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In the ORS 656.327 Medical Treatment Dispute of

**Michael W. Thompson, Claimant**

Contested Case No: 11-009H

**PROPOSED & FINAL ORDER**

September 7, 2011

MICHAEL W. THOMPSON, Petitioner  
EMPLOYERS INSURANCE OF WAUSAU, Respondent  
Before David Lipton, Administrative Law Judge

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Pursuant to notice, a hearing convened on June 8, 2011 in Portland, Oregon before David D. Lipton, Administrative Law Judge. Claimant was present and was represented by Donald Beer. The employer, Joseph T Ryerson & Son Inc, and its insurer, Employers Ins. of Wausau, were represented by Meg Carman. The hearing was continued for the deposition of Gregory Gullo, M.D. Thereafter, recorded closing argument was presented on July 27, 2011 and the record closed.

Proposed exhibits 1 through 18 submitted by the Workers' Compensation Division and identified on its January 28, 2011 exhibit list were admitted.

**ISSUE**

Claimant protests the Workers' Compensation Division's December 23, 2010 Administrative Order of Dismissal.

**FINDINGS OF FACT**

Claimant was compensably injured on May 10, 1999. He was examined the following day in the office of Timothy Treible, M.D. by Todd Rosborough, P.A. A lumbar Magnetic Resonance Imaging (MRI) scan was performed the same day. Claimant completed a Workers' Compensation Claim Form 801 for the May 10, 1999 low back injury on June 9, 1999. Liberty NW's predecessor, Wausau, accepted a disabling low back strain on August 30, 1999. On January 5, 2000 Dr. Treible performed L4-5, L5-S1 laminotomies with discectomy for degenerative disc disease and disc protrusions. Thereafter, Wausau modified the Notice of Acceptance to add disabling mild disc bulges at L4-5 and L5-S1.

The claim was initially closed on December 29, 2000. An Order on Reconsideration awarded Claimant unscheduled and scheduled permanent partial disability benefits.

On June 26, 2002 a Stipulation was approved. The Stipulation recited the acceptance of a left thumb abrasion, contusion and strain and that Claimant's chronic low back pain was "part and parcel" of his accepted disc conditions.

On September 10, 2002 Claimant presented to Carl Balog, M.D. for pain management. After referrals to and examinations by other physicians, on June 10, 2003 Dr. Balog recommended steroid injections and a discectomy at L3-4.

On April 2, 2004, Liberty NW issued a current condition denial reciting that Claimant's compensable condition was no longer the major contributing cause of his combined condition.

A hearing addressing the April 2, 2004 denial was convened before Administrative Law Judge Mills on June 22, 2004. At hearing, Liberty NW contended that Claimant suffered from a combined condition consisting of his accepted low back condition and preexisting conditions. The record of the hearing closed on December 13, 2004. Judge Mills issued his Opinion and Order on January 6, 2005. He held that the denial was procedurally valid but set it aside on its merits. He found that "the functional overlay or psychosocial issues or pain behavior are all part and parcel of Claimant's chronic pain syndrome, a condition which...was accepted as related to Claimant's injury by the insurer. Under those circumstances, the chronic pain syndrome problem can hardly be characterized as a non-compensable preexisting condition." Judge Mills further found that "Claimant...did have disc pathology following his injury which was accepted by the insurer. He had surgery for that pathology and obviously the surgery did not lead to a good result for Claimant. This lead to the chronic pain syndrome which was also a real condition accepted by the insurer."

The record does not reflect that Liberty thereafter issued a Modified Notice of Acceptance consistent with Judge Mills' Order.

On September 26, 2006 Claimant was examined by Jordi Kellogg, M.D. Claimant complained of low back pain and bilateral radiculopathy, worse on the left than the right. Dr. Kellogg initially pursued a conservative approach to Claimant's condition. Subsequently, Dr. Kellogg obtained a lumbar CT scan and a lumbar discogram. Thereafter, on April 30, 2007, authorization for an L4-5, L5-S1 posterior interbody fusion was requested. Following Liberty's response that it would not authorize the surgery on the grounds that the purpose was to address potential new or omitted conditions, on July 17, 2007 Claimant's attorney requested Liberty to accept claims for an L4-5 disc bulge/protrusion, annular tear at L4-5, L5-S1 disc bulge/protrusion and LS-S1 annular tear.

At Liberty's request, Claimant was examined by Gary Olbrich, M.D., a specialist in pain management and addiction, John Swanson, M.D., orthopedic surgeon, and M. Sean Green, M.D., neurologist, on September 19, 2007. On September 20, 2007 Claimant was examined at Liberty's request by psychiatrist Eric Goranson, M.D. Following the receipt of their reports, on October 12, 2007 Liberty NW denied the new or omitted condition claims for L4-5 disc bulge/protrusion, L4-5 annular tear, L5-S1 disc bulge/protrusion and L5-S1 annular tear.

A hearing to address the October 12, 2007 denial proceeded to hearing before the undersigned Administrative Law Judge on January 14, 2008. The record closed on February 29, 2008. The Opinion and Order issued on March 24, 2008. The Order set aside the denial.

On April 18, 2008 Liberty NW issued a Modified Notice of Acceptance for disabling L4-5 disc bulge, L5-S 1 disc bulge, left thumb abrasion, left thumb contusion, left thumb strain, L4-5 disc protrusion, L4-5 annular tear at, L5-S1 disc protrusion and L5-S 1 annular tear.

On July 29, 2008 Dr. Kellogg performed a laminectomy and facetectomy at L4-5 and L5-S1, bilateral discectomy at L4-5 and L5-S1 and a fusion at L4-5 and LS-S1.

On May 27, 2009 Claimant was examined by Jon Benson, PhD on referral from Gregory Gullo, M.D. He was examined in connection with a recommendation that Claimant receive a spinal cord stimulator.

On August 4, 2009 Claimant was examined at Liberty's request by William Carr, M.D. Focusing solely on the strain which was initially accepted but not the subsequently accepted conditions, Dr. Carr concluded that Claimant's current need for treatment constituted a chronic pain syndrome. He did not consider surgery to implant a permanent spinal cord stimulator was appropriate.

Claimant was also examined at Liberty's request by David Glass, M.D., psychiatrist. Dr. Glass concluded that Claimant was relatively free of psychiatric symptoms but was suffering from opioid dependence and nicotine dependence.

Also on August 4, 2009 Claimant was again examined at Liberty's request by Dr. Olbrich. He concluded that Claimant was suffering from addictive disease and a pain disorder associated with psychological factors.

Liberty subsequently authorized a trial of a temporary spinal cord stimulator. Dr. Gullo performed the placement of the trial spinal cord stimulator on December 1, 2009. On December 9, 2009 Claimant indicated to Dr. Gullo that he wished to proceed with the implantable neurostimulator.

Liberty NW disputed the appropriateness of implanting a permanent spinal cord stimulator. However, the Workers' Compensation Department in its March 31, 2010 Administrative Order found that Liberty NW's response to the proposed procedure had not been timely and that Liberty was therefore barred from challenging whether the procedure was excessive, inappropriate or ineffectual. It determined that the decision whether to proceed with the procedure was entirely up to Claimant and Dr. Gullo.

On May 26, 2010 Dr. Gullo performed the implantation of the spinal cord stimulator system.

On November 4, 2010 Dr. Gullo recommended that Claimant return to Dr. Benson to address Claimant's chronic pain and comorbid depression issues.

Liberty NW disputed Dr. Gullo's referral for psychological treatment on the grounds that the referral was for a new or omitted condition for which acceptance had not been sought. On those grounds, the Workers' Compensation Department, on December 8, 2011 dismissed the treatment dispute for further processing by the parties.

On December 8, 2010, based on Liberty's position concerning Dr. Gullo's referral to Dr. Benson, Claimant requested that Liberty authorize the referral for psychiatric treatment and accept claims for chronic pain syndrome and depression.

Liberty again referred Claimant for an examination by Dr. Olbrich. The examination occurred on January 19, 2011. Among other conditions, Dr. Olbrich diagnosed opioid dependence and chronic pain syndrome. He opined that the major contributing cause of Claimant's chronic pain syndrome was his addictive disease. He felt that this condition needed to be dealt with and identified treatment centers that would be appropriated for this.

At Liberty NW's request, Claimant was also examined by Eugene Klecan, M.D., psychiatrist, on January 19, 2011. He neither thought that Claimant was depressed nor that the term "chronic pain syndrome" identified a medical condition. Rather, chronic pain syndrome "is an iatrogenic, psychosocial, culturally-driven condition caused not by physical injury but by a combination of personality factors, medical misdiagnosis, iatrogenic prescribing, chronic opioid narcotics, and culturally popular notions enforced by court orders. Opioid narcotics are initially and appropriately prescribed to patients to treat acute pain from acute injuries. When the acute injury complaints start to become chronic pain complaints, narcotics-promoting and chronic narcotics prescriptions become inappropriate. Not recognizing the fundamentally psychosocial and personality-driven nature of the subjective complaints, still less the addiction process itself or the secondary gain context that is almost always present, and not knowing what else to do for the complaining patient, narcotics-promoting doctors begin chasing after what they imagine to be 'pain control' by ever more narcotics. Narcotics are by nature habituating, i.e., addictive, regardless of good intentions. And soon the chronic pain patient has a new additional problem in addition to his chronic pain words: Narcotics dependency."

On February 21, 2011 Liberty NW denied the Claimant for chronic pain syndrome and depression for the reason that these conditions were not related to the May 10, 1999 injury. A duplicate copy of the same denial was mailed on February 22, 2011.

Responding to an inquiry from Claimant's attorney, on April 11, 2011 Dr. Kellogg attributed Claimant's depression to his pain and his chronic pain syndrome to the 1999 injury. He opined that that injury was the major contributing cause of Claimant's chronic pain.

In response to an inquiry from Claimant's attorney, on April 14, 2001 Dr. Gullo explained that he recommended the referral to Dr. Benson in November 2010 for assistance in separating the physical symptoms from the psychological symptoms which comprised the chronic pain syndrome and to determine the role of the May 1999 injury in Claimant's present condition. He noted that the injury and the subsequent treatment provided exposure to substances which were likely to have contributed to Claimant's addictive disease condition.

Dr. Gullo was deposed on June 9, 2001. Again he explained that he referred Claimant to Dr. Benson to address his perception that Claimant was suffering from depression and would benefit from pain management. Claimant's depression was a part of the chronic pain

syndrome. However, he is not sure if Claimant rises to the level of a psychiatric diagnosis of clinical depression. His referral to Dr. Benson would address that. In his opinion, the injury and its sequelae are at least a significant event causing the addiction disease and the referral to Dr. Benson. The depression, the chronic pain and the medication misuse are linked. He agrees with Dr. Olbrich that Claimant would benefit from help identifying tools other than narcotics to deal with his chronic pain.

Chronic pain syndrome has been an accepted condition since Judge Mills' January 6, 2005 Opinion and Order if not since the June 26, 2002 Stipulation approval. The February 21, 2011 denial is an attempt to back up and deny that accepted condition. The referral to Dr. Benson is an appropriate medical service for a condition caused in material part by the injury. It would also be appropriate as a diagnostic medical service.

### **OPINION AND CONCLUSION**

Claimant protests WCD's Administrative Order of Dismissal pursuant to Liberty's characterization of the issue before it as pertaining to a new or omitted condition which had not yet been presented for processing.

A claim for chronic pain syndrome is already an accepted condition resulting from the May 10, 1999 injury. A Stipulation was approved on June 26, 2002 recognizing chronic low back pain as "part and parcel" of the accepted disc conditions. As a finding necessary to his January 6, 2005 Opinion and Order, Judge Mills found that "chronic pain syndrome...was also a real condition accepted by the insurer." Liberty NW's denials are back up denials of a previously accepted condition; a practice which is prohibited under ORS 656.262(6), with some exceptions none of which are met in this case.

However, ignoring that Liberty had already agreed to, and was subsequently ordered to, recognize chronic pain syndrome as a component of the May 10, 1999 injury claim, it treated the referral to Dr. Benson as one involving a new or omitted condition. It is not, it is an issue arising under ORS 656.245. WCD followed Liberty's misdirection and given Liberty's intransigence, Claimant was required to present a new or omitted medical condition claim in order to obtain processing.

Given the mischaracterization of the issue presented by Dr. Gullo's referral of claimant to Dr. Benson and WCD's reliance on that characterization, the Order of Dismissal was appropriate. However, given the resolution of Liberty's denials in WCB Case No. 11-00966, I do not find that there is any purpose to be served by a remand to WCD. The only response presented by Liberty to the referral was its contention that treatment was for a new or omitted condition. That issue has been addressed above. Any other response available to Liberty has been waived just as WCD found in its March 31, 2010 Administrative Order.

**ORDER**

IT IS HEREBY ORDERED:

1. WCD's Administrative Order of Dismissal entered December 23, 2010 is affirmed.