

VOLUME NO. 44

OPINION NO. 3

ADMINISTRATIVE LAW AND PROCEDURE - Scope of rulemaking authority of Department of Social and Rehabilitation Services;
FEES - Reimbursement for therapeutic agents by occupational therapists;
HEALTH - Use of modalities by occupational therapists;
LICENSES, PROFESSIONAL AND OCCUPATIONAL - Therapeutic agents not within scope of occupational therapy practice;
SOCIAL AND REHABILITATION SERVICES, DEPARTMENT OF - Scope of rulemaking authority;
ADMINISTRATIVE RULES OF MONTANA - Section 46.12.547;
MONTANA CODE ANNOTATED - Title 37, chapter 24; sections 37-11-104(2), 37-24-103(4), 53-6-101(1), 53-6-113(3), (4).

- HELD: 1. Occupational therapists are not permitted by Montana law to employ heat, cold, air, light, water, electricity, or sound as therapeutic agents.
2. Section 46.12.547, ARM, adopted by the Department of Social and Rehabilitation Services and authorizing occupational therapists to be reimbursed through medicaid for modalities performed in the course of treatment, is invalid as an improper exercise of the Department's rulemaking authority.

January 11, 1991

Julia Robinson, Director
Department of Social and
Rehabilitation Services
P.O. Box 4210
Helena MT 59604-4210

Dear Ms. Robinson:

You have requested my opinion on the following questions:

1. Are occupational therapists permitted by Montana law to perform modalities (that is, use therapeutic agents such as heat, cold, air, light, water, electricity and sound)?
2. Is the adoption of section 46.12.547, ARM, authorizing occupational therapists to be reimbursed for the use of such therapeutic agents in the course of treatment, a valid exercise of the Department's rulemaking authority?

The Department of Social and Rehabilitation Services (hereinafter referred to as the Department) is statutorily charged with the duty of administering the Montana medicaid program. § 53-6-101(1), MCA. In connection with that duty, section 53-6-101(1), MCA, authorizes the Department to adopt appropriate rules necessary for the administration of the program, including the establishment of reimbursement rates for services provided by health care professionals. In establishing rates of reimbursement, the Department may consider the following factors:

- (a) the availability of appropriated funds;
- (b) the actual cost of services;
- (c) the quality of services;

- (d) the professional knowledge and skills necessary for the delivery of services; and
- (e) the availability of services.

§ 53-6-113(3), MCA. The statute further directs that "[t]he department shall specify by rule those professionals who may deliver or direct the delivery of particular services." § 53-6-113(4), MCA.

Recently, the Department promulgated section 46.12.547, ARM, which establishes rates of reimbursement for occupational therapists. At issue in this opinion is the propriety of that rule insofar as it sets a reimbursement schedule for the performance of the following services:

MODALITIES

Modality is the employment, or method of employment, of a therapeutic agent (used in conjunction with occupational therapy procedures)

H5300 Modalities, initial 15 minutes	13.31
Z9216 Each additional 15 minutes	3.00

This rule is challenged by the Montana Chapter of the American Physical Therapy Association and the Montana Association of Private Practice Physical Therapists (Associations), who contend that occupational therapists are not statutorily authorized to use modalities or therapeutic agents. The Associations allege that the Department has effectively expanded the scope of occupational therapy practice, thereby exceeding the scope of its rulemaking authority and usurping the role of the Legislature.

Whether an agency acts within the scope of its rulemaking authority in promulgating administrative rules requires consideration of two factors. First, the rule must be consistent and not in conflict with the enabling legislation or other provisions of law. Second, the rule must be reasonably necessary to effectuate its purpose. § 2-4-306(5), (6), MCA; Bick v. Department of Justice, 224 Mont. 455, 730 P.2d 418 (1986). Administrative regulations have been declared invalid if they engraft additional or contradictory requirements on a statute or if they engraft additional noncontradictory requirements which were not envisioned by the Legislature. McPhail v. Montana Board of Psychologists, 196 Mont. 514, 517, 640 P.2d 906, 908 (1982).

The Montana Legislature first sought to regulate the profession of occupational therapy in 1985 through the Occupational Therapy Practice Act (OTPA), 1985 Mont. Laws, ch. 629, now codified in Title 37, chapter 24, MCA. The definition of "occupational therapy" is found at section 37-24-103(4), MCA:

"Occupational therapy" means the use of purposeful activity with an individual who is limited by physical injury or illness, psychosocial dysfunction, developmental or learning disability, or the aging process in order to maximize independence, prevent disability, and maintain health. The practice encompasses evaluation, treatment, and consultation. Occupational therapy services may be provided individually, in groups, or through social systems. Specific occupational therapy services include but are not limited to:

- (a) teaching daily living skills;
- (b) developing perceptual-motor skills and sensory integrative functioning;
- (c) developing play skills and prevocational and leisure capacities;
- (d) designing, fabricating, or applying splints, or selective adaptive equipment and training in the use of upper extremity prosthetics or upper extremity orthotic devices;
- (e) using specifically designed crafts and exercises to enhance functional performance;
- (f) administering and interpreting tests such as manual muscle and range of motion; and
- (g) adapting environments for the handicapped.

Nowhere in this definition does the term "modalities" appear, nor are occupational therapists specifically authorized to use therapeutic agents in the course of their treatment. It is significant that in the closely related profession of physical therapy, modalities are specified as within the scope of the practice. Section 37-11-104(2), MCA, authorizes "physical agents including but not limited to mechanical devices, heat, cold, air, light, water, electricity, and sound" for use in physical therapy treatment. The Legislature is presumed to have had knowledge of the specific definition of physical therapy treatment in section 37-11-104(2), MCA, at the time the OTPA was passed six years later. Theil v. Taurus Drilling LTD 1980-II, 218 Mont. 201, 207, 710 P.2d 33, 36 (1985). Thus, had the Legislature intended to include modalities or similar physical agents within the scope of occupational therapy as well, it would have included the same list of therapeutic agents that appear in the physical therapy treatment statutes.

The noninclusive language of section 37-24-103(4), MCA, arguably suggests that the Legislature did not intend to exclude any procedure not specifically listed as an occupational therapy service. However, neither the legislative history nor the statutory language itself supports this conclusion. The committee minutes from the hearings on Senate Bill 79, which became the OTPA, contain no reference to the use of modalities or therapeutic agents as a part of the occupational therapy practice. Minutes of House Business and Labor Committee, March 8, 1985, at 2; Minutes of Senate Public Health Committee, January 23, 1985, at 7. Nowhere in the list of services submitted to the committee and describing the services typically provided by occupational therapists, the bill's primary proponents, were modalities or therapeutic agents ever mentioned. Minutes of House Business and Labor Committee, March 8, 1985, Exhibit 4. Instead, the list of services submitted to the committee largely mirrors that which now appears in the statute, § 37-24-103(4), MCA. To construe the list of services expressly authorized in section 37-24-103(4), MCA, so broadly as to allow anything not specifically excluded is inconsistent with the scope of practice contemplated by the Legislature at the time the OTPA was created.

The definition of occupational therapy found in section 37-24-103(4), MCA, includes a list of specific occupational services. The list, according to the statute's express language, is not meant to be exhaustive. However, in order for any service not specifically mentioned to fall within the definition, it would at least have to be similar in nature to those mentioned in the statute. Under the rules of statutory construction, where general words follow the enumeration of particular classes of persons or things, the general words should be construed as applicable only to persons or things of the same general nature or class as those enumerated. State Board of Barber Examiners v. Walker, 192 P.2d 723, 731 (Ariz. 1948); White v. Moore, 46 P.2d 1077, 1080-81 (Ariz. 1935). When a statute lists a number of particulars and adds a general reference like "and so forth" it means to include by use of the general reference not everything else but only others of like kind. 2A Sutherland Statutory Construction § 47.18 (4th ed.). See also Haas v. Breton, 387 N.E.2d 138, 140 (Mass. 1979) ("[t]he problem is to determine what particulars that were not mentioned are sufficiently like those that were, in ways that are germane to the subject and purpose of the act, to be made subject to the act's provisions by force of the general reference").

Thus, while the list of permissible occupational services set forth in section 37-24-103(4), MCA, is not exhaustive, it would surely not be permissible for an occupational therapist to perform surgery or practice cosmetology. The services listed in the statute promote the "use of purposeful activity." In my opinion, the application of heat, cold, paraffin wax, or other similar kinds of therapeutic agents is not reasonably related to the purposeful activity suggested by those services set forth in the statute. The types of services set

forth in the statute involve functional activities, such as the development of skills, the use of crafts, and the administration of muscle and motion tests.

A similar conclusion was reached in an opinion of the North Dakota attorney general in October 1989. The definitions of physical therapy and occupational therapy in North Dakota are similar to the Montana definitions. The North Dakota attorney general determined that physical therapists were permitted to use specific exercise, gait training, heat, massage, light, water treatments, etc., to accomplish treatment goals, while occupational therapists could use specific exercise, neuromuscular facilitation, and functional activities such as work, homemaking, feeding, dressing, and personal hygiene, as well as the fabrication of splints and adapted devices to aid in self-care activities.

While the use of therapeutic agents may very well be a viable part of the occupational therapy practice, and occupational therapists may be fully trained in the employment thereof, the Legislature has not yet authorized their use as within the scope of the practice. The Department may not expand this scope of practice through its rulemaking authority by allowing reimbursement for modalities performed in the course of occupational therapy treatment. Any such rules are invalid.

THEREFORE, IT IS MY OPINION:

1. Occupational therapists are not permitted by Montana law to employ heat, cold, air, light, water, electricity, or sound as therapeutic agents.
2. Section 46.12.547, ARM, adopted by the Department of Social and Rehabilitation Services and authorizing occupational therapists to be reimbursed through medicaid for modalities performed in the course of treatment, is invalid as an improper exercise of the Department's rulemaking authority.

Sincerely,

MARC RACICOT
Attorney General