

In the ORS 656.245 Medical Services Dispute of  
**EDWARD L. HERSCHBERGER, Claimant**

Contested Case No: H04-118

**REVISED-PROPOSED AND FINAL ORDER**

December 21, 2004

OREGON CONTRACTORS WORKERS COMPENSATION TRUST, Petitioner

EDWARD L. HERSCHBERGER, Respondent

Before Catherine P. Coburn, Administrative Law Judge, Administrative Hearings

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**HISTORY OF THE CASE**

Insurer appeals an administrative order issued on June 16, 2004 by the medical Review Unit (MRU) of the Workers' Compensation Division (WCD), Department of Consumer and Business Services (director or department). On August 23, 2004, the department referred the matter to the Office of Administrative Hearings (OAH). On October 6, 2004, Administrative Law Judge (ALJ) Catherine P. Coburn conducted a contested case hearing. Petitioner Oregon Contractors' Workers' Compensation Trust and its claims administrator, Empire Pacific Risk Management (insurer) were represented by attorney David P. Levine. Respondent Edward L. Herschberger (claimant) was represented by attorney James T. Guinn. Assistant Attorney General Laurie Linley represented the department. Claimant testified on his own behalf and the record closed on the date of hearing.

**ISSUE**

Whether MRU correctly determined that a thoracolumbar MRI, proposed by Stephen S. Anderson, MD is compensable as a diagnostic medical service pursuant to ORS 656.245(1)(c)(H).

**EVIDENTIARY RULINGS**

WCD Exhibits 1 through 24, as well as insurer's Supplementary Exhibits 1A, 17A, 17B, 24A, 24B and 25 were admitted into the record without objection.

**FINDINGS OF FACT**

I adopt the findings of fact contained in the administrative order on appeal with the following supplementation.

(1) On May 22, 2003, claimant suffered a compensable back injury while moving a refrigerator. (Ex. 1.) Insurer accepted an acute thoracic muscle strain. (Ex. 2.) On July 17, 2003, the accepted condition became medically stationary and the claim was closed on September 8, 2003. (Exs. 1A and 2.)

(2) On September 30, 2003, claimant sought treatment from Steven S. Anderson, MD who recommended a thoracic and lumbar MRI. Dr. Anderson noted, “Thoracic disc herniation could have been missed by the CT. MRI is also a very sensitive test for disc space and epidural infections and we will also evaluate for that.” Dr. Anderson noted that claimant had a history of IV drug abuse three years ago without associated infection. (Ex. 4.)

(3) On October 13, 2003, claimant filed an aggravation claim and designated Dr. Anderson as his attending physician. (Ex. 6.) On October 6, 2003, insurer denied the aggravation claim. (Ex. 7.)

(4) On December 15, 2003, complained of chronic thoracolumbar pain and Dr. Anderson planned an “MRI of the lumbar spine including thoracolumbar junction to rule out infection although this is more likely mechanical.” (Ex. 9.)

(5) Insurer denied reimbursability of the proposed MRI based on lack of causal relationship. (Exs. 13 and 14.) On January 29, 2004, claimant requested administrative review. (Exs. 11 and 17.)

### CONCLUSION OF LAW

MRU correctly determined that a thoracolumbar MRI, proposed by Stephen S. Anderson, MD is compensable as a diagnostic medical service pursuant to ORS 656.245(1)(c)(H).

### OPINION

Jurisdiction lies with the director of the department. ORS 656.704(3)(b)(B); ORS 656.245(6). I review for substantial evidence or error of law. ORS 656.245(6). The burden of producing evidence to support a fact or position rests with the proponent. ORS 184.450(2). As petitioner, insurer bears the burden of proving by a preponderance of the evidence that the administrative order is incorrect. *See Cook v. Employment Div.*, 47 Or App 437 (1980) (In the absence of contrary legislation, 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).

MRU relied on Dr. Anderson’s opinion and determined that the proposed thoracolumbar MRI is reimbursable. Insurer contends that the proposed MRI is not causally related to the work injury. In contrast, claimant contends that the administrative order is correct and should be affirmed. I agree with claimant’s position.

Pursuant to ORS 656.245(1), an insurer is obligated to provide medical services that are materially related to a compensable injury for such period as the nature of the injury or the process of recovery requires. This obligation continues over the injured worker’s lifetime. Pursuant to ORS 656.245(1)(c), medical services after the medically stationary date are not compensable with certain exceptions. Pursuant to ORS 656.245(1)(c)(H), medical services that

are necessary to diagnose the worker's condition are compensable. ORS 656.245(1)(c)(H) provides:

(c) Notwithstanding any other provision of this chapter, medical services after the worker's condition is medically stationary are not compensable except for the following:

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(H) Services that are necessary to diagnose the worker's condition.

When diagnostic services are necessary to determine the cause or extent of the compensable injury, such services are compensable whether or not the condition discovered as a result is compensable. *Counts v. International Paper Company*, 146 Or App 768 (1997). In *Counts*, the court placed the burden on the claimant to show that the compensable injury made the diagnostic tests necessary. Here, the record contains only one medical opinion. Attending physician Anderson recommended the disputed MRI because a thoracic disc herniation could have been missed by the CT and because the chronic pain is likely mechanical. Additionally, Dr. Anderson noted that the MRI would incidentally rule out spinal infection. Under *Counts*, Dr. Anderson's opinion establishes that the proposed MRI is necessary to determine the cause and extent of the compensable injury. Based on the record, I find that insurer has failed to carry its burden of proving by a preponderance of evidence that the administrative order is incorrect. Accordingly, I affirm.

### ATTORNEY FEES

Claimant has prevailed in a contested case hearing, and therefore, is entitled to a reasonable attorney fee. ORS 656.385(1). On October 6, 2004, claimant's attorney submitted a statement of services listing 3.2 hours preparation. Considering the factors listed in OAR 436-001-0265, I find that \$640 is a reasonable fee for claimant's attorney's services in this contested case.

### ORDER

IT IS HEREBY ORDERED that:

Administrative Order **TX 04-226** dated June 16, 2004 is affirmed. Insurer shall pay claimant's attorney a fee of \$640.