

In the ORS 656.245 Medical Service Dispute of

**RONALD KRAFT, Claimant**

Contested Case No: H04-166

**PROPOSED AND FINAL ORDER**

JANUARY 13, 2005

LIBERTY NORTHWEST INS. CO., Petitioner

RONALD KRAFT, Respondent

Before Allison Greene Webster, Administrative Law Judge, Administrative Hearings

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### **HISTORY OF THE CASE**

Liberty Northwest Insurance Corporation appeals an administrative order issued September 29, 2004 by the Medical Review Unit (MRU) of the Workers' Compensation Division (WCD) of the Department of Consumer and Business Services (director or department). The department referred the matter to the Office of Administrative Hearings and, on January 6, 2005, Administrative Law Judge Alison Greene Webster of the Office of Administrative Hearings conducted a telephone hearing in this matter. Petitioner Liberty Northwest Insurance (insurer) was represented by attorney Leah Sideras. Respondent Ronald Kraft was represented by attorney Aukjen T. Ingraham. The record closed on the date of hearing.

### **ISSUE**

Whether MRU incorrectly determined that the insurer was liable for medical services provided to claimant by St. Vincent Hospital on August 7, 2002.

### **EVIDENTIARY RULINGS**

WCD Exhibits 1 through 115 and insurer's supplemental Exhibits 1A, 1B, 19A, 35A, 60A, 73A, 79A and 86A were received and admitted without objection. Insurer withdrew supplemental Exhibit 77A.

### **FINDINGS OF FACT**

I adopt the Findings of Fact set forth in the September 29, 2004 Administrative Order, with the following summary and supplementation:

(1) Claimant sustained a compensable back injury on August 23, 1995. The insurer ultimately accepted a claim for L4-5 and L5-S1 herniated nucleus pulposus. (Exs. 8, 35A, 59.)

(2) Claimant received surgical treatment for his injury. In September 1995, he underwent an L4-5 laminotomy and microdiscectomy. (Ex. 13.) He experienced persistent back and leg pain. In August 1999, Oisín R. O'Neill, MD performed an L5-6 microdiscectomy with fusion and instrumentation. (Ex. 27.)

(3) Claimant continued to experience back pain, but his condition became medically stationary by July 2001. Claimant's attending physician, Joseph Gifford, MD, prescribed medication to reduce his symptoms. (Ex. 71.) Claimant also participated in a vocational rehabilitation program in 2001. (Ex. 74.)

(4) In April 2002, Dr. Gifford referred claimant to Kathleen Moore for treatment of his continuing back pain. Dr. Moore recommended epidural steroid injections along with abdominal and lumbar strengthening exercises. (Exs. 79, 80.)

(5) In June 2002, claimant returned to Dr. O'Neill. Claimant reported no change in his condition and denied any left leg symptoms. Dr. O'Neill found no significant change in the clinical examination, but recommended that claimant undergo a right L4-5 decompression laminectomy and foraminotomy with far lateral discectomy. Dr. O'Neill noted that although claimant did not have many symptoms, he planned to proceed with the right side surgery because he believed it would address symptoms that claimant would likely develop.<sup>1</sup> (Ex. 84.) Dr. O'Neill then requested from the insurer authorization for L4-5 inpatient surgery. (Ex. 85.)

(6) In a fax transmittal dated June 18, 2002, the insurer denied the authorization for L4-5 surgery. The insurer noted that claimant was not experiencing many symptoms and had no significant change since his prior medical examinations. In addition, the insurer advised that claimant's attending physician, Dr. Gifford, had requested other treatment (steroid injections) by Dr. Moore. (Ex. 86.) That same day, the insurer notified Dr. Moore by fax that it was authorizing her to proceed with the requested steroid injections. (Ex. 86A.)

(7) On July 9, 2002, the insurer was notified that claimant was scheduled for L4-5 surgery at Providence St. Vincent Hospital on August 7, 2002. The insurer advised the hospital that the surgery was not authorized. (Ex. 87; test. of Morley.)

(8) On August 7, 2002, claimant was admitted to Providence St. Vincent Hospital for the L4-5 surgery. Hospital personnel performed routine pre-operative procedures on claimant, including blood work, an EKG and administration of intravenous fluids and antibiotics. (Ex. 88.) Claimant was then taken to the operating room, which was set up and ready for his surgery. When Dr. O'Neill arrived and spoke with claimant, claimant reported that he was feeling much better and no longer experiencing symptoms. After this discussion with claimant, Dr. O'Neill called off the surgery. In claimant's discharge summary, Dr. O'Neill wrote:

I discussed this with the patient, but if he is not having symptoms, he should not have surgery. He and I have gone over this in detail. Of course, this pain syndrome could recur, and if it does I will be glad to see him back, but I do not think it is conscionable to proceed with surgical intervention on someone who is not symptomatic. (Ex. 90.)

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<sup>1</sup> In a June 11, 2002 letter to Dr. Gifford, Dr. O'Neill wrote: "I have discussed [the surgery] with [claimant] and he wishes me, despite the fact that he does not have many symptoms, to proceed to the right side because he is concerned that he will develop symptoms (as am I)." (Ex. 84.)

(9) Following the cancelled surgery, the hospital billed the insurer \$5,521.85 for costs incurred in anticipation of the surgery. (Ex. 91.) The insurer declined to pay, noting that the surgery was not authorized, and was not requested or recommended by claimant's attending physician. (Test. of Morley; Ex. 100.) The hospital then billed claimant for these costs, asserting that he was responsible for the unpaid balance. (Ex. 93.)

(10) Claimant paid the hospital bill and requested Administrative Review, seeking reimbursement from the insurer for the amount paid. (Ex. 99.)

(11) In response to claimant's request for Administrative Review, the insurer again asserted that the surgery was not authorized and was not requested by claimant's attending physician. (Ex. 100.)

### CONCLUSIONS OF LAW AND REASONING

Jurisdiction over this medical services dispute lies with the Director. ORS 656.245(6); I review *de novo*. OAR 436-001-0225(1). The burden on proving a fact or position falls upon the proponent. ORS 183.450(2). Here, as the petitioner, the insurer bears the burden of proving that the administrative order is incorrect. See *Cook v. Employment Div.*, 47 Or App 437 (1980).

Pursuant to ORS 656.245(1)(a), an insurer is obligated to provide medical services that are materially related to a compensable condition for so long as the nature of the injury or the process of recovery requires. This obligation continues throughout the worker's lifetime. ORS 656.245(1)(b) Once the worker is medically stationary, however, only certain medical services are compensable. ORS 656.245(1)(c). In this case, MRU determined that the surgery proposed, and later cancelled, by Dr. O'Neill was compensable as "curative care" under ORS 656.245(1)(c)(L). Under this subsection, "curative care" is compensable if it is "provided to a worker to stabilize a temporary and acute waxing and waning of symptoms of the worker's condition."

On review, the insurer argues that the cancelled surgery was not curative care and therefore not compensable under ORS 656.245(1)(c). In addition, insurer asserts that the surgery was not authorized and not requested by claimant's attending physician. The insurer also notes that it was inappropriate for the hospital to bill claimant for these services. Claimant, on the other hand, contends that the administrative order is correct and should be affirmed.

Upon review of the record, I agree with the insurer. MRU erred in concluding that the cancelled surgery meets the criteria of compensable curative care. In *William S. Holland*, 4 WCSR 60, 63 (1999), the director considered the meaning of "curative care":

The statute, by its very terms, addresses *symptoms*, not *conditions*. This is certainly consistent with ORS 656.245(1)(c), which applies

only to care given after the worker is medically stationary. "Medically stationary" means that "no further material improvement would reasonably be expected from medical treatment, or the passage of time." ORS 656.005(17). The statutory scheme contemplates that healing will occur, if at all, while a claim is open. Thereafter, medical care will treat symptoms rather than the underlying condition. The only question is whether the symptoms are temporary and acute, and treatment is needed to restore the worker to a baseline or medically stationary level. If so, the care is "curative."

In this case, claimant was medically stationary by July 2001. When Dr. O'Neill proposed the L4-5 surgery in June 2002, claimant was not experiencing many symptoms. Dr. O'Neill recommended surgical intervention primarily as a preemptive measure, to avoid symptoms that both he and claimant believed claimant would develop in the future. Two months later, Dr. O'Neill cancelled the surgery at the last minute, because claimant was still asymptomatic. Indeed, in his August 7, 2002 hospital discharge summary, Dr. O'Neill acknowledged that it would not be "conscionable to proceed to with surgical intervention on someone who is not symptomatic." Considering that, under ORS 656.245(1)(c)(L), "curative care" is treatment provided to stabilize symptoms that are temporary and acute, and in this case, claimant was essentially asymptomatic at all times pertinent to the proposed surgery, it is not reasonable to characterize the disputed medical services as compensable curative care.

It is unfortunate that the hospital billed claimant, and that claimant paid the hospital for all the disputed charges. And, although it may not be fair for claimant to bear responsibility for these charges, there is also no basis in the law to hold the insurer liable under these circumstances. The services provided by Providence St. Vincent Hospital on August 7, 2002 in connection with the cancelled surgery fall outside the scope of compensable services enumerated in ORS 656.245(1)(c). I therefore reverse MRU's order.

#### **ATTORNEY FEES**

Claimant has not prevailed at this contested case hearing and is therefore not entitled to an attorney fee. ORS 656.385(1).

#### **ORDER**

IT IS HEREBY ORDERED that:

The Administrative Order dated September 29, 2004 is reversed. Liberty Northwest Insurance Corporation is not liable for the August 7, 2002 services provided by Providence St. Vincent Hospital.