
In the ORS 656.245 Medical Services of

Ronald G. Kraft, Claimant

Contested Case No: 07-087H

FINAL ORDER

October 9, 2008

RONALD G. KRAFT, Petitioner

LIBERTY NW INSURANCE CORP., Respondent

Before John Shilts, Workers' Compensation Division Administrator

Through his attorney, claimant filed exceptions to Administrative Law Judge Douglas C. Crummé's, May 2, 2008 Corrected Proposed and Final Order which affirmed a May 15, 2007 Resolution Team (RT) Administrative Order on Remand.¹ This matter comes before the director for a final order. The issue is whether certain medical services are compensable even though claimant's attending physician did not authorize them. OAR 436-010-0220(2).² I find that attending physician authorization was required and that, therefore, insurer is not liable for the contested charges.

FACTUAL SUMMARY

I adopt the facts as found in the May 15, 2007 RT order. Claimant suffered a compensable back injury in August 1995. On the attending physician's referral, claimant underwent back surgery in September 1995. In 1999, Dr. O'Neill performed additional surgery. Dr. Gifford was claimant's attending physician. In April 2002, Dr. Gifford referred claimant to Dr. Moore who recommended epidural steroid injections. In June 2002, without approval from the attending physician, claimant consulted with Dr. O'Neill. Dr. O'Neill scheduled surgery for August 7, 2002. Although the hospital prepared for surgery, resulting in the charges at issue here, Dr. O'Neill ultimately cancelled the surgery.

Insurer refused to pay for the pre-surgery charges and claimant sought administrative review. In September 2004, the Medical Review Unit (MRU) issued an administrative order stating insurer was liable for the pre-surgery costs. Insurer requested a hearing. A January 13, 2005 Proposed and Final Contested Case Hearing Order issued by ALJ Webster reversed and found insurer not liable for these costs. The Court of Appeals reversed this decision in February

¹ The unit at Workers' Compensation Division currently identified as the Resolution Team was formerly the Medical Review Unit (MRU). The unit has issued orders under both names in this matter.

² OAR 436-010-0220(2) provides in part:

"The worker may have only one attending physician or authorized nurse practitioner at a time. Simultaneous or concurrent treatment by other medical service providers must be based upon a written request of the attending physician or authorized nurse practitioner, with a copy of the request sent to the insurer. Except for emergency services, or otherwise provided for by statute or these rules, all treatments and medical services must be authorized by the injured worker's attending physician or authorized nurse practitioner to be reimbursable. . . ."

2006, on the grounds the ALJ had applied an incorrect standard of review, and remanded. *Liberty Northwest Ins. Corp. v. Kraft* 205 Or App 59, 62 (2006) In the May 15, 2007 RT Administrative Order on Remand, the reviewer concluded insurer was not liable for these costs because the attending physician did not request or authorize the 2002 proposed surgery by Dr. O'Neill. Claimant requested review of this decision. The matter was submitted on the documentation. ALJ Crummé found the relevant rule did not exceed statutory authority and that insurer was not responsible for the challenged costs because the attending physician did not authorize the surgery.

CONCLUSIONS OF LAW

As this is a medical services dispute, I may modify the RT order only if it is not supported by substantial evidence or reflects an error of law. ORS 656.327(2); OAR 436-001-0225(2); *Liberty, supra*, 205 Or App 59, 62. Claimant does not challenge the sufficiency of the evidence, but instead asserts that either the relevant rules and statutes do not require attending physician authorization for these costs to be compensable or that the rule in question exceeds its statutory authorization.

OAR 436-010-0220(2) states that “[e]xcept for emergency services . . . all treatments and medical services must be authorized by the injured worker’s attending physician . . . to be reimbursable . . .” Claimant does not allege or offer evidence that the charges at issue arose from treatment authorized by the attending physician. Under this rule, therefore, insurer is not liable for these charges.

Claimant argues this rule exceeds the director’s rulemaking authority or impermissibly alters the meaning of the authorizing statute. I disagree.³

An administrative rule is invalid if it exceeds the promulgating agency’s statutory authority. ORS 183.400(4)(b)⁴; *Roseburg Forest Products v. Humbert*, 212 Or App 285, 288-289 (2007). An agency may not amend, alter, enlarge, or limit the terms of a statute through a rule. *Booth v. Tektronix, Inc.*, 312 Or 463, 478 (1991).

The director is authorized to establish rules to facilitate the function of the workers’

³ The ALJ relied on language in ORS 656.245(2)(b)(A) and the parties dispute the applicability and interpretation of that statute. As there is a clear and valid rule resolving the issue in this case I need not address that argument. The relevant portion of that statute provides:

“(b) A medical service provider who is not a member of a managed care organization is subject to the following provisions:

(A) A medical service provider who is not qualified to be an attending physician may provide compensable medical service to an injured worker for a period of 30 days from the date of injury or occupational disease or for 12 visits, whichever first occurs, without the authorization of an attending physician. Thereafter, medical service provided to an injured worker without the written authorization of an attending physician is not compensable.”

⁴ ORS 183.400(4) states: “[t]he court shall declare [a] rule invalid only if it finds that the rule . . . [e]xceeds the statutory authority of the agency”

compensation system. ORS 656.726(4)(a).⁵ One purpose of the workers' compensation laws is to ". . . provide, regardless of fault, sure, prompt and complete medical treatment for injured workers . . ." ORS 656.012(2)(a). Another purpose is to reduce the costs of work-related injuries to the worker, the employer, and to society. ORS 656.012(1)(b), (1)(c);⁶ *Booth, supra*, 312 Or at p. 473 (1991).

The rule at issue, in mandating that, in order for care to be compensable, the attending physician must approve the care, clearly serves all of the stated purposes of the workers' compensation system. The defined role of the attending physician is the appropriately licensed medical practitioner who is ". . . primarily responsible for the treatment of a worker's compensable injury." ORS 656.005(12)(b). Having a single medical professional oversee and coordinate all care for an injured worker facilitates consistent diagnosis and treatment and helps to eliminate duplicative, conflicting, or incompatible treatment. This both improves care for the worker and reduces costs to the employer and society. This case, in fact, is a clear example of the benefit to the worker of requiring attending physician oversight. Had claimant sought approval for the surgery from the attending physician, it would either have been denied, as other, substitute treatment had already been recommended, or it would have been compensable had the attending physician approved it. In either case, claimant would not have become responsible for costs for a surgery which the surgeon ultimately cancelled.

Claimant contends this application of the rule improperly alters or infringes on ORS 656.245(1)(c)(L) because that sub-paragraph identifies curative care as compensable but does not expressly require attending physician authorization. The rule at issue here does not restrict or conflict with the statute because the rule does not render the described treatment categorically non-compensable. The rule only serves to ensure that there is some coordination and review of all of the treatment that a worker receives, which further serves to ensure that treatment is appropriate, effective, and consistent. An administrative agency may properly establish procedural rules for carrying out its statutory duties. *Weyerhaeuser Company v. Miller*, 306 Or 1, 3-4 (1988); *Roseburg Forest Products v. Humbert*, 212 Or App 285, 291-292 (1997).

⁵ ORS 656.726(4) states in part:

"(4) The director hereby is charged with duties of administration, regulation and enforcement of ORS 654.001 to 654.295, 654.412 to 654.423, 654.750 to 654.780 and this chapter. To that end the director may:

(a) Make and declare all rules . . . which are reasonably required in the performance of the director's duties."

⁶ ORS 656.012(2) provides in part:

"[T]he objectives of the Workers' Compensation Law are declared to be as follows:

(b) To provide a fair and just administrative system for delivery of medical and financial benefits to injured workers that reduces litigation and eliminates the adversary nature of the compensation proceedings, to the greatest extent practicable;

(c) To restore the injured worker physically and economically to a self-sufficient status in an expeditious manner and to the greatest extent practicable"

Finally, claimant points to other sub-paragraphs of ORS 656.245, which specifically refer to attending physician authorization. See ORS 656.245(1)(c)(J), (2)(b)(A).⁷ Claimant asserts the legislature could have included a requirement for attending physician approval in sub-paragraph (1)(c)(L) had that been the intent. The rule at issue is not inconsistent with the statute nor does it prevent an injured worker from obtaining care under ORS 656.245(1)(c)(L). A statute will not normally contain all of the detailed procedural mechanisms necessary to implement it and it is the director's duty to promulgate rules that carry out the policies of the relevant statutes. As discussed in *Weyerhaeuser and Roseburg, supra*, this rule is an example of an appropriate procedural requirement, which is consistent with the purposes of the workers' compensation system. It is therefore a proper exercise of the director's rule making authority.

IT IS HEREBY ORDERED

The ALJ's May 2, 2008 order is affirmed.

DATED this 9th day of October, 2008.

⁷ ORS 656.245 states in part:

“(J) With the approval of the insurer or self-insured employer, palliative care that the worker's attending physician referred to in ORS 656.005 (12)(b)(A) prescribes and that is necessary to enable the worker to continue current employment or a vocational training program [is compensable]. . . .