

In the ORS 656.245 Medical Service Dispute of

**Hector Rojo-Heredia, Claimant**

Contested Case No: 06-114H

**FINAL ORDER**

April 13, 2007

HECTOR ROJO-HEREDIA, Petitioner

LIBERTY NORTHWEST INSURANCE CORPORATION, Respondent

Before John L. Shilts, Workers' Compensation Division Administrator

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Kevin Willingham, Manager of the Reemployment and Dispute Resolution Services Section<sup>1</sup> of the Workers' Compensation Division, timely filed exceptions to Workers' Compensation Board Administrative Law Judge (ALJ) Nicholas M. Sencer's December 21, 2006 Proposed and Final Order. Petitioner claimant, through his attorney Lourdes Sánchez, timely filed a response. Respondent insurer, through its attorney Sally A. Curey, filed an appearance indicating agreement with Mr. Willingham's exceptions. This matter comes before the director for a final order. The issues are Mr. Willingham's authority to file exceptions, and whether medications prescribed by a non-authorized nurse practitioner are reimbursable. I affirm on different grounds.

I adopt the ALJ's findings of fact and make the following supplemental finding:

Joe Knaus, NP is not on the director's list of nurse practitioners authorized to provide compensable medical services.

The underlying issue is whether insurer is liable to reimburse claimant for out-of-pocket expenses paid for medications prescribed by Joe Knaus, NP on December 21, 2005 and January 28, 2006. The Medical Review Unit (MRU), by Administrative Order dated June 15, 2006, found insurer not liable because Mr. Knaus was not an authorized nurse practitioner under OAR 436-010-0210(7).<sup>2</sup> Claimant requested a hearing. ALJ Sencer reversed, concluding that MRU made an error of law in interpreting the rules. ALJ Sencer interpreted OAR 436-010-0210(1) and (7) to mean that nurse practitioners only have to be authorized to authorize time loss and manage medical services, and do not need to be authorized to sign prescriptions under the direction and control of an attending physician.

Mr. Willingham contends that the ALJ misstated OAR 436-010-0210(7), that it actually states that nurse practitioners must be authorized to provide any compensable medical services. Mr. Willingham refers to 2003 legislation in support of his argument.

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<sup>1</sup> At the time Mr. Willingham filed his exceptions, the former Medical Review Unit (MRU) was part of the Reemployment and Dispute Resolution Services Section. MRU is now known as the Resolution Team of the newly-created Medical Section of the Workers' Compensation Division.

<sup>2</sup> The rule text is set forth below.

Claimant first argues that the Department of Consumer and Business Services was not adversely affected by the ALJ's order and has no right to appeal it. 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.*”

(Emphasis added.) Under the director's rulemaking authority,<sup>3</sup> 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) explicitly allows the division to file exceptions to initiate director review of an ALJ's proposed 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.

Claimant next argues that he should be reimbursed for the prescriptions because the medications were authorized by his attending physician and Mr. Knaus was acting as the attending physician's agent.

The authority of nurse practitioners in workers' compensation claims changed with the passage of House Bill 3669 in 2003. The bill added the following language to ORS 656.245(2)(b):

“(C) [A] nurse practitioner licensed under ORS 678.375 to 678.390 may:

“(i) Provide compensable medical services for 90 days from the date of the first visit on the claim;

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<sup>3</sup> ORS 656.726(4) provides:

“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.”

“(ii) Authorize the payment of temporary disability benefits for a period not to exceed 60 days from the date of the first visit on the initial claim; and

“(iii) When an injured worker treating with a nurse practitioner authorized to provide compensable services under this section becomes medically stationary within the 90-day period in which the nurse practitioner is authorized to treat the injured worker, shall refer the injured worker to a physician qualified to be an attending physician as defined in ORS 656.005 for the purpose of making findings regarding the worker’s impairment for the purpose of evaluating the worker’s disability. If a worker returns to the nurse practitioner after initial claim closure for evaluation of a possible worsening of the worker’s condition, the nurse practitioner shall refer the worker to an attending physician and the insurer shall compensate the nurse practitioner for the examination performed.”

HB 3669 (2003) also provided:

“On or after October 1, 2004, a nurse practitioner licensed under ORS 678.375 to 678.390, *prior to providing compensable medical services* or authorizing temporary disability benefits *under ORS 656.245*, must certify in a form acceptable to the Director of the Department of Consumer and Business Services that the nurse practitioner has reviewed the materials developed under section 29 of this 2003 Act.”

(Emphasis added.) Section 30, chapter 811, Oregon Laws 2003.<sup>4</sup> The department has interpreted this language to mean that all nurse practitioners must become “authorized” by the director prior to providing any compensable medical services under ORS 656.245 to injured workers. OAR 436-010-0210(7)<sup>5</sup> provides,

“(7) Effective October 1, 2004, *in order to provide any compensable medical service under ORS chapter 656*, a nurse practitioner licensed under ORS 678.375 to 678.390 must certify in a form provided by the director that the nurse practitioner has reviewed a packet of materials which the director will provide upon request and must have been assigned an authorized nurse

<sup>4</sup> Section 30 was not codified in the Oregon Revised Statutes.

<sup>5</sup> The Proposed and Final Order quotes the version of the rule that was adopted effective April 1, 2004. That version of the rule provided, in part, “Effective October 1, 2004, in order to qualify as an authorized nurse practitioner, \* \* \*.” That language was replaced effective April 1, 2005 to provide, “Effective October 1, 2004, in order to provide any compensable medical service under ORS chapter 656, \* \* \*.” This is the language that was in effect at the time of the services in dispute here, and remains effective today.

practitioner number by the director. An authorized nurse practitioner may:

“(a) Provide compensable medical services to an injured worker for a period of 90 days from the date of the first nurse practitioner visit on the initial claim. Thereafter, medical services provided by an *authorized* nurse practitioner are not compensable without authorization of an attending physician; and

“(b) Authorize temporary disability benefits for a period of up to 60 days from the date of the first nurse practitioner visit on the initial claim.”

(Emphasis added.)

ALJ Sencer found that nurse practitioners must be authorized only to authorize time loss and manage medical services, under OAR 436-010-0210(1). That section of the rule provides, “Attending physicians and authorized nurse practitioners may authorize time loss and manage medical services subject to the limitations of these rules.” It refers to limits on authorizing time loss and managing medical services; it does not state that nurse practitioners need only be authorized to perform those specific functions. Section (7) of the rule sets forth the requirements nurse practitioners must meet before providing *any* compensable medical services. A nurse practitioner must become “authorized” and be assigned a number after reviewing materials provided by the director. At the time Mr. Knaus wrote the prescriptions, he had not completed the process to become authorized and therefore could not provide compensable medical services.

The ALJ reasoned that the prescriptions are reimbursable because Mr. Knaus was acting under the direction and control of claimant’s attending physician. However, under the rule a nurse practitioner must be authorized to provide any services, even if the services are provided under the direction and control of the attending physician.<sup>6</sup>

Because Mr. Knaus was not authorized under the statute and rules, he could not provide medical services to injured workers and expect the workers’ compensation insurer to pay for those services. Had he billed insurer for office visits or for other services provided directly by him, insurer would not be obligated to pay. However, that is not what happened here. Here, claimant’s attending physician signed the chart notes for office visits that are in the record. The

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<sup>6</sup> In September 2004 the department issued a notice to nurse practitioners reminding them that they needed to become authorized by October 1, 2004 in order to provide compensable medical services to injured workers. The notice stated, in part:

“Effective October 1, 2004, the statute \* \* \* requires licensed nurse practitioners treating Oregon injured workers to certify they have read informational materials provided by the Workers’ Compensation Division (WCD). **This requirement applies to all nurse practitioners treating Oregon injured workers, whether treating in lieu of an attending physician or under the supervision of an attending physician.**”

(Emphasis in original.) The notice can be accessed at

[http://www.cbs.state.or.us/external/wcd/communications/industry\\_notices/anp04.pdf](http://www.cbs.state.or.us/external/wcd/communications/industry_notices/anp04.pdf).

chart notes list claimant's current medications and the treatment plan, in part, is for claimant to continue taking the medications. Apparently however, the attending physician did not sign all of the prescriptions; Mr. Knaus signed the prescriptions for which claimant is now seeking reimbursement. It is undisputed that the medications are related to claimant's compensable condition. Insurer does not dispute whether the medications are reasonable, necessary, and appropriate for claimant's compensable condition. In other words, the medications are otherwise compensable.<sup>7</sup>

Under these circumstances, claimant should not be held responsible for Mr. Knaus' failure to comply with the statute and rules.<sup>8</sup> Claimant paid the pharmacy for the prescriptions and requested reimbursement from insurer. The rules and process for reimbursement of related service costs therefore apply.<sup>9</sup> Under OAR 436-009-0025(1) an insurer is required to reimburse a worker upon request for actual and reasonable costs paid for prescriptions.

Claimant has prevailed and his attorney is entitled to a fee. ORS 656.385(1). Based on the matrix in OAR 436-001-0265, ALJ Sencer awarded \$700. Neither party has objected to the ALJ's calculation of the fee, and claimant has not requested an additional fee for the exceptions process. Even considering the additional time claimant's attorney has spent during the exceptions process (assumed to be less than 2 hours), \$700 is on the upper end of the amount allowed by the matrix where the benefit to the worker is less than \$2,000 and the time devoted is between 4.1 and 6 hours. Therefore, the total fee awarded to claimant's attorney is \$700.

**IT IS HEREBY ORDERED** that the December 21, 2006 Proposed and Final Order is affirmed for the reasons stated above. Insurer shall reimburse claimant for the cost of the disputed medications, and pay to claimant's attorney a total fee of \$700.

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<sup>7</sup> Prescription medications are compensable medical services, and continue to be compensable after a worker's condition becomes medically stationary. ORS 656.245(1)(b), (1)(c)(B).

<sup>8</sup> OAR 436-009-0015(1) provides, in part, "An injured worker is not liable to pay for any medical service related to an accepted compensable injury or illness \* \* \*."

<sup>9</sup> See OAR 436-009-0090(7) ("Except for sections 2, 3, 4 and 6 of this rule, this [Pharmacy Fees] rule does not apply to a worker's direct purchase of prescription medications, and does not limit a worker's right to reimbursement for actual out-of-pocket expenses under OAR 436-009-0025.").