

In the Matter of the ORS 656.327 Medical Treatment Dispute of
Grout, Ronnie A., Claimant

Contested Case No: H01-084

PROPOSED & FINAL ORDER

January 2, 2002

LIBERTY NORTHWEST INSURANCE CORPORATION, Petitioner
RONNIE A. GROUT, Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

Insurer appeals a July 5, 2001 Administrative Order issued by the Medical Review Unit (MRU) of the Workers' Compensation Division, Department of Consumer and Business Services. On October 11, 2001, Administrative Law Judge (ALJ) Ella D. Johnson conducted a telephone hearing in this matter. Senior Trial Counsel David O. Wilson represented petitioner Liberty Northwest Insurance Corporation (Liberty or insurer). Respondent Ronnie A. Grout (claimant) was represented by attorney Juli Point Hall. The Department of Consumer and Business Services, Workers' Compensation Division (WCD) waived appearance. No witnesses testified. The record closed following the hearing and was reopened and closed on December 17, 2001.

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 on the entire record.

ISSUE

Whether MRU's order determining that the proposed anterior interbody fusion of L4-5 surgery is appropriate treatment for claimant's compensable condition is not supported by substantial evidence in the record or reflects an error of law.

EVIDENTIARY RULING

The record consists of WCD Exhibits 1 through 98, which were received into evidence without objection. Liberty withdrew Exhibit 80A and offered Exhibits 6A, 16A, 36A, 37A, 42A, 71A, 73A, 73B, 78A, 79A, 86A, and 99, and 100 through 106. Inasmuch as these exhibits do not constitute new medical evidence but rather clarification of the medical evidence before MRU, they were admitted into the record without objection. OAR 436-001-0195.

Additionally, insurer subsequently offered the November 29, 2001 Opinion and Order (O & O) by Workers' Compensation Board (WCB) Administrative Law Judge (ALJ) Menashe regarding the compensability of claimant's current L5-S1 disc condition. I have marked the ALJ's O & O as Exhibit 107, reopened the record and admitted Exhibit 107 into the record.

FINDINGS OF FACT

I affirm, adopt and incorporate by this reference the Findings of Fact set forth in MRU's

July 5, 2001 Administrative Order with the following supplementation.

Dr. Bert proposed a two level fusion at L4-5 and LS-1 surgery and claimant asked for approval of the surgery on February 6, 2001. (Ex. 71A). In response to claimant's counsel's January 31, 2001 letter asking if claimant's condition had worsened, Dr. Bert opined that claimant has always had painful discs at L4-5 and L5-S1. (Ex. 73B). On January 15, 2001, Dr. Bert opined that in order to relieve claimant's pain, both the L4-5 and L5-S1 discs should be addressed by surgery. (Ex. 71). Dr. Bert further opined that surgery at L4-5 was reasonable and necessary and that claimant's L5-S1 disc degeneration was caused in major part and accelerated by claimant's repetitive lifting and work injury. (Exs. 74 and 78A).

On May 21, 2001, the department requested Michael W. Potter, MD (Neurosurgery) to examine claimant and provide an opinion as to whether the proposed interbody fusion of L4-5 and L5-S1 was appropriate treatment for claimant's compensable condition. (Ex. 89).

On June 6, 2001, Dr. Potter examined claimant and reviewed his medical records. Noting claimant's persistent low back and leg pain and associated numbness, Dr. Potter opined that the proposed treatment was indicated because claimant met the indication for IDET or surgical fusion. (Ex. 93).

By Opinion and Order issued on November 29, 2001, a WCB ALJ found that the L-5 nerve involvement was due to the accepted L4-5 disc herniation and was already part of the accepted claim. (Ex. 107).

FINDINGS OF ULTIMATE FACT

The two level fusion at L4-5 and LS-1 is reasonable and necessary treatment for claimant's accepted condition.

CONCLUSIONS OF LAW AND REASONING

I may modify the director's administrative order in this matter only if it is not supported by substantial evidence in the record, or reflects an error of law. ORS 656.327(2). Jurisdiction lies with the director. ORS 656.327(1). I may modify the administrative order only if it is not supported by substantial evidence in the record or reflects an error of law. ORS 656.327(2) and OAR 436-001-0225(3). The burden of proving a fact or position falls upon the proponent. ORS 183.450(2). As petitioner, insurer bears the burden of establishing that MRU's determination is not supported by substantial evidence or reflects an error of law.

ORS 656.245 requires an insurer to provide medical services that are materially related to a compensable condition for such period as the nature of the injury or the process of recovery requires. This obligation continues for over the worker's lifetime. ORS 656.245(1)(b). Pursuant to ORS 656.327, an insurer is not responsible to provide medical services that are excessive, inappropriate, ineffectual or in violation of administrative rules.

Relying on the opinions of Drs. Bert and Potter, MRU concluded that the proposed fusion surgery of L4-5 was appropriate. Consequently, MRU found Liberty liable for all costs associated with the proposed surgery. MRU limited its review to the accepted L4-5 level only

because the L5-S1 condition had been denied by Liberty and was in litigation. However, my reading of MRU's administrative order is that, but for litigation concerning the L5-S1 level, MRU would have found the two level interbody fusion at L4-5 and LS-1 appropriate treatment. Moreover, subsequent to MRU's order, a WCB ALJ found that that the L5 nerve involvement was due to the accepted L4-5 disc herniation and was already part of the accepted claim.

Having reviewed the complex record in the entirety, I find no reason to remand to MRU inasmuch as MRU previously relied on the opinions of Drs. Bert and Potter, who concurred that the two level fusion at L4-5 and LS-1 surgery was reasonable and necessary. Consequently, I conclude that MRU's order should be modified in light of the WCB ALJ's Opinion and Order to include fusion surgery at both L4-5 and LS-1. Accordingly, Liberty is liable for the two level fusion surgery.

ATTORNEY FEES

Because claimant has prevailed in this contested case hearing, his counsel is entitled to attorney fees for defending MRU's order. ORS 656.385(1). However, claimant's counsel has not provided a statement of services. The record shall remain open for the submission of claimant's counsel's request for attorney fees.

ORDER

IT IS HEREBY ORDERED that MRU's July 5, 2001 Administrative Order is modified to order Liberty to pay for claimant's two level fusion surgery at L4-5 and LS-1.

DATED this 2nd day of January 2002.

Ella D. Johnson
Administrative Law Judge
Hearing Officer Panel