

In the Managed Care Dispute of
RANDALL B. SMITH, Claimant
Contested Case No: H05-116
PROPOSED AND FINAL ORDER
January 9, 2006

SAIF CORP., Petitioner
RANDALL B. SMITH, Respondent
Before Catherine P. Coburn, Administrative Law Judge, Administrative Hearings

HISTORY OF THE CASE

Insurer appeals the Administrative Order issued on July 7, 2005 by the Medical Review Unit (MRU) of the Workers' Compensation Division (WCD), Department of Consumer and Business Services (department or director). On August 8, 2005, the department referred the matter to the Office of Administrative Hearings (OAH). On September 21, 2005, Administrative Law Judge Catherine P. Coburn conducted a hearing in Beaverton, Oregon. Attorney David L. Runner represented petitioner SAIF Corporation (insurer). Attorney Christine Jensen represented respondent Randall B. Smith (claimant). Oregon Health Systems managed care organization (MCO) waived appearance. Claimant and his wife, Diane Smith, testified on claimant's behalf. I left the record open for claimant's supplementary exhibits and for Dr. Weller's deposition. Pursuant to OAR 137-003-0572 and OAR 436-001-0170(2)(c), I ruled that insurer is liable for the cost of the deposition. The deposition took place on November 11, 2005 and the record closed on December 7, 2005 following oral closing argument.

ISSUE

Whether MRU incorrectly determined that insurer is liable for emergency room treatment provided to claimant on December 29 and 30, 2004.

EVIDENTIARY RULINGS

The following exhibits were admitted without objection: WCD Exhibits 1 through 22, insurer's Supplementary Exhibits 5A, 5B, 17A, 24 and 25, as well as claimant's Supplementary Exhibits 2A, 2B and 3C. Claimant's Supplementary Exhibits 3A through 23 were admitted into the record over insurer's relevance objections.

FINDINGS OF FACT

1. On June 6, 2000, claimant suffered a compensable injury in a fall. (Ex. 1; testimony of claimant.) Insurer accepted L4-5 and L5-S1 disc herniations combined with pre-existing degenerative disc disease. (Exs. 1-2 and 3.) On August 28, 2000, insurer enrolled claimant in an MCO. (Ex. 1-3.) In 2000, Catherine Gallo, M.D., performed microdiscectomy. (Exs. 3B-2, 6-2 and 24-5.)

2. Claimant's condition became medically stationary on May 2, 2001 and the claim was closed on June 27, 2001 with a permanent partial disability (PPD) award of 30 percent for loss of use of the lumbosacral spine. (Exs. 2A and 3C.) In an Order on Reconsideration dated August 28, 2001, the department awarded 5 percent PPD for loss of use of the left leg. (Ex. 2B.)

3. In December 2004, claimant lived in Roseburg and worked as a building supply yardman. (Exs. 3A-1, 6-2; testimony of claimant.)

4. K. Annette Weller, MD, whose office is in Eugene, was claimant's workers' compensation attending physician from 2001 through 2004. (Ex. 24-5; testimony of claimant.) In July 2004, Dr. Gallo examined claimant and discussed surgical options. (Ex. 3A-1.) In October 2004, pain medications prescribed by Dr. Weller controlled claimant's pain incompletely. (Ex. 24-8.) On October 21, 2004, Dr. Weller noted that claimant suffered left hip and leg pain rated at 8/10 with persistent left foot numbness, interfering with sleep. (Ex. 3A-1.) Dr. Weller prescribed Effexor and referred claimant to Joseph S. Dunn, M.D. or an emergency room for pain management. (Exs. 3A-2, 15 and 24-19.) In December 2004, Dr. Dunn, M.D. changed claimant's medication regimen by adding Keppra and discontinuing Effexor. (Exs. 3B-4, 5A, 5B, 6A-1, 17A, 24-19.)

5. In December 2004, claimant experienced gradually increased low back pain with left leg pain and partial numbness in the left foot, interfering with sleep. (Ex. 15; testimony of claimant and Diane Smith.) During the last weekend in December 2004, claimant stayed on the couch due to low back pain. (Testimony of claimant and Diane Smith.) When claimant came home from work on Monday, December 27, 2004, he remained on the couch due to low back pain and was unable to work on Tuesday, December 28, 2004. (Ex. 15; testimony of claimant and Diane Smith.)

6. Claimant slept fitfully due to lumbar pain and awoke in extreme pain early in the morning on Wednesday, December 29, 2004. (Testimony of claimant.) He telephoned Dr. Weller's office,¹ was informed that Dr. Weller was on vacation and advised to call Dr. Dunn, whose office is in Eugene. (Exs. 5A, 15 and 17A; 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. Lin in Dr. Weller's office and was advised to go to the emergency room if the pain became intolerable. (Exs. 5B, 15, 17A and 24-12; testimony of claimant.) Claimant's 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 arrived at the ER at 10:00 a.m. and reported to Charles S. Ross, D.O. 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

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

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, was confined to the couch and 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.)

8. On May 5, 2005, Dr. Weller responded to insurer’s inquiry about the December 29 and 30, 2004 ER visits. (Exs. 8 and 24.) Referring to telephone notes, she wrote, “Note from [claimant] on December 29, 2004 indicates that he went to ER because of blood in the urine.” (Ex. 8.) She opined that the two ER visits were not related to the June 2000 work injury. (*Id.*)

CONCLUSION OF LAW

MRU correctly determined that insurer is liable for emergency room treatment provided to claimant on December 29 and 30, 2004.

OPINION

The director has jurisdiction over medical service and managed care disputes. ORS 656.704(3), ORS 656.245(6) and ORS 656.260(16). I review for substantial evidence or error of law. OAR 436-001-0225(1). The burden of proving a fact or position falls upon the proponent. ORS 183.450(2). As petitioner, insurer bears the burden of proving by a preponderance of evidence that the administrative order is incorrect. *Cook v. Employment Div.*, 47 Or 437 (1982) (in the absence of legislation adopting a different standard, the standard of proof in an administrative hearing is preponderance of evidence). Proof by a preponderance of the evidence means that the fact finder is persuaded that the facts asserted are more likely true than false. *Riley Hill General Contractors v. Tandy Corp.*, 303 Or 390 (1989).

MRU determined that insurer is liable for the disputed ER visits. Insurer contends that the treatment is not compensable because it was not authorized by the attending physician and because it was not causally related to the work injury. In contrast, claimant contends that the administrative order is correct and should be affirmed.

Pursuant to ORS 656.245(1)(a), an insurer is obligated to provide medical services that are materially related to a compensable condition for so long as the nature of the injury or the process of recovery requires. This obligation continues over the worker’s lifetime. ORS

656.245(1)(b). ORS 656.245(1)(c)² lists certain medical services that remain compensable after the medically stationary date. These include prescription medications ORS 656.245(1)(c)(B), services necessary to monitor prescription medications ORS 656.245(1)(c)(C), and services necessary to diagnose an injured worker's condition. ORS 656.245(1)(c)(H).

OAR 436-010-0220(2) provides in pertinent part:

Except for **emergency services**, or otherwise provided for by statute or these rules, all treatments and medical services must be authorized by the injured worker's attending physician or authorized nurse practitioner to be reimbursable.

(Emphasis added.)

Here, the compensable lumbar condition became medically stationary in May 2001 and claimant continued treatment. In October 2004, the medications prescribed by attending physician Dr. Weller controlled claimant's pain only partially. Then in December 2004, Dr. Dunn changed claimant's medication regimen by adding Keppra and deleting Effexor. Next, in late December 2004, claimant suffered debilitating, intolerable low back pain; this fact is established by the credible testimony of claimant and his wife, as well as the ER chart notes. Next, claimant attempted to reach attending physician Dr. Weller and Dr. Dunn, learned that both of them were on vacation and was advised to visit the ER for intolerable pain. Although the term "emergency services" is not defined by statute or rule, I find that under the circumstances, claimant was justified in visiting the ER without Dr. Weller's authorization.

Finally, I am not persuaded by insurer's argument concerning the cause of the ER visits. The ER chart notes document that the primary need for treatment was extreme lumbar pain and that the bloody urine was incidental. Moreover, the chart notes establish that both ER visits were necessary to control claimant's lumbar pain by diagnosing the compensable condition, monitoring the prescriptions and administering pain relieving medications. Furthermore, I find Dr. Weller's opinion concerning causation unreliable because it was based on telephone messages rather than chart notes. For these reasons, I agree with MRU's determination that insurer is liable for the disputed ER visits.

² ORS 656.245(1)(c) provides in pertinent part:

(c) Notwithstanding any other provision of this chapter, medical services after the worker's condition is medically stationary are not compensable except for the following:

(B) Prescription medications.

(C) Services necessary to administer prescription medication or monitor the administration of prescription medication.

(H) Services that are necessary to diagnose the worker's condition.

ATTORNEY FEES

Claimant has prevailed in a contested case hearing and is entitled to a reasonable attorney fee. ORS 656.385(1). On January 5, 2006, claimant's attorney submitted a statement of services requesting a fee in the amount of \$2,500. Considering the factors listed in OAR 436-001-0265, I find that \$2,500 is a reasonable fee for claimant's attorney's services in this case. I find that an extraordinary fee is warranted because the case preparation included Dr. Weller's deposition.

ORDER

IT IS HEREBY ORDERED that:

1. The Administrative Order dated July 7, 2005 is affirmed.
2. Insurer shall pay claimant's attorney a fee of \$2,500.