
In the Matter of the ORS 656.327 Medical Treatment Dispute of

Grout, Ronnie A., Claimant

Contested Case No: HH01-084

FINAL ORDER

May 23, 2002

LIBERTY NORTHWEST INSURANCE CORPORATION , Petitioner

RONNIE A. GROUT , Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

On October 11 2001, Hearing Officer Ella D. Johnson conducted a telephone hearing. David O. Wilson represented petitioner Liberty Northwest Insurance Corporation (insurer). Juli Point Hall represented Ronnie A. Grout (claimant). The Department of Consumer and Business Services, Workers' Compensation Division (WCD) waived appearance. No witnesses testified.

The petitioner filed exceptions to the hearing officer's January 2, 2002 Proposed and Final Contested Case Hearing Order that found it liable for claimant's two-level fusion surgery at L4-5 and L5-S1. Before the Director, the issue is the appropriateness of the proposed 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

Claimant sustained a compensable low back injury on June 26, 1997. The insurer accepted the claim for intraforaminal disc herniation at L4-5. (Ex. 11). Dr. McGirr, neurosurgeon, first saw claimant in August 1997 for complaints of severe back pain, right leg symptoms, and foot drop. (Exs. 8, 105 pp. 7-9). He performed a L4-5 discectomy in October 1997. (Ex. 15). Claimant, however, continued to experience occasional right leg give-way, but he was not interested in an interbody fusion or further surgical exploration. In addition, Dr. McGirr was uncertain whether further surgery would be effective. Dr. McGirr declared claimant medically stationary on May 20, 1998. (Exs. 10-4, 37, 105 pp. 29-32). The claim was closed on September 23, 1998 with an award of 26 percent unscheduled permanent disability. (Exs. 42, 43).

Claimant returned to Dr. McGirr in February 1999 for an exacerbation of his right L4-distribution pain. (Exs. 10-6, 45, 105-25). Myelogram showed persistent right L4 root entrapment. Dr. McGirr recommended a selective nerve root block, and if not better, then he would consider a repeat discectomy but without fusion. Dr. McGirr, however, was not keen on surgery because claimant had not done well with the first surgery and any second operation would be much more involved. (Ex. 10-7).

Dr. James, orthopedic surgeon, and Dr. Williams, neurosurgeon, examined claimant on Final Order – Ronnie A. Grout, H01-084, Page 2 of 5
May 18, 1998 at the insurer's request. Claimant complained of ongoing low back pain and right lower extremity pain. They diagnosed post herniated nucleus pulposus, L4-5 on the right. The doctors found no objective evidence of a pathological worsening. They also questioned whether

there was a good indication for surgery. But if surgery was elected, they agreed with Dr. McGirr's approach. (Ex. 47).

Dr. Bert saw claimant on June 21, 1999 for a second opinion. (Ex. 48). Dr. Bert thought the June 1999 MRI showed some recurrent L4-5 disc herniation, but he recommended a discogram to see if that disc was the pain generator. (Exs. 49, 50). Dr. Karasek performed a three-level lumbar discogram, which was indeterminate. (Exs. 51, 80, 106 pp. 20-21).

Dr. McGirr reviewed the discogram and also discussed it with Dr. Karasek. Dr. Karasek could not achieve a full study at L4-5, so he could not determine whether claimant's pain was coming from the L4-5 disc. They were also uncertain whether the L5-S1 disc was contributing to claimant's pain symptoms. (Exs. 105 pp. 48-49, 54; 106-34). The pain at L5-S1 disc elicited by the discogram was not the type of pain that explained claimant's back and leg symptoms. (Ex. 105 pp. 61-62). Dr. McGirr thought that claimant was probably symptomatic from two-level disc disease. Dr. McGirr, however, did not recommend further surgery to claimant. Rather, he speculated as to a surgical procedure that could be offered—a two-level anterior interbody fusion at L4-5 and at L5-S1-- that it was quite morbid, and had a low success rate. Claimant wanted to defer surgery. (Exs. 10-9, 83, 105 pp. 55-57). Dr. Karasek agreed with Dr. McGirr that claimant was an unlikely candidate for a fusion. (Ex. 106-34).

Based on the discogram, Dr. Bert felt claimant had a recurrent disc at L4-5 but also a painful disc at L5-S1. Dr. Bert opined that claimant needed a fusion as a salvage procedure for a failed disc laminectomy syndrome at L4-5. He recommended an interbody fusion. (Exs. 59, 60).

The insurer issued a partial denial of the L5-S1 condition on January 12, 2001. (Ex. 70). WCB Administrative Law Judge (ALJ) Menashe found that claimant failed to prove that the June 1997 accident caused a L5-S1 disc injury. The ALJ, however, found that the L4-5 disc injury caused a L5 nerve root problem and that the insurer's acceptance included the L5 nerve root entrapment. The ALJ affirmed the denial of a L5-S1 disc condition. (Ex. 107)

Conclusions of Law and Opinion

At issue in this ORS 656.327 medical treatment dispute is whether the proposed fusion is "excessive, inappropriate, ineffectual or in violation of rules regarding the performance of medical services." The Medical Review Unit's (MRU) order may be modified 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). Substantial evidence supports a finding when the record, viewed as a whole, permits a reasonable person to make the finding. ORS 183.482(8).

Because compensability of claimant's L5-S1 disc condition was pending appeal before the Workers' Compensation Board (WCB) Hearings Division, MRU limited its review to the appropriateness of the proposed surgery for the accepted L4-5 condition. MRU found "no clear and convincing opinion against the need for further surgery..." MRU did not find the May 1999 Final Order – Ronnie A. Grout, H01-084, Page 3 of 5 opinion of Drs. James and Williams persuasive because it was conflicting and because it was rendered before the June 1999 MRI and the September 1999 discography, and thus was not

based on complete information. MRU also found Dr. McGirr's opinion unpersuasive because he changed his opinion (to oppose surgery) without explanation. MRU discounted Dr. Karasek's opinion as inconclusive regarding the proposed fusion surgery. Rather, finding the opinions of Dr. Bert and Dr. Potter persuasive, MRU concluded that the proposed interbody fusion of L4-5 was appropriate medical treatment.

The hearing officer affirmed, determining that MRU's order was supported by substantial evidence. In addition, based on ALJ Menashe's opinion and order, which found that claimant's L5 nerve root problem was due to the accepted L4-5 disc condition, the hearing officer found that the two level fusion of L4-5 and L5-S1 was appropriate medical treatment. In so finding, the ALJ determined that remand to MRU was unnecessary in light of the opinions of Drs. Bert and Potter.

Petitioner contends that the opinions of Dr. Potter and Dr. Bert were not persuasive for a number of reasons. In essence, petitioner's contentions assert that substantial evidence does not support MRU's decision to find these doctor's opinions persuasive as a basis for concluding that the proposed L4-5 surgery was appropriate.

Under the limited standard of review, the director may not reweigh the medical evidence, but she may examine whether MRU's and the hearing officer's decisions to discount evidence is supported by substantial evidence. *Garcia v. Boise Cascade Corp.*, 309 Or 292, 296 (1990). The director may also determine whether the credible evidence weighs overwhelmingly in favor of one finding when MRU or the hearing officer found the other without giving a persuasive explanation. *Armstrong v. Asten-Hill Co.*, 90 Or App 200, 206 (1988). Here, substantial evidence supports the MRU's decision regarding the L4-5 disc surgery, but not the hearing officer's decision regarding the appropriateness for surgery at L5-S1.

MRU's decision to discount Dr. McGirr's opinion is not supported by substantial evidence. MRU's conclusion that Dr. McGirr changed his opinion regarding the surgery was an incorrect statement of the evidence and, thus, not supported by the evidence. MRU did not have the benefit of Dr. McGirr's deposition.¹ In his deposition, Dr. McGirr clarified that his preferred treatment approach was conservative treatment, specifically steroid blocks. He also explained that he did not recommend fusion surgery because claimant had not done well with the first and a second surgery would be much more involved, was quite morbid, and had a low success rate. In addition, the discogram was indeterminate for purposes of making surgical decisions. Because MRU's decision to discount Dr. McGirr's opinion was based on a misinterpretation of the evidence, it is not supported by substantial evidence. *Asten-Hill Co. v. Armstrong*, 100 Or App 559 (1990).

Dr. Potter examined claimant on June 6, 2001 at the request of MRU to address whether a proposed interbody fusion of L4-5 and L5-S1 was appropriate treatment for claimant's compensable condition. (Ex. 89). Dr. Potter read the diagnostic studies as showing some L4-5

¹ The parties do not dispute that the deposition does not constitute inadmissible new medical evidence. ORS 656.327(2); OAR 436-001-0195. Accordingly, the Director may consider Dr. McGirr's testimony.

degeneration; no nerve compression or herniated disc at L4-5; and degenerated joints at L5-S1. Dr. Potter diagnosed lumbar spondylosis, lumbago, and lumbar radiculopathy. Dr. Potter reported that the indications for surgical fusion were many, but for this case were: persistent low back pain and leg pain and associated numbness post surgery for herniated disc with degeneration seen on MRI and pain generated on discogram. He also did not disagree with treatment recommendations of Drs. Bert, McGirr or Karasek. (Ex. 93). Dr. Potter did not review the depositions of Drs. McGirr and Karasek and, thus, did not have complete information when he rendered his opinion. In their depositions, Drs. McGirr and Karasek explained the indeterminacy of claimant's discogram and further explained their opinions against the fusion surgery for claimant. In light of this further information, Dr. Potter's opinion is internally inconsistent.

MRU also did not have benefit of the depositions of Drs. McGirr and Karasek, in which they further explained their opinions regarding the discogram and the appropriateness of fusion surgery for claimant. This evidence weighs overwhelmingly in favor of finding that MRU's basis for discounting their opinions was incorrect and not supported by substantial evidence. As a result, there is medical evidence for and against the appropriateness of fusion surgery at L4-5. The doctors, however, agree that claimant continues to experience symptoms following the 1997 surgery and that some of those symptoms are caused by the L4-5 disc. Under the substantial evidence standard of review, the director cannot choose sides. *See Armstrong v. Asten-Hill Co.*, 90 Or App 200, 206 (1988). Based on Dr. Bert's opinion, a reasonable person could find that the proposed fusion at L4-5 was appropriate treatment for claimant's accepted L4-5 disc condition. Accordingly, MRU's decision is affirmed.

The hearing officer's decision regarding the appropriateness of surgery for the L5-S1 disc condition is not supported by substantial evidence. Dr. McGirr and Dr. Bert opined that the L5-S1 disc is degenerative. Dr. McGirr attributed the degeneration to the natural aging process; Dr. Bert related it to the industrial injury and to repetitive lifting. ALJ Menashe, however, found the L5-S1 disc condition not compensable. Thus, Dr. Bert's causation opinion is contrary to the current law of the case. *See Kuhn v. SAIF*, 73 Or App 768 (1985). Rather, the ALJ found that the L5 nerve root compromise was part of the L4-5 accepted disc condition.² In addition, Dr. McGirr opined that the L4-5 disc herniation was large enough to cause the L5 nerve root compression. He explained that if he were to perform surgery it would be because the L4-5 disc was the cause of claimant's symptoms, including those caused by the L5 nerve root. Surgery on the L5-S1 disc would be as a precautionary matter to avoid problems in the future because of the degenerative nature of that disc. Because the hearing officer's decision was based on a misinterpretation of the medical evidence, it is not supported by substantial evidence. The decision also errs in its interpretation ALJ Menashe's order.

Attorney Fee

² Although the compensability decision pending appeal, that decision is binding on this forum until the appeal is final. *See SAIF v. Castro*, 60 Or App 112 (1982).

Claimant's attorney submitted a supplemental statement of services seeking a \$630 attorney fee for services on appeal.³ Claimant did not prevail over that portion of the hearing officer's order that find Liberty liable for surgery at L5-S1. Considering the factors pursuant to

OAR 426-001-0265(1), claimant's attorney is entitled to a \$1,000 attorney fee for services at the contested case hearing and on appeal before the director.

IT IS HEREBY ORDERED that

1. The January 2, 2002 Proposed and Final Contested Case Hearing Order is affirmed in part and reversed in part. That portion ordering Liberty to pay for surgery at the L5-S1 disc level is reversed. The remainder of the order is affirmed.
2. The proposed interbody fusion of L4-5 is approved, if claimant elects to proceed with surgery.

DATED this _____ day of May, 2002.

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

By: _____
John Shilts, Administrator
Workers' Compensation Division