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In the Matter of the ORS 656.327 Treatment Dispute of

**Sexton, Nisha A., Claimant**

Contested Case No: H03-062

**PROPOSED AND FINAL ORDER**

September 29, 2003

NISHA A. SEXTON, Petitioner

INTEL CORPORATION, Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

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**HISTORY OF THE CASE**

Claimant appeals a May 19, 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 physical therapy proposed by Robert Fields, MD was not appropriate treatment. Claimant appealed MRU's decision. WCD referred to the matter to the Office of Administrative Hearings (OAH) for hearing on June 11, 2003.

On July 25, 2003, OAH Administrative Law Judge (ALJ) Ella D. Johnson conducted a telephone hearing in this matter in Salem, Oregon. Attorney at Law Dave Lefkowitz represented petitioner, Nisha A. Sexton (claimant). Attorney at Law Bob Yandy represented respondent self-insured employer Intel Corporation and its service company, Matrix Absence Management, Inc. (employer). WCD waived appearance. No witnesses testified. The record closed following the hearing.

**ISSUE**

Whether MRU's decision that the physical therapy proposed by Dr. Fields was not appropriate treatment for claimant's compensable condition is supported by substantial evidence or reflects an error of law.

**EVIDENTIARY RULING**

The record consists of Exhibits 1 through 71, which were admitted into the record without objection.

**FINDINGS OF FACT**

I affirm and adopt the Findings of Fact contained in MRU's May 19, 2003 Administrative Order, with the following supplementation.

(1) Claimant sustained a compensable injury on May 18, 2002 and was treated by Dr.

Fields,<sup>1</sup> who became her attending physician. (Ex. 3.) Employer subsequently accepted claimant's claim for lumbar strain. (Ex. 23.) Claimant's injury was thereafter treated conservatively with cortisone shots and physical therapy including cold packs, ultrasound, therapeutic exercise, electrical stimulation and manual therapy. (Ex.3.)

(2) Dr. Fields referred claimant to Brian Seitz, DC for chiropractic treatment to be provided from May 23 through June 23, 2002. After two sessions, claimant discontinued the chiropractic care because the chiropractic treatment exacerbated her back pain. On May 29, 2002, Dr. Fields reexamined claimant and referred her to Timothy Brinker, PT CMPT at Therapeutic Associates for physical therapy (PT) five times a week for two weeks to decrease pain and increase range of motion. (Ex. 8.)

(3) Mr. Brinker evaluated claimant on June 4, 2002 and treated her from May 31 to July 8, 2002. Claimant's PT treatments consisted of cold packs, ultrasound, therapeutic exercise, electrical stimulation and manual therapy. Claimant continued to experience significant pain and functional limitations. On June 5, 2002, David F. Abbott, MD injected claimant's right SI joint with marcaine which provided some relief. On June 24, 2002, Dr. Fields repeated the SI joint injection and prescribed additional PT with Mr. Brinker three times per week for six weeks. He asked Mr. Brinker to consider using an SI Brace. (Ex. 19.) Mr. Brinker treated claimant from July 10 to July 23, 2002. (Ex. 13.)

(4) A June 20, 2002 MRI noted minimal annulus bulging at L4-5 extending towards the right but no evidence of focal extruded fragments or root compression. (Ex. 18.)

(5) On June 26, 2002, Edward Grossenbacher, MD (Orthopedic Surgery) performed an insurer medical examination (IME). He noted no objective findings and preexisting scoliosis. He did not find her to be medically stationary but opined that she would be medically stationary within three to four weeks. He recommended an aggressive proactive rehabilitation and strengthening program. (Ex. 20.) Dr. Fields did not concur with Dr. Grossenbacher's opinion. (Ex. 21.) On August 8, 2002, Thomas Rosenbaum, MD (Neurosurgery) performed a second IME, diagnosed chronic lumbosacral strain and noted that no objective abnormalities were revealed by examination or MRI. Dr. Rosenbaum opined that claimant was medically stationary with no loss of function, that no further medical treatment was required, and that she was released to return to regular work. (Exs. 29 – 31.) Dr. Abbott did not concur with Dr. Rosenbaum's opinion because it was internally conflicting concerning whether the MRI revealed abnormalities. Employer's attorney in a November 26, 2002 letter to Dr. Fields, noted that the internal inconsistency was caused by a typographical error. (Exs. 33, 53.)

(6) On July 8, 2002, Mr. Brinker noted that claimant's progress in PT was slower than expected and expressed concerns regard the rate of progress and the ongoing neurological deficits. (Ex. 13.)

(7) On August 8, 2002, Kim A Wayson, MD (Neurosurgery) evaluated claimant at the request of Dr. Abbott. Dr. Wayson opined that claimant had "a rather inconsistent physical

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<sup>1</sup> Drs. Field, Abbot and Seitz all practiced at the Tuality Physicians office. (Ex. 69.)

therapy exam” and that he was “not convinced that there are not secondary gain issues involved with this.” Dr. Wayson recommended nerve conduction studies and an EMG to document the lack of radiculopathy and a CT scan of claimant’s pelvis to rule out any possible pelvic disease. (Ex. 28.) Dr. Wayson concurred with the opinion of Dr. Rosenbaum. (Ex. 49.)

(8) On August 30, 2002, employer closed claimant’s claim and notified her concerning the provision on medical services after being found to be medically stationary. (Exs. 34, 35, 40-42.) On September 19, 2002, claimant requested reconsideration of the closure of her claim. (Exs. 45, 46.) On October 16, 2002, the department ordered that the Notice of Closure dated August 30, 2002 be rescinded and the claim reopened. (Ex. 41.)

(9) On October 18, 2002, Dr. Fields ordered daily PT for claimant by Sylvan Hills physical therapy. (Ex. 48.) Employer refused to authorize the physical therapy and claimant requested that MRU resolve the matter. (Ex. 50.) The claim was reclosed on December 10, 2002, awarding only temporary disability. (Exs. 56 -58.) On December 12, 2002, Dr. Fields opined that there had been no objective changes in claimant’s condition since September 13, 2002 and agreed with the findings of Drs. Rosenbaum and Wyson. (Ex. 53.) On administrative review by MRU, employer argued that the physical therapy was excessive, inappropriate, ineffectual, or in violation of the medical services rules. The employer also argued that the service was not a compensable service under ORS 656.245(1)(c). (Ex. 55.)

(10) On March 6, 2003, Ronald D. Rohlfing, MD was scheduled to examine claimant at MRU’s request. Claimant failed to appear at the examination and Dr. Rohlfing performed a record review. Dr. Rohlfing noted several PT reports by Mr. Brinker noting that the PT was not addressing claimant’s complaints and “the potential for further progress with physical therapy appears limited.” He concluded that the PT proposed by Dr. Field was not appropriate treatment. (Exs. 66, 67.)

## CONCLUSIONS OF LAW

MRU’s decision that the physical therapy proposed by Dr. Fields was not appropriate treatment for claimant’s compensable condition is supported by substantial evidence and does not reflect an error of law.

## OPINION

This dispute arises under ORS 656.327 and compensability is not at issue. Therefore, jurisdiction lies with the director. I may modify MRU’s administrative order only if it is not supported by substantial evidence or reflects an error of law. ORS 656.327(2). The burden of proving a fact or position falls upon the proponent. ORS 183.450(2). As petitioner, claimant bears the burden of proving by a preponderance of evidence that the administrative order is not supported by substantial evidence or reflects an error of law. *See 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). Claimant argues that MRU’s is not supported by substantial evidence and reflects an error of law. I find that claimant has failed to meet her burden.

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). That test requires the ALJ to:

“ \*\*\* look at the whole record with respect to the issue being decided, rather than one piece of evidence in isolation. If an agency’s finding is reasonable, keeping in mind the evidence against the finding as well as the evidence supporting it, there is substantial evidence. \*\*\* For instance, and in the 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 [director] finds the facts will probably have substantial evidentiary support. [The ALJ] would not need to choose sides. The difference between the ‘any evidence’ rule and the substantial evidence test \*\*\* will be decisive only when the credible evidence apparently weighs overwhelmingly in favor of the finding and the [ALJ] finds the other without giving a persuasive explanation.”

*Armstrong v. Asten-Hill Co.*, 90 Or App 200, 206 (1988).

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.” *Id.* If a finding is reasonable in light of countervailing as well as supporting evidence, the finding is supported by substantial evidence. *Garcia v. Boise Cascade*, 309 Or 292, 295 (1990).

MRU determined that Dr. Fields’ referral for additional PT was not supported in the record by convincing objective findings or diagnostic studies. MRU relied upon the opinions of the consulting physicians who reported normal neurological examination and diagnostic studies indicating no significant abnormalities. Even Dr. Fields concurred with the opinions of Drs. Rosenbaum and Wyson concerning the lack of objective findings. MRU also relied upon its own consulting physician, Dr. Rohlfing, who stated that there were no objective evidence that that correlated with her subjective complaints indicating that additional PT was warranted. Consequently, I conclude that MRU’s decision is supported by substantial evidence.

Claimant also argued that MRU’s order reflected an error of law. In that regard, claimant appeared to argue that claimant was entitled to PT because the department rescinded employer’s first Notice of Closure and reopened the claim. While that is true, the fact that the claim was in open status does not constitute an error of law by itself nor does it entitle her to PT without some showing that the PT is appropriate treatment. Accordingly, I conclude that MRU’s order does not reflect an error of law and affirm the Administrative Order.

### **ATTORNEY FEES**

Claimant has not prevailed in this contested case hearing, and therefore, is not entitled to an assessed attorney fee.

**ORDER**

*IT HEREBY ORDERED* that MRU's May 19, 2003 Administrative Order is affirmed.

Dated this 29<sup>th</sup> day of September 2003 at Salem, Oregon.

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Ella D. Johnson, Administrative Law Judge  
Office of Administrative Hearings