In the Matter of the Reopened Claims Program Reimbursement (656.265)
of:

Bruce T. Cutshall, Claimant

Contested Case No: 09-147H

PROPOSED & FINAL ORDER

August 18, 2010

CITY OF EUGENE, Petitioner
WORKERS' COMPENSATION DIVISION, Respondent

Before Chuck Mundorff, Administrative Law Judge

Pursuant to notice a hearing convened in Eugene, Oregon on July 7, 2010 before Administrative Law Judge Chuck Mundorff. The employer, City of Eugene, and its 3rd party claims administrator, Cannon Cochran Management Services, were represented by attorney Krishna Balasubramani. The Workers' Compensation Division (WCD) was represented by attorney Lori Lindley. Also present at the proceeding was Kristine Webster on behalf of WCD and attorney E. Jay Perry on behalf of City of Eugene. The claimant was not present. The record closed on July 19, 2010 with receipt of the employer's written closing argument.

ISSUES

City of Eugene requests a hearing from a denial of reimbursement from the Reopened Claims Program by WCD for settlement proceeds from two Claim Disposition Agreements.

EXHIBITS

At hearing exhibits 1-3, A-J and B1, B2, and B3 were admitted into the record.

JURISDICTION

This matter was referred to the Workers' Compensation Board Hearings Division by the WCD Hearings Coordinator pursuant to ORS 656.704(2) and OAR 436-001-0019.

FINDINGS OF FACT

Claimant suffered two compensable injuries while employed with the City of Eugene. The first, claim number 900065, was a left knee injury with date of injury October 3, 1989. The second, claim number 2002007, was for an L1-2 disc herniation with date of injury July 9, 2001. (Exs. A, B). Both claims were reopened for "post-aggravation rights" new or omitted medical conditions on September 26, 2007 pursuant to ORS 656.278(5).

Claimant and the City of Eugene scheduled a mediation to resolve any outstanding issues. The City's prior counsel, Jay Perry, testified that he has represented employers in the State of Oregon for 31 years. In preparing for the mediation he said that he reviewed the rules and statutes regarding the Reopened Claims Program and it was not clear to him what exactly needed to be done. He testified that he had not previously handled a claim which involved reimbursement from that Program. Mr. Perry called WCD and was referred to Kristine Webster,

a lead auditor for WCD, who was currently administrating reimbursements for Own Motion Claims.

Mr. Perry testified that he took handwritten notes while speaking to Ms. Webster on June 10, 2008. (Ex. B1). He said that he described the claims that were being negotiated and was told that WCD would not have a representative at the mediation and that he was essentially representing WCD at the mediation. He stated that he was told "after you get the settlement, and it has been approved, send it on to the Division, we can't pre-approve settlements." He said that he was advised that reimbursements were requested on a quarterly basis and that he discussed what exactly were reimbursable expenses and what were not. He said that there were six claims, some subject to Claims Disposition Agreements and some subject to Disputed Claim Settlements. His notes, taken contemporaneously with the conversation correspond to his testimony. (Ex. B1).

Mr. Perry further testified that he emailed Ms. Webster on July 7, 2008 with additional questions regarding the reimbursements for the claims. She responded for him to call her and a second phone conversation ensued. (Ex. B2). Mr. Perry again took handwritten notes in conjunction with this conversation. In that conversation, after discussing the conditions which were being reopened, he noted that it was likely that there would be reimbursement for some if not all of the settlement monies for the arthritic knee condition. (Ex. B3).

The mediation commenced and settlements were entered into on the claims identified above in the total amount of $79,363.50. (Exs. D, E). The CDA's were received by the Workers' Compensation Board on September 11, 2008. (Ex. C). The documents were approved by the mediator on September 16, 2008. (Exs. D -5, E-5).

The City of Eugene filed a Reopened Claims Reimbursement Request on March 2, 2009 requesting reimbursement of $79,363.50. (Ex. 1). The request was denied on April 17, 2009 with the stated basis for denial:

> "Per OAR 436-045-0025(2) Dispositions submitted in accordance (1) are not eligible to receive reimbursement from the Reopen Claims Program unless made with the prior written approval of the director.
>
> Our records indicate neither of these CDA's was submitted to WCD for reimbursement approval prior to being sent to WCB, therefore, neither is eligible for reimbursement from the Reopened Claims Program." (Ex. 1-2).

At hearing, Kristine Webster testified on behalf of WCD. She testified that she has been with the Division for 25 years and she is a lead auditor who manages the reimbursable program, reviews qualifications and eligibility for settlements on the quarterly requests, manages bankrupt self-insured employers and determines social security offsets. She said that it was her initial decision to deny the reimbursement. She testified that she was aware of OAR 436-045-0003 which provides in regards to the Reopened Claims Program:

> "(4) Applicable to this chapter, the director may, unless otherwise obligated by statute, in the director's discretion waive any procedural rules as justice so requires."

However, she was unaware of that rule ever being invoked to waive a procedural rule or allow reimbursement.

Ms. Webster stated that she did not deny the reimbursement request on the adequacy or reasonableness of the settlement, but rather that procedurally, prior approval for reimbursement was not obtained before the CDA was approved and therefore the claim was ineligible for reimbursement. She said that her understanding of the meaning of OAR 436-045-0025[1] was that written approval of the reimbursement must be obtained prior to the approval of the CDA as opposed to prior to the actual reimbursement itself. She had no notes of her conversations with Mr. Perry, and no independent recollection of their conversations but stated emphatically that she never would have advised him to submit the CDAs' to the WCB before requesting reimbursement. In fact, it was her testimony that in 25 years she had always related the exact opposite procedure in obtaining reimbursement. She confirmed that she likely told him that no one from WCD would be at the mediation but that the carrier would be in essence their representative in negotiating a reasonable settlement. She said that WCD's role would be to review and approve the settlement once it was negotiated. She also disputed that she would advise him that the settlement would be reimbursed at 100% noting that she did not have specific information regarding the claim.

Mr. Perry testified that he took meticulous notes and that his handwritten notes and summaries are an accurate recounting of the conversations he had with Ms. Webster. He said that he had a meeting with a representative from WCD and discussed the rule that allowed waiver of procedural rules; however, the response to that meeting – which was in letter form – did not mention consideration of the rule. Mr. Perry testified that subsequent to that meeting he wrote a letter to WCD outlining his position. (Ex. J). He testified that it was his understanding that he could not request reimbursement until the City had actually expended the funds and it could not expend the funds until they had an approved CDA.

A response to that correspondence by WCD confirmed the denial. The City filed a request for hearing resulting in this proceeding. (Ex. I).

CONCLUSIONS OF LAW AND OPINION

The City of Eugene argues that it is entitled to reimbursement from the Reopened Claims Program and advances three arguments in support of its position. First, the City argues that it in

[1] That rule reads in pertinent part:
"(1) In order for a disposition of a claim by the parties to be considered for reimbursement eligibility under the Reopened Claims Program, it must be submitted to the director during the period of time in which the claim remains open under the Board's Own Motion or voluntary claim reopening.

(2) Dispositions submitted in accordance with (1) are not eligible to receive reimbursement from the Reopened Claims Program unless made with the prior written approval of the director."

fact, complied with the pertinent statute and rules in seeking reimbursement and as such, WCD has no basis to deny it. Second, the City argues that it reasonably relied upon the representations from WCD's agent and the agency is now estopped from denying reimbursement. And third, the procedural rule relied upon by WCD in denying reimbursement should be waived to achieve justice as the reasonableness or adequacy of the settlement was not at issue.

WCD responds that the City did not follow the rules of procedure required to be eligible for reimbursement. That it correctly interpreted those rules to determine that written prior approval of the settlement amounts was mandated before the CDA was approved by the Board. Additionally, that while the agency has authority to waive a procedural rule – it may not do so if it violates a statutory requirement – a condition that applies in this instance. Finally, WCD asserts that even if the agency may waive a rule, there is no provision that would allow any delegation of that authority to require WCD to waive it.

The pertinent statute concerning CDA's, ORS 656.236(6) reads:

> "Any claim in which the parties enter into a disposition under this section shall not be eligible for reimbursement of expenditures authorized by law from the Workers' Benefit Fund without the prior approval of the Director of the Department of Consumer and Business Services."

The City of Eugene urges a reading of this provision to require that "prior written approval" of the CDA means before the actual reimbursement is issued and not that the settlement is ratified by WCD before the CDA is approved by the Board.[2] ORS 656.625 which concerns the Reopened Claims Program provides:

> "(3) The director, by rule, shall prescribe the form and manner of requesting reimbursement under this section, the amount payable and such other matters as may be necessary for the administration of this section."

As noted above the division has adopted rules, at OAR 436-045, that describe the criteria for eligibility for reimbursement and the process and requirements for requesting reimbursement. The City argues that 436-045-0025(2) does not contain a requirement that the CDA be approved by the WCD before the settlement is approved by the Board, however, subsection (1) of that rule provides "In order for a disposition of a claim by the parties to be considered for reimbursement eligibility under the Reopened Claims Program, it must be submitted to the director during the period of time *in which the claim remains open* under the Board's Own Motion or voluntary claim reopening." OAR 436-045-0025(1)(emphasis added).

[2] Much was made at hearing of a statutory change in July of 2008 which allowed an ALJ who mediated the settlement or the Board to approve CDA's. The ALJ is an employee and representative of the Board in that instance and referral to the ALJ or the Board for approval is synonymous and really has no bearing on the disposition of the issues before me.

In determining what constitutes an open claim, it has been reiterated by the Board and the Court's in numerous holdings that a CDA resolves all matters that, in the future, could arise out of a claim with the exception of medical services. An open, or reopened claim entitles a claimant to temporary disability benefits, potential permanent disability benefits and other claim benefits that are extinguished once a CDA has been approved. *Rash v. McKinstry Co.,* 331 Or 665 (2001); *Rick K. Eden* 57 Van Natta 2326 (2005). In addition, once the CDA has become final, ORS 656.236(2) provides that "[n]otwithstanding any other provision of this chapter, an order approving disposition of a claim pursuant to this section is not subject to review." A claim that is subject to a CDA cannot be an open claim as there is no benefit to close or any other determination to be made at the time medical services cease. OAR 436-045-0025(1) is consistent with the agency's interpretation of OAR 436-045-0025(2).

As such, the agency's interpretation of the statute, requiring submission and written approval of the settlement agreement prior to approval of the CDA itself, is reasonable and not inconsistent with the text of the rule or statute. It is well established law that an agency's construction and intrepretation of its own rules is entitled to substantial deference. *Don't Waste Oregon Com. v. Energy Facility Siting,* 320 Or 132, 142, 188 P.2d 119 (1994).

Likewise, I do not find that the agency is estopped from denying the reimbursement by representations from Ms. Webster on behalf of WCD. First, it is not clear that those representations were actually made as asserted by the City of Eugene. Concerning their conversation, Mr. Perry is quite convinced of what he was told and had contemporaneous written notes that confirm his testimony. On the other hand, while she had no independent recollection of their conversation, Ms. Webster is equally adamant that under no circumstances would she advise someone that a CDA be approved by the Board prior to written approval by WCD. She stated emphatically that in 20 years she had never given that advice, but in fact, gave the exact opposite advice. I believe that there was miscommunication regarding the requirement of "prior written approval." Both witnesses testified that WCD relayed that it did not "pre-approve" settlements. I believe this was confused with "prior written approval" of reimbursement once the settlement was reached.

The elements of estoppal include that a party against whom estoppal is asserted make a false or misleading statement on which an individual justifiably and detrimentally relied, the statement must be one of material fact, and must be made knowingly. *Mannelin v. DMV,* 176 Or App 9 (2001) *aff'd* 336 Or 147 (2003). Here, it is not conclusive that the statements attributed to the agency were actually made, nor was there a demonstration that they were made intentionally. I do not find that estoppal applies in this instance.

Finally, while it is clear that OAR 436-045-0003(4) allows the director, within his discretion, to waive any procedural requirement, that authority is not otherwise delegated and is written in the permissive and not the obligatory. The exercise of discretion to not waive the rule is not a determination that is reviewable in this forum. It is clear that the director considered, and rejected, that remedy.

While the equities in this dispute may lie with the petitioner (in that the reasonableness and adequacy of the settlement was not contested) the law compels an outcome in which the agency's decision to deny reimbursement is affirmed.