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In the ORS 656.245 Medical Services Dispute of

**DOUGLAS J. LAMBERT, Claimant**

Contested Case No: H05-063

**PROPOSED AND FINAL ORDER**

June 21, 2005

DOUGLAS J. LAMBERT, Petitioner

LIBERTY NORTHWEST INSURANCE CORP., Respondent

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

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### **HISTORY OF THE CASE**

Claimant appeals the Administrative Order issued on March 24, 2005 by the Medical Review Unit (MRU) of the Workers' Compensation Division (WCD), Department of Consumer and Business Services (department or director). On April 22, 2005, the department referred the matter to the Office of Administrative Hearings (OAH). On June 9, 2005, Administrative Law Judge Catherine P. Coburn conducted a hearing in Beaverton, Oregon. Attorney Andrew H. Josephson represented petitioner Douglas J. Lambert (claimant). Attorney Philip Nyberg represented respondent Liberty Northwest Insurance Corporation and its insured, Tenant Improvement Services (insurer). Eric W. Long, MD, appeared as a limited party pursuant to OAR 137-003-0535 and testified on claimant's behalf. The record closed on the date of hearing.

### **ISSUE**

Pursuant to ORS 656.245(1)(b)(H), whether MRU incorrectly determined that an L4-5 facet nerve block was not compensable as a diagnostic medical service.

### **EVIDENTIARY RULINGS**

WCD Exhibits 1 through 40, as well as claimant's Supplementary Exhibits 41 and 42 and insurer's Supplementary Exhibits 24A, 24B and 31A were admitted into the record without objection.

### **FINDINGS OF FACT**

I adopt and incorporate the findings of fact contained in the Administrative Order dated March 24, 2005, with the following supplementation:

(1) On October 16, 1989, claimant suffered a lumbar injury while performing construction demolition work. (Ex. 2.) Insurer initially accepted a lumbar strain and subsequently accepted right knee strain and L5-S1 herniated disk. (Exs. 1 and 6.)

(2) On January 20, 2005, Dr. Long wrote, "Therefore, the purpose of the L4-5 facet nerve block is to determine the extent of the continued involvement of the L5-S1 disk condition and the

appropriate treatment plan.” (Ex. 34-2.)

### CONCLUSION OF LAW

Pursuant to ORS 656.245(1)(b)(H), MRU incorrectly determined that an L4-5 facet nerve block was not compensable as a diagnostic medical service.

### OPINION

Jurisdiction lies with the director. ORS 656.245(6) and 656.704(3)(a). I review for substantial evidence or error of law. ORS 656.245(6) and OAR 436-001-0225(1). The burden of producing evidence to support a fact or position rests with the proponent. ORS 184.450(2). As petitioner, claimant 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). Having reviewed the record, I conclude that claimant has met his burden.

Following a work injury, an insurer is obligated to provide medical services for conditions caused in material part by the injury for such period as the nature of the injury or the process of the recovery requires. ORS 656.245(1)(a). This obligation continues over the injured worker’s lifetime. ORS 656.245(1)(b). After the medically stationary date, medical services are not compensable with certain exceptions, such as diagnostic services. ORS 656.245(1)(c)(H). To establish compensability, the injured worker must show that the compensable injury made the diagnostic service necessary. *Counts v. International Paper Co.*, 146 Or App 768, 770 (1997). Diagnostic services for the purpose of determining a causal relationship, if any, between an accepted condition and the worker’s condition are compensable. *Roseburg Forest Products v. Langley*, 156 Or App 454, 462 (1998). The service is compensable if it is necessary to determine the cause or extent of the compensable injury, even if a noncompensable condition is discovered as a result. *Counts*, at 771. Tests to determine the extent of a compensable injury are reimbursable; tests to establish the existence of a new or consequential condition are not. *Langley*, at 463.

MRU determined that insurer is not liable for the proposed L4-5 facet nerve block as a diagnostic medical procedure. Claimant contends that the order is not supported by substantial evidence because MRU misconstrued Dr. Long’s opinion. In contrast, insurer contends that the administrative order is correct and should be affirmed.

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).

MRU misread Dr. Long's statement concerning the purpose of the proposed facet block. On January 20, 2005, Dr. Long wrote, "Therefore, the purpose of the L4-5 facet nerve block is to determine the extent of the continued involvement of the **L5-S1 disk** condition and the appropriate treatment plan." (Emphasis added.) (Ex. 34-2.) In the administrative order, MRU quoted Dr. Long incorrectly, stating, "In his January 20, 2005 letter, Dr. Long writes that the purpose of the L4-5 facet nerve block is to determine the extent of the continued involvement of the **L4-5 disk** condition and the appropriate treatment plan." (Emphasis added.) (Administrative Order, p. 6, para. 3.) MRU mistakenly concluded that the diagnostic procedure was directed to a noncompensable condition. However, Dr. Long proposed the L4-5 facet block in order to ascertain the extent of the accepted L5-S1 disk condition. This is compensable under *Counts*. Finally, inasmuch as the administrative order is not supported by substantial evidence, I reverse.

### ***ATTORNEY FEES***

Claimant has prevailed in a contested case hearing and is entitled to a reasonable attorney fee. ORS 656.385(1). On June 17, 2005, claimant's attorney submitted a statement of services listing 4 hours and 25 minutes. Considering the factors listed in OAR 436-001-0265, I find that \$900 (\$200 x 4.5 hours) is a reasonable fee for claimant's attorney's services in this case.

### **ORDER**

IT IS HEREBY ORDERED that:

1. The Administrative Order dated March 24, 2005 is affirmed.
2. Insurer shall pay claimant's attorney a fee of \$900.