

---

In the Matter of the ORS 656.248(12) Medical Fee Dispute of  
**Turner Whitfield, Claimant**  
Contested Case No: H00-005

**REVISED PROPOSED AND FINAL CONTESTED CASE  
HEARING ORDER ON REMAND**

August 12, 2004

SAIF CORPORATION, Petitioner  
TURNER WHITFIELD AND DONALD OSBORN, Respondent  
Before Catherine P. Coburn, Administrative Law Judge

---

**HISTORY OF THE CASE**

Insurer appealed an administrative order issued on December 6, 1999 by the Medical Review Unit (MRU) of the Workers' Compensation Division (WCD), Department of Consumer and Business services (department or director). On December 18, 2000, Administrative Law Judge Catherine P. Coburn conducted a contested case hearing in this matter. Petitioner SAIF Corporation (insurer) was represented by attorney H. Thomas Anderson. Respondent Turner Whitfield (claimant) was represented by attorney James C. Egan. Donald Osborn (Osborn), Orthopedic Technologist Certified (OTC) was represented by attorney Aaron E. Clingerman. The Workers' Compensation Division (WCD) was represented by Assistant Attorney General Carol A. Parks.

On March 13, 2001, I issued a Proposed and Final Order determining that the disputed medical fees were not reimbursable. On April 10, 2001, WCD filed exceptions and on September 24, 2001, WCD issued a Final Order determining that insurer was liable for the disputed medical fees. On November 21, 2001, insurer appealed. On September 29, 2003, the Court of Appeals affirmed the Final Order. On February 5, 2004, WCD requested me to conduct further hearing concerning Osborn's usual and customary fees.

On July 12, 2004, I conducted further hearing on remand. Attorney Jerome P. Larkin represented insurer. Attorney James C. Egan represented claimant. Attorney Aaron E. Clingerman represented the medical provider, Donald Osborn, Orthopedic Technologist Certified (OTC). Osborn testified on his own behalf and the record closed upon adjournment.

**ISSUE**

What is the usual and customary fee for the technical medical services provided by Donald Osborn, OTC during a compensable surgery performed on April 5, 1999?

**EVIDENTIARY RULINGS**

In the December 2000 hearing, WCD Exhibits 1 through 16 were admitted into the record without objection and Exhibit A was received into the record over claimant's objection.

### FINDINGS OF FACT

(1) On February 24, 1999, claimant suffered a left shoulder injury while working as a janitor. (Ex. 2.) Insurer accepted supraspinatus tear and infraspinatus tear, left shoulder (Ex. 3). On April 5, 1999, at Albany General Hospital, attending physician Stephen Newman, MD, performed a compensable, reasonable and necessary surgery to repair the left shoulder. Donald Osborn, OTC, assisted in the surgery under the direct control and supervision of Dr. Newman. (Ex. 4). Osborn positioned the patient on the table, held the arm and shoulder in position according to the surgeon's instructions and held instrumentation during surgery. (Testimony of Osborn.)

(2) Osborn billed insurer \$482.40 under CPT Code 23420.81 and \$227.40 under CPT Code 23120.81 for a total of \$709.80. (Ex. 6-1.) Osborn listed the same CPT Codes as the surgeon listed and he claimed 20 percent of the surgeon's fee as his usual and customary fee. (Testimony of Osborn.)

### CONCLUSION OF LAW

The usual and customary fee for the technical medical services provided by Donald Osborn, OTC during a compensable surgery performed on April 5, 1999 is \$709.80

### OPINION

OAR 436-009-0040(1) appears under the heading "Calculating Medical Provider Fees" and provides:

(1) Medical fees shall be paid at the provider's usual and customary fee or in accordance with the fee schedule whichever is less. For all MCO enrolled claims, payment of medical fees shall be at the provider's usual and customary fee or according to the fee schedule, whichever is less, unless otherwise provided by MCO contract. Where there is no maximum payment established by the fee schedule, an insurer may challenge the reasonableness of a provider's billing on a case by case basis by asking the director to review the billing under OAR 436-009-0008. If the director determines the amount billed is unreasonable, the director may establish a different fee to be paid to the provider based on at least one, but not limited to, the following: reasonableness, the usual and customary fees of similar providers, the services provided in the specific case, fees for similar services in similar geographic regions, and any extenuating circumstances.

Insurer contends that Osborn failed to carry his burden of establishing the amount of his usual and customary fee<sup>1</sup>. However, the record contains Osborn's bill reflecting CPT codes and dollar amounts. Additionally, Osborn credibly testified that he billed insurer using the same CPT

---

<sup>1</sup> Insurer does not contend that the fee would be less if it were calculated in accordance with the fee schedule.

Codes as the surgeon and that he billed 20 percent of the surgeon's fee. Osborn further testified credibly that this was his usual and customary fee. Therefore, insurer is liable for a fee of \$709.80.

**ATTORNEY FEE**

ORS 656.385(1) excludes medical fee disputes arising under ORS 656.248 from an award of attorney fees. Therefore, claimant is entitled to no attorney fee.

**ORDER**

IT IS HEREBY ORDERED that:

Administrative Order MS99-786 dated December 6, 1999 is affirmed.

**DATED this 12<sup>th</sup> day of August 2004**