

In the ORS 656.260 Managed Care Dispute of

David A. Hitt, Claimant

Contested Case No: 08-048H

PROPOSED & FINAL ORDER

September 23, 2008

DAVID A. HITT, Petitioner
SAIF CORPORATION, Respondent

Before Kate Donnelly, Administrative Law Judge

Claimant appealed the Director's Administrative Order issued on March 27, 2008 by the Resolution Team (RT) of the Workers' Compensation Division (WCD), Department of Consumer and Business Services (Director). Pursuant to notice, a hearing was scheduled for July 10, 2008, in Eugene, Oregon, before Administrative Law Judge (ALJ) Kate Donnelly. Claimant is represented by attorney Christine Jensen. The employer, Oregon Family Support Network, Inc., and its insurer, SAIF Corporation (SAIF), are represented by Trial Counsel, Thomas A. Sieg. Because this matter involved a medical service dispute, notice of hearing was also mailed to Mark Meyers, MD and to Oregon Health Systems. Prior to the scheduled hearing, the parties agreed to submit this matter on the documentary record. WCD Exhibits 1 through 20 were received into evidence. The record closed on September 4, 2008, following receipt of the final written closing arguments.

ISSUE

Whether claimant is entitled to massage therapy as proposed by Mark Meyers, MD.

FINDINGS OF FACT

The following facts are taken from the Director's administrative order, as supplemented by the documentary record (*See* Ex. 19). Claimant sustained a compensable injury on December 7, 2007. SAIF accepted cervical strain, lumbar strain, right hand contusion and right knee contusion as the compensable conditions in this claim (Ex. 4-1). SAIF enrolled claimant in Oregon Health Systems (OHS), a managed care organization (MCO) (Ex. 5).

On January 24, 2008, Dr. Meyers requested precertification from OHS for massage therapy at Crest Massage Therapy for six to eight visits (Ex. 6). Dr. Meyers is an authorized MCO provider (Ex. 5-1). Dr. Meyer's medical office is located at 2280 Marcola Road, Springfield, Oregon (*See* Ex. 5-6). Crest Massage Therapy is located in Eugene, Oregon (*See* Ex. 11).

On January 29, 2008, OHS notified Dr. Meyer, and claimant, that it was declining to review the request for massage therapy on the grounds that licensed massage therapist's (LMT's) services are not compensable unless provided under the direct control and supervision of the attending physician (Ex. 9).

On March 3, 2008, claimant, acting through his attorney, requested administrative review of OHS's refusal to review Dr. Meyer's prescription for licensed massage therapy (LMT) (Ex. 12).

On March 13, 2008, SAIF responded that it did not have any issues with compensability or causation with relationship to the request for massage therapy. However, SAIF agreed with OHS's decision that the LMT's services were not compensable unless provided under the direct supervision of the attending physician (Ex. 15-1). On the Specification of Disputed Medical Issues form, SAIF checked the box for "[t]he service is excessive, inappropriate, ineffectual" (Ex. 15-2).

On March 26, 2008, the Medical Reviewer for the RT, Daphne Girod, spoke to Richard, the LMT at Crest Massage Therapy. Per Richard, he only worked at his facility and the massage would not be "under the direct control and supervision of the attending physician" (Ex. 16).

The March 27, 2008 Administrative Order (MMS 08-0298) found that claimant was not entitled to massage therapy, reasoning that a LMT is not licensed to provide a medical service, and, therefore, services provided by a LMT are reimbursable only when provided under the direct control and supervision of the attending physician (Ex. 19-2-3).

Claimant requested a contested case hearing with regard to Administrative Order MMS 08-0298 (Ex. 20).

CONCLUSIONS OF LAW AND OPINION

This is a managed care dispute arising under ORS 656.260. The administrative order may be modified only if it is not supported by substantial evidence in the record or reflects an error of law. New medical evidence or issues may not be admitted or considered. Decisions by the Director regarding medical disputes are subject to review under ORS 656.704. ORS 656.260(16); OAR 436-001-0225(2).

As petitioner, claimant bears the burden of proving by a preponderance of evidence that the administrative order is incorrect. *Cook v. Employment Div.*, 47 Or 437 (1982). Proof by a preponderance of the 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).

Claimant contends that he is entitled to massage therapy at Crest Massage Therapy as prescribed by Dr. Mark Meyers, his attending physician. Claimant asserts that the Director erred, as a matter of law, in concluding that LMT is not a "medical service" within the workers' compensation system. Claimant argues that, because LMT is a medical service, it need not be rendered under the direct supervision and control of the attending physician.

SAIF responds that the administrative order should be upheld in its entirety because claimant has not made any new arguments, nor shown any change in the law, or

substantial error in the past that would justify changing the Director's policies in this matter. SAIF relies upon the case of *James M. O'Leary*, 10 CCHR 269 (2005) in support of its argument that it has been the law for many years that LMT's are not medical providers, and, thus, the massage service has to be provided under the direct control and supervision of the attending physician.

ORS 656.260(12) defines "medical service provider" as "a person duly licensed to practice one or more the healing arts in any country or in any state or territory or possession of the United States." "Medical service provider" is also defined in OAR 436-10-0005(27) as "a person duly licensed in one or more of the healing arts." For a person to be a medical service provider under workers' compensation law that person must be licensed and in an area of practice within the "healing arts."

The term "healing arts" is not defined by statute or rule, but Oregon courts have had occasion to review the definition and use of the term in the Oregon Revised Statutes (ORS). In *Cook v. Workers' Compensation Division*, 360 Or 134 (1988), the Oregon Supreme Court analyzed whether a nurse practitioner constituted a "doctor" or "physician" under workers' compensation law and in making that determination considered whether the nurse practitioner practiced in one of the healing arts.

The court then looked at what exactly nurse practitioners did in the course of their practice. They looked at the administrative rules pertaining to the licensing and regulation of nurse practitioners and noted that they are licensed to provide "primary health care" and that they are independently responsible and accountable for the continuous and comprehensive management of personal health services. The court further stated that "healing arts" should be given its literal meaning unless to do so would bring about an absurd result. In reviewing a dictionary definition of "healing" the court found that "healing art" would commonly be understood as "the skill to treat disease or disability, and where the nature of the problem permits, to restore health. *Cook*, 306 Or 134, 143 (1988).

Here, claimant argues that one need not be a "doctor" to practice the "healing arts." In support of his argument, claimant cites *SAIF v. Johnson*, 198 Or App 504 (2005) (a hearing aid specialist who performed a hearing test and fitted claimant with a hearing aid had performed "medical services" and was a practitioner of the "healing arts"). The *Johnson* court, citing to *Raytheon Constructors v. Tobola*, 195 Or App 396, 97 P3d 1278 (2004), held that the audiologist had taken action "designed to alleviate or cure a disease or injury." In the present case, I find that there is no evidence presented that LMT's diagnose or take action to alleviate or cure a disease or injury.

Here, the Director stated that the "healing arts" still pertain to the diagnosis and treatment of disease or injury, requiring the examination and evaluation of the individual to determine a plan of care based on an initial diagnosis (Ex. 19-2). The Director noted that there are no CPT codes for evaluation by LMT's, nor does the LMT's licensing include any provision for making a diagnosis. Additionally, the Director noted that, under OAR 334-010-0025(1) and ORS 687.011, the LMT is limited to maintaining good health and physical conditioning. For these reasons, the Director concluded that LMT services are not medical services within the

workers' compensation system. Thus, the Director further concluded that a LMT is not licensed to provide a medical service. Therefore, the Director held that, pursuant to OAR 436-010-0210(3), services provided to an injured worker by a LMT are reimbursable only when provided under the direct control and supervision of the attending physician. Finding that the proposed services would not be provided under the direct control and supervision of Dr. Meyers, the Director found the proposed massage therapy services not reimbursable.

Where an agency's interpretation of its own rule is plausible and not inconsistent with the wording of the rule itself, the rule's context or with any other source of law, there is no basis for asserting that the rule has been misinterpreted by the agency. *See Don't Waste Oregon Com. V. Energy Siting Council*, 320 Or 132 (1994). Here, the Director's interpretation of its own administrative rule is plausible and not inconsistent with the wording of the rule. Consequently, I affirm the Director's conclusion that claimant is not entitled to massage therapy.

Because the Director's order is supported by substantial evidence and does not contain errors of law, the order should be affirmed.

ATTORNEY FEES

Claimant has not prevailed in a contested case hearing and is not entitled to a reasonable attorney fee. ORS 656.385(1).

ORDER

IT IS THEREFORE ORDERED that the March 27, 2008 Administrative Order is affirmed.