

In the ORS 656.260 Managed Care Dispute of
ADRIAN GUZMAN, Claimant
 Contested Case No: H04-170
AMENDED PROPOSED AND FINAL ORDER
 December 22, 2005

ADRIAN GUZMAN, Petitioner
 OREGON CONTRACTORS WC TRUST, C/O EMPIRE PACIFIC RISK
 MANAGEMENT, Respondent
 Before John Shilts, Administrator, Workers' Compensation Division

Respondent employer, through its attorney Ray Myers, timely filed exceptions to Office of Administrative Hearings Administrative Law Judge (ALJ) Daina Upite's June 24, 2005 Proposed and Final Order. Attorney Allen W. Lyons, on behalf of Providence Managed Care Organization (MCO), and petitioner claimant, through his attorney Lourdes Sanchez, responded. This matter comes before the director for a final order. The issue raised by the exceptions is whether the ALJ's order is overly broad. I affirm in part and reverse in part, and issue an amended proposed and final order. *See* OAR 137-003-0655(3).

I affirm the ALJ's evidentiary rulings and adopt the ALJ's findings of fact.

The underlying issue is whether employer is liable for physical therapy services provided by Bodywise Physical Therapy in 2003 on the following dates: February 10, 13, and 28;¹ March 20 and 25; April 1 and 17; May 20; and June 12. The Medical Review Unit (MRU), by Administrative Order dated September 23, 2004, concluded employer was not liable for any of the services. MRU found that the services provided on February 10 and 13, 2003 were not carried out under a treatment plan meeting the requirements of OAR 436-010-0230(4),² and the remainder of the services were not provided in accordance with the managed-care organization (MCO) contract as required by ORS 656.245(4)(a).³

¹ It was unclear at hearing whether the services provided in February were still at issue.

² OAR 436-010-0230(4)(a) (WCD Admin. Order 02-061, eff. 11/1/02) provides:

"Except as otherwise provided by the MCO, ancillary services including but not limited to physical therapy or occupational therapy, by a medical service provider other than the attending physician or specialist physician shall not be reimbursed unless prescribed by the attending physician or specialist physician and carried out under a treatment plan prepared prior to the commencement of treatment and signed by the attending physician or specialist physician within 30 days of beginning treatment. The medical service provider shall provide an initial copy of the treatment plan to the attending physician or specialist physician and the insurer within seven days of beginning treatment. A copy of the treatment plan signed by the attending physician or specialist physician shall be provided to the insurer by the medical service provider within 30 days of beginning treatment. The treatment plan shall include objectives, modalities, frequency of treatment, and duration. The treatment plan may be recorded in any legible format including, but not limited to, signed chart notes. Treatment plans required under this subsection do not apply to services provided pursuant to ORS 656.245(2)(b)(A)."

³ ORS 656.245(4)(a) provides, in part:

"(4) Notwithstanding subsection (2)(a) of this section, when a self-insured employer or the insurer of an employer contracts with a managed care organization certified pursuant to ORS 656.260 for medical services required by this chapter to be provided to injured workers:

"(a) Those workers who are subject to the contract shall receive medical services in the manner prescribed in the contract. Workers subject to the contract include those who are receiving medical treatment for an accepted compensable injury or occupational disease, regardless of the date of injury or medically stationary status, on or

The ALJ affirmed MRU's conclusion that employer is not liable for services provided on February 10 and 13, 2003. The ALJ, however, found that employer's MCO enrollment notice was defective because employer did not simultaneously notify Bodywise that claimant was being enrolled, as required by OAR 436-010-0275(4).⁴ Therefore, according to the ALJ, claimant did not become subject to the MCO contract. The ALJ analyzed the remaining dates of services under OAR 436-010-0230(4). She found that the requirements of a treatment plan were not met for the services provided on February 28, 2003, but that the requirements of a treatment plan were met for the remaining dates of service. The ALJ found employer liable for services provided on March 20 and 25, April 1 and 17, May 20, and June 12, 2003.

Employer takes exception to the ALJ's finding that because the MCO enrollment notice was defective, claimant did not become subject to the contract. Employer contends the issue of whether claimant was subject to the contract was not before the ALJ, so the finding is overly broad. The issue, according to employer, is whether employer became liable for the physical therapy services by failing to provide Bodywise notice of MCO enrollment. Providence MCO concurs with employer's exceptions. Claimant responds that because employer does not disagree with the conclusion that it is liable for the services, he will not comment on whether the ALJ's finding is overly broad.

I agree with employer that the ALJ's finding is overly broad. A worker becomes subject to an MCO contract upon the worker's receipt of actual notice of enrollment in the MCO, or upon the third day after notice was mailed, whichever is earliest. ORS 656.245(4)(a). The worker's enrollment status is not conditioned upon the insurer providing notice to the medical providers as required by the administrative rules. Here, the notice of enrollment is dated February 14, 2003. Claimant therefore became subject to the MCO contract no later than February 17, 2003, as MRU found. I do not adopt the ALJ's finding that claimant did not become subject to the contract.

Although employer suggests that the appropriate inquiry is whether it became liable for the services due to its failure to notify Bodywise of claimant's enrollment, I do not reach that issue for the following reasons.

MRU found that employer was not liable for dates of services on and after February 28, 2003 because they were provided outside the MCO contract. The ALJ found that MRU erred as a matter of law with respect to dates of service on and after February 28, 2003, based on the finding that claimant was not enrolled in an MCO. Having rejected the ALJ's finding, I may only find employer liable for those dates of service if there is another basis on which to modify MRU's order. I may modify MRU's order only if it is not supported by substantial evidence in

after the effective date of the contract. * * * A worker becomes subject to the contract upon the worker's receipt of actual notice of the worker's enrollment in the managed care organization, or upon the third day after the notice was sent by regular mail by the insurer or self-insured employer, whichever event first occurs. * * * Insurers or self-insured employers who contract with a managed care organization for medical services shall give notice to the workers of eligible medical service providers and such other information regarding the contract and manner of receiving medical services as the director may prescribe. * * *

⁴ OAR 436-010-0275(4) provides, in part: "When the insurer is enrolling a worker in an MCO, the insurer shall simultaneously provide written notice to the worker, all medical service providers, and the MCO of enrollment."

the record or reflects an error of law. ORS 656.260(16); OAR 436-001-0225(1). As petitioner, the burden is on claimant to show that MRU's order should be modified. ORS 183.450(2).

The issue of proper notice was not raised at hearing. Claimant argued that employer is liable for the services for two reasons. First, because employer told Bodywise it would pay for the services and Bodywise provided the services in good faith. The evidence in the record is conflicting; employer denies telling Bodywise that it would pay for the services. I am not persuaded that MRU's order is not supported by substantial evidence in the record in this regard. Claimant further cites the contested case of *Julie A. Glenn*, 8 CCHR 220 (2003). In *Glenn*, the ALJ waived application of the treatment plan rule,⁵ finding that on the record it was unjust for the insurer to raise it as a defense to payment. In the final order, *Julie A. Glenn*, 9 CCHR 88 (2004), the director rejected the ALJ's waiver of the rule, finding that the rule was substantive, not procedural, and thus not subject to waiver. Here, MRU found employer not liable for the services because the services did not comply with the treatment plan rule, OAR 436-010-0230(4), or were not provided in the manner prescribed by the MCO contract, as required by ORS 656.245(4). Both requirements are substantive, and neither can be waived.

Alternatively, claimant argued that employer is liable for the services because the record as a whole included the elements of a treatment plan as required by the rule. The ALJ affirmed MRU's conclusion that services provided on February 10 and 13, 2003 were not provided under a treatment plan meeting the requirements of the rules. The parties do not dispute that finding and I affirm it. As to the services provided on and after February 28, 2003, I am not persuaded to modify MRU's finding that they were provided outside the MCO contract. Because they were provided outside the contract, they are not reimbursable regardless of whether they were provided under a treatment plan meeting the requirements of the rules.

I find no persuasive basis on which to modify MRU's order, and therefore affirm it.

Employer is not liable for services provided on February 10 and 13, 2003 because they were not provided under a treatment plan meeting the requirements of OAR 436-010-0230(4).

Employer is not liable for services provided on and after February 28, 2003 because they were not provided in the manner prescribed in the MCO contract, as required by ORS 656.245(4)(a).

Claimant has not finally prevailed, so his attorney is not entitled to a fee under ORS 656.385(1).

IT IS ORDERED that the June 24, 2005 Proposed and Final Order is affirmed in part and reversed in part.

⁵ OAR 436-010-0003(2) provides for director waive of procedural rules "as justice so requires."