

In the ORS 656.245 Medical Services of

Dennis K. Burchett, Claimant

Contested Case No: 09-010H

FINAL ORDER

October 7, 2009

DENNIS K. BURCHETT, Petitioner

SAIF CORPORATION, Respondent

Before John Shilts, Workers' Compensation Division Administrator

Insurer SAIF Corporation (insurer) refused to pay for massage therapy services provided by James Case on the grounds Mr. Case was not a licensed medical service provider and had not been directly supervised by the attending physician. OAR 436-010-0210(4); 436-010-0005(10), (27); 436-010-0230(4)(a).¹ The Workers' Compensation Division Resolution Team (RT) issued an Administrative Order on January 16, 2009 finding insurer was not liable for these charges. On July 2, 2009 Administrative Law Judge Jill M. Riechers issued a Proposed and Final Order affirming RT's order. Claimant Dennis K. Burchett (claimant) seeks review of the ALJ's order. I affirm both orders.

FACTUAL SUMMARY

I adopt the facts as found by the RT. Claimant was compensably injured. Doctor Richard Heitsch was identified as the attending physician. Dr. Heitsch created a treatment plan including chiropractic treatment and massage.

Claimant obtained chiropractic treatment from Dr. Featherstone. He also obtained massage therapy from James Case who provided treatment in Dr. Featherstone's office. Dr. Featherstone's office is in a different physical location from Dr. Heitsch's office.

¹ OAR 436-010-0210(4) states in part:

Attending physicians and authorized nurse practitioners may prescribe treatment or services to be carried out by persons licensed to provide a medical service. Attending physicians may prescribe treatment or services to be carried out by persons not licensed to provide a medical service or treat independently only when such services or treatment is rendered under the physician's direct control and supervision.

OAR 436-010-0005(10) states:

"Direct control and supervision" means the physician is on the same premises, at the same time, as the person providing a medical service ordered by the physician. The physician can modify, terminate, extend, or take over the medical service at any time.

OAR 436-010-0005(27) states: "'Medical Service Provider' means a person duly licensed to practice one or more of the healing arts."

OAE 436-010-0230(4)(a) states in part:

Except as otherwise provided by an MCO, ancillary services including but not limited to physical therapy or occupational therapy, by a medical service provider other than the attending physician . . . will not be reimbursed unless prescribed by the attending physician

Insurer has refused to pay for the massage treatments provided by Mr. Case. Insurer asserts Mr. Case is not a licensed medical service provider and was not directly supervised by the attending physician, Dr. Heitsch.

CONCLUSIONS OF LAW

I may only alter RT's order if substantial evidence does not support it or if it is based on an error of law. OAR 436-001-0225(2). Substantial evidence supports a finding where the record, viewed as a whole, would allow a reasonable person to make that finding. ORS 183.482(8)(c). As the party advocating for a fact, the party seeking a modification of the order bears the burden of proof. *See Harris v. SAIF*, 292 OR 683, 690 (1982); *Fernandez v. M&M Reforestation*, 124 Or App 38, 41 (1993).

When the attending physician orders treatment to be provided by other practitioners, that treatment is only reimbursable if it is provided by a person who is a licensed medical service provider or who is working under the attending physician's direct supervision. OAR 436-010-0210(4). The relevant rule defines "direct supervision" as meaning the services are provided in a location where the attending physician is physically present at the time the services are provided. OAR 436-010-0005(10). This is not the case here. The only other option, then, is if Mr. Case as a massage therapist qualifies as a licensed medical service provider.

A licensed medical service provider is a person who is licensed to practice one of the "healing arts." OAR 436-010-0005(27). RT concluded on the record before it that massage providers do not practice a healing art. Although the parties present legal arguments on this point, no party appears to have offered any actual testimony or evidence of any kind relevant to this question. Thus, there are legal definitions of what constitutes a healing art, but no evidence in the record in this case supporting the proposition that massage therapists provide services matching the legal definition of a "healing art." Given the complete lack of evidence in the record in this case that massage therapists do practice a healing art, I cannot find error in RT's conclusion that they do not.

The parties erroneously rely on a defective line of legal authority. Insurer cites the decisions in *James M. O'Leary*, 10 CCHR 269 (2005), and *David A. Hitt*, 13 CCHR 282 (2008), which in turn cites *O'Leary*. These decisions are cited in support of the position that licensed massage therapists are not practitioners of a healing art and therefore are not "licensed medical service providers." The 2005 *O'Leary* order was a Proposed and Final Order that was superseded by a subsequent Final Order. *See James M. O'Leary*, 11 CCHR 4 (2006). ORS 656.704(2)(a), (2)(b); OAR 436-001-0170(2), 436-001-0246(3). In the Final Order in *O'Leary* I found that it had not been necessary for the ALJ to reach the question of whether massage therapists are practitioners of a healing art and that RT's predecessor, MRU, had not decided that question. I specifically rejected the ALJ's discussion of the definition of "medical provider" in the Proposed Order and decided the case on other grounds. The Proposed Order in *O'Leary* therefore does not constitute authority on the question of whether massage therapists are practitioners of a healing art who are "medical providers." *Hitt* errs to the extent it relies on the Proposed Order in *O'Leary*. In addition, the ALJ in *Hitt* found that there had been "no evidence presented" in the case that licensed massage therapists are practitioners of a healing art. Thus, the *Hitt* order is

limited to the facts presented in that case.

Claimant relies on *James G. Earnest*, 10 CCHR 69 (2005) where an ALJ in a Proposed and Final Order found that because massage therapists are licensed, they do not need to be directly supervised. This is not what the rule requires. OAR 436-010-0210(4) requires that, for a provider's services to be reimbursable, the provider must be a licensed medical service provider or else that they be directly supervised. OAR 436-010-0005(27) defines a licensed medical service provider as a person licensed to practice one of the healing arts. Simply being licensed to provide a service does not satisfy this requirement. The ALJ in *Earnest* did not address the issue of whether a massage therapist is a practitioner of the healing arts or is a licensed medical provider as defined in OAR 436-010-0005(27). That decision is therefore not persuasive in this case.

IT IS HEREBY ORDERED the ALJ's July 2, 2009 Proposed and Final Order and RT's January 16, 2009 Administrative Order are affirmed.

DATED this 7th day of October, 2009.