

In the Matter of the ORS 656.327 Medical Treatment Dispute of  
**Bardales, Claimant**

Contested Case No: HH02-073

**PROPOSED & FINAL ORDER**

October 24, 2002

VICTOR M. BARDALES, Petitioner

LIBERTY NORTHWEST INSURANCE CORPORATION, Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

---

**HISTORY OF THE CASE**

Claimant appeals an Administrative Order issued on June 19, 2002 by the Medical Review Unit (MRU) of the Workers' Compensation Division (WCD), Department of Consumer and Business Services (director or the department). On September 24, 2002, Administrative Law Judge (ALJ) Paul Vincent conducted a hearing in this matter. Petitioner Victor M. Bardales (claimant) was represented by attorney Martin L. Alvey. Respondent Liberty Northwest Insurance Corporation (insurer) was represented by attorney Barbara A. Woodford. Claimant testified on his own behalf and the record closed on the date of hearing.

**ISSUE**

The issue is whether substantial evidence supports MRU's finding that an arthroscopic right rotator cuff repair, proposed by Paul Puziss, MD (Orthopedic Surgery), on December 3, 2001, is not appropriate medical treatment for claimant's compensable condition.

**EVIDENTIARY RULINGS**

WCD Exhibits 1 through 87 were received into the record without objection. Based on ORS 656.327(2)<sup>1</sup>, insurer objected to claimant's Supplementary Exhibit 88 and

I reserved ruling. OAR 436-001-0195(2) provides:

The following does not constitute "new medical evidence" and, if relevant, may be admissible in a contested case:

(2) Supplemental reports, correction and clarifications by medical

---

<sup>1</sup> 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 in the record or if it reflects an error of law. No new medical evidence shall be admitted.

professional whose reports or work products are in the medical evidence gathered by the Medical Review Unit's staff provided the scope of the additional items deals with events occurring on or before the date the Medical Review Unit's record was closed.

Claimant's Supplementary Exhibit 88 is a letter authored by Dr. Puziss and dated September 18, 2002. The letter clarifies Dr. Puziss' opinion which is contained in the evidence gathered by MRU and the letter discusses events that took place before MRU's record closed in June 2002. Therefore, I admit Supplementary Exhibit 88 into the record over insurer's objection.

### **FINDINGS OF FACT**

(1) On August 29, 1995, claimant suffered a right shoulder injury when he lifted a 50-pound sack of sugar while working as a product mixer in a food processing plant. (Ex. 1.)

(2) On October 24, 1995, Dr. Puziss examined claimant and diagnosed chronic right rotator cuff tendonitis, with impingement, post-strain. (Ex. 3-2.)

(3) On January 18, 1996, claimant designated Dr. Puziss as his attending physician. (Ex. 9.)

(4) On January 21, 1996, an MRI revealed a right rotator cuff tear and degenerative changes in the right acromioclavicular joint. (Ex. 10.)

(5) Insurer initially accepted "right shoulder bursitis" and subsequently accepted "right rotator cuff tear" as compensable conditions. (Exs. 41 and 56.)

(6) On July 19, 1996, July 21, 1997, and May 28, 1998, Dr. Puziss performed arthroscopic right rotator cuff repair. (Exs. 13, 21, and 39.)

(7) On February 6, 2001, December 3, 2001, and February 14, 2002, Dr. Puziss provided notice of his intent to perform arthroscopic right rotator cuff tear repair. (Exs. 47, 61, and 70.)

(8) On March 2, 2001, Steven Schilperoot, MD (Orthopedic Surgeon) examined claimant and reviewed his medical records at insurer's request. He noted that claimant's tobacco use would compromise his circulation and impede post-surgical healing. Dr. Schilperoot also noted two attempts at surgical repair is generally regarded as maximum and opined that since claimant had three failed attempts, a fourth surgery was not appropriate medical treatment. (Ex. 49.)

(9) On June 15, 2001, Dr. Puziss agreed with Dr. Schilperoot's opinion that a fourth surgery was inappropriate while claimant continued to smoke. Dr. Puziss advised claimant that he would reconsider the proposed surgery after claimant discontinued smoking for six months. (Ex. 54.)

(10) On October 17, 2001, Dr. Puziss noted that claimant had stopped smoking since the previous June. Dr. Puziss recommended using a new orthobiologic implant material in

claimant's proposed fourth right rotator cuff tear surgery. (Ex. 57.)

(11) On November 30, 2001, Dr. Puziss requested insurer to authorize the proposed surgery using the new suture method. (Exs. 59 and 61.)

(12) On December 27, 2001, Dr. Schilperoot examined claimant and reviewed his medical records at insurer's request. He opined that even if claimant had quit smoking, the proposed fourth surgery had a dismal chance of repair and was not appropriate medical treatment. (Ex. 64-8.)

(13) On January 9, 2002, insurer denied the surgery request. (Ex. 65.)

(14) On January 20, 2002, Dr. Puziss continued to recommend a fourth surgery, recognizing that there is always a theoretical potential for failure in any repair. (Exs. 66, 67, 69, and 70.)

(15) On May 24, 2002, Robert D. Cook, MD (Orthopedic Surgeon) examined claimant and reviewed his medical records at MRU's request. Dr. Cook opined that a fourth right rotator cuff surgery was not appropriate medical treatment. (Ex. 84-2.)

(16) On September 18, 2002, Dr. Puziss reiterated that claimant's non-smoking and new technology improved the likelihood of success for a fourth surgical rotator cuff repair. (Ex. 88.)

### CONCLUSIONS OF LAW AND REASONING

Jurisdiction lies with the director. ORS 656.327(2). 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 656.273(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 proving by a preponderance of evidence that the proposed surgery is inappropriate. *Cook v. Employment Div.*, 47 Or 437 (1982) (In the absence of legislation adopting a different standard, the standard of proof in an administrative hearing is preponderance of evidence). Proof by a preponderance of evidence means that the fact finder is persuaded that the facts asserted are more likely true than false. *Riley Hill General Contractors v. Tandy Corp.*, 303 Or 390 (1989).

#### Medical Service

Pursuant to ORS 656.245(1), an insurer is obligated to provide medical services for a compensable condition for so long as the nature of the injury or the process of recovery requires. After the injured worker's condition becomes medically stationary, such services are limited to those listed in ORS 656.245(1)(c).

ORS 656.245(1)(c)(K) provides:

With the approval of the director, curative care arising from a generally recognized, nonexperimental advance in medical science

since the worker's claim was closed that is highly likely to improve the worker's condition and that is otherwise justified by the circumstances of the claim. The decision of the director is subject to the contested case and review provisions of ORS 183.310 to 183.550.

MRU found that the proposed surgery qualified as a compensable medical service under ORS 656.245(1)(c)(K) because Dr. Puziss planned to use a newly developed orthobiologic suture method. I disagree. The record establishes that the proposed surgery is not justified by the circumstances of the claim as the statute requires. (See below under the discussion of appropriate medical treatment.) Inasmuch as the proposed surgery fails to meet one prong of the statutory test, it is not compensable pursuant to ORS 656.245(1)(c)(K).

### Medical Treatment

Pursuant to ORS 656.327, an insurer is not obligated to provide medical services that are excessive, inappropriate, ineffectual or in violation of administrative rules.

ORS 656.327 provides:

If an injured worker, an insurer or self-insured employer or the Director of the Department of Consumer and Business Services believes that the medical treatment, not subject to ORS 656.260, that the injured worker has received, is receiving, will receive or is proposed to receive is excessive, inappropriate, ineffectual or in violation of the rules regarding the performance of medical services, the injured worker, insurer or self-insured employer shall request review of the treatment by the director and so notify the parties.

MRU found and insurer contends that the proposed surgery is medically inappropriate. I agree.

I review MRU's finding for substantial evidence or errors of law. ORS 656.327(2). Claimant does not challenge the administrative order based on legal error. Rather, claimant contends that the administrative order is not 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 183.482(8)(c). The "substantial evidence" standard of review can be overcome only when "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 292, 295 (1998). A finding is supported by substantial evidence if it is reasonable in light of countervailing as well as supporting evidence. *Garcia v. Boise Cascade Corp.*, 309 Or 292, 295 (1990).

It is not for an ALJ to decide which medical opinions are more persuasive. I am authorized only to determine whether the record contains substantial evidence to support MRU's order. See *John J. Rice*, 4 WCSR 173, 176 (1999). Under substantial evidence review standard, an ALJ is not obligated to defer to the opinion of the attending physician. *Dillon v. Whirlpool Corp.*, 172 Or App 484 (2001).

The medical record here is divided. MRU reviewed the medical records and found the opinions of Dr. Schilperoot and Dr. Cook opposing the proposed surgery more persuasive than that of Dr. Puziss supporting it. MRU reasoned that the proposed fourth surgery, following three previous failed surgeries on the same body part, is not appropriate despite claimant's having quit smoking and the availability of a newly developed suture material. Having reviewed the record in its entirety, I cannot say that the Dr. Puziss' opinion is so persuasive as to render the record "overwhelmingly in favor" of the surgery. Furthermore, I conclude that the record, viewed as a whole, would permit a reasonable person to find that the proposed fourth surgery is not appropriate medical treatment. MRU's finding that the proposed surgery is not appropriate is reasonable in light of countervailing as well as supporting evidence, and therefore, I affirm.

#### **ATTORNEY FEES**

Claimant has not prevailed at the contested case hearing, and therefore, his attorney is entitled to no fee. ORS 656.385(1).

#### **ORDER**

IT IS HEREBY ORDERED that:

The Administrative Order dated June 19, 2002 is affirmed.

DATED this \_\_\_\_ day of October, 2002.

---

Paul Vincent  
Administrative Law Judge  
Hearing Officer Panel