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In the ORS 656.327 Medical Treatment Dispute of

**Ennis, Gary L., Claimant**

Contested Case No: H01-099

**ORDER ON REMAND**

February 15, 2002

LIBERTY NORTHWEST INSURANCE CORPORATION, Petitioner

GARY A. ENNIS, Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

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On October 15, 2001, Hearing Officer Catherine P. Coburn conducted a telephone hearing. Deryl K. Nielsen represented petitioner Liberty Northwest Insurance Corporation (insurer). Respondent, Gary A. Ennis (claimant), was not present but was represented by attorney Christine Jensen. The Department of Consumer and Business Services, Workers' Compensation Division (WCD) waived appearance. Vida Rich testified on behalf of the insurer; claimant testified on his own behalf.

The petitioner, insurer, filed exceptions to Hearing Officer Coburn's October 19, 2001 Proposed and Final Contested Case Hearing Order that determined the insurer failed to timely respond to the request for surgery. Before the Director, the issue is proposed elective surgery. The entire record, consisting of a tape recording of the hearing, all evidence received, and all documents filed, has been considered. WCD did not respond to the exceptions.

**Findings of Fact**

Claimant sustained a compensable right shoulder injury on September 19, 1996. The insurer accepted the claim for right shoulder rotator cuff tear. Claimant underwent surgical rotator cuff repairs in October 1996 and December 1997. Following the second surgery, claimant's right shoulder remained symptomatic. Claimant's attending physician, Dr. Carlsen, referred claimant for a second opinion to Dr. Scott Jacobson, who opined that further surgical intervention would not be helpful. (Ex. 4-7).

In June 1998, Dr. Christopher Dupuis examined claimant at the insurer's request. Dr. Dupuis also believed additional surgery was inappropriate because it would unlikely improve claimant's pain or function. (Exs. 6, 7). Dr. Carlsen concurred with the IME report.

In spite of claimant's repeated request for surgery, Dr. Carlsen reported from July 1998 through October 2000 that a third surgery would have an unpredictable success rate. (Ex. 4 pp. 10, 13, 15, 23, 24). On October 4, 2000, claimant had right shoulder MRI, which revealed a chronic supraspinatus rotator cuff tear with retraction and frayed tendon margins, underlying changes of impingement, medial subluxation of the long head of the biceps tendon, and attenuation of the suprascapularis tendon. Dr. Carlsen again referred claimant to Dr. Jacobson for consultation, on October 17, 2000, Dr. Jacobson diagnosed chronic rotator cuff tear with chronic shoulder pain, and opined that surgery had a very high likelihood of failure. (Ex. 4-25).

On November 8, 2000, Dr. Carlsen faxed a request for surgical authorization to Liberty.

However, the request contained no explanation for the need for surgery. (Ex. 9). Dr. Carlsen's November 7 and November 27, 2000 chart notes provided the necessary information. Liberty received these chart notes on Monday, November 27, 2000. Liberty disapproved the surgery request on Monday, December 4, 2000. (Ex. 10).

### Conclusions of Law and Opinion

MRU found that Liberty failed to comply with OAR 436-010-0250<sup>1</sup> because it did not timely notify Dr. Carlsen within seven days of November 27, 2000, (by December 3, 2000), whether an independent consultation or administrative review were desired. MRU, thus, concluded that the insurer was barred from challenging the appropriateness of the surgery, and that it was liable for costs associated with the surgery. The hearing officer affirmed, reasoning that although December 3<sup>rd</sup> was a Sunday, weekend days were included in computing the seven-day response period in OAR 436-010-0250(3).

Relying on ORCP 10A, the insurer contends that, in computing the time period in the rule, neither the date of receipt of Dr. Carlsen's chart notes or Sunday are counted. I agree.

ORCP 10A provides:

“In computing any period of time prescribed or allowed by these rules, by the local rules of any court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday or a legal holiday, including Sunday, in which event the period runs until the end of the next day which is not a Saturday or a legal holiday. \*\*\*”

The rules of civil procedure have been applied in workers' compensation cases. *See Sekermestrovich v. SAIF*, 280 Or 723 (1977) (court found no reason to apply different rules for compensation cases from civil cases in determining good cause for failure to timely file a request for hearing).

Here, Dr. Carlsen faxed his surgery request to Liberty on November 8, 2000. The notice, however, did not include medical information that substantiated the need for surgery, as required by OAR 436-010-0250(2). This information was contained in Dr. Carlsen's November 7 and November 27, 2000 chart notes, which the insurer received on November 27<sup>th</sup>. The insurer notified Dr. Carlsen on Monday, December 4, 2000 that the proposed surgery was not authorized because it was unlikely to be effective.<sup>2</sup> (Ex. 10). Pursuant to the method for computing time

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<sup>1</sup> OAR 436-010-250(3) provides in relevant part: “When elective surgery is recommended, the insurer may require an independent consultation with a physician of the insurer's choice. The insurer shall notify the recommending physician, worker and the worker's representative, within seven days of receipt of the notice of intent to perform surgery, whether or not a consultation is desired.”

<sup>2</sup> The insurer contends it was justified in not requiring an independent consultation because it already had sufficient information to deny the surgery request. Given this record, I agree. Dr. Dupuis had previously opined that a third surgery was not recommended. Dr. Carlsen had already referred claimant to Dr.

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periods under ORCP 10A, the insurer's response to Dr. Carlsen's surgery request was timely.

Because MRU did not address whether the proposed surgery is excessive, inappropriate or ineffectual, this matter is remanded to MRU to make that determination.

IT IS HEREBY ORDERED that the October 19, 2001 Proposed and Final Contested Case Hearing Order is reversed and that this matter is remanded to MRU for a determination on the merits regarding the proposed surgery.

DATED this 15<sup>th</sup> day of February, 2002.

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

By: \_\_\_\_\_

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John Shilts, Administrator  
Workers' Compensation Division