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In the ORS 656.245 Medical Services of

**Guy A. Landis, Claimant**

Contested Case No: 10-190H

**PROPOSED & FINAL ORDER**

August 10, 2011

GUY A. LANDIS, Petitioner

LIBERTY NORTHWEST INSURANCE CORPORATION, Respondent

Before Gregory J. Naugle, Administrative Law Judge

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Pursuant to notice, a hearing convened on the record in this matter on July 13, 2011, in Klamath Falls, Oregon, before Administrative Law Judge Naugle. Claimant appeared and was represented by attorney Jodie Phillips Polich. The employer, Lithia Motors Support Services, Inc., and its insurer, Liberty NW Insurance Corporation (Liberty), were represented by attorney David O. Wilson. The record closed at the conclusion of the hearing.

**ISSUES**

1. Propriety of WCD's November 18, 2010 Administrative Order MS 10-1092 which concluded that Liberty is not liable for a TENS unit and physical therapy prescribed by Jon McKellar, M.D.; and
2. Claimant's entitlement to an attorney fee.

**EVIDENTIARY RULINGS**

Exhibits 1-23 were submitted and admitted into evidence without objection. At hearing, an issue arose as to whether claimant should be allowed to testify. Claimant contended that while the record is closed with regard to medical evidence, the record can be supplemented at hearing with testimony or other nonmedical evidence, and that claimant should be allowed to testify. Claimant indicated the proposed testimony would be directed toward how long he has had the TENS unit, the failure of a neurostimulator, and his efforts regarding vocational retraining and work activities. Liberty, citing *Liberty Northwest Ins. Corp v. Kraft*, 205 Or App 59 (2006), and *Liberty Northwest Ins. Corp v. Mundell*, 219 Or App 358 (2008)<sup>1</sup>, objected to claimant testifying and argued that a substantial evidence review does not contemplate the ALJ making findings of fact.

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<sup>1</sup>See *Kraft*, 205 Or App at 62-63 (a substantial evidence review does not contemplate an ALJ making supplemental findings of fact), *Mundell*, 219 Or App at 362 (in reviewing the MRU's order for substantial evidence, an ALJ is limited to evaluating the evidence in the record to determine whether, based on that evidence, a reasonable factfinder in the MRU's position could have made the findings that the MRU actually made )

OAR 436-001-0225(2)<sup>2</sup> provides that in a substantial evidence/error of law review no new medical issues or evidence are admissible. However, in reading the cited cases, I am not persuaded that it is appropriate to allow any new evidence at such a hearing. Liberty's objection was sustained, and claimant's testimony was not considered.<sup>3</sup>

### FINDINGS OF FACT

I adopt the Findings of Fact in the Administrative Order.<sup>4</sup>

### CONCLUSIONS OF LAW AND OPINION

The WCD, acting as the Director's designate, concluded that Liberty was not liable for a TENS unit and physical therapy prescribed by Dr. McKellar. Claimant contends that WCD erred in its determination. Liberty argued the administrative order was supported by substantial evidence and did not reflect an error of law and should be affirmed. As follows, I agree with claimant that an error of law exists and that the medical services at issue are compensable.

The burden of proving a fact or position rests with the proponent. *Salem Decorating v. National Council on Comp. Ins.*, 116 Or App 170 (1992), *rev den* 315 Or 643 (1993). As the proponent of his position, claimant bears the burden of proving by a preponderance of evidence that the WCD's November 18, 2010 Administrative Order is incorrect. *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.)

The standard for reviewing the Director/WCD's Administrative Order is set forth in ORS 656.327(2), which provides that "[t]he administrative order may be modified at hearing only if it is not supported by substantial evidence in the record or if it reflects an error of law." *See* OAR 436-001-0225(2); *Liberty Northwest Ins. Corp v. Mundell*, 219 Or App 358, 362 (2008).

Here, the issue is whether Liberty is liable for a TENS unit and physical therapy prescribed by Dr. McKellar as compensable medical services.

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<sup>2</sup> OAR 436-001-0225(2) provides

"In medical service and medical treatment disputes under ORS 656 245, 656 247(3)(a), and 656 327, and managed care disputes under ORS 656 260(16), the administrative law judge may modify the director's order only if it is not supported by substantial evidence in the record or if it reflects an error of law. New medical evidence or issues may not be admitted or considered "

<sup>3</sup> To facilitate potential review, claimant made an offer of proof, and claimant's testimony was taken outside of the All's presence

<sup>4</sup> *See Kraft*, 205 Or App at 62-63, and *Mundell*, 219 Or App at 362

Pursuant to ORS 656.245(1)(a), an insurer is required to provide medical services for compensable conditions for such period as the nature of the injury or the process of recovery. ORS 656.245(1)(c)(A-L) identifies compensable medical services after the worker's condition is medically stationary and provides in relevant part:

"(c) Notwithstanding any other provision of this chapter, medical services after the worker's condition is medically stationary are not compensable except for the following:

(B) Prescription medications.

(J) With the approval of the insurer or self-insured employer, palliative care that the worker's attending physician \*\*\* prescribes and that is necessary to enable the worker to continue current employment \*\*\*. If the insurer or self-insured employer does not approve, the attending physician or the worker may request approval from the Director of the Department of Consumer and Business Services for such treatment. \*\*\*

(L) Curative care provided to a worker to stabilize a temporary and acute waxing and waning of symptoms of the worker's condition. "

Claimant contends that the TENS unit and physical therapy prescribed by Dr. McKellar are curative care essential for controlling pain and allowing him to remain functional to accomplish activities of daily living. Liberty contended the continued use of the TENS unit and physical therapy was palliative and that no sufficient palliative care request had been submitted.

Citing *Holland, William S.*, 98 CCHR 120 (1999), claimant argued that whether medical services are curative or palliative is a case-by-case determination depending on the nature of the treatment at issue.

Here, the record reflects that claimant's accepted conditions include arachnoiditis and that he has been using a TENS unit since 2008.

Dr. McKellar indicated that claimant's condition was medically stable and that his pain control had been greatly improved through the TENS unit and water therapy, which allowed him to reduce his narcotic usage. Dr. McKellar opined that without the treatment claimant's condition would worsen and he would experience moderately severe pain with limited motion and become bedridden over time. (Ex. 16.)

Although called "curative care," treatment must stabilize a temporary and acute waxing and waning of *symptoms* of the worker's condition to be compensable.

Here, Dr. McKellar indicated that claimant's pain is a symptom of his condition and that the TENS unit and physical therapy are directed towards controlling his pain symptoms. This treatment, however, is not compensable "curative care" unless it stabilizes a temporary and

acute waxing and waning. Dr. McKellar opined that that without the treatment claimant's condition would worsen and he would experience moderately severe pain with limited motion. As Dr. McKellar's opinion reflects that both claimant's condition and his pain symptoms would worsen without the treatment at issue, it is sufficient to establish that the disputed treatment is stabilizing acute waxing and waning of pain symptoms.

Accordingly, claimant has established that the disputed treatment is compensable "curative care" under ORS 656.245(1)(c)(L) and met his burden to establish the administrative order erred in concluding Liberty was not liable for the TENS unit and physical therapy prescribed by Dr. McKellar.<sup>5</sup>

ORS 656.385(1) provides that the Administrative Law Judge shall require the insurer to pay a reasonable attorney fee to claimant's attorney when claimant prevails in a dispute of compensation benefits or medical services pursuant to ORS 656.245. ORS 656.385(1) further provides that absent a showing of extraordinary circumstances, the maximum attorney fee awarded under this subsection shall be adjusted annually on July 1 by the same percentage increase as made to the average weekly wage defined in ORS 656.211. WCB Bulletin No. 1-2011, effective July 1, 2011, reflects that an attorney fee awarded under ORS 656.211 may not exceed \$3,157.09 absent showing of extraordinary circumstances.

Here, claimant did not contend extraordinary circumstances were present; and I agree. However, when considering the time likely devoted and benefit achieved, a reasonable attorney fee is \$3,157.09.

### **ORDER**

**IT IS HEREBY ORDERED** that Liberty Northwest Insurance Corporation shall pay for the TENS unit and physical therapy prescribed by Dr. McKellar; and

**IT IS FURTHER ORDERED** that Liberty Northwest Insurance Corporation is assessed a reasonable attorney fee pursuant ORS 656.385(1) in the amount of \$3,157.09 to be paid directly to claimant's attorney.

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<sup>5</sup> Claimant also argued that the services were compensable as prescriptions and that the TENS unit was a prosthetic device. I decline to address these arguments as the disputed treatment was found compensable curative care.