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In the Matter of the Compensation of  
**DENISE AMOS, Claimant**  
WCB Case No. 12-06257  
ORDER ON REVIEW  
Hansen Malagon, Claimant Attorneys  
Lyons Lederer LLP, Defense Attorneys

Reviewing Panel: Members Lowell and Lanning.

Claimant requests review of Administrative Law Judge (ALJ) Jacobson's order that affirmed a Workers' Compensation Division (WCD) order that denied claimant's request for a worker-requested medical examination (WRME). On review, the issue is claim processing.<sup>1</sup>

We adopt and affirm the ALJ's order with the following supplementation.

In 2002, claimant sustained a compensable injury. (Ex. 2). The insurer accepted a right hip strain and right-sided L5-S1 annular disc tear. (Exs. 6, 31, 96-2).

In March 2012, claimant requested administrative review by WCD regarding an L4-5 injection proposed by Dr. Fiks, attending physician. (Ex. 126). The insurer contended that the proposed injection was not causally related to the accepted conditions. (*Id.*) Thereafter, WCD transferred the dispute to the Hearings Division for resolution of the medical services causation issue. (*Id.*)

The insurer requested claimant to submit to an independent medical examination (IME) by Drs. Woodward and DeBolt on May 2, 2012. The stated purpose of the examination was to evaluate claimant's current and work-related conditions. (Ex. 131A).

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<sup>1</sup> The insurer moves to strike claimant's reply brief, asserting that her counsel has stated material facts and raised issues that were not presented in her appellant's brief. In support of its motion, the insurer submits documents not presented for admission at the hearing, as well as seeks official notice of other information.

We have confined our review to those portions of claimant's reply brief which are supported by the evidentiary record. Likewise, we have neither considered the insurer's submitted documents nor taken official notice of the requested information.

Claimant was unable to attend the IME. (Ex. 133-1). At the insurer's request, Dr. Woodward produced a "Medical File Review" report. (Ex. 132). In addressing the issues, Dr. Woodward's source of information included only a review of the medical records. (Ex. 132-1). Based on his records review, he concluded that claimant did not require medical treatment for her accepted conditions. (Ex. 132-44).

On May 11, 2012, the insurer denied that claimant's L4-5 disc condition was the result of a work-related injury or disease. (Ex. 133). The denial stated that it was based in part on Dr. Woodward's "file review," in lieu of the scheduled IME. (Ex. 133-1).

In November 2012, Dr. Fiks disagreed with Dr. Woodward's conclusions and opinions. (Ex. 134A-1).

Subsequently, claimant requested a Worker Requested Medical Examination (WRME). (Ex. 135). Reasoning that the insurer's denial was based on a "file review," and not on an "examination," WCD did not approve the WRME request. (Ex. 136). Claimant requested a hearing. *See* ORS 656.325(6) ("Any party may request a hearing on any dispute under this section pursuant to ORS 656.283.").

Relying on OAR 436-060-0147 and OAR 436-010-0265, the ALJ determined that claimant's right to a WRME was contingent on the attending physician's disagreement with an IME, which was defined to include an "actual examination." Reasoning that the appointment with Dr. Woodward was originally scheduled as an examination, and that claimant did not appear for the examination, the ALJ concluded that claimant was not entitled to a WRME on her attending physician's disagreement with the resulting "file review" report.

On review, claimant asserts that she is entitled to a WRME based on the insurer's use of the "file review" in denying her claim. Based on the following reasoning, we disagree.

ORS 656.325(1)(e)<sup>2</sup> allows a worker to request a WRME when the worker's attending physician does not concur with a report of an examination conducted pursuant to ORS 656.325(1)(a). Here, Dr. Fiks did not concur with

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<sup>2</sup> ORS 656.325(1)(e) provides:

"If the worker has made a timely request for a hearing on a denial of compensability as required by ORS 656.319(1)(a) that is based on one or more reports of examinations conducted pursuant to paragraph (a) of this

Dr. Woodward's report based on a "file review." The question is whether Dr. Woodward's "file review" was a report of an examination conducted pursuant to ORS 656.325(1)(a).

In interpreting ORS 656.325(1), we must discern legislative intent. ORS 174.020. We begin by examining the text and context of the statute. *PGE v. Bureau of Labor and Inds.*, 317 Or 606, 610 (1993). In interpreting the text of a statute, "words of common usage should be given their plain, natural and ordinary meaning." *PGE Id.* at 611. We are particularly mindful of the statutory enjoiner "not to insert what has been omitted." ORS 174.101. We assume that the legislature's choice of words was purposeful and, therefore, do not disregard that choice lightly. *Martin v. City of Albany*, 320 Or 175, 181 (1994).

ORS 656.325(1)(a) requires a worker "to submit to a medical examination at a time reasonably convenient for the worker."<sup>3</sup> The statute does not define "submit" or "medical examination." Accordingly, we consider the "plain, natural, and ordinary meaning" of the words. *PGE*, 317 Or at 611. To "submit" is "to allow oneself to become subjected \* \* \* as to an operation." *Webster's Third New Int'l Dictionary* 1930 (unabridged ed. 1993). An "examination" is "the act or process of examining or state of being examined." (*Id.* at 790). To "examine," in this context, is "to inspect or test for evidence of disease or abnormality (the doctor *examined* the young men and found them in perfect health)." *Id.* (emphasis in original). Applying the "plain, natural, and ordinary meaning" in the context of

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subjection and the worker's attending physician or nurse practitioner authorized to provide compensable medical services under ORS 656.245 does not concur with the report or reports, the worker may request an examination to be conducted by a physician selected by the director from the list described in ORS 656.328. The cost of the examination and examination report shall be paid by the insurer or self-insured employer."

<sup>3</sup> ORS 656.325(1)(a) provides:

"Any worker entitled to receive compensation under this chapter is required, if requested by the Director of the Department of Consumer and Business Services, the insurer or self-insured employer, to *submit to a medical examination at a time reasonably convenient for the worker* as may be provided by the rules of the director. No more than three independent medical examinations may be requested except after notification to and authorization by the director. If the worker refuses to submit to any such examination, or obstructs the same, the rights of the worker to compensation shall be suspended with the consent of the director until the examination has taken place, and no compensation shall be payable during or for account of such period. The provisions of this paragraph are subject to the limitations on medical examinations provided by ORS 656.268." (Emphasis added.)

the statute's requirement that the medical examination be "at a time reasonably convenient for the worker" supports the proposition that the requisite medical examination involves an in-person evaluation of the worker.

We find further support for this interpretation in the Director's rules promulgated to implement ORS 656.325(1). OAR 436-060-0147(1)<sup>4</sup> provides for a WRME where a denial of compensation is based on an "IME" report. OAR 436-060-0147(3)(d) adopts the definition of "IME" in OAR 436-010-0265(1).<sup>5</sup> Thus, an "IME" is "any medical examination including a physical capacity or work capacity evaluation or consultation that includes an examination \* \* \* that is requested by the insurer and completed by a medical service provider \* \* \*." OAR 436-010-0265(1). While "examination" is not otherwise defined, we again apply its "plain, natural, and ordinary meaning" in the context of the rule's requirement that, if the examination is conducted by multiple providers, the examination must be completed within 72 hours and "at locations reasonably convenient to the worker," to conclude that a "medical examination" involves an in-person evaluation of the worker.<sup>6</sup>

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<sup>4</sup> OAR 436-060-0147(1) provides:

"The director shall determine the worker's eligibility for a Worker Requested Medical Examination (Exam) under ORS 656.325(1). The worker is eligible for an exam if the worker has made a timely request for a Workers' Compensation Board hearing on a denial of compensation as required by ORS 656.319(1)(a); and the denial was based on one or more Independent Medical Examination reports with which the attending physician or authorized nurse practitioner disagreed."

<sup>5</sup> OAR 436-010-0265(1) provides in part:

"For purposes of this rule, "independent medical examination" (IME) means any medical examination including a physical capacity or work capacity evaluation or consultation that includes an examination, except as provided in section (5) of this rule, that is requested by the insurer and completed by a medical service provider, other than the worker's attending physician or authorized nurse practitioner. The examination may be conducted by one or more providers with different specialty qualifications, generally done at one location and completed within a 72-hour period. If the providers are not at one location, the examination is to be completed within a 72-hour period and at locations reasonably convenient to the worker."

<sup>6</sup> We acknowledge the administrative list of examinations that are not considered IMEs, and that "file reviews" are not on that list. *See* OAR 436-010-0265(5). We note, however, that the list is provided to determine when Director approval of a proposed examination is required.

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In conclusion, based on the aforementioned reasoning, we hold that the WRME remedy is available only when the attending physician or authorized nurse practitioner has disagreed with an IME report based on an in-person evaluation of the worker. Neither the text nor context of ORS 656.325 indicates that the WRME remedy is available when the carrier obtains a “file review,” which does not involve an in-person evaluation of the worker.<sup>7</sup>

Accordingly, we affirm.

ORDER

The ALJ’s order dated May 10, 2013 is affirmed.

Entered at Salem, Oregon on November 4, 2013

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<sup>7</sup> In the alternative, claimant requests a “WRME record review.” While that alternative may have some equitable appeal, we are obliged to apply the statutes and administrative rules as written. As an administrative agency, we lack the power to enlarge upon the rights awarded by the plain language of the statute. *Jerry E. Duvall*, 55 Van Natta 2190, 2194-95 (2003).