

In the Compensation of  
**John L. Wyncoop, Jr., Claimant**  
Contested Case No: 06-099H  
**PROPOSED & FINAL ORDER**

March 1, 2007

LIBERTY NW INSURANCE CORPORATION, Petitioner  
JOHN L. WYNCOOP, JR., Respondent  
Before G Duff Bloom, Administrative Law Judge

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Pursuant to notice, a hearing was scheduled to convene December 1, 2006, in Medford, Oregon before Administrative Law Judge Bloom. In lieu of hearing, the parties agreed to submit the case on the record through written argument. Claimant is represented by Attorney Arthur Wilber Stevens III. The employer, Panther Crushing, and its insurer, Liberty Northwest Insurance Corporation (Liberty) are represented by Attorney Darren W Lee. WCD waived appearance on June 16, 2006. The record consists of Exhibits 1 through 61.<sup>1</sup>

*The record closed on February 28, 2007*, on receipt of Liberty's waiver of reply to claimant's February 22, 2007 supplemental response.<sup>2</sup>

### ISSUES

1. Medical treatment dispute: Liberty requests this hearing from WCD-MRU's May 30, 2006 Administrative Order No TX-06-589. (Ex 59).<sup>3</sup>

2. Claimant's entitlement to an assessed attorney's fee.

### FINDINGS OF FACT

I adopt the "Findings of Fact" as set forth in the May 30, 2006 Administrative Order, as supplemented below. (Ex 59-1 through 59-2). *See Liberty Northwest v Kraft and DCBS*, 205 Or App 59 (2006) (the Court of Appeals held: "Nothing in our understanding of 'substantial evidence' review comports with an adjudicator rendering findings of fact.").

The 21<sup>st</sup> day after March 30, 2006 was April 20, 2006. The 25<sup>th</sup> day after March 30, 2006 was April 24, 2006.

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<sup>1</sup> Exhibits 1 through 61 were submitted by WCD on July 5, 2006; an identical list was submitted by Liberty on August 22, 2006. For the record, and pursuant to law, I rely on the WCD submission.

<sup>2</sup> Liberty waived its right to file an initial reply; I solicited claimant's supplemental responding argument, received claimant's supplemental response on February 23, 2007, and obtained Liberty's telephone waiver of the right to file a supplemental reply from Mr Lee on February 28, 2007.

<sup>3</sup> Claimant misidentified the issue as whether Liberty timely requested *this* hearing from the MRU order. As I am issuing this order, it is evident that Liberty did perfect its request for hearing (*see* Exs 59, 60), and I choose to accept claimant's statement of the issue as a misstatement rather than further delay the parties' decision by asking for more supplemental clarification.

Liberty requested administrative review of the appropriateness of proposed medical treatment by submitting to MRU a WCD Form 2842, which it dated April 20, 2006. (Ex 55). That form was not sent certified mail, nor was it certified by the sender as having been mailed on April 20, 2006. *Id.* There is no postmark in evidence. *Id.* There is no evidence it was hand-delivered on or before April 20, 2006. It was perforated date-stamped as received by WCD on April 24, 2006. *Id.*

The MRU of WCD ordered that, pursuant to OAR 436-010-0250(5), Liberty did not timely request administrative review of Dr O’Sullivan’s March 30, 2006 elective surgery notification form, missing its request deadline by 4 days. (Ex 59-2, 59-3).

Liberty timely requested this hearing on June 8, 2006, within 30 days of the mailing date of the Administrative Order. (Ex 59).

The Director referred the hearing to the Board. (Rec).

## CONCLUSIONS AND OPINION

### 1. Medical treatment.

This medical treatment dispute arises under ORS 656.245, 656.327, and OAR 436-010-0008. I review for substantial evidence and errors of law. ORS 656.327(2); OAR 436-001-0225(2); *Kraft, supra*.

The burden of proving a fact or position rests with its proponent. ORS 183.450(2); *Salem Decorating v. National Council on Comp. Ins.*, 116 Or App 170 (1992), *rev den* 315 Or 643 (1993). As the proponent of its position, Liberty bears the burden of proving by a preponderance of evidence that the administrative order is incorrect. *See Harris v. SAIF*, 292 Or 683 (1982) (general rule regarding allocation of burden of proof is that burden is on the proponent of the fact or position.); *Cook v. Employment Div.*, 47 Or 437 (1982) (in the absence of legislation adopting a different standard of proof, the standard in an administrative hearing is preponderance of evidence). Proof by a preponderance of evidence means that the fact-finder is convinced that the facts asserted are more likely true than not. *Riley Hill General Contractors v. Tandy Corp.*, 303 Or 390 (1989).

For the following reasons, I hold Liberty has failed to meet its burden of proving Department error.

### *Error of Law*

First, Liberty argues that MRU erred as a matter of law. I disagree.

ORS 183.482(8)(a) provides that in an “error of law” analysis of an agency’s decision, the question is whether the “agency has erroneously interpreted a provision of law.” In this matter, MRU correctly interpreted OAR 436-010-0250(5) as requiring the insurer to request

agency review of a physician's WCD Form 440-3228 notice within 21 days. (Ex 59-3). That is precisely the inquiry the agency demanded be investigated; the rule's language is not enigmatic.

Moreover, OAR 436-010-005(24)<sup>4</sup> provides a specific set of rules to establish the mailing date for the purposes of determining timeliness under OAR Chapter 436, Division 010. There are listed three ways, and only three ways, to establish a mailing date for the purposes of determining whether a party timely requested MRU action:<sup>5</sup> (1) the date a document is postmarked; (2) the date a document is FAXed, provided the date is printed on the banner automatically produced by the transmitting FAX machine; or (3) the date a hand-delivered document is date-stamped or punched-in by the WCD. Again, MRU correctly interpreted and applied the unambiguous language in OAR 436-010-005(24) to conclude Liberty requested its review on April 24, 2006.

Liberty does not articulate how it believes MRU erred as a matter of law, and I discern no error of law.

### *Substantial Evidence*

The essence of Liberty's argument actually lies in its disagreement with the medical reviewer's analysis of the record—specifically, Liberty believes it timely requested administrative review from Dr O'Sullivan's March 30, 2006 notification. That presents a "substantial evidence" argument, and I hold it unpersuasive.

ORS 183.482(8)(c) provides "Substantial evidence exists to support a finding of fact when the record, viewed as a whole, would permit a reasonable person to make that finding." In order to conduct a review under ORS 183.482(8)(c), "[I] must be able to know what [MRU] found as fact and why it believes that its findings led to the conclusions that it reached. That requires a reasoned opinion based on explicit findings of fact." *Armstrong v. Asten-Hill Co.*, 90 Or App 200, 205 (1988) (footnote omitted); *see also Christman v. SAIF*, 181 Or App 191, 197-98 (2002) (holding that, to conduct a meaningful review for substantial evidence, the body whose order is being reviewed must explain its conclusions in a manner that is supported by substantial reason).

OAR 436-010-0250(5) requires an insurer to request agency review of a physician's WCD Form 440-3228 notice within 21 days. Dr O'Sullivan's notice was dated March 30, 2006. (Ex 59-2; Liberty argument at 2).

OAR 436-010-005(24) provides, in whole:

"Mailed or Mailing Date," for the purposes of determining timeliness under these rules, means the date a document is postmarked. Requests submitted by facsimile or "fax" are considered mailed as of the date printed on the banner automatically produced by the

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<sup>4</sup> OAR 436-010-0005(24) is set out in full *infra*.

<sup>5</sup> A fourth method, proving for circumstances in which phone or in-person requests are authorized under these rule, is (1) inapplicable to this matter; and (2) if it were applicable, there is no evidence any such phone-request or in-person request was made on or before April 20, 2006.

transmitting fax machine. Hand-delivered requests will be considered mailed as of the date stamped or punched in by the Workers' Compensation Division. Phone or in-person requests, where allowed under these rules, will be considered mailed as of the date of the request."

The record proves Liberty requested administrative review of the appropriateness of proposed medical treatment by submitting to MRU a WCD Form 2842, which Liberty dated April 20, 2006. (Ex 55). That form was not sent certified mail, nor was it certified by the sender as having been mailed on April 20, 2006. *Id.* There is no postmark in evidence. *Id.* There is no FAX banner visible. *Id.* There is no evidence proving it was hand-delivered, and—if it had been, it was hand-delivered on April 24, 2006, the date it was perforated date-stamped as received by WCD. *Id.*

I hold there is substantial evidence in the record supporting MRU's decision. Liberty has not carried its burden of proving MRU error.

I find no persuasive basis on which to modify MRU's order, and therefore affirm it.

2. Assessed attorney's fee.

Claimant does not request an assessed fee for prevailing over Liberty's request for hearing.

That said, claimant's counsel would have been entitled to an assessed attorney's fee under ORS 656.385(3), which provides:

"If a request for a contested case hearing, review on appeal or cross-appeal to the Court of Appeals or petition for review to the Supreme Court is initiated by an insurer or self-insured employer, and the director, Administrative Law Judge or court finds that the compensation awarded under ORS 656.245, 656.247, 656.260, 656.327 or 656.340 to a claimant should not be disallowed or reduced, the insurer or self-insured employer shall be required to pay to the claimant or the attorney of the claimant a reasonable attorney fee in an amount set by the director, the Administrative Law Judge or the court for legal representation by an attorney for the claimant at the contested case hearing, review on appeal or cross-appeal."

For the following reason, I cannot award a fee in this matter. As noted above, claimant did not request an assessed fee. In *Glenn R Horn*, 56 Van Natta 2924, 2927 (2004), the Board reversed a penalty and penalty-based assessed fee awarded by this ALJ because claimant did not request the penalty or fee. Accordingly, I hold I am without authority to award an assessed fee in the absence of any express cross-request for hearing so requesting, or hearing argument so requesting.

**ORDER**

**IT IS THEREFORE ORDERED** that MRU's May 30, 2006 Administrative Order is affirmed and Liberty is ordered to process the medical-treatment claim according to law.