

November 16, 2015

Brad J. Lee
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Letter Decision and Order

Jeremy D. Nauman
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Rapid City, SD 57709-0341

RE: HF No. 186, 2012/13 – Ricky V. Percy v. Kraft Construction and FirstComp Insurance.

Dear Mr. Lee and Mr. Nauman:

Submissions:

This letter addresses the following submissions by the parties:

September 18, 2015	[Claimant's] Motion to Set Expert Fee; [Claimant's] Memorandum in Support of Claimant's Motion to Set Expert Fee; Affidavit of Brad J. Lee;
October 9, 2015	Employer and Insurer's Response to Claimant's Motion to Set Expert Fee;
October 21, 2015	[Claimant's] Reply in Support of Motion to Set Expert Fee; Affidavit of Brad J. Lee.

Background:

The facts of this case as reflected by the above submissions and documentation are as follows:

1. Ricky V. Percy (Claimant) suffered a work-related injury to his lower back on November 29, 2012, while lifting a window during the regular course of his

employment. At the time of this injury, Claimant was employed by Kraft Construction (Employer).

2. On November 29, 2012, Employer was insured by FirstComp Insurance (Insurer) for purposes of workers' compensation.
3. On December 21, 2011, Dr. Farnham at the request of Employer and Insurer performed an independent medical evaluation (IME) on Claimant. Dr. Farnham was paid \$1,950 for the examination.
4. On January 7, 2013, Insurer sent Claimant a letter denying workers' compensation coverage for his injury based on Dr. Farnham's IME and instructing Claimant to submit medical bills from his injury to his private health insurer.
5. On May 28, 2013, Claimant filed a Petition for Hearing.
6. On June 13, 2014, Dr. Farnham reviewed 52 pages of new medical records and 130 pages of prior medical records, including the IME report. Farnham provided a supplemental IME report indicating the new medical records he reviewed would not change any of his previous opinions. For the review and report, Dr. Farnham was paid \$2,500.
7. On July 30, 2014, Dr. Farnham submitted a billing statement to Insurer in the amount of \$3,500 plus tax for his review of 52 pages of new medical records, 20 pages of new medical records, 130 pages of prior medical records, review of the IME report, pre-deposition chart review, pre-deposition telephone conversation, and for 2 hours to take the deposition scheduled for September 5, 2014.
8. On September 5, 2014, the deposition of Richard J. Farnham, M.D., was taken. Claimant appeared pro se and did not ask any questions during the deposition.
9. On December 10, 2014, Claimant retained counsel and a Notice of Appearance was file with the Department.
10. On April 10, 2015, Claimant filed a Motion to Reopen Deposition of Dr. Farnham.
11. On April 29, 2015, Administrative Law Judge Catherine Duenwald issued a letter opinion granting Claimant's motion to reopen the deposition of Dr. Farnham.
12. On July 8, 2015, Claimant filed a Notice of Taking Deposition of Dr. Farnham and certificate of service. The deposition was scheduled to take place at 1:30 PM central time on Friday, July 31, 2015, in Sioux Falls, South Dakota.

13. On July 13, 2015, Claimant received Dr. Farnham's billing invoice in the amount of \$6,598.50. Dr. Farnham calculated he spent 10.45 hours reviewing medical records and allowed 2 hours for the deposition, totaling 12.45 hours. Dr. Farnham charged a fee of \$500 per hour plus tax. In the billing invoice Dr. Farnham stated "I will not appear for deposition if fee for services is not received prior to or on Tuesday, July 21, 2015."
14. On July 16, 2015, counsel for Claimant sent an email to counsel for Employer and Insurer indicating, "I am going to cancel Dr. Farnham's supplemental deposition, which we scheduled for July 31, until we have exhausted attempts to resolve this matter. If resolution is unsuccessful, I am going to contact the Department of Labor to have it decide whether Dr. Farnham's proposed fee of \$6,598.50 is reasonable or not."
15. On September 18, 2015, Claimant filed a Motion to Set Expert Fee.

Motion to Set Expert Fee:

Claimant filed a Motion to Set Expert Fee for the supplemental deposition of Dr. Richard J. Farnham. ARSD 47:03:05:05 governs the Department of Labor & Regulation's authority regarding reimbursement criteria in workers' compensation cases. That regulation states:

To be reimbursed, the charge must be for reasonable and necessary services for the cure or relief of the effects of a compensable injury or disability. A health care provider is not entitled to payment from an insurer or employee for fees in excess of the maximum reimbursement allowed under this chapter.

Except as otherwise provided in this chapter, to determine the maximum reimbursement for services, the base unit value for a procedure code is multiplied by the following factors:

Procedure Code	Factor
10000-69999	\$98.24
70000-79999	\$18.60
80000-89999	\$14.90
90000-99071	\$ 6.40
99075	\$14.29 1 st hour, \$1.78 each additional 15 min
99076-99199	\$ 6.40
99201-99450	\$ 7.80
99455-99456	\$19.23 1 st hour, \$2.41 each additional 15 min
99460-99499	\$ 7.80
99500-99607	\$ 6.40

If a code is properly submitted for one of these services, but is not listed in **Relative Values for Physicians**, or the base unit value is RNE or BR, the reimbursement is 80% of the provider's charge.

ARSD 47:03:05:05. Claimant specifically argues that the fee Dr. Farnham is charging Claimant for a supplemental deposition is unreasonable. Claimant requests that the fee for Claimant to take Dr. Farnham's deposition be limited to \$500 per hour for the deposition and \$500 for one hour of preparation. Claimant identifies SDCL 15-6-26(b), which states in relevant part:

Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivisions (4)(A)(ii) and (4)(B) of this section; and (ii) with respect to discovery obtained under subdivision (4)(A) (ii) of this section the court may require, and with respect to discovery obtained under subdivision (4)(B) of this section the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

SDCL 15-6-26(b)(4)(E) (emphasis added).

Claimant argues that Dr. Farnham estimates he would need to prepare for 10.45 hours for a two hour deposition. However, when Dr. Farnham testified on behalf of Employer and Insurer initially, he only charged for four hours of preparation, one hour talking to counsel and two hours for the deposition. Claimant believes his medical history is not complex and it should not take Dr. Farnham 10.45 hours of preparation. However, in this matter, Dr. Farnham has provided a very detailed billing statement that itemized how much time he would need to spend reviewing the medical records, IME, and prior depositions. Preparation is in both the deposing and retaining parties' interest, given the expectation that "good preparation will lead to a more efficient deposition." *Cabana v. Forcier*, 200 F.R.D. 9, 16 (D. Mass. 2001). The Department cannot say that the amount of time Dr. Farnham calculated for spending in preparation for the supplemental deposition is unreasonable.

Dr. Farnham's billing statement indicates that 10.45 hours will be spent in preparation of the deposition and two hours spent taking the deposition, for a total time spent of 12.45 hours. When determining the fee for medical testimony, ARSD 47:03:05:05 dictates the necessary criteria to be used. The procedure code when dealing with medical testimony is 99075, which gives 35 as the base unit value. OptumInsight, Inc., *Relative Values for Physicians*, 389 (Relative Value Studies, Inc. 2013). The 1st hour is multiplied by \$14.29 and by the base unit code of 35, (1 x \$14.29 x 35), totaling \$500.15. Each additional 15 minutes spent, is multiplied by \$1.78 and the base unit value of 35. Thus the remaining 11.45 hours taken in 15 minute intervals is 47, (47 x \$1.78 x 35), totaling \$2,928.10. The total adds up to \$3,428.25 plus tax for Dr. Farnham's preparation for the deposition and taking the deposition.

Order:

In accordance with the above analysis, it is ordered that Claimant's Motion to Set Expert Fee is granted in part and denied in part. The fee for taking the supplemental deposition of Dr. Farnham with a total of 12.45 hours will be set at the amount of \$3,428.25 plus tax. This letter shall constitute the Department's Order in this matter.

Sincerely,

 /s/ Sarah E. Harris
Sarah E. Harris
Administrative Law Judge