

In the ORS 656.245 Medical Services of

Dennis K. Burchett, Claimant

Contested Case No: 09-010H

PROPOSED & FINAL ORDER

July 2, 2009

PAUL C. FEATHERSTONE DC, Petitioner

SAIF CORPORATION, Respondent

Before Jill M. Riechers, Administrative Law Judge

Pursuant to a request for hearing filed by Paul Featherstone, DC, a hearing was scheduled before Administrative Law Judge Jill M. Riechers for May 4, 2009, in Portland, Oregon. Dr. Featherstone is not represented by an attorney. Claimant, Mr. Burchett, is represented Jeffrey S. Ratliff. The employer, Oregon Episcopal Schools, and its insurer SAIF Corporation, are represented by Larry Schucht.

In lieu of hearing, the matter was submitted by way of the documentary record and written closing arguments. The Workers' Compensation Division (WCD) offered Exhibits 1 through 12. Employer/SAIF offered Exhibits 13, 14 and 15 on April 10, 2009. Subsequently, by way of its May 26, 2009 written closing argument, employer/SAIF withdrew proposed Exhibits 13 through 15. On May 5, 2009, claimant offered proposed Exhibit A, an April 28, 2008 massage practitioner license for James T. Case. Employer/SAIF objects to admission of Exhibit A.

Claimant also offered proposed Exhibits 6A, 7A, 7B and 7C, on May 18, 2009, when he submitted his opening written closing argument. Proposed Exhibits 6A, 7A, 7B and 7C are not admitted, as they are duplicative of Exhibits 12-7 – -10, already contained in the record.

Exhibits 1 through 12 are admitted into evidence. For reasons addressed further below, Exhibit A is not admitted, but shall remain part of the agency file.

ISSUE

Dr. Featherstone appealed from WCD's January 16, 2009 Administrative Order, MS 09-0052, which ordered that SAIF Corporation was not liable for massage therapy provided by James Case from September 29, 2008 through October 22, 2008.

EVIDENCE

OAR 436-001-0225(2) provides:

“In medical service and medical treatment disputes under ORS 656.245, 656.247(3)(a), and 656.327, and managed care disputes under ORS 656.260(16), the administrative law judge may modify the director's order only if it is not supported by substantial

evidence in the record or if it reflects an error of law. New medical evidence or issues may not be admitted or considered.”

Employer/SAIF, hereinafter, collectively referred to as “SAIF,” objects to admission of proposed Exhibit A on the grounds that it is “new medical evidence.” Claimant contends that Exhibit A is not medical evidence and therefore should be admitted.

Exhibit A is a Massage Practitioner License granted for James T. Case, the massage therapist whose services have been disputed in this case. The license indicates that it was issued by the Washington State Department of Health, and was issued April 28, 2008, and expired May 7, 2009. The license shows a credential number of MA 00023707.

The term “medical evidence” contained in OAR 436-001-0225(2) is not defined elsewhere in the rules. Giving the words their ordinary meanings, the phrase would seem to refer to evidence such as chart notes, medical reports, laboratory reports, imaging study reports, insurer-arranged medical evaluation reports, and the like. Proposed Exhibit A does not fall into that general category of evidence, but instead, reflects the professional license that has been granted to Mr. Case. Accordingly, I agree with claimant that proposed Exhibit A is not “new medical evidence” barred by OAR 436-001-0225(2).

Nevertheless, my review of this matter is limited to modification of the director’s order only if it is not supported by substantial evidence in the record or if it reflects an error of law. The Court of Appeals has made clear in the *Mundell* and *Kraft* cases that, as stated in *Mundell*, “[i]n reviewing the MRU’s order for substantial evidence, the ALJ was limited to evaluating the evidence in the record to determine whether, based on that evidence, a reasonable fact finder in the MRU’s position could have made the findings that the MRU actually made.” *Mundell*, 219 Or App at 363 (Emphasis added). See also *Kraft*, 205 Or App at 62-63, “Nothing in our understanding of ‘substantial evidence’ review comports with an adjudicator rendering findings of fact. Rather, the rendition of findings of fact is associated with *de novo* review.”

It is unclear to me whether Exhibit A may be admitted into the record, based on previous case law. Compare *Thomas A. Dourgarian*, 12 CCHR 60, 61 (2007) with *Richard E. Robuck*, 11 CCHR 50, 54 (2006). It is somewhat difficult to understand how a substantial evidence review may be conducted, if additional evidence beyond that which was considered by the director may be admitted and considered. Baring in mind the court’s statement in *Mundell*, quoted above, I conclude that Exhibit A is inadmissible. Accordingly, it will not be admitted into evidence, although it will remain part of the agency file.¹

FINDINGS OF FACT

The findings of fact set forth in the January 16, 2009 Administrative Order at pages 1 and 2 are hereby adopted and incorporated by reference. (Ex 10). See *Liberty Northwest Ins. Corp. v. Kraft*, 205 Or App 59, 62-63 (2006); *Liberty Northwest Ins. Corp. v. Mundell*, 219 Or App 358, 362-63 (2008). Here, the director’s designee, the medical reviewer from the Medical

¹ See OAR 436-001-0240(4), WCD Admin. Order 08-052.

Section of WCD concluded:

“No one disputes that Mr. Case must provide the massage therapy under the direct control and supervision of a physician. The threshold issue is whether Mr. Case must be under Dr. Heitsch’s supervision or if Dr. Featherstone could supervise Mr. Case. OAR 436-010-0210(4) provides in relevant part, that 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. In this case, Dr. Heitsch prescribed chiropractic treatment and massage therapy. Dr. Featherstone provided the chiropractic and Mr. Case provided the massage therapy. Dr. Featherstone and Mr. Case practice at the same office. Dr. Featherstone is licensed to provide a medical service, Mr. Case is not. Mr. Case must practice under the direct control and supervision of a physician. In this case Dr. Featherstone is providing care as an ancillary medical service provider not as the attending physician. While out side of Workers’ Compensation Dr. Featherstone is fully capable of supervising Mr. Case, however the rules are clear that care that the attending physician prescribes to be (sic) carried out by an unlicensed provider must be carried out under his or her direct control and supervision. Since Dr. Heitsch and Mr. Case do not practice in the same office, the director concludes that the rule requirements were not satisfied and the massage therapy is not reimbursable.” (Ex 10-2).

CONCLUSIONS OF LAW AND OPINION

The Hearings Division of the Workers’ Compensation Board has jurisdiction to consider the disputed services addressed in the Administrative Order. See ORS 656.704(2)(a). I review for substantial evidence and errors of law. ORS 656.327(2); OAR 436-001-0225(2). Substantial evidence exists to support a finding of fact when the record, viewed as a whole, would permit a reasonable person to make that finding. ORS 183.482(8)(c).

As found by the medical section, the attending physician was Dr. Heitsch, who developed treatment plans referring claimant for chiropractic treatment and massage therapy. Dr. Heitsch, an M.D., is based in Portland. Dr. Featherstone, the chiropractor, is based in Vancouver, Washington, and Mr. Case works in Dr. Featherstone’s office.

OAR 436-010-0210(4) provides, in pertinent 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.”

Claimant asserts that Mr. Case was, in fact, licensed, and that therefore, his treatment should be reimbursable pursuant to OAR 436-010-0210(4). SAIF responds that a massage therapist, even if licensed, does not qualify as a licensed medical provider. SAIF relies on the cases of *James M. O'Leary*, 10 CCHR 269 (2005) and *David A. Hitt*, 13 CCHR 282 (2008). Claimant maintains that the treatment is compensable, in reliance on *James G. Earnest*, 10 CCHR 69 (2005).

In *O'Leary*, the claimant argued that a massage therapist was a medical provider within the meaning of the definition set forth in the rule by virtue of his license.² In *O'Leary*, decided after *Earnest*, the judge noted that MRU had interpreted the rule to mean that a licensed massage therapist was not a medical provider. The judge deferred to MRU's interpretation of the rule. The judge in *Hitt* relied in part on *O'Leary* in concluding that a licensed massage therapist was not a “medical provider.”

In the present case, the medical reviewer determined that Dr. Featherstone was licensed to provide a medical service, and that Mr. Case was not. It appears that the focus of the reviewer was not whether or not Mr. Case was licensed, but whether he was a medical provider. Accordingly, under OAR 436-010-0210(4), the services carried out by Mr. Case, who was not licensed “to provide a medical service” were not reimbursable, because those services were not rendered under the direct control and supervision of Dr. Heitsch.

There is no more recent precedent after *Hitt* that I could locate or that claimant has cited that would suggest that MRU is no longer interpreting its rules the way it did in *O'Leary* and *Hitt*. So, even if I could consider the license offered in proposed Exhibit A, under MRU's interpretation of the rules, licensed massage therapists are not medical service providers.

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. *Don't Waste Oregon Comm. v. Energy Facility Siting Council*, 320 Or 132 (1994).

Because the director's order is not shown to contain any errors of law, the order should be affirmed, unless it is not supported by substantial evidence. This case, the record reflects that Mr. Case and Dr. Heitsch do not practice in the same office, and therefore, Mr. Case was not under Dr. Heitsch's direct control and supervision. There is substantial evidence in the record to support this finding. Accordingly, under OAR 436-010-0210(4), Mr. Case's services are not reimbursable. The January 16, 2009 Administrative Order will consequently be affirmed.

² OAR 436-010-0005(27), which, at the time *O'Leary* was decided, was contained in subsection (28), provides: “Medical Service Provider” means a person duly licensed to practice one or more of healing arts.

ORDER

IT IS THEREFORE ORDERED that the Administrative Order dated January 16, 2009, Case No. MS 09-0052, is affirmed.