

In the ORS 656.327 Medical Treatment Dispute of

**Ciro Reyes-Flores, Claimant**

Contested Case No: 11-130H

**PROPOSED & FINAL ORDER**

December 30, 2011

INTERMOUNTAIN CLAIMS, INC., Petitioner

CIRO REYES-FLORES, Respondent

Before Jill M. Riechers, Administrative Law Judge

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Pursuant to notice, the hearing convened on December 1, 2011, before Administrative Law Judge Jill M. Riechers in Portland, Oregon.<sup>1</sup> Claimant was present and represented by Matthew L. Roy. The employer, Vinyl Northwest, Inc. - Pella Corporation, and its insurer processing agent, Intermountain Claims, Inc. (“Intermountain”), were represented by Robert J. Radler. Jerry Olson was present on behalf of employer. In WCB Case No. 11-00130H, Exhibits 1 through 112, submitted on October 4, 2011 by Becky Miner of the Department of Consumer & Business Services (“DCBS”) Workers' Compensation Division (“WCD”), were admitted into evidence. The record in this case closed on the date of hearing.

**ISSUE**

Employer/Intermountain appeal from WCD's August 31, 2011 Administrative Order, TX 11-0645, which resolved a medical treatment dispute by ordering that L5-S1 foraminotomy surgery proposed by Jordi Kellogg, M.D. was appropriate surgery for claimant, and that if the surgery was provided, the insurer was liable for all associated costs. (Ex 110).

**FINDINGS OF FACT**

The Findings of Fact set forth in Administrative Order, TX 11-0645, dated August 31, 2011, are hereby adopted and incorporated by reference. (Ex 110). See *Liberty Northwest Ins. Corp. v. Kraft*, 205 Or App 59, 62-63 (2006); see also *Liberty Northwest Ins. Corp. v. Mundell*, 219 Or App 358 (2008).

**CONCLUSIONS OF LAW AND OPINION**

An injured worker, insurer or self-insured employer must request review by the director of the DCBS if there is a belief that the medical treatment the worker is receiving, will receive or is proposed to receive is “excessive, inappropriate, ineffectual or in violation of rules regarding the performance of medical services” prior to requesting a hearing on the issue. See ORS 656.327(1)(a). After the director decides the medical treatment dispute in an administrative order, the dissatisfied party may request review under ORS 656.704. See ORS 656.327(2). The

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<sup>1</sup> This matter was originally consolidated with WCB Case No. 11-02451 and heard at the same time on December 1, 2011. The cases have been bifurcated. The record in WCB Case No. 11-02451 remains open at this time.

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. ORS 656.327(2); OAR 436-001-0225(2); OAR 436-010-0008(13)(a). No new medical evidence or issues shall be admitted. *Id.*

In the present case, employer/Intermountain assert that the August 31, 2011 Administrative Order should be modified, on grounds that it is neither supported by substantial evidence in the record nor applies the correct law. Claimant maintains that the Administrative Order was correct and should be affirmed. As the parties seeking modification of the Order, employer/Intermountain have the burden of proof. See *Harris v. SAIF*, 292 Or 683, 690 (1982) (general rule is that burden of proof is on the proponent of a fact or position).

#### Is Administrative Order TX 11-0645 Supported by Substantial Evidence?

“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.” ORS 183.484(5)(c). In reviewing a finding to determine whether it is supported by substantial evidence, the reviewing entity must:

“evaluate evidence against the finding as well as evidence supporting it to determine whether substantial evidence exists to support that finding. If a finding is reasonable in light of countervailing as well as supporting evidence, the finding is supported by substantial evidence.” *Mundell*, 219 Or App at 362, citing *Garcia v. Boise Cascade Corp.*, 309 Or 292, 295 (1990).

If there are doctors on both sides of a medical issue, whichever way the WCD found the facts will probably have substantial evidentiary support. See *Dynea USA, Inc. v. Fairbanks*, 241 Or App 311, 318-19 (2011), citing *Armstrong v. Asten-Hill Co.*, 90 Or App 200, 206 (1988). The WCD's decision should be overturned only if “the credible evidence apparently weighs overwhelmingly in favor of one finding” and WCD found the other, without providing substantial reason in its order for doing so. *Id.*

Here, WCD's medical reviewer, on behalf of the director, noted that Dr. Dietrich, a physician who evaluated claimant in an independent medical examination (“IME”), determined that the surgery proposed by Dr. Kellogg was not medically necessary. WCD also considered the opinion of Christopher Morgan, M.D., a diagnostic radiologist, who thought the area of decreased signal on the February 2, 2011 MRI scan was scar tissue and unlikely to be causing symptoms. The director also considered the IME opinion of Drs. Reimer and Swanson (rendered in February 2010, prior to Dr. Kellogg's 2011 request to perform surgery), which concluded the claimant's lumbar fusion was stable and noted non-anatomic complaints.

The director arranged for Todd Kuether, M.D., a neurosurgeon, to evaluate claimant and provide an opinion concerning the proposal for surgery. (Ex 102). Dr. Kuether noted that claimant had developed twinging pain down his right leg in an L5 distribution. Claimant rated his right leg pain at 5/10, and his back pain at 4/10. (Ex 102-1). Dr. Kuether thought that removal of the material shown in the MRI at the right foramen at L5-SU which he believed was a piece of ligament abutting the right L5 nerve root, would relieve claimant's right leg pain. Dr. Kuether stated that to “alleviate right-sided radiating leg pain, a right L5-S1 foraminotomy is certainly a

reasonable and appropriate option." (Ex 102-4). Dr. Kuether did not think that claimant's chronic low back pain would improve with the proposed surgery, however.

In deciding that the proposed surgery should be approved, WCD considered the opinions from these physicians and Dr. Kellogg, and also the fact that Dr. Kellogg, who had proposed the surgery, had the most opportunity to become familiar with claimant's response to pain and ability to continue to function. WCD also took into account that neither Dr. Kellogg nor Dr. Kuether had documented pain behaviors. WCD noted that Dr. Kuether had identified objective neurological findings in support of the diagnosis of a right L5 radiculopathy, and had concluded that the proposed surgery was reasonable and appropriate. After reviewing all the records, WCD concluded that "the disputed right L5-S1 foraminotomy is appropriate." (Ex 110-5).

In reviewing the Administrative Order for substantial evidence, I do not "have authority to determine whether the record could support findings different from those reached" by WCD, nor do I "have authority to reweigh the evidence and substitute" my "view of the evidence for that of" WCD. See *Mundell*, 219 Or App at 363. Here, WCD considered the various opinions, and explained its reasons for concluding that Dr. Kuether's opinion was the most persuasive. A reasonable factfinder in WCD's position could make the findings and draw the conclusions that WCD did in this case. See *Mundell*, 219 Or App at 363. It follows that WCD's opinion is supported by substantial evidence.

#### Does Administrative Order TX 11-0645 Reflect an Error of Law?

Employer/Intermountain assert that the Director erroneously applied an older version of the law dealing with reasonableness and necessity of medical treatment, rather than the current version. They point to the Director's citation to the phrase, "reasonable and necessary" from *West v. SAIF*, 74 Or App 317, 320 (1985) as evidence that the Director applied the wrong standard.

ORS 656.245(1) requires, in part, that medical services be provided "for such period as the nature of the injury or the process of the recovery requires \*\*\*." ORS 656.327(1) permits a party to request director review if proposed treatment is "excessive, inappropriate, ineffectual or in violation of rules regarding performance of medical services." OAR 436-010-0230(1) (WCD Admin. Order 11-056) provides:

Medical services provided to the injured worker must not be more than the nature of the compensable injury or the process of recovery requires. Services which are unnecessary or inappropriate according to accepted professional standards are not reimbursable.

At the outset, Administrative Order TX 11-0645 provided that the matter would be reviewed pursuant to ORS 656.327 and OAR 436-010-0008 (which describes the review process). (Ex 110-1). At the beginning of the Conclusion and Opinion section of the Order, the Director correctly identified the standard of review when the issue was described; "whether the proposed right L5-S1 foraminotomy and possible removal/replacement of right-sided screws proposed by Dr. Kellogg is appropriate treatment for Mr. Reyes." (Ex 110-4). The Director also correctly noted the standard of review prescribed by ORS 656.327(1), "So long as treatment is

not excessive, ineffectual, inappropriate or in violation of the medical rules, the insurer is required to pay for such treatment. ORS 656.327.” (Ex 110-4). After considering the evidence, the Director concluded that the surgery was appropriate, and reiterated that in the Conclusion section of the Order. (Ex 110-5, -6).

Reading Administrative Order TX 11-0645 in its entirety, it appears that the Director applied the proper legal standards contained in the statutes and rule in analyzing the evidence and reaching a conclusion.

It follows that because Administrative Order TX 11-0645 is supported by substantial evidence and reflects no errors of law, it must be affirmed. See ORS 656.327(2); OAR 436-001-0225(2); OAR 436-010-0008(13)(a).

### Attorney Fees

OAR 436-010-0008(12) provides that attorney fees in administrative review will be awarded as provided in ORS 656.385(1) and OAR 436-001-0400 through 436-001-0440. The statutory basis for an attorney fee in this type of case is contained in ORS 656.385(1). An attorney fee awarded pursuant to this subsection may not exceed \$3,000.00, 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, if any. ORS 656.385(1). The current state average weekly wage is \$842.52, and the current maximum attorney fee is \$3,157.09. See WCD Bulletins 1-2011 and 111.

On August 29, 2011, claimant's counsel estimated he had spent four hours on the issue of the proposed surgery that was before WCD. (See Exs 106, 107, 110-5). Applying the matrix set forth in OAR 436-001-0410, the Director ordered claimant a fee of \$2,050.00. Claimant did not provide an additional statement of hours for services devoted to the issue of the proposed surgery at hearing, but I estimate that he spent at least an additional four hours. Based on that assumption, as well as on the results achieved, including the significant value of the benefit claimant has obtained by virtue of the approval of the proposed surgery, I conclude that a reasonable attorney fee in this matter is a total of \$3,157.09, representing the \$2,050.00 awarded by the Administrative Order, and an additional \$1,107.09 awarded in the present proceeding.<sup>2</sup> ORS 656.385(1); OAR 436-001-0400(3); OAR 436-001-0410(1).

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<sup>2</sup> I do not believe I have the authority to award a total fee in excess of \$3,157.09, absent a showing of extraordinary circumstances. See, e.g., *Glen A. Dever*, 11 CCHR 39 (2006).

**ORDER**

IT IS THEREFORE ORDERED that the August 31, 2011 Administrative Order, TX 11-0645, is affirmed in its entirety. In addition to the assessed attorney fee of \$2,050.00 granted in the Administrative Order, claimant's counsel is hereby awarded an additional attorney fee of \$1,107.09, for a total attorney fee of \$3,157.09, to be paid in addition to, and not out of, compensation.