held that services provided before the attending physician signed the treatment plan were not reimbursable. *Blanton*, *supra*, 139 Or App at 288. Here, as in *Blanton*, the disputed treatment was simply not delivered in compliance with the rule.

physician or specialist physician shall be provided to the insurer by the medical service provider within 30 days of beginning treatment. The treatment plan shall include objectives, modalities, frequency of treatment, and duration. The treatment plan may be recorded in any legible format including, but not limited to, signed chart notes. Treatment plans required under this subsection do not apply to services provided pursuant to ORS 656.245(2)(b)(A).

“(b) Medical services prescribed by an attending physician and provided by a chiropractor, naturopath, acupuncturist, or podiatrist shall be subject to the treatment plan requirements set forth in subsection (4)(a) of this rule.”

² The *Blanton* court interpreted the former OAR 436-10-040(3)(a) that contained language identical to that of the current OAR 436-010-0230(3)(a).

Claimant argues that because this case involves medical services for a claimant found permanently and totally disabled, the treatment plan requirements of OAR 436-010-0230 do not apply. However, I find nothing in Blanton, the administrative rules, or the Workers' Compensation Law which suggest that there is an unstated exception to the administrative rules for chiropractic treatment to permanently and totally disabled workers. To the contrary, under Blanton, the treatment plan requirement is strictly applied and I am bound by that interpretation. See, e.g., *Beatty*, supra. As the Court of Appeals stated in Blanton:

"There is nothing equivocal about the *** rules. They contain no exceptions for reasonable and necessary treatment or for physicians who are unfamiliar with them. Nor can the rules be regarded as merely precatory. By their own terms, they are mandatory. *** Although *** [Dr.] Beers [the attending physician who prescribed the treatment] may not have been familiar with them, he should have been." *Aetna Casualty & Surety Company v. Blanton*, supra, 139 Or App at 287, 288.

There is simply no document present in this record that is both signed by the attending physician and contains all the required elements of "objectives, modalities, frequency of treatment and duration." While the rule allows the treatment plan to be prepared "in any legible format including, but not limited to, signed chart notes" it is specific in its requirement that "a treatment plan" containing all the required elements be prepared prior to treatment. Because a copy of an integrated treatment plan signed by the attending physician is not present in the record, chiropractic services provided after March 3, 2000 are not reimbursable.

Attorney Fees

In H01-111, the claimant has not prevailed and therefore his attorney is not entitled to compensation.

In H00-041, SAIF Corporation withdrew its request for contested case review at hearing. Claimant's attorney has submitted a request for attorney fees attributing approximately 9.9 hours of services devoted to the appropriateness issue prior to hearing and a fee of \$3000. SAIF opposes the request for attorney fees, arguing that they did not "proceed to hearing" in this matter. Because the case had not been dismissed prior to the opening of the contested case hearing, I find that claimant has prevailed in a contested case hearing and is entitled to a reasonable attorney fee. ORS 656.385(1). Considering the factors listed in OAR 436-001-0265, I find that \$3,000 is a reasonable fee for claimant's attorney in this matter.

ORDER

IT IS HEREBY ORDERED that:

- 1) In contested case H00-111, the administrative order dated October 24, 2000, MS 00-656, is reversed. SAIF is not liable for chiropractic treatments provided by Dr. Watts after March 3, 2000 in the absence of a treatment plan signed by an attending

physician.

2) In contested case H01-041, SAIF is ordered to pay claimant's attorney a fee of \$3000.

DATED this 26th day of February, 2002.

Paul Vincent, Hearing Officer
Hearing Officer Panel