

1 **BEFORE THE HEARING OFFICER PANEL**  
2 **STATE OF OREGON**  
3 **FOR THE DEPARTMENT OF CONSUMER AND BUSINESS SERVICES**  
4 **WORKERS' COMPENSATION DIVISION**

5 **In the Matter of the ORS 656.327** )  
6 **Medical Treatment Dispute of** ) **PROPOSED AND FINAL**  
7 **Gary L. Ennis, Claimant** ) **CONTESTED CASE**  
8 ) **HEARING ORDER**  
9 LIBERTY NORTHWEST INSURANCE )  
10 CORPORATION, Petitioner )  
11 ) Contested Case No: H01-099  
12 v. ) Claim No: C604-513809  
13 ) Date of Injury: 9-19-96  
14 GARY A. ENNIS, Respondent ) WCD File No: I872282  
15 )

16 Insurer appeals an administrative order issued by the Medical Review Unit (MRU) of the  
17 Workers' Compensation Division (WCD) of the Department of Consumer and Business Services  
18 (director or department). On October 15, 2001, Administrative Law Judge Catherine P. Coburn  
19 conducted a hearing in this matter. Petitioner Liberty Northwest Insurance Corporation (insurer)  
20 was represented by attorney Deryl K. Nielsen. Respondent Gary L. Ennis (claimant) was  
21 represented by attorney Christine Jensen. The Workers' Compensation Division (WCD) waived  
22 appearance. Senior case manager Vida Rich testified on insurer's behalf; claimant testified on  
23 his own behalf.

24 The record of this proceeding, consisting of a tape recording of the hearing, all evidence  
received, and all hearing papers filed, has been considered. The findings of fact set out below  
are based upon the entire record.

**ISSUE**

The issue is whether MRU correctly determined that insurer was barred from disputing  
the medical appropriateness of a right shoulder surgery proposed by Thomas J. Carlsen, MD  
pursuant to OAR 436-010-0250.

1 **EVIDENTIARY RULINGS**

2 WCD Exhibits 1 through 30 were received without objection. The parties stipulated that  
3 insurer received Dr. Carlson’s chart note dated November 7, 2000 (Ex. 4-26) on November 27,  
4 2000. Pursuant to OAR 137-003-0615, I take judicial notice of the fact that December 3, 2000  
5 was a Sunday.

6 **FINDINGS OF FACT**

7 On September 19, 1996, claimant suffered a right shoulder injury while working as a  
8 millwright welder. (Ex. 1). In December 1997, insurer accepted “rotator cuff tear right  
9 shoulder” as a disabling claim. (Ex. 3). Claimant underwent surgical rotator cuff repair in  
10 October 1996. (Ex. 4-5). Dr. Carlsen performed a second surgical rotator cuff tear repair in  
11 December 1997. (Id). Following the second surgery, the right shoulder remained symptomatic  
12 and Dr. Carlsen referred claimant to Scott R. Jacobson, MD for a second opinion. (Ex. 4-5). Dr.  
13 Jacobson stated, “I do not think further surgical intervention will be helpful here.” (Ex. 4-7).

14 Dr. Carlsen administered a series of injections. (Exs. 4-8 and 4-19). In June 1988, Dr.  
15 Carlsen discussed with claimant that surgery has “a very unpredictable success rate and it’s very  
16 doubtful that his rotator cuff function will be improved.” (Ex. 4-10). However, claimant elected  
17 to pursue surgery. (Id). Dr. Carlsen’s December 3, 1998 chart note states, “ I don’t think we are  
18 going to operate on him. I think his rotator cuff has had two failed surgeries. It is unlikely he  
19 would tolerate a third, and it is unlikely to be anymore successful with a third than it has been  
20 with the first two...” (Ex. 4-13). In October 1999, Dr. Carlsen repeated that no further surgery  
21 would help claimant. (Ex. 4-15). In September 2000, Dr. Carlsen reiterated that a third surgery  
22 did not have a predictable chance of helping claimant. (Ex. 4-23). In October 2000, Dr. Carlsen  
23 discussed a surgical option and noted, “This would be a complex surgery with an unpredictable  
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1 success rate. It is not something I am suggesting for him, but I think it is his other choice other  
2 than live with it, which so far has been unacceptable for him.” (Ex. 4-24).

3 In October 2000, Dr. Carlsen again referred claimant to Dr. Jacobson for consultation.  
4 (Ex. 4-25). Dr. Jacobson opined, “My feeling is that it is probably best to treat this  
5 nonoperatively and have [claimant] continue to deal with his pain. I think if he chose to undergo  
6 surgery that he needs to understand there is a very high likelihood of failure.” (Ex. 4-25). On  
7 November 7, 2000, Dr. Carlsen wrote, “I explained to [claimant] that both Dr. Jacobson and I  
8 were not confident that we could help him, and that he could be made worse...This would be a  
9 pretty significant surgery with a very unpredictable success rate.” (Ex. 4-26).

10 On November 8, 2000, Dr. Carlsen submitted a request for surgery which contains no  
11 explanation of the need for surgery. (Ex. 9). Insurer received Dr. Carlsen’s November 8, 2000  
12 chart note on November 27, 2000. (By stipulation of the parties). On December 4, 2000, insurer  
13 denied the request for surgery. (Ex. 10).

14 **CONCLUSIONS OF LAW AND REASONING**

15 This case presents a medical treatment dispute arising under ORS 656.327. Jurisdiction  
16 lies with the director. ORS 656.245(1)(c)(J) and ORS 656.327(1). I may modify the  
17 administrative order only if it is not supported by substantial evidence in the record or if it  
18 reflects an error of law. ORS 656.327(2); OAR 436-001-0225(3).

19 An insurer is obligated to provide medical services for conditions materially caused by  
20 the work injury for such period as the nature of the injury or the process of recovery requires.  
21 ORS 656.245(1). This obligation continues over the injured worker’s lifetime. ORS 656.245  
22 (1)(b). However, medical treatment that is excessive, inappropriate, ineffectual or violates  
23 administrative rules is not reimbursable. ORS 656.327. The director reviews medical  
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1 appropriateness questions pursuant to ORS 656.327 and administrative rules promulgated for  
2 the purpose of establishing uniform guidelines for provision of medical services to injured  
3 workers.

4 Under the heading “Elective Surgery”, OAR 436-010-0250 provides:

5 “(2) “Except as otherwise provided by the MCO, when an  
6 attending physician or [consulting physician] surgeon upon referral  
7 by the attending physician believes elective surgery is needed to  
8 treat a compensable injury or illness, the attending physician or the  
9 surgeon, shall give the insurer actual notice at least seven days  
prior to the date of the proposed surgery. Notification shall give  
the medical information that substantiates the need for surgery, an  
estimate of the surgical date and the post-surgical recovery period,  
and the hospital where surgery is to be performed.”

10 “(3) When elective surgery is recommended, the insurer may  
11 require an independent consultation with a physician of  
12 insurer’s choice. The insurer shall notify the recommending  
13 physician, worker and the worker’s representative, within  
14 seven days of receipt of the notice of intent to perform surgery,  
whether or not a consultation is desired. When requested, the  
consultation shall be completed within 28 days after notice to  
the attending physician.

15 OAR 436-010-0250(5) provides in part:

16 “(5) Failure of the insurer to timely respond to the physician’s  
17 elective surgery request or to timely request administrative  
18 review pursuant to this rule shall bar the insurer from later  
disputing whether the surgery was excessive, inappropriate or  
ineffectual”

19 MRU determined that insurer was barred from disputing the appropriateness of the  
20 proposed surgery because it failed to comply with the requirements of OAR 436-010-0250.  
21 MRU found that insurer failed to respond within seven days of receiving the surgery request as  
22 required by subsection (3). Consequently, MRU ruled that insurer was barred from challenging  
23 the medical appropriateness of the proposed surgery pursuant to subsection (5). Finally, MRU  
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1 concluded that the decision to proceed with the proposed surgery rests with claimant and the  
2 attending physician and that insurer is liable for all costs associated with the surgery.

3 Insurer first contends that it received no valid recommendation for surgery and therefore,  
4 insurer is not subject to the response requirement prescribed by OAR 436-010-0250(3). Insurer  
5 next contends that if OAR 436-010-0250(3) applies, it complied timely and is not barred from  
6 challenging the medical appropriateness of the proposed surgery. In support of its position,  
7 insurer argues that weekend days are not computed in the timeframe specified by OAR 436-010-  
8 0250.

9 I disagree with insurer's argument that it received no valid surgery recommendation, and  
10 therefore, the response required by OAR 436-010-0250(3) was not triggered. Although Dr.  
11 Carlsen and Dr. Jacobson had repeatedly recommended against additional surgery, the surgery  
12 request form, in conjunction with the November 7, 2000 chart note constitute a valid surgery  
13 recommendation. Therefore, insurer was required by OAR 436-010-0250(3) to respond within  
14 seven days of its receipt.

15 OAR 436-010-0250(3) imposes a mandatory requirement that the insurer provide notice,  
16 within seven days of receiving a surgery request, whether or not it desires an independent  
17 consultation. The term "days" means "calendar days". OAR 436-010-0005(9). Dr. Carlsen  
18 submitted a surgery request form on November 8, 2000 and insurer received the November 7,  
19 2000 chart note on November 27, 2000. Eight days after receiving the valid surgery request, on  
20 December 4, 2000, insurer responded. December 3, 2000 was a Sunday; however, pursuant to  
21 OAR 436-010-0005(9), weekend days are included in computing the seven-day response period.  
22 Therefore, insurer failed to respond timely to the surgery request and is barred from disputing  
23 the medical appropriateness of the proposed right shoulder surgery.

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**ATTORNEY FEES**

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Claimant has prevailed in a contested case hearing, and therefore, is entitled to a reasonable attorney fee. ORS 656.385(1). Claimant’s attorney requested a fee of \$2,500. Considering the factors listed in OAR 436-001-0265, \$2,500 is a reasonable fee for claimant’s attorney in this matter.

**ORDER**

IT IS HEREBY ORDERED that:

Administrative Order TX01-861 dated August 15, 2001 is affirmed.

Dated this \_\_\_\_\_ day of October, 2001

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Catherine P. Coburn, Administrative Law Judge  
Hearing Officer Panel