

In the Matter of the Compensation of
METIN BASMACI, Claimant
WCB Case No. 98-10143
ORDER ON REMAND
Carney Et Al, Claimant Attorneys
Reinisch Et Al, Defense Attorneys

Reviewing Panel: Members Biehl, Lowell, and Bock.

This matter is before the Board on remand from the Court of Appeals. *Basmaci v. The Stanley Works*, 177 Or App 102 (2001). The court has reversed that portion of our prior order, *Metin Basmaci*, 52 Van Natta 337 (2000), concerning the issues of interim compensation, penalties and attorney fees. Reasoning that we never considered claimant's request for interim compensation or penalties for the self-insured employer's failure to pay interim compensation (as well as the employer's contention that claimant never submitted a valid low back claim under ORS 656.262(7)(a)), the court has remanded the aforementioned portion of our order for reconsideration.

On remand, we agree with the employer's contention that claimant never perfected a low back "new medical condition" claim. Consequently, we conclude that claimant is not entitled to interim compensation, or an "out-of-compensation" attorney fee award and penalties based on such compensation.

"Interim compensation" is paid upon receipt of notice of a claim until the claim is accepted or denied. *Jones v. Emanuel Hospital*, 280 Or 147 (1977). ORS 656.262(4)(a) provides that the "first installment of temporary disability compensation shall be paid no later than the 14th day after the subject employer has notice or knowledge of the claim, if the attending physician authorizes the payment of temporary disability compensation." To trigger the claimant's entitlement to interim compensation, the attending physician's authorization must relate the claimant's inability to work to a job-related injury or occupational disease. See *Robert W. Fagin*, 50 Van Natta 1680 (1998).

To make a "new medical condition" claim pursuant to ORS 656.262(7)(a), claimant must clearly request formal written acceptance of the condition. See *James E. Templeton, on recon*, 51 Van Natta 1061 (1999); *Eston Jones*, 50 Van Natta 1407, *on recon* 50 Van Natta 1582 (1998); *Diane S. Hill*, 48 Van Natta 2351, 2352-53 (1996), *aff'd mem Hill v. Stuart Andersons*, 149 Or App 496 (1997).

The carrier has no obligation to pay interim compensation on a “new medical condition” claim under ORS 656.262(7)(a) in the absence of a clear request for formal written acceptance. *Labor Ready, Inc. v. Mann*, 158 Or App 666, 670, *on recon* 160 Or App 666, *rev den* 329 Or 479 (1999); *Cf. Gustavo Barajas*, 51 Van Natta 613, *on recon* 51 Van Natta 732 (1999); *aff’d mem Nike, Inc. v. Barajas*, 166 Or App 237 (2000) (in an *omitted* medical condition claim, the claimant need not first comply with ORS 656.262(6)(d) to be entitled to interim compensation).¹

Here, the record contains no such clear written request with regard to claimant’s consequential back strain condition. In a June 29, 1998 “Form 827,” claimant’s treating physician, Dr. Lazar, diagnosed “back strain.” (Ex. 14). However, that form does not amount to a request for formal written acceptance of the back strain condition. *See Diane S. Hill*, 48 Van Natta at 2351-2353 (a physician’s report that supported a causal relationship between a new trapezius condition and the claimant’s compensable condition, but was “silent” as to any request for formal acceptance, was insufficient to constitute a “new medical condition” claim under ORS 656.262(7)(a)). There are no other medical reports or correspondence in the record which could be interpreted as making such a request for formal written acceptance.

Accordingly, in the absence of the statutorily required request, claimant is not entitled to interim compensation. We therefore reverse the ALJ’s interim compensation award.² In addition, because there has been no increase in claimant’s interim compensation award, the ALJ’s “out-of-compensation” attorney fee award under ORS 656.386(2) related to such compensation is also reversed.

¹ Claimant’s consequential back strain claim is a “new medical condition,” as opposed to an “omitted medical condition,” because the back strain was diagnosed after the employer’s January 1998 acceptance of his bilateral plantar fasciitis condition. (Ex. 7). *Mark A. Baker*, 50 Van Natta 2333 (1998).

² The “order” portion of the ALJ’s order did not distinguish between interim compensation and temporary disability. (*O&O* at 8). Nevertheless, we reverse that portion of the ALJ’s temporary disability award that would constitute interim compensation (*i.e.*, through the date of the May 25, 1999 denial (Ex. 40)).

Finally, as there are no “amounts due” upon which to base a penalty in the absence of interim compensation due, we also reverse the ALJ’s penalty award based on any unpaid interim compensation related to the back strain condition. ORS 656.262(11)(a); *Lloyd A. Humpage*, 49 Van Natta 1784 (1997).

Therefore, on remand, the ALJ’s interim compensation and accompanying penalty and attorney fee awards are reversed.

IT IS SO ORDERED.

Entered at Salem, Oregon on May 21, 2002