
In the Matter of the Compensation of
SAMUEL C. MORENO, Claimant
WCB Case No. 02-01828
ORDER ON REVIEW
Vick & Conroy, Claimant Attorneys
Terrall & Terrall, Defense Attorneys

Reviewing Panel: Members Langer, Bock, and Phillips Polich. Member Phillips Polich chose not to sign the order.

The self-insured employer requests review of Administrative Law Judge (ALJ) Martha Brown's order that: (1) awarded temporary disability from February 24, 2002 until properly terminated under law; and (2) assessed a 25 percent penalty for the employer's allegedly unreasonable claim processing. On review, the issues are temporary disability and penalties. We reverse.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact."

CONCLUSIONS OF LAW AND OPINION

The ALJ determined that claimant was entitled to temporary disability from February 24, 2002, finding that claimant was in the work-force at the time of disability and that he had otherwise established entitlement to the disputed compensation. Finally, the ALJ found that the employer did not have a legitimate doubt regarding its liability for payment temporary disability and, therefore, assessed a 25 percent penalty for the employer's allegedly unreasonable claim processing.

On review, the employer contends that the ALJ's decision was incorrect. Specifically, it asserts that claimant was not entitled to the disputed temporary disability because there was insufficient authorization of such benefits and further, even if there was, claimant was not in the work-force at the time of the alleged disability. Finally, the employer argues that, even assuming claimant was entitled to the disputed temporary disability, the ALJ incorrectly assessed a penalty because it had "legitimate doubt" regarding its liability to pay such benefits.

Because we agree that the record lacks sufficient authorization of temporary disability, we find that claimant was not entitled to the disputed benefits, even

assuming that claimant was in the work-force at the time of the alleged disability. Therefore, we need not decide the work-force issue. Lastly, given the above conclusion, it follows that the employer's failure to pay the disputed benefits was not unreasonable. We reason as follows.

Only the attending physician may authorize temporary disability. ORS 656.245(2)(b)(B); ORS 656.262(4)(a),(h). Temporary disability is not due and payable "for any period of time not authorized by the attending physician." ORS 656.262(4)(g). In this case, the claim was in "open" status as a result of a prior ALJ's order on January 4, 2002 that set aside the employer's aggravation denial. Because the issue of entitlement to temporary disability on an open claim necessarily involves satisfaction of the statutory requirements of ORS 656.262, it is claimant's burden to prove his entitlement to temporary disability benefits. ORS 656.266.

Dr. Quijano was claimant's attending physician during the relevant period. (Ex. 29). However, there is no temporary disability authorization from Dr. Quijano during the contested period. Specifically, on a form 827 signed on February 5, 2002, Dr. Quijano left blank the box pertaining to temporary disability authorization. (Ex. 29). In a "Work Status report" signed by a physician (apparently Dr. Quijano) on February 9, 2002, a check mark was placed next to the phrase "Return to Work—Modified Duty." (Ex. 32). However, the record does not indicate that claimant was ever released for regular duty before the aggravation claim. (Ex. 18). Thus, it is unclear whether the February 9, 2002 release reflected any change in disability status.

In a February 19, 2002 report from Dr. Quijano and in another "Work Status Report" signed on March 9, 2002, claimant was again authorized to return to "modified duty." (Exs. 33, 35). However, as was the case with previous documents, we decline to infer from these records that Dr. Quijano was authorizing temporary disability.¹ See *Darwin B. Lederer*, 54 Van Natta 1948 (2002) (no affirmative duty to infer authorization of temporary disability from a medical report that does not clearly authorize such benefits.); *Vitaliy A. Dikov*, 53 Van Natta 1031 (2001); *Kerry Nguyen*, 52 Van Natta 688 (2000) (Board declined to

¹ We distinguish *John M. Bowhan*, 54 Van Natta 285 (2002), in which we held that a physician's work restrictions represented ongoing authorization for temporary disability benefits. However, unlike that case where there was ultimately an explicit authorization of temporary disability, in this case there was no authorization of temporary disability nor any indication that claimant's disability status had changed. Under these circumstances, we do not find *Bowhan* controlling and, therefore, decline to infer temporary disability authorization.

“infer” entitlement to temporary disability benefits from the medical record in the absence of authorization by attending physician).

In sum, the record does not support a conclusion that claimant is entitled to the disputed temporary disability. Accordingly, we reverse the ALJ’s award of temporary disability and of a 25 percent penalty.

ORDER

The ALJ’s order dated May 15, 2002 is reversed. The ALJ’s “out-of-compensation” attorney fee is also reversed.

Entered at Salem, Oregon on December 17, 2002