

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

Contested Case No: HH01-120

**FINAL ORDER**

August 13, 2002

ALBERTSON'S CORPORATION, Petitioner

LISA G. FLYNN, Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

Pursuant to administrative order dated September 17, 2001 the Medical Review Unit (MRU) determined that proposed interbody fusion surgery was appropriate medical treatment. On March 20, 2002, Hearing Officer Catherine P. Coburn conducted a telephone hearing. Attorney Patrick D. Gilroy represented petitioner Albertson's Corporation (employer) and its claims processor Gates McDonald. Respondent, Lisa G. Flynn (claimant), appeared and was represented by attorney Donald E. Beer. The Department of Consumer and Business Services, Workers' Compensation Division (WCD) waived appearance. Claimant testified on her own behalf.

The petitioner, employer, filed exceptions to Hearings Officer Coburn's April 17, 2002 Proposed and Final Contested Case Hearing Order, which found MRU's order was supported by substantial evidence. Claimant timely responded. Before the Director, the issue is appropriateness of proposed elective surgery. The entire record, consisting of a tape recording of the hearing, all evidence received, and all documents filed, has been considered.

**Findings of Fact**

The Director accepts the hearing officer's findings of fact, and with the following supplementations.<sup>1</sup>

Claimant has degenerative disc disease at L4-5 and L5-S1 including degenerative changes of the facet joint. Prior litigation has determined that this condition is not a preexisting condition. (Ex. 50).

Dr. Franks declared claimant's condition medically stationary on May 10, 1999. (Ex. 43). Claimant's claim was closed in February 2000, with an award of permanent disability. (Exs. 36, 37, 44, 55, 56).

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<sup>1</sup> Relevant testimony is excluded from ORS 656.327's "new medical evidence" limitations. OAR 436-001-0195. The hearing officer made findings of fact regarding claimant's medication needs post-fusion surgery based upon claimant's testimony. However, the hearing officer incorrectly rejected that evidence in the conclusion portion of her order.

Claimant returned to Dr. Franks in August 2000 for complaints of intolerable pain,

radiating down both buttocks. Dr. Franks recommended a myelogram to evaluate the possibility of translational instability. (Ex. 13-5, 59). The myelogram showed no motion present at the L4-5 level with flexion and extension. (Ex. 60). Upon review of the myelogram, Dr. Franks opined that claimant did not have translational instability, but that claimant's low back pain was mechanical. He believed the pain emanated from the degenerative discs and the facet joints at L4-5 and possibly L5-S1. (Ex. 85, 85a). He referred claimant to Dr. Treible for further evaluation.

Dr. Treible ordered additional diagnostic studies. The discography revealed advanced degenerative disc at L4-5 and highly degenerative disc at L5-S1. (Ex 82). Based upon the CT scan, Dr. Treible diagnosed facet fracture that claimant apparently sustained at the time of discectomy. Based on her history and onset of symptoms, the etiology of the L4-5 degenerative disc disease was post-traumatic. Dr. Treible recommended a fusion. (Exs. 86, 86a).

Dr. Arbeene and Dr. Berquist examined claimant on April 18, 2001 at the employer's request. Based on their review of imaging studies, the doctors opined that the facet fragments at L4-5 were consistent with postoperative changes involving the left L4-5 facet rather than fractures of the facet. Their diagnosis included preexisting degenerative disc disease at L4-5 and L5-S1 levels based on radiographic studies. The doctors opined that claimant's preexisting conditions contributed to the current need for treatment. They noted fusion surgery was generally performed in the presence of intervertebral instability. (Ex. 92).

Dr. Vessely, who had examined claimant in August 1999, concurred with the April 18, 2001 examination by Drs. Arbeene and Berquist. In particular, he stated that instability would be a more objective indication to perform the degree of surgery being recommended. (Ex. 113a).

Dr. Franks disagreed with the conclusions and recommendations of the Drs. Arbeene and Berquist. He also responded that the "facet fragments" were what concerned Dr. Treible and him as regards to claimant's ongoing severe low back pain. He agreed with Dr. Treible's recommendation for fusion. (Ex. 96)

Dr. Ho conducted an examination on August 1, 2001. He opined that it had not yet been established that intervertebral movement at L4 and L5 were either the sole or primary source of claimant's pain. If that can be established, then fusion surgery is warranted. A chronic strain of the interspinous ligaments L3-S1 could be the primary source of claimant's pain. He recommended trigger point injections to rule out this as a pain source. The fracture of the L4-5 intervertebral joint remained a possible source of pain. Bone scan results raised the question of whether discitis may be the cause of claimant's pain. (Ex. 109).

Claimant subsequently questioned Dr. Treible regarding trigger point injections. He, however, did not believe that the injections would provide lasting relief. (Ex. 109a)

Dr. Treible performed an anterior interbody fusion on October 5, 2001. The postoperative diagnosis was lumbar degenerative disc disease. (Ex. 115A)

### Conclusions of Law and Opinion

MRU found that claimant had no documented evidence of instability, but there was evidence of degenerative disc disease at L4-5 and L5-S1. In addition, relying on Dr. Treible's opinion that claimant developed a facet fracture, MRU determined that the fracture would impact the degenerative disc disease and possibly the stability of that area. MRU concluded that, based on claimant's "increasing back pain, the diagnostic evidence of the L4 and L5 discs, and the failure of conservative care," the proposed fusion surgery was appropriate.

The hearing officer determined that the medical evidence was divided, that MRU misinterpreted Dr. Ho's opinion, but that the MRU's reliance on the opinions of Drs. Franks and Treible was reasonable. The hearing officer, thus, concluded that MRU's order was supported by substantial evidence.

The employer contends that this case involves more than dueling doctors. Rather, MRU's order is not supported by substantial evidence because it did not fully explain how the facts it found led to its decision, as required in *Armstrong v. Asten-Hill Co.*, 90 Or App 200 (1988).

The substantial evidence standard of review requires explicit findings of fact and a reasoned opinion. In regards to the findings of fact requirement, the court in *Armstrong* stated:

"[I]n a context which is likely frequently to occur in workers' compensation cases, if there are doctors on both sides of a medical issue, whichever way the [factfinder] finds the facts will probably have substantial evidentiary support. We would not need to choose sides. The difference between the 'any evidence' rule and the substantial evidence test in ORS 183.482(8)(c) will be decisive only when the credible evidence apparently weighs overwhelmingly in favor of one finding and the [factfinder] finds the other without giving a persuasive explanation." *Id.* at 206.

A reasoned explanation requires that the order "clearly and precisely state what it found to be the facts and fully explain why those facts lead it to the decision it makes." *Armstrong*, *supra* at 205 (citing *Home Plate, Inc. v. OLCC*, 20 Or App 188 (1975)). Such an explanation is required to facilitate "meaningful judicial scrutiny of the activities of an administrative agency \*\*\*." *Home Plate, Inc.*, 20 Or App at 190.

Contrary to the employer's position, this dispute involves "dueling doctors." On one side, Drs. Arbeene, Bergquist, and Vessely opined that claimant was not a candidate for fusion surgery because she did not have intervertebral instability. (Exs. 92, 113a). In addition, these doctors felt that claimant's degenerative disc disease was a preexisting condition. On the other side, Drs. Franks and Treible opined that claimant's degenerative facet fragments/fracture was the cause of the need for surgery. They also felt that claimant's degenerative condition was post traumatic. (Exs. 13-6, 85, 85a, 86, 86a). The medical evidence was also divided whether claimant had a facet fracture or facet fragments. MRU relied on the opinions of Dr. Treible, but did not explain why his opinion was more persuasive. However, because claimant's degenerative condition is not a preexisting condition, to the extent that Drs. Arbeene, Bergquist,

and Vessely opined to the contrary, their opinions are contrary to the law of the case. *See Kuhn v. SAIF*, 73 Or App 768 (1985). Dr. Treible's opinion may have been given more weight because he performed the surgery. However, the Director cannot assume that MRU relied on these bases for discounting the other medical evidence. *See Drew v. PSRB*, 322 Or 491, 499 (1996). In any event, the Director cannot choose which side of the medical evidence is more persuasive. *Armstrong*, 90 Or App at 206.

The employer contends that MRU misinterpreted Dr. Ho's opinion and that this error led MRU to mistakenly conclude that the "diagnostic evidence of the L4 and L5 discs" support the need for surgery. The employer is correct that MRU misinterpreted Dr. Ho's opinion. Generally, conclusions based on misstatement or misinterpretation of the evidence are not supported by substantial evidence. *See Asten-Hill Co. v. Armstrong*, 100 Or App 599 (1990). The record as a whole, however, supports MRU's finding that claimant had documented evidence of degenerative disc disease at L4-5 and L5-S1.

In addition, substantial evidence supports MRU's determination that the degenerative disc disease was a factor in the need for the fusion surgery. Dr. Franks felt claimant's chronic low back pain and need for treatment emanated from the degenerative discs and from the facet joints. (Exs. 85, 85a, 96). As discussed further below, Dr. Treible relied upon the degenerative condition of the discs and the facet joint as the basis for the need for the fusion surgery.

The employer next argues that MRU's order lacks a reasoned explanation because MRU found that claimant did not have intervertebral instability yet relied on Dr. Treible's opinion to conclude that the facet fracture impacted the degeneration and possibly the stability of this area. The employer also contends that there is no substantial evidence to support MRU's determination.<sup>2</sup>

The Director agrees that MRU misstated Dr. Treible's opinion. Dr. Treible did not discuss whether claimant had instability. When Dr. Franks referred claimant to Dr. Treible, Dr. Franks had already found no evidence of instability at L4-5. (Exs. 59, 60, 85a). Because Dr. Franks felt that claimant's back pain was coming from the disc and facet joints at L4-5 levels and possibly the L5-S1 levels, he referred claimant to Dr. Treible for consultation regarding fusion surgery. (Ex. 85). Dr. Treible requested discography, which revealed advanced degenerative disc at L4-5 and highly degenerative disc at L5-S1. (Ex 82). Dr. Treible opined that imaging studies and discography revealed significant pain at L4-5 and L5-S1. Dr. Treible diagnosed discogenic back pain as a consequence of the prior disc herniation and subsequent discectomy. He felt most of claimant's symptoms were coming from the L4-5 disc. Dr. Treible interpreted the CT scan as apparently showing that claimant sustained a facet fracture at the time of her discectomy, which significantly compromised her outcome. Dr. Treible recommended a L4-5, L5-S1 fusion. (Exs. 68, 86, 86a). Dr. Treible focused on the L4-5 disc and the facet joint; not on intervertebral instability. MRU's decision regarding the impact of the facet fracture on

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<sup>2</sup> The employer also argued that MRU committed legal error by relying on the treatise *The Adult Spine, Principles and Practice* because this was not a source from which an agency could take administrative notice nor did MRU have the specialized expertise entitling it to take official notice of technical facts. The employer did not raise this

legal error issue at hearing, accordingly the director declines to address the issue. See *Stevenson v. Blue Cross of Oregon*, 108 Or 247 (1991).

intervertebral stability is not supported by substantial evidence. Thus, its order fails to explain how reliance on Dr. Treible's opinion led to its decision on this issue.

However, MRU's misinterpretation of Dr. Treible's opinion is, in itself, insufficient to warrant reversal of MRU's order. The substantial evidence standard of review requires evaluating the record as a whole, not merely a single piece of evidence. *Armstrong*, 90 Or App at 206. MRU could have reasonably read Dr. Treible's opinion as otherwise supporting the appropriateness of the surgery. The employer does not dispute the other reasons MRU relied upon to determine that the fusion surgery was appropriate. Those findings, including claimant's increased back pain and her degenerative disc disease along with the facet joint disease, are supported by substantial evidence. Those findings related to the need for surgery.

IT IS HEREBY ORDERED that the April 17, 2002 Proposed and Final Contested Case Hearing Order is affirmed.

DATED this day of August 2002.

**MARY NEIDIG, DIRECTOR  
DEPARTMENT OF CONSUMER  
AND BUSINESS SERVICES**

By: \_\_\_\_\_  
John Shilts, Administrator  
Workers' Compensation Division