

In the Matter of the ORS 656.327 Medical Treatment Dispute of
Flynn, Lisa G., Claimant

Contested Case No: HH10-120

PROPOSED & FINAL ORDER

April 17, 2002

ALBERTSON'S CORPORATION, Petitioner
LISA G. FLYNN, Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

HISTORY OF THE CASE

The self-insured employer appeals an administrative order issued by the Medical Review Unit (MRU) of the Workers' Compensation Division (WCD) of the Department of Consumer and Business Services (director or department). On March 20, 2002, Administrative Law Judge Catherine P. Coburn conducted a hearing in this matter. Petitioner self-insured employer Albertson's Corporation and its insurance processor Gates McDonald (insurer) was represented by attorney Patrick D. Gilroy. Respondent Lisa G. Flynn (claimant) was represented by attorney Donald E. Beer. The Workers' Compensation Division (WCD) waived appearance. Claimant testified on her own behalf and no other witnesses testified. The record closed on the date of hearing.

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 the lumbar surgery recommended on March 6, 2001 by Timothy J. Treible, MD (Orthopedic Surgery) was appropriate medical treatment pursuant to ORS 656.327.

EVIDENTIARY RULINGS

WCD Exhibits 1 through 120, insurer's Supplementary Exhibits 85a through 113a and 115A through 122 as well as claimant's Supplementary Exhibits 115AA through 125 were received without objection.

FINDINGS OF FACT

On December 2, 1998, claimant suffered a lumbar injury while working as a meat butcher. (Exs. 6, 20, 30 and 54). Insurer accepted a disabling claim for a "central herniated disc at L4-5". (Ex. 54).

On January 12, 1999, Lawrence J. Franks, MD performed an L4-5 discectomy. (Ex. 10).

In May 1999, Dr. Franks released claimant to regular work with limitations. (Ex. 25). Claimant returned to work and experienced increasing lumbar pain. (Testimony of claimant). In April 2000, Dr. Franks noted, "If this pain becomes incapacitating she might require and best be treated with a fusion at L4-5." (Ex. 42).

In April 2000, Dr. Franks limited claimant's work to 25 hours per week. (Ex. 46). In October 2000, Dr. Franks noted that claimant continued to work with progressive disability due to pain and recommended a lumbar myelogram as a diagnostic procedure. (Ex. 59). In December 2000, Dr. Franks took claimant off work for one week and referred claimant to Dr. Treible for evaluation as to whether a fusion at L4-5 or L5-S1 would be appropriate. (Exs. 63, 66, 68, 85 and 96).

In February 2001, Dr. Treible performed a discography at L3-4, L4-5 and L5-S1 in order to evaluate claimant for a fusion. (Ex. 82). On March 6, 2001, Dr. Treible recommended an anterior interbody fusion at L4-5 and L5-S1. (Ex. 86). Dr. Treible stated, "It appears as though she sustained a facet fracture at the time of her lumbar discectomy which has significantly compromised her outcome. The treatment for this is fusion." (*Id.*).

On April 18, 2001, Richard C. Arbeene, MD (Orthopedic Surgery) and Bradley J. Berquist, MD (Neurosurgery) conducted an insurer's medical examination (IME). (Ex. 92). They questioned the existence of an L4-5 facet fracture. (Ex. 92-5). They opined that the proposed surgery was neither reasonable nor appropriate and expressed doubt that it would improve claimant's chronic low back pain. (Ex. 92-7). Insurer sent the IME report to Dr. Treible requesting his opinion concerning the proposed surgery and Dr. Treible did not respond. (Exs. 93 and 99). In May 2001, Dr. Franks disagreed with the opinions of Drs. Arbeene and Berquist and stated, "I believe the best way to treat this patient and to get her back to work is to perform the fusion as is recommended by Dr. Treible." (Ex. 96-2).

On August 1, 2001, Robert W.H. Ho, DO conducted a medical arbiter's examination at MRU's request. (Ex. 109). Dr. Ho explained that spinal fusion is effective in relieving pain if intervertebral segment movement is the source of pain. Dr. Ho opined that in claimant's case, it had not been established that movement at L4 and L5 was the sole or primary source of pain. (Ex. 109-2). Dr. Ho recommended treating claimant with conservative measures and eliminating alternative causes of pain, including the L4-5 facet fracture before resorting to additional surgery. (Ex. 109-3).

On September 17, 2001, MRU issued the administrative order holding insurer liable for the cost of the proposed surgery. (Ex. 114). On October 5, 2001, Dr. Treible performed an L4-5 and L5-S1 anterior interbody fusion. (Ex. 115A).

Prior to the disputed surgery in October 2001, claimant took six 750 mg Vicodan, Soma and sleeping pills per day. (Testimony of claimant). At the time of hearing, five months postsurgery, claimant took four 500 mg Vicodan per day and no Soma or sleeping medication. (*Id.*).

CONCLUSIONS OF LAW AND REASONING

This case presents a medical treatment dispute arising under ORS 656.327. Jurisdiction lies with the director. ORS 656.245(1)(c)(J) and ORS 656.327(1). I may modify the administrative order 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(3). Insurer does not raise specific errors of law, but argues that MRU's findings are not supported by substantial evidence. In order to determine whether substantial evidence exists, I am required to:

“[L]ook at the whole record with respect to the issue being decided, rather than one piece of evidence in isolation. If an agency's finding is reasonable, keeping in mind the evidence against the finding as well as the evidence supporting it, there is substantial evidence. For instance, and in the context which is likely to occur in workers' compensation cases, if there are doctors on both sides of a medical issue, whichever way the [director] finds the facts will probably have substantial evidentiary support.***The difference between the 'any evidence' rule and the substantial evidence test***will be decisive only when the credible evidence apparently weighs overwhelmingly in favor of one finding and the [director] finds the other without giving a persuasive explanation.”
Armstrong v. Asten-Hill Co., 90 Or App 200, 206 (1988).

An insurer is obligated to provide medical services for conditions materially caused by the work injury for such period as the nature of the injury or the process of recovery requires. ORS 656.245(1). This obligation continues over the injured worker's lifetime. ORS 656.245(1)(b). However, medical treatment that is excessive, inappropriate, ineffectual or violates administrative rules is not reimbursable. ORS 656.327. OAR 4360-010-250 governs the provision of elective surgery¹ to injured workers. Pursuant to OAR 436-010-0250(5)², insurer timely contested the medical appropriateness of the proposed surgery.

¹ OAR 436-010-0250 (1) provides:

“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.”

² OAR 436-010-0250(5) provides:

“If the insurer believes the proposed surgery is excessive, inappropriate, or ineffectual and cannot resolve the dispute with the recommending physician, the insurer shall request an administrative review by the director within 21 days of the notice provided in (4)(c). Failure of the insurer to timely respond to the physician's elective surgery request or to timely request administrative review pursuant to this rule shall bar the insurer from later disputing whether the surgery was excessive, inappropriate or ineffectual.”

As petitioner, insurer contends that MRU's decision that the proposed surgery is medically appropriate is not supported by substantial evidence. In support of its position, insurer first argues that claimant's continued reliance on pain medication five months-post surgery demonstrates that the surgery was ineffectual. However, the record contains no medical evidence to support this defense theory. Furthermore, new medical evidence that was not

before MRU is not admissible at the contested case hearing. ORS 656.327(2).³ Inasmuch as the surgery was performed after MRU published its order, I may not consider any medical evidence pertaining to claimant's post-surgery medications.

Insurer further argues that MRU's decision is not supported by substantial evidence because the record contains several medical opinions recommending against the disputed surgery. Upon substantial evidence review, my role is not to reweigh the evidence but simply to determine whether the record supports MRU's decision in this matter. The medical evidence here is divided. In determining that the proposed surgery was appropriate, MRU relied upon and found the opinions of Drs. Franks, Treible and Ho persuasive. Before he recommended surgery, Dr. Treible performed a discography which he interpreted as revealing a facet fracture at L4-5. Dr. Treible identified the fracture as the pain source and opined that fusion was the appropriate treatment. Dr. Franks agreed with Dr. Treible's surgery recommendation.

Contrary to MRU's interpretation, Dr. Ho's opinion does not weigh in favor of either party's position. Supporting insurer's contention, Dr. Ho opined that the proposed surgery would be appropriate only after conservative measures were applied and alternate causes were ruled out. Supporting claimant's contention, Dr. Ho noted the L4-5 facet fracture. However, he failed to address the question whether the proposed surgery would appropriately treat such a fracture. Finally, Drs. Arbeene and Berquist questioned whether the discogram established the existence of a facet fracture and recommended against the proposed surgery.

Having reviewed the record in the entirety, I conclude that MRU's reliance on the opinions of Drs. Frank and Treible is reasonable. Therefore, MRU's determination that the proposed surgery was appropriate medical treatment is supported by substantial evidence in the record. Accordingly, I affirm.

ATTORNEY FEES

Claimant has prevailed in a contested case hearing, and therefore, is entitled to a reasonable attorney fee. ORS 656.385(1). Claimant's attorney submitted a Statement of Services listing 6.9 hours devoted to the case and requesting a fee of \$1,863. Considering the factors listed in OAR 436-001-0265, I find that \$1,863 is a reasonable fee for claimant's attorney's services in this matter.

³ ORS 656.327(2) provides in part:

"At the contested case hearing, the administrative order may be modified only if it is not supported by substantial evidence or reflects an error of law. No new medical evidence or issues shall be admitted."

ORDER

IT IS HEREBY ORDERED that:

The Administrative Order dated September 17, 2001 is affirmed.

Dated this _____ day of April 2002.

Catherine P. Coburn, Administrative Law Judge
Hearing Officer Panel