

In the Matter of the Medical Treatment of

Patricia A. Moore, Claimant

Contested Case No: 06-042H

PROPOSED & FINAL ORDER

August 23, 2006

FRED MEYER, Petitioner

PATRICIA A. MOORE, Respondent

Before Claudette Mirassou McWilliams, Administrative Law Judge

Claimant in this medical treatment dispute is represented by Dale C. Johnson. The direct responsibility employer, Fred Meyer Stores (Fred Meyer), and its processing agent, Sedgwick Claims Management Services (CMS) are represented by Krishna Balasubramani.

On February 13, 2006, Jean Zink, R.N. of the Medical Review Unit (MRU) of the Workers' Compensation Division (WCD) issued an Administrative Order that required the employer to pay for all costs associated with placement of a spinal cord stimulator (Ex. 69-4). Following a March 3, 2006, WCD Request for Hearing by CMS (Ex. 70), WCD issued a March 21, 2006, Referral to Workers' Compensation Board for hearing pursuant to ORS 656.704(2)(a) and OAR 436-001-0019.

A hearing was scheduled to convene on June 13, 2006, before Administrative Law Judge Kate Donnelly in Eugene, Oregon. Prior to hearing the parties agreed to have the matter decided upon the written record in lieu of formal proceedings. A hearing was not conducted. The record closed on July 23, 2006, following receipt of the Reply Closing Argument. Administrative Law Judge Claudette Mirassou McWilliams thereafter assumed responsibility for this matter.

EXHIBITS

The record in WCD File No. I132379 that resulted in Administrative Order TX-06-150 consisted of 69 exhibits in addition to Fred Meyer's hearing request (Ex. 70). Exhibits 1 through 70 are hereby received into evidence.

ISSUE

Whether Fred Meyer must pay for treatment by Dr. Dunn consisting of surgical implantation of a spinal cord stimulator.

FINDINGS OF FACT

In disputes involving proposed medical treatment under ORS 656.245 and ORS 656.327, new medical evidence cannot be admitted or considered. Moreover, on appeal of an MRU order an 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. ORS 656.327. As a result, the findings of fact made by MRU are controlling. *See Liberty Northwest Insurance Corporation v. Kraft*, 205 Or App 59 (2006).

CONCLUSIONS OF LAW AND REASONING

The hearing in this matter was scheduled for June 13, 2006, and the record closed on July 23, 2006. The current dispute is, therefore, governed by the Director's rules set forth in WCD Administrative Order 06-050.¹ OAR 436-01-0003(2); *former* OAR 436-010-0250.

Here, MRU found *sua sponte* that OAR 436-010-0250 barred Fred Meyer from contesting the appropriateness of surgery to implant a spinal cord stimulator (Ex. 69). Fred Meyer argues, *inter alia*,² that the Department's rule, OAR 435-010-0250, is invalid because it imposes stricter requirements than ORS 656.327. Specifically, the employer contends that the time limits imposed by rule exceed the scope of the governing statute, which is silent regarding timeliness requirements before the Director's review begins.

In response, claimant contends that Fred Meyer cannot now seek consideration of the validity of the applicable administrative rule because the issue was not asserted in its hearing request (Ex. 70). The employer indicated that it was requesting a hearing regarding medical treatment. It did not check the "Other" box that directed the requesting party to "identify and cite applicable statute," despite the availability of blank lines on the form for that purpose. *Id.*

As previously discussed, the Director's order can be modified only upon a showing that it is not supported by substantial evidence in the record or if it reflects an error of law. OAR 436-001-0225(2). In my view, the application of an invalid administrative rule qualifies as an error of law encompassed within review of "medical treatment." Consequently, I conclude that Fred Meyer is not precluded from raising the issue regarding the validity of OAR 436-010-0250.³

ORS 656.327 provides, in pertinent part, that:

“(1)(a) If an injured worker, an insurer or self-insured employer or the Director of the Department of Consumer and Business Services believes that he medical treatment * * * that the injured worker * * * 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 shall

¹ Recent changes not affecting this decision were included in Administrative Order 06-054, effective July 1, 2006.

² Fred Meyer also maintains that the MRU improperly considered an issue not raised by claimant, failed to correctly assign the initial burden of proof, and rendered a decision that was unsupported by substantial evidence. Given the decision reached here, I need not address those arguments.

³ Because an administrative agency with quasi-judicial power must follow the law, if an administrative rule that must be applied is inconsistent with a statute, it must follow the superior law. *Schultz v. City of Springfield Forest Products*, 151 Or App 727, 730-31 (1997).

request review of the treatment by the director and so notify the parties”

* * * *

“(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. Notwithstanding ORS 656.325(1) the worker may refuse a test without sanction. 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 contested case hearing before the director pursuant to ORS chapter 183. At the contested 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.”

The Director is charged under ORS 656.726(4) “with duties of administration, regulation and enforcement of [ORS Chapter 656].” *See generally, Sandra A. Ainsworth*, 56 Van Natta 1408, 1410 (2004). In the discharge of those duties to administer the provisions of ORS 656.327, the Department promulgated OAR 436-010-0250. That rule requires an employer to notify the recommending physician, the worker and the workers’ representative that an independent consultation is required within seven days of receipt of the notice of intent to perform surgery. Several other deadlines are imposed by the rule, including the requirement that an employer submit a Form 440-3228 within a certain time period to ensure its right to review. Together the statute and rule establish a mechanism by which the propriety of medical services can be challenged. In cases not involving the validity of the rule, it has been applied to preclude an insurer from disputing the appropriateness of proposed surgery due to its failure to comply with its provisions. *E.g. John Foster*, 55 Van Natta 3066 (2003); *Steven D. Clark*, 54 Van Natta 1260 (2002); *Gaylynn Grant*, 52 Van Natta 1439 (2000).

Administrative rules must be consistent with an agency’s statutory authority. An agency may not alter, enlarge or limit the terms of an applicable statute by rule. *E.g. Harrison v. Taylor Lumber & Treating, Inc.*, 11 Or App 325, 328 (1992). In particular, administrative rules cannot impose a time limit that is absent from statute. *Nada Lovre*, 56 Van Natta 598 (2004)(Administrative rule imposing time limit by which worker must supply verifiable

documentation of wages conflicted with statute governing worker's entitlement to temporary disability benefits so no effect was given to the rule's time limit.).

In discussing the prohibition on inserting language into statute by means of administrative rule, the Court of Appeals in *Franzen v. Liberty Mutual Fire Ins. Co.*, 154 Or App 503 (1998), commented that: "a desire for administrative simplicity is no justification for reading into the statute a requirement that the statute does not include. *Id.* at 508, citing *Guardado v. J.R. Simplot Co.*, 137 Or App 95, 100 (1995).

To the extent that OAR 436-010-0250 is read to provide a time limit in which the employer must act to preserve its right to contest whether medical services are reasonable and necessary, it would be in conflict with ORS 656.327 because there is no statutory support for any time limits, including a seven-day limit on notice that an independent consultation is required. When there is a conflict between an administrative rule and a statute, it is the statute that controls. *Nada Lovre, id.*

I find that by enacting a rule that imposes a limitation absent from the statute, the Director has amended, altered, enlarged, or limited the terms of the statute. *Harrison, supra*, 11 Or App 325. Accordingly, OAR 436-010-0250 is inconsistent with the Director's statutory authority to promulgate rules. As a result, I give no effect to such limitation. *Julio C. Garcia-Carol*, 50 Van Natta at 163; *Lee R Jones*, 46 Van Natta at 2181. If Fred Meyer is not barred from presenting its challenge to the Administrative Order, a decision on the merits should be made. Remand to the Director for that purpose is appropriate. OAR 435-001-0170(5).

ORDERS

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

1. The February 13, 2006, Administrative Order TX 06-150 is set aside.
2. The matter is remanded to the Director for a decision on the merits whether Fred Meyer must pay for all costs associated with placement of a spinal cord stimulator.