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In the Matter of  
**VICTOR J. CERVANTES, Claimant**  
Contested Case No: H03-122  
**PROPOSED AND FINAL ORDER**  
October 7, 2005  
BARRET BUSINESS SERVICES, INC., Petitioner  
VICTOR J. CERVANTES, Respondent  
Before Catherine P. Coburn, Administrative Law Judge, Administrative Hearings

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### **HISTORY OF THE CASE**

Self-insured employer appeals the Administrative Order issued on September 8, 2003 by the Medical Review Unit (MRU) of the Workers' Compensation Division (WCD), Department of Consumer and Business Services (department or director). On August 15, 2005, the department referred the matter to the Office of Administrative Hearings (OAH). On September 20, 2005, Administrative Law Judge Catherine P. Coburn conducted a hearing in Beaverton, Oregon. Attorney Travis L. Terrall represented petitioning self-insured employer, Barrett Business Services, Inc., and its claims administrator Pinnacle Risk Management Services (insurer). Victor J. Cervantes (claimant) appeared without benefit of counsel and testified on his own behalf. The record closed on September 30, 2005 following submission of additional evidence.

### **ISSUE**

Whether MRU incorrectly determined that a bilateral epicondylectomy, proposed by Charles D. Layman, M.D., is appropriate medical treatment.

### **EVIDENTIARY RULINGS**

WCD Exhibits 1 through 128, as well as insurer's Supplementary Exhibits 129 and 130 were admitted into the record without objection.

### **FINDINGS OF FACT**

- (1) On April 30, 1997, claimant developed bilateral hand and arm conditions while working as a roofer. (Ex. 1.) Following litigation, employer accepted left medial and lateral epicondylitis, right medial and lateral epicondylitis. (Exs. 37, 43, 44, 51 and 53.)
- (2) On June 21, 1999, Stan Neitling, M.D. performed right medial epicondylitis surgery. (Exs. 48-1, 76-1 and 115-1.)
- (3) Videotapes taken on July 23 and July 24, 1999 show claimant engaged in various activities, including using a chain saw. (Ex. 42; testimony of claimant.)
- (4) Stan J. Neitling, M.D. viewed the videotapes and on September 22, 1999, discussed them with claimant. (Ex. 45.) Claimant did not report any increase in symptoms following the

activity shown on the videotape. (*Id.*) Dr. Neitling noted, “Based on my review of this tape, it is my feeling that there is no impairment here, and that his epicondylitis is not severe enough to warrant any further medical intervention, including surgery.” Dr. Neitling found the claimant’s conditions medically stationary and released claimant to regular work. (Ex. 45-2.)

(5) On September 27, 1999, claimant sought treatment from Bart Rask, M.D. who recommended left elbow surgery. (Ex. 46.) On the same day, claimant designated Dr. Rask as his new attending physician. (Ex. 47.) In October 1999, Dr. Rask viewed the videotapes, read Dr. Neitling’s reports and retracted the surgical recommendation. (Ex. 50.)

(6) On November 18, 1999, the claim was closed without any permanent partial disability award (PPD). (Ex. 54.)

(7) On December 17, 1999, Dr. Neitling opined that claimant had no elbow impairment other than during a brief period of time while recouping from surgery. (Ex. 55.)

(8) On January 17, 2000, claimant designated Harry H. Rinehart, M.D. as his new attending physician. (Exs. 57.) Dr. Rinehart noted that claimant had bilateral elbow tenderness but no objective findings. (Ex. 57.)

(9) On January 31, 2000, the department issued an Order on Reconsideration affirming the medically stationary date and awarding 5 percent PPD for the left arm and 3 percent PPD for the right arm. (Ex. 59.)

(10) On February 2, 2000, insurer notified claimant that any further change of attending physician would require the director’s approval. (Ex. 60.)

(11) On April 24, 2001, claimant sought treatment from Dr. Layman on referral from Dr. Rinehart. (Exs. 70 and 75.) Dr. Layman referred claimant to Jeffrey I. Gerry, M.D., Ph.D. who performed electrodiagnostic studies which rendered normal results. (Exs. 76 and 77.) On May 17, 2001, Dr. Gerry prescribed a trial of cervical traction and noted that claimant remained a surgical candidate for right lateral epicondylitis. (Ex. 79.)

(12) On September 4, 2001, Douglas Bald, M.D. conducted an independent medical examination. He opined that claimant’s condition remained stationary since the 2000 claim closure, and recommended against any further medical treatment, including surgery. (Ex. 87-10.) Dr. Rinehart concurred. (Ex. 89.) Dr. Layman did not concur. (Exs. 88 and 90.)

(13) On October 30, 2001, Dr. Layman requested authorization to proceed with bilateral epicondylectomy and periostial stripping. (Ex. 91.)

(14) On January 2, 2002, claimant designated Wendy Callander, M.D. as his new attending physician. (Exs. 92 and 93.)

(15) On October 15, 2002, John W. Swanson, M.D. conducted an independent medical examination. (Ex. 100.) Dr. Swanson opined that claimant’s condition remained medically

stationary since the 1999 claim closure and suggested weaning claimant off of narcotic medications. (Ex. 100-22.)

(16) On October 30, 2002, Jon C. Vessely, M.D. conducted an independent medical examination and opined that claimant had no objective pathology in the upper extremities. (Ex. 102-14.)

(17) On November 5, 2002, claimant requested director's review of insurer's refusal to authorize surgery. (Ex. 104.)

(18) On May 15, 2003, Michael Van Allen, M.D. examined claimant at MRU's request and opined that surgery was appropriate. The report references neither the medical records of Dr. Neitling and Dr. Rask nor the July 1999 videotapes. (Exs. 115, 116 and 117.)

(19) On July 14, 2003, claimant's attorney stated that claimant is the person shown on the July 1999 videotapes. (Ex. 119.)

(20) On August 21, 2003, Dr. Van Allen viewed the 1999 videotapes and opined,

If in fact this is [claimant] and the patient that I examined back on May 15, 2003, I would say that it is unlikely that surgical treatment would benefit the patient or make him more functional than we see on the video tape. After viewing the video tape, although it does not confirm that the patient did not have symptoms following these activities, in my opinion, it clearly shows an activity status exceeding that which you would expect with a surgical candidate. If this is [claimant] on the video tape, I do not believe he would benefit from surgery based on the observed activities. (Ex. 123.)

(21) On November 2, 2004, following litigation, insurer was determined to be responsible for claimant's bilateral elbow condition and its aggravation denial was upheld. (Exs. 129 and 130.)

### **CONCLUSION OF LAW**

MRU incorrectly determined that a bilateral epicondylectomy, proposed by Charles D. Layman, M.D., is appropriate medical treatment.

### **OPINION**

Jurisdiction lies with the director. ORS 656.327(2). I may modify the administrative order only if it is not supported by substantial evidence in the record or reflects an error of law. ORS 656.327(2) and OAR 436-001-0225(1). The burden of presenting evidence to support a fact or position falls upon the proponent. ORS 183.450(2). As petitioner, insurer bears the burden of proving by a preponderance of evidence that the administrative order is incorrect.

*Cook v. Employment Div.*, 47 Or App 437 (1980) (In the absence of contrary legislation, the standard of proof in administrative hearings 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 (1998). Having reviewed the record, I find that insurer has met its burden.

MRU determined that the disputed medical treatment is appropriate. MRU relied on the opinion of Dr. Layman and cited the opinion of medical arbiter Dr. Van Allen. MRU assigned no weight to the July 1999 videotapes offered by insurer for two reasons. First, MRU stated that it had no means of verifying that the person shown on the videotape was claimant. Second, MRU stated that it had no means of ascertaining whether claimant suffered increased symptoms after he engaged in the activities shown on the videotape.

Insurer first contends that MRU erred by discounting the videotape. Insurer next contends that MRU erred by misconstruing medical arbiter Dr. Van Allen's opinion. Insurer further contends that the administrative order is not supported by substantial evidence. In contrast, claimant contends that the administrative order is correct and should be affirmed. Having reviewed the record, I conclude that insurer has met its burden.

Under ORS 656.245(1)(a), an insurer is obligated to provide medical services for conditions caused in material part by the work 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. ORS 656.245(1)(b). However, an insurer is not required to provide treatment that is excessive or medically inappropriate under ORS 656.327.

MRU ignored the videotape because it was unsure whether the video showed claimant or another person. However, the record confirms that the videotape shows claimant and not another person. For example, claimant admitted to Dr. Neitling that he used a chain saw as recorded on the videotape. Moreover, claimant's attorney stated that the videotape shows claimant. Finally, claimant testified at hearing that the videotape shows him using a chain saw and that he had never denied this fact.

Next, MRI ignored the videotape because it was unaware whether claimant had suffered any increased symptoms following his chain saw activities. However, the contemporaneous medical record indicates that claimant suffered no increased symptoms. On the contrary, on September 22, 1999, within two months after the videotapes were filmed, Dr. Neitling discussed the chain saw activity with claimant and claimant mentioned no increase in symptoms. Moreover, claimant testified at hearing that he did not recall suffering any increase in symptoms following his chain saw activities. For these reasons, I find that MRU erred by assigning no weight to the videotape.

The next question is whether the administrative order is supported by substantial evidence. Substantial evidence exists to support a finding "when the record, viewed as a whole, would permit a reasonable person to make that finding." ORS 183.482(8)(c). To determine whether substantial evidence exists, an ALJ is required 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 findings 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 (director) finds the other without giving a persuasive explanation.” *Armstrong v. Asten-Hill Co.*, 90 Or App 200, 206 (1998).

Under substantial evidence review standard, an ALJ is not obligated to defer to the opinion of the attending physician. *Dillon v. Whirlpool Corp.*, 172 Or App 484 (2001). Here, MRU relied on the opinions of Dr. Layman and medical arbiter Dr. Van Allen. Having considered the record as a whole, I find that the administrative order is not supported by substantial evidence.

To begin, Dr. Layman recommended surgery in October 2001, four years ago. The record contains no recent statement from Dr. Layman in light of claimant’s intervening medical history and current medical condition. Consequently, I find Dr. Layman’s surgical recommendation unreliable. Next, MRU misconstrued Dr. Van Allen’s opinion. Dr. Van Allen stated without equivocation that if the videotapes showed claimant, then the proposed surgery was inappropriate. The record establishes that the videotape shows claimant. Furthermore, the contemporaneous medical record as well as claimant’s testimony establishes that he did not suffer increased symptoms following the chain saw activity. Finally, Drs. Bald, Rinehart, Swanson, and Vessely have recommended against further treatment. For these reasons, I conclude that the administrative order is not supported by substantial evidence, and accordingly, I reverse.

### **ORDER**

IT IS HEREBY ORDERED that:

The Administrative Order dated September 8, 2003 is reversed.