In the Medical Treatment of

Patricia A. Moore, Claimant

Contested Case No: 06-042H

FINAL ORDER

December 27, 2006

FRED MEYER C/O SEDGWICK CMS, Petitioner
PATRICIA A. MOORE, Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

---

Respondent claimant, through her attorney Dale C. Johnson, and Kevin Willingham, Manager of the Reemployment and Dispute Resolution Services Section[1] of the Workers' Compensation Division, both timely filed exceptions to Workers' Compensation Board Hearings Division Administrative Law Judge (ALJ) Claudette Mirassou McWilliams' August 23, 2006 Proposed and Final Order. Petitioner employer, through its attorney Krishna Balasubramani, filed a response. This matter comes before the director for a final order. The issues are the division's authority to file exceptions and the validity of OAR 436-010-0250. I reverse.

I adopt the findings of fact as stated in the February 13, 2006 Administrative Order issued by the Medical Review Unit (MRU).

<u>The Workers' Compensation Division's authority to file exceptions.</u>

Employer objects to Mr. Willingham's exceptions, arguing that the division has no statutory authority to participate in the exceptions process.

Hearings in matters within the director's authority are governed by ORS 656.704(2), which provides:

> "A party dissatisfied with an action or order regarding a matter other than a matter concerning a claim under this chapter may request a hearing on the matter in writing to the director. The director shall refer the request for hearing to the Workers' Compensation Board for a hearing before an Administrative Law Judge. Review of an order issued by the Administrative Law Judge shall be by the director and the director shall issue a final order that is subject to judicial review as provided by ORS 183.480 to 183.497."

Under the director's rulemaking authority,[2] the director has adopted supplemental procedural rules for hearings held under ORS 656.704(2). *See* OAR 436-001-0003. OAR 436-001-0246(2)

---

[1] The Medical Review Unit is part of the Reemployment and Dispute Resolution Services Section.

[2] ORS 656.726(4) provides:

explicitly allows the division to file exceptions to initiate director review of an ALJ's order: "The parties or the division may initiate director review of a proposed and final order by filing exceptions * * *." Mr. Willingham filed exceptions, and the parties were provided with the opportunity to respond, pursuant to the rule.

Validity of OAR 436-010-0250.

The underlying issue in this dispute is whether a spinal cord stimulator proposed by Joseph Dunn, MD, is appropriate treatment for claimant's compensable conditions. MRU found that employer did not comply with OAR 436-010-0250 and was therefore barred from challenging the appropriateness of the surgery under section (5) of that rule.[3] MRU ordered employer to pay for the surgery if provided. ALJ McWilliams reversed, finding that the time limits in OAR 436-010-0250 are in conflict with ORS 656.327 and the rule is inconsistent with the director's authority to promulgate rules, and remanded the matter to MRU for a decision on the merits.

Claimant initially argues that the ALJ should not have considered an issue – the validity of the rule – that was not previously raised by employer. Employer responds that the issue of "medical treatment" includes the legal issue of whether application of the rule was an error of law. Further, employer argues, because the ALJ found that the rule was inconsistent with statute, she was required to address the issue.

In its order, MRU found that employer did not comply with OAR 436-010-0250 and was therefore barred from challenging the appropriateness of the surgery under section (5) of the rule. In the caption, MRU referred to the matter as "ORS 656.327 Treatment Dispute." Employer requested a hearing, using the "Workers' Compensation Division Request for Hearing" form (Form 2839), marked as exhibit 70 in the record. The form includes a space for the requesting party to indicate the subject matter of the hearing by checking a box under "I request a hearing concerning (check below all that apply):." The list provided below are the types of matters that are within the director's authority, such as "Medical fee," "Managed care organization (MCO) medical dispute," and "Vocational assistance." There is a space for "Other" if the matter doesn't fall within one of the categories listed. This dispute arises under ORS 656.327 and accordingly, employer checked the box in front of "Medical treatment." The form does not require the requesting party to list all issues or arguments that the party will raise at hearing, nor does the division's rule relating to requests for hearing.[4] Employer was not required to specify in its

---

> "The director hereby is charged with duties of administration, regulation and enforcement of ORS 654.001 to 654.295, 654.750 to 654.780 and this chapter. To that end the director may:
> "(a) Make and declare all rules and issue orders which are reasonably required in the performance of the director's duties.
> "* * * * *
> "(g) Prescribe procedural rules for and conduct hearings, investigations and other proceedings pursuant to ORS 654.001 to 654.295, 654.750 to 654.780 and this chapter regarding all matters other than those specifically allocated to the board or the Hearings Division."

[3] The relevant portions of the rule and statute are set out below.

[4] OAR 436-001-0019(2) provides:

request for hearing the issues it would raise. Employer raised the issue of the validity of the rule in its written closing argument, and it was appropriate for the ALJ to address the issue.

The statute that applies when the appropriateness of medical treatment is at issue is ORS 656.327. The relevant provisions are as follows:

> "(1)(a) If an injured worker, an insurer or self-insured employer or the [d]irector * * * believes that the medical treatment, not subject to ORS 656.260, that the injured worker has received, is receiving, will receive or is proposed to receive is excessive, inappropriate, ineffectual or in violation of rules regarding the performance of medical services, the injured worker, insurer or self-insured employer shall request review of the treatment by the director and so notify the parties.
>
> "(b) Unless the director issues an order finding that no bona fide medical services dispute exists, the director shall review the matter as provided in this section. * * *
>
> "(c) The insurer or self-insured employer shall not deny the claim for medical services nor shall the worker request a hearing on any issue that is subject to the jurisdiction of the director under this section until the director issues an order under subsection (2) of this section.
>
> "(2) The director shall review medical information and records regarding the treatment. The director may cause an appropriate medical service provider to perform reasonable and appropriate tests, other than invasive tests, upon the worker and may examine the worker. * * * Review of the medical treatment shall be completed and the director shall issue an order within 60 days of the request for review. The director shall create a documentary record sufficient for purposes of judicial review. If the worker, insurer, self-insured employer or medical service provider is dissatisfied with that order, the dissatisfied party may request a

---

"A request for hearing must be in writing. A party may use the division's Form 2839. A request for hearing must include the following information, as applicable:
"(a) The identity, name, address, and phone number of the party making the request;
"(b) The division's administrative order number;
"(c) The worker's name, address, and phone number;
"(d) The name, address, and phone number of the worker's attorney, if any;
"(e) The date of injury;
"(f) The insurer or self-insured employer claim number;
"(g) The division's file number; and
"(h) The reason for requesting a hearing."

> contested case hearing before the director pursuant to ORS chapter 183. At the contested case hearing, the administrative order may be modified only if it is not supported by substantial evidence in the record or if it reflects an error of law. No new medical evidence or issues shall be admitted. * * * Review of the director's order shall be by the Court of Appeals pursuant to ORS chapter 183."

The process the parties are required to follow when elective surgery is recommended is described in OAR 436-010-0250[5] which is as follows:

> "(1) "Elective Surgery" is surgery which may be required in the process of recovery from an injury or illness but need not be done as an emergency to preserve life, function or health.
>
> "(2) * * * [W]hen the attending physician or surgeon upon referral by the attending physician or authorized nurse practitioner, believes elective surgery is needed to treat a compensable injury or illness, the attending physician, authorized nurse practitioner, or the surgeon must give the insurer actual notice at least seven days prior to the date of the proposed surgery. Notification must provide the medical information that substantiates the need for surgery, and the approximate surgical date and place if known.
>
> "(3) When elective surgery is recommended, the insurer may require an independent consultation with a physician of the insurer's choice. The insurer must notify the recommending physician, the worker and the worker's representative, within seven days of receipt of the notice of intent to perform surgery, whether or not a consultation is desired by submitting a completed Form 440-3228 (Elective Surgery Notification) to the recommending physician. If the form is not completed the physician is not required to respond. When requested, the consultation must be completed within 28 days after notice to the physician.
>
> "(4)(a) Within seven days of the consultation, the insurer must notify the recommending physician of the insurer's consultant's findings.
>
> "(b) When the insurer's consultant disagrees with the proposed surgery, the recommending physician and insurer should endeavor to resolve any issues raised by the insurer's consultant's report. Where medically appropriate, the recommending physician, with the insurer's agreement to pay, may obtain additional diagnostic testing, clarification reports or other information designed to assist

[5] Effective April 1, 2005, adopted by WCD Admin. Order 05-052. The rule in effect at the time of the elective surgery request applies.

> them in their attempt to reach an agreement regarding the proposed surgery.
>
> "(c) The recommending physician must notify the insurer, the worker and the worker's representative by signing Form 440-3228 or providing other written notification that further attempts to resolve the matter would be futile.
>
> "(5) If the insurer believes the proposed surgery is excessive, inappropriate, or ineffectual and cannot resolve the dispute with the recommending physician, the insurer must request an administrative review by the director within 21 days of the notice provided in subsection(4)(c) of this rule. Failure of the insurer to timely respond to the physician's elective surgery request by submitting a completed Form 440-3228, or to timely request administrative review under this rule shall bar the insurer from later disputing whether the surgery is or was excessive, inappropriate, or ineffectual.
>
> "(6) If the recommending physician and consultant disagree about the need for surgery, the insurer may inform the worker of the consultant's opinion. The decision whether to proceed with surgery remains with the attending physician and the worker.
>
> "(7) A recommending physician who prescribes or proceeds to perform elective surgery and fails to comply with the notification requirements in section (2) of this rule, may be subject to civil penalties as provided in ORS 656.254 and OAR 436-010-0340.
>
> "* * * * *."

ALJ McWilliams found that the time limits in the rule conflict with ORS 656.327 and the rule is inconsistent with the director's authority to promulgate rules.

Claimant argues the director has authority to provide time limits and the rule is consistent with the policy of providing prompt medical treatment. Mr. Willingham argues the director is inherently and explicitly authorized by ORS 656.704(2) and 656.726(4)(a) and (g) to adopt procedural rules for proceedings within her authority, including disputes regarding medical services and treatment. Further, according to Mr. Willingham, the director's rule is reasonably required in the performance of the director's duties and is consistent with the policies in ORS 656.012.

Employer responds that the rule imposes deadlines and restrictions not found in statute and is invalid. According to employer, the rule legislates who may request director review of elective surgery and under what circumstances, narrowing the scope of the statute and effectively excluding employers from seeking review but permitting other parties to do so without rigid

deadlines. Employer further argues that it is impermissible for the division to distinguish elective surgery requests from other disputed forms of medical treatment.

OAR 436-010-0250 is a valid exercise of the director's rulemaking authority under ORS 656.726(4) and 656.327. ORS 656.726(4) provides, in part:

> "The director hereby is charged with duties of administration, regulation and enforcement of * * * [the Workers' Compensation Law]. To that end the director may:
>
> "(a) Make and declare all rules and issue orders which are reasonably required in the performance of the director's duties.
>
> "* * * * *
>
> "(g) Prescribe procedural rules for and conduct hearings, investigations and other proceedings pursuant to * * * chapter [656] regarding all matters other than those specifically allocated to the board or the Hearings Division."

Under ORS 656.726(4), the director is charged with administering the workers' compensation law, and is given the express authority to adopt all rules, including procedural rules, which are reasonably required for the director to exercise her duty of administering the law. ORS 656.327 provides for director review of medical treatment disputes. OAR 436-010-0250 lays out the process the parties are required to follow in order to initiate that review in disputes regarding elective surgery the worker is proposed to receive. Section (5) provides that the insurer in effect defaults if it fails to comply with procedural requirements. As discussed below, such requirements are reasonably required in the administration of ORS 656.327.

Rules adopted under ORS 656.726(4) have been found valid if within the range of discretion allowed by the more general policies of the Workers' Compensation Law. *Black v. Dep't of Ins. and Fin.*, 108 Or App 437, 440 (1991) (rule under which fee for deposition testimony was calculated valid under *former* ORS 656.726(3)). Those policies are found in ORS 656.012, which provides in part:

> "(2) * * * [T]he objectives of the Workers' Compensation Law are declared to be as follows:
>
> "(a) To provide, regardless of fault, sure, prompt and complete medical treatment for injured workers * * * ;
>
> "(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 * * *."

Rules reasonably related to the objectives stated in ORS 656.012 have been upheld. *Rager v. EBI Companies*, 107 Or App 22 (1991), *reconsidering* 102 Or App 457 (1990) (medical services rule did not conflict with ORS 656.012 or 656.245, but was reasonably related to statutory objective and established a reasonable standard). OAR 436-010-0250 is such a rule.

Under the rule, the attending physician[6] must give the insurer notice, including medical information substantiating the need for surgery and approximate date and place if known, at least seven days prior to the date of surgery. The insurer may require an independent consultation. The insurer must notify the attending physician and the worker, by submitting a Form 3228 to the attending physician, within seven days of receiving the notice whether or not it desires an independent consultation. The consultation must be completed within 28 days of submitting the form. Within seven days of the consultation, the insurer must notify the attending physician of the consultant's findings. If the consultant disagrees with the proposed surgery, the attending physician and the insurer try to resolve areas of disagreement. If appropriate, additional information may be obtained. If the attending physician believes further attempts to resolve the matter with the insurer would be futile, the attending physician must notify the insurer and the worker by signing the Form 3228 or providing written notice. If the insurer believes the proposed surgery is excessive, inappropriate, or ineffectual and cannot resolve the dispute with the attending physician, the insurer must request review by the director within 21 days of the physician's notice that further attempts to resolve the matter would be futile. The insurer may also simply inform the worker of the consultant's opinion. If the insurer does not request administrative review within 21 days or does not submit Form 3228 within seven days of receiving notice of proposed surgery, the insurer is barred from later disputing whether the surgery was excessive, inappropriate, or ineffectual. If the physician does not give the insurer the required notice at least seven days prior to the proposed surgery, the physician may be subject to civil penalties.

The intent of the rule is to keep the process moving forward, and it provides time frames for each step of the process. The process is reasonably related to the objectives of the Workers' Compensation Law "[t]o provide * * * sure, prompt and complete medical treatment for injured workers * * *" and "[t]o restore the injured worker physically * * * to a self-sufficient status in an expeditious manner * * *." ORS 656.012(2)(a), (c).

The rule allows an insurer the opportunity to get a second opinion. While the insurer only has seven days from the date it receives the elective surgery request in which to decide whether it wants an independent consultation, it has 28 days to obtain the consultation.

Section (4) of the rule also provides for a collaborative process between the parties to attempt to informally resolve any disagreements regarding elective surgery prior to bringing a

---

[6] Surgery may be proposed by the attending physician, authorized nurse practitioner, or surgeon upon referral by the attending physician. OAR 436-010-0250(2). This discussion refers only to the attending physician for the sake of simplicity.

dispute to the director. This encouragement of collaboration between the parties is reasonably related to the objective of "provid[ing] a fair and just administrative system for delivery of medical * * * benefits to injured workers that reduces litigation and eliminates the adversary nature of * * * proceedings, to the greatest extent practicable." ORS 656.012(2)(b).

The rule protects the parties while keeping the process in motion. Injured workers get compensable treatment as expeditiously as possible; insurers have the right to challenge that treatment; and physicians are protected against nonpayment. The rule does not alter the parties' rights under the statute; it provides a process for exercising those rights.

ORS 656.327 charges the director with the duty to review medical treatment disputes. ORS 656.327 does not, however, provide the procedural parameters for how to bring such a dispute before the director. The director retains the authority and responsibility under ORS 656.726(4) to adopt procedural rules reasonably required to review disputes and reasonably related to the objectives of the workers' compensation law. OAR 436-010-0250 is within the director's authority and is valid.[7]

I affirm MRU's finding that employer did not comply with OAR 436-010-0250(3) and (5) by not notifying Dr. Dunn that a second surgical opinion was desired and by not requesting administrative review. Employer is therefore barred from challenging the appropriateness of the proposed surgery.

IT IS HEREBY ORDERED the August 23, 2006 Proposed and Final Order is reversed. The February 13, 2006 Administrative Order is affirmed.

[7] This issue was addressed in *Steven G. Humbert*, 10 CCHR 352 (2005), and *Robert Shaddy*, 10 CCHR 359 (2005), both of which have been appealed to the Court of Appeals.