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In the Matter of the ORS 656.327 Medical Treatment Dispute of

**Horn, Glenn R., Claimant**

Contested Case No: H03-067

**PROPOSED & FINAL ORDER**

April 7, 2004

BARRETT BUSINESS SERVICES, Petitioner

GLENN R. HORN, Respondent

Before Catherine P. Coburn, Administrative Law Judge, Office of Administrative Hearings

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**HISTORY OF THE CASE**

Insurer appeals the May 21, 2003 Administrative Order issued by the Medical Review Unit (MRU) of the Workers' Compensation Division, Department of Consumer and Business Services (WCD or the department) which determined that insurer is precluded from challenging the medical appropriateness of a surgery because it failed to comply with OAR 436-010-0250(3) and (5). On June 16, 2003, WCD referred the matter to the Office of Administrative Hearings (OAH) for a contested case hearing.

On October 2, 2003, Administrative Law Judge (ALJ) Catherine P. Coburn convened a telephone hearing in this matter in Salem, Oregon. Attorney Lance Johnson represented petitioning self-insured employer, Barrett Business Services and its claims administrator, Pinnacle Risk Management (insurer). Attorney Richard D. Adams represented respondent Glenn D. Horn (claimant). Claimant testified on his own behalf and insurer called no witnesses. I left the record open for a deposition of Hal Townsend, M.D. The deposition took place on October 27, 2003 and OAH received a copy of the transcript on December 1, 2003. On March 3, 2004, the parties reconvened for closing argument and the record closed.

**ISSUES**

- (1) Whether MRU correctly determined that insurer failed to comply with OAR 436-010-0250(3) and (5).
- (2) If so, whether insurer is barred from disputing medical appropriateness of the surgical request.

**EVIDENTIARY RULINGS**

WCD Exhibits 1 through 32 and Insurer's Supplementary Exhibits 30A and 30B were received into the record without objection. Claimant's Supplementary Exhibit 33 was received into the record over insurer's objection pursuant to ORS 656.327(2). Pursuant to OAR 436-001-0231 and OAR 137-003-0615, I take official notice of the 2002 calendar.

**FINDINGS OF FACT**

- (1) On July 25, 2000, claimant suffered a right knee injury while working as a truck driver. (Ex. 4.) Following litigation, insurer accepted "right lateral meniscus tear" as a

compensable condition. (Exs. 5, 7 and 21.)

(2) On February 26, 2002, Hal Townsend, MD performed arthroscopic surgery. (Ex. 2-2.) Claimant underwent physical therapy and continued experiencing right knee pain and swelling. (Ex. 2; testimony of claimant.)

(3) On August 29, 2002, Dr. Townsend requested authorization for a second right knee arthroscopy. The Surgical Pre-Authorization Request does not contain legible fax label or insurer's date stamp. (Ex. 11.)

(4) On September 10, 2002, insurer notified Dr. Townsend, claimant and claimant's attorney that it had scheduled a consultation examination. (Ex. 12.)

### CONCLUSIONS OF LAW

1. MRU correctly determined that insurer failed to comply with OAR 436-010-0250(3) and (5).
2. Insurer is barred from disputing medical appropriateness of the surgical request.

### OPINION

Jurisdiction lies with the director. ORS 656.327(2). I may modify the administrative order only if it is not supported by substantial evidence in the record or reflects an error of law. ORS 656.273(2) and OAR 436-001-0225(3). 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 contrary legislation, the standard of proof in administrative hearings is preponderance of evidence). Proof by a preponderance of 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 (1998).

Under ORS 656.245 and ORS 656.327, the insurer is required to provide medical services for a compensable injury unless the treatment is excessive, inappropriate, ineffectual or in violation of the administrative rules. OAR 436-010-0250 appears under the heading "Elective Surgery" and provides in relevant part:

- (3) When an 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, the 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 by submitting Form 440-3228 (Elective Surgery Notification) to the recommending physician. When requested, the consultation shall be completed within **28 days** after notice to the attending physician.

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(5) If the insurer believes the proposed surgery is excessive, inappropriate, or ineffectual and cannot resolve the dispute with the recommending physician, the insurer shall request an administrative review by the director within 21 days of the notice provided in subsection (4)(c)<sup>1</sup> of this rule. **Failure of the insurer to timely respond to the physician's elective surgery request or to timely request administrative review pursuant to this rule shall bar the insurer from later disputing whether the surgery was excessive, inappropriate, or ineffectual.**

(Emphasis added.)

In the administrative order, MRU determined that insurer failed to comply with the timeliness requirements specified by OAR 436-010-0250(3) and (5), and therefore, is barred from disputing whether the proposed surgery is excessive, inappropriate or ineffectual. MRU ruled on the timeliness issue but did not address the medical appropriateness question.

Insurer concedes that the Surgical Pre-Authorization Request form is dated August 29, 2002 and insurer's response is dated September 10, 2002, more than seven days later. However, insurer contends that OAR 436-010-0250(3) and (5) do not apply because the record contains no evidence when insurer received the Surgical Pre-Authorization Request form. In contrast, claimant contends that insurer bears the burden of producing evidence of its date of receipt. Claimant further argues that in the absence of such evidence, the record shows that insurer responded in writing in an untimely fashion, and therefore, is barred from contesting medical appropriateness. The question, then, is which party bears the burden of producing evidence establishing the date insurer received the request, triggering insurer's obligation to respond within seven days.

Pursuant to ORS 656.726(4)(a), WCD promulgated OAR 436-060-0017(2) (eff. 1/1/02) which provides:

(2) The insurer shall date stamp each document upon receipt. The date stamp shall include the month, day, year of receipt, and name of the company, unless the document already contains the date information and name of recipient company, as in faxes, e-mail and other electronically transmitted communications.

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<sup>1</sup> OAR 436-010-0250(4)(c) provides:

The recommending physician shall provide written notice to the insurer, the worker and the worker's representative when further attempts to resolve the matter would be futile by signing Form 440-3228.

OAR 436-060-0017(2) assigns responsibility to an insurer to produce evidence of its date of receipt. In the event that insurer fails to date stamp a Surgical Pre-Authorization request, the failure to produce such evidence falls upon insurer. *See* ORS 183.450(2). Here, Dr. Townsend's Surgical Pre-Authorization Request is dated August 29, 2002 but the record contains no evidence when insurer received it. The record establishes that insurer did receive it at some point because insurer responded on September 10, 2002, albeit five days late. Based on the record, I find that insurer failed to respond to the Surgical Pre-Authorization Request within seven days of its receipt, as required by OAR 436-010-0250(5).

Finally, MRU did not address the case medical appropriateness issue. Inasmuch as my review is limited to substantial evidence and legal error, I lack authority to address the case on the merits. Therefore, pursuant to OAR 436-001-0170(7)<sup>2</sup>, I remand the matter to MRU.

### **ATTORNEY FEES**

On remand, claimant has not finally prevailed in defending MRU's decision and is, therefore, entitled to no attorney fees. ORS 656.385(1).

### **ORDER**

IT HEREBY ORDERED:

The May 21, 2003 Administrative Order is remanded to MRU.

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<sup>2</sup> OAR 436-001-0170(7) provides:

The presiding officer shall conduct a fair and impartial hearing. The presiding officer has authority to:  
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(7) Remand to the administrative unit;