

In the Matter of the ORS 656.327 Treatment Dispute of

**Moreno, Samuel, Claimant**

Contested Case No: H03-055

**PROPOSED & FINAL ORDER**

December 2, 2003

BARRETT BUSINESS SERVICES, Petitioner

SAMUEL MORENO, Respondent

Before Ray Myers, Administrative Law Judge, Office of Administrative Hearings

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**HISTORY OF THE CASE**

Barrett Business Services (Barrett) appeals a April 24, 2003 Administrative Order issued by the Medical Review Unit (MRU) of the Workers' Compensation Division (WCD), Department of Consumer and Business Services (the director or the department) which determined that a proposed right lateral tennis elbow release is reasonable and necessary treatment for Mr. Moreno's accepted condition. On June 2, 2003, the matter was referred to the Office of Administrative Hearings (OAH) for hearing

On July 24 2003, Administrative Law Judge (ALJ) Paul Vincent conducted a telephone hearing in this matter in Salem, Oregon. Attorney Lance Johnson represented Barrett. Attorney Matthew Roy represented Mr. Moreno. WCD waived appearance. No witnesses testified. The record closed following the hearing.

After the hearing, the OAH assigned the matter to Administrative Law Judge Ray Myers to review the record and to write this order. The record of this proceeding, consisting of tape recordings of the hearing, all evidence received and all hearing papers filed, has been considered. The findings of fact and conclusions of law are based upon the entire record.

**ISSUE**

Under ORS 656.245, is a proposed right lateral tennis elbow release reasonable and necessary treatment for Mr. Moreno's accepted condition?

**Evidentiary Ruling**

The record consists of Exhibits 1 through 63, which were admitted into the record without objection.

**FINDINGS OF FACT**

I adopt MRU's Findings of Fact with the following supplementation:

1. Mr. Moreno filed a workers' compensation claim with Barrett on January 8, 1999. He complained of right elbow pain that had begun in July 1998 and continued to worsen. He noted

that his work involved pruning trees, lifting trees and moving trees. (Ex. 7.) Barrett's original processing agent, Self-Insured Management Services, Inc.(SIMS), sent Mr. Moreno for an IME on February 25, 1999. Dr. Tesar, the IME physician, found no objective abnormalities. However, based on subjective complaints, he diagnosed right lateral epicondylitis. (Ex. 8.) Barrett accepted a claim for right elbow lateral epicondylitis. (Ex. 18.)

2. Dr. Pollard saw Mr. Moreno on March 15, 1999. He opined that Mr. Moreno has "an overuse tendonitis." (Ex. 10.) Dr. Dupuis performed an IME on May 11, 1999. He reported that Mr. Moreno had no reproducible objective findings; however, he noted that epicondylitis is frequently and typically without objective findings. He considered Mr. Moreno capable of returning to his regular work. (Ex. 13.) Dr. Pollard concurred. (Ex. 14.) SIMS closed the claim on June 10, 1999 with no award for permanent disability. (Ex. 17.) Dr. Tobin performed an arbiter's examination on August 3, 1999. Mr. Moreno told Dr. Tobin that if he tried to do his regular work using a machete he had significant pain. Dr. Tobin opined that Mr. Moreno is significantly limited in his ability to repetitively use his right elbow due to the compensable claim. (Ex. 19.) On reconsideration of the Notice of Closure, WCD awarded 6 percent scheduled disability to the right arm. (Ex. 20.)

3. On February 26, 2001, Dr. Henery, the attending physician, requested that the claim be reopened. He noted that Mr. Moreno uses his arm continuously at work and that it has begun to worsen. (Ex. 23.) Dr. Farris performed an IME on May 16, 2001. He concluded that Mr. Moreno has common extensor tendonitis of the right elbow—another name for lateral epicondylitis or tennis elbow. He, too, stated that this condition seldom has truly objective findings, but is based upon history and a finding of tenderness. (Ex. 24.) SIMS denied the aggravation claim on June 14, 2001. (Ex. 25.) By Opinion and Order dated January 4, 2002, Administrative Law Judge Kekauoha of the Workers' Compensation Board, found the aggravation claim compensable. (Ex. 27.) On January 18, 2002, SIMS successor as Barrett's processing agent, Pinnacle Risk Management Service (Pinnacle) accepted the aggravation claim. (Ex. 28.)

4. Mr. Moreno saw Dr. Quijano on February 5, 2002. He ordered an MRI. (Ex. 29.) The MRI was normal. (Ex. 32.) Dr. Pollard saw Mr. Moreno on March 8, 2002. He reported that Mr. Moreno continued to have intermittent lateral epicondylitis. Dr. Pollard told Mr. Moreno that the condition is self-limiting and that it would resolve eventually with no treatment. He noted, however, that there are treatment options including cortisone injections and surgery. He discouraged surgery. (Ex. 34.)

5. On April 5, 2002, Mr. Moreno again saw Dr. Pollard. This time with complaints of severe lateral elbow pain. Mr. Moreno wanted to proceed with surgery. Dr. Pollard concluded that surgery was a reasonable approach and requested authorization from Pinnacle. (Ex. 34-1.) Pinnacle scheduled an IME with Dr. Sacamano as a result of the request for authorization. (Ex. 36.) Dr. Sacamano saw Mr. Moreno on May 29, 2002. Mr. Moreno told Dr. Sacamano that he is unable to perform any work except light duty work. He specifically stated that he had last planted trees three years previously. Dr. Sacamano expressed some doubt about the efficacy of surgery, but concluded that it was between Mr. Moreno and Dr. Pollard whether to do surgery. He stated that it was not contraindicated. (Ex. 38.)

6. Surveillance video was taken of Mr. Moreno on May 1, 2002, May 7, 2002 and May 8, 2002.<sup>1</sup> The video reveals Mr. Moreno doing yard work, including swinging a pick. The May 8 video also shows Mr. Moreno planting seedlings using a shovel, which he forces into the ground and wiggles with his right arm. (Ex. 37.) After viewing the surveillance video, Dr. Sacamano withdrew his approval of surgery. He noted that Mr. Moreno had told him that he had not been planting trees, whereas the video taken shortly before the IME revealed that he had been planting trees. Dr. Sacamano noted that diagnosing Mr. Moreno's condition depends mainly on subjective information in the history and the physical examination. If Mr. Moreno's reliability is questionable, then so is the diagnosis. (Ex. 41.) Dr. Pollard concurred with Dr. Sacamano's IME report and the addendum. (Ex. 42.)

7. Mr. Moreno returned to Dr. Quijano in August 2002. (Ex. 44.) Dr. Quijano placed Mr. Moreno on modified work pending his being able to see an orthopedist for surgical options. (Ex. 45.) On October 25, 2002, he noted that Mr. Moreno continued to have symptoms in his right elbow, which prevented him from doing the heavy work he wanted to do. He again requested authorization for surgery. (Ex. 34-3.) Pinnacle disapproved the surgery on November 19, 2002. Mr. Moreno requested administrative review. (Ex. 47.)

8. MRU sent Mr. Moreno to Dr. Van Allen who examined him on February 13, 2003.<sup>2</sup> Dr. Van Allen also viewed the surveillance tape. Mr. Moreno told Dr. Van Allen that he had been unable to do any significant heavy activities since 1999. He stated that he had only worked part-time since then and only with light duty restrictions. Dr. Van Allen stated that Mr. Moreno meets the classical indications for this surgery; however, for surgery to be successful, the patient must be reliable and honestly wish to improve. He reported that the activities viewed in the surveillance tape show activities that involve heavy use of the muscles involved in the accepted condition. Considering that Mr. Moreno has consistently denied an ability to do these activities, Dr. Van Allen concluded that it is highly unlikely that Mr. Moreno would benefit from surgical intervention. (Ex. 31.)

### CONCLUSIONS OF LAW

Under ORS 656.245, a proposed right lateral tennis elbow release is not reasonable and necessary treatment for Mr. Moreno's accepted condition

### OPINION

The Director has jurisdiction over medical disputes arising under ORS 656.245(1)

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<sup>1</sup> Mr. Moreno does not contend that the surveillance film is of anyone other than himself. In argument, his attorney appears to assume that the video is of Mr. Moreno. Therefore, I find that the video is of Mr. Moreno.

<sup>2</sup> The report is dated February 13, 2002; however within the report Dr. Van Allen states that the examination was conducted on February 13, 2003. In addition, the 2003 date is consistent with the chronology of this case. Therefore, I conclude that the examination, in fact, occurred on February 13, 2003.

in cases where compensability of the condition to which medical services are directed is not at issue. OAR 436-010-0008(3), (4). Diagnostic medical service disputes are not matters concerning a claim under ORS 656.704(3) and are within the director's jurisdiction. *See James P. Fisher*, 5 WCSR 332 (2000) (determination of causation is not necessary to resolve dispute.) Pursuant to ORS 656.327(2) and ORS 656.245(6), I review MRU's decision for substantial evidence and errors of law.

Substantial evidence supports a finding when the record, viewed as a whole, permits a reasonable person to make the finding. *Garcia v. Boise Cascade Corp.*, 309 Or 292, 295, 787 P2d 884 (1990); ORS 183.482(8)(c). I must evaluate the substantiality of supporting evidence by considering all of the evidence in the record. *Younger v. City of Portland*, 305 Or 346, 356, 752 P2d 262 (1988).

MRU found the surveillance film unpersuasive because it showed only "a very small window of time" and because it does not show how Mr. Moreno tolerated the activity. It discounted the film because it was taken before Mr. Moreno returned to work trimming trees. Based on its finding that the surveillance film was unpersuasive, MRU found that Mr. Moreno's subjective reports of right elbow symptoms were persuasive. Because both Dr. Sacamano and Dr. Van Allen had agreed that absent the film, surgery is appropriate, MRU concluded that surgery is reasonable treatment for Mr. Moreno's compensable condition.

Only two medical opinions discuss the reasonableness of surgery in light of the surveillance film. Dr. Sacamano stated:

Mr. Moreno told me in the independent medical evaluation that he had not done any vigorous work and he specifically stated he had not planted trees for three years. Since this alleged planting activity occurred a few weeks prior to my IME, it would appear that Mr. Moreno was not giving me accurate information. This presents a real problem in interpreting the patient's symptoms and, for obvious reasons, casts doubt on the reliability of the history and the subjective response to the physical examination.

Dr. Van Allen stated:

Although the patient meets the classical surgical indications, several issues regarding this patient's case individually must be considered. Dr. Sacamano's opinions tend to reflect my opinions very closely. It should also be noted that Dr. Pollard had actually concurred with Dr. Sacamano and his report following the surveillance video as well. For any surgical procedure to have the expected result, the patient must be reliable with an honest desire to improve. Following my review of the video tape and record and review of the patient, I feel it is quite clear that the patient has little, if any, limitations due to the accepted condition. The video tape clearly shows activities which involve relatively heavy use of the muscles involved in the accepted condition. Throughout, however, the patient has denied the ability to do these activities, and that certainly creates an objective conflict in this case. Based on this, I think it would be highly unlikely that this patient would benefit long term from surgical intervention.

No other evidence discusses the inconsistencies between Mr. Moreno's reported symptoms and limitations and the activities revealed in the surveillance film. Even Dr. Pollard concurred with Dr. Sacamano. Dr. Pollard offered no explanation for his apparent change of mind in later seeking authorization for surgery. Thus, his second request for surgery provides no substantial evidence in support of MRU's decision.

It is apparent from the reports of both Drs. Sacamano and Van Allen that none of the factors MRU considered significant in discounting the video are medically significant. What is significant to both doctors is that Mr. Moreno's subjective responses and reports are inconsistent with what he has demonstrated he can do. Both doctors believe that in a condition like Mr. Moreno's, surgery is contraindicated when subjective reports differ from demonstrated ability. I find no substantial evidence to support MRU's conclusion that Mr. Moreno's subjective reports of right elbow pain are persuasive in light of the surveillance film.

I conclude that the proposed surgery is not reasonable and necessary treatment for Mr. Moreno's accepted condition.

#### **ATTORNEY FEES**

Claimant has not prevailed in this contested case hearing, and therefore, is entitled to no assessed attorney fee.

#### **ORDER**

*IT HEREBY ORDERED* that MRU's Administrative Order dated April 24, 2003 is reversed.