

In the ORS 656.325 Medical Services Dispute of

**Audrey Castillo, Claimant**

Contested Case No: 09-125H

**PROPOSED & FINAL ORDER**

December 16, 2009

ROSEBURG FOREST PRODUCTS CO. INC. , Petitioner

AUDREY CASTILLO , Respondent

Before Douglas C. Crummé, Administrative Law Judge

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Pursuant to stipulation, the parties have submitted this matter<sup>1</sup> for hearing through written evidence and argument instead of an in-person hearing. Christine Jensen, Attorney at Law, represents claimant, Audrey Castillo. H. Scott Plouse, Attorney at Law, represents the self-insured employer, Roseburg Forest Products, and its claims processing agent, RLC Industries Co. The Administrative Law Judge (ALJ) is Douglas Crummé. Exhibits 1 through 161 are admitted. The hearing record closed with the expiration of employer's opportunity to file reply argument, on November 16, 2009.<sup>2</sup>

**ISSUES**

Employer challenges the Workers' Compensation Division's (WCD's) Administrative Order MS 09-0724 ordering that employer may not require claimant to attend an additional independent medical examination (IME) to determine the appropriateness of surgery for claimant's accepted conditions.

**FINDINGS OF FACT**

Employer has accepted claimant's claim for an injury on January 6, 2002, for an acute L1 compression fracture condition. (Ex. 138.)

On November 11, 2003, claimant's specialist, Dr. Van Pett, provided a Prior Authorization Request to employer to perform surgery on claimant. The proposed procedures included an L1 corpectomy with fusion and instrumentation through a transthoracic approach with possible posterior approach. (Exs. 49 and 66.)

In April 2004, after employer did not authorize Dr. Van Pett's proposed surgery, claimant requested that the WCD review the matter and order employer to approve the surgery. (Ex. 57.)

In October 2004, WCD issued an Administrative Order holding that employer was liable for Dr. Van Pett's proposed surgery, if provided. (Ex. 66.)

In October 2007, the Oregon Supreme Court ultimately affirmed the WCD's October 2004 Administrative Order. (Exs. 72, 74, 104, and 118.)

In October 2007, Dr. Van Pett last examined claimant. Dr. Van Pett again requested that employer authorize the surgery that Dr. Van Pett had proposed in 2003. (Ex. 128.)

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<sup>1</sup> WCB Case No. 09-00125H was consolidated for hearing with WCB Case No. 09-04318. The two matters involve the same parties and the same evidentiary record. In the interests of substantial justice, the matters are hereby bifurcated for decision in separate orders because the appeal rights differ. *See* OAR 438-006-0065(5).

<sup>2</sup> See ALJ letter to counsel dated December 10, 2009.

In January 2008, claimant last attended an IME. (Ex. 126.)

In March 2008, upon claimant's request for WCD review, WCD ordered that employer was liable for the surgery that Dr. Van Pett had recently proposed because it was the same surgery that she had proposed in 2003. (Exs. 128 and 130.)

Subsequently, claimant discontinued treating with Dr. Van Pett and, in November 2008, began treating with Dr. Noonan. (Ex. 135.)

On April 21, 2009, Dr. Noonan submitted a Prior Authorization Request Form to employer for proposed surgery on claimant's back. The proposed procedures included an L1 corpectomy and a T12-L2 posterior fusion with iliac crest graft. Dr. Noonan advised that the surgery was to be scheduled later. (Exs. 146 and 153-17.)

On April 24, 2009, employer scheduled claimant for an IME on May 8, 2009, to evaluate the compensability of her condition and of treatment recommendations.(Ex. 132.)

On May 1, 2009, claimant requested WCD review. Claimant requested WCD to order employer to approve and pay for Dr. Noonan's proposed surgery and to order that claimant was not obligated to attend the IME that employer had scheduled for May 8, 2009. She argued that she had been required to attend past IMEs on the same issue.(Ex. 147.)

Claimant did not attend the IME on May 8, 2009, on the advice of her attorney.(Ex. 151.)

On May 27, 2009, WCD issued Defer and Transfer Order TX 09-0672. That Order addressed claimant's request for review of Dr. Noonan's proposed surgery. The Order stated that the issues in the review were whether the surgery was "appropriate" and, if so, whether employer was "liable." Pursuant to ORS 656.704(3)(b), the Order deferred the WCD's review of whether the surgery was appropriate and transferred the matter to the Workers' Compensation Board for hearing regarding an apparent causation issue. (Ex. 154.)

Employer requested that WCD reconsider the Defer and Transfer Order TX 09-0672. Employer stated in its request that it agreed Dr. Noonan's proposed surgery was related in major part to the accepted conditions. Employer stated that it did not believe, though, that the proposed surgery was reasonable and necessary. (Ex. 156.)

On June 10, 2009, WCD issued "Administrative Order MS 09-0724." That Order addressed whether claimant was required to attend an additional IME at employer's request. The Order noted that Dr. Van Pett's 2003 request for surgery had been upheld. The Order concluded that an additional IME would not "shed any light on the issue of a surgery that has already been litigated." WCD ordered that employer could not require claimant "to attend an additional exam to determine the appropriateness of surgery for the accepted condition." (Ex. 157.)

On July 10, 2009, WCD issued Administrative Order of Dismissal DTX 09-0877, which dismissed employer's request for reconsideration of the Defer and Transfer Order TX 09-0672. (Ex. 159.)

On July 27, 2009, employer requested a hearing challenging WCD's Administrative Order MS 09-0724. (Official notice.)

On July 29, 2009, employer requested a hearing objecting to the WCD's Defer and Transfer Order TX 09-0672 and its Administrative Order of Dismissal DTX 09-0877. (Official notice.)

### CONCLUSIONS OF LAW AND OPINION

Employer challenges the WCD's Administrative Order MS 09-0724 ordering that employer may not require claimant to attend an additional IME to determine the appropriateness of surgery for claimant's accepted condition.

The WCD's Administrative Order is reviewed *de novo* because the IME issue arises under ORS 656.325(1). See OAR 436-001-0025(1).

Employer is entitled to an independent medical consultation with respect to Dr. Noonan's surgery recommendation because it is a new, distinct recommendation under the director's rules.

ORS 656.325(1)(a) provides, in pertinent part,

“Any worker entitled to receive compensation under this chapter is required, if requested by the...self-insured employer, to submit to a medical examination at a time reasonably convenient for the worker as may be provided by the rules of the director. No more than three independent medical examinations may be requested except after notification to and authorization by the director...”

Under the WCD's rules, an insurer may obtain three medical examinations of the worker by medical service providers of its choice for each opening of the claim. OAR 436-010-0265(1); OAR 436-060-095(3). When the insurer has obtained the three medical examinations allowed and wishes to require the worker to attend an additional examination, the insurer must first notify and request authorization from the WCD. OAR 436-010-0265(2). However, for purposes of determining the number of IMEs, an elective surgery consultation obtained in accordance with OAR 436-010-0250(3) is not considered an IME and does not require approval under OAR 436-010-0265(2). OAR 436-010-0265(5)(c).

“Elective Surgery” is “surgery which may be required in the process of recovery from an injury or illness but need not be done as an emergency to preserve life, function or health.” OAR 436-010-0250(1). The attending physician, the authorized nurse practitioner, or the surgeon must give the insurer notice of the proposed surgery. The notice must provide the medical information that substantiates the need for the surgery and must state the approximate surgical date and location, if known. OAR 436-010-0250(2). “When elective surgery is recommended,

the insurer may require an independent consultation with a physician of the insurer's choice." OAR 436-010-0250(3).

Claimant argues that another IME should not be allowed because Dr. Noonan has simply proposed the same surgery that Dr. Van Pett proposed. Claimant argues that, since employer has already had at least one IME for Dr. Van Pett's notices of proposed surgery, employer has had the IME that OAR 436-0250(3) and OAR 436-0265(5)(c) allow for Dr. Noonan's notice of proposed surgery.

Claimant's arguments are not persuasive. OAR 436-010-0250(2) provides that only a limited group of physicians, including the surgeon, may provide a notice of proposed surgery. OAR 436-010-0250(3) gives employer the right to an independent medical consultation "when elective surgery is recommended." The rules provide then that the recommendations are physician and time sensitive. A different surgeon's notice given significantly later gives employer the right to a new medical consultation under OAR 436-010-0265(5)(c) regardless of any IMEs that employer obtained for the distinct prior notices. Dr. Van Pett's recommendation for surgery in 2003 and 2007 was a distinct notice from that by Dr. Noonan more than one year later.

This is not to say that the evidence might not ultimately support the application of "issue preclusion" to preclude denial of the later surgery because of the litigation of essentially the same issue in the prior proceeding. See *Drews v. EBI Companies*, 310 Or 134 (1990); *Liberty Northwest Insurance Corp. v. Bird*, 99 Or App 560, 560, rev den 309 Or 645 (1990) (prior litigation does not preclude further litigation where circumstances have changed to create a new set of operative facts). That is a distinct question though from whether a further elective surgery notice occurs that gives the employer a right to a further independent consultation.

Under the rules, WCD would be prejudging the merits of Dr. Noonan's new surgery recommendation by determining issue preclusion before employer exercised its rights to an independent medical consultation.

Accordingly, the director should order that employer is allowed an IME as an independent medical consultation concerning Dr. Noonan's notice of proposed elective surgery.

Claimant argued that she should be awarded a \$2,000 attorney fee if she prevailed and employer did not prevail on the IME question. However, employer prevailed. The director should not award such a fee.<sup>3</sup>

## ORDER

**IT IS THEREFORE ORDERED THAT** employer is allowed an IME as an independent medical consultation concerning Dr. Noonan's notice of proposed elective surgery.

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<sup>3</sup> There might have been an issue whether prevailing on the IME issue here would have involved compensation sufficiently to allow an assessed attorney fee here under ORS 656.385(1), (2), and (3). See *Brandon Grove*, 61 Van Natta 2565 (2009).