
In the Matter of the Compensation of
MICHAEL WINEGART, Claimant
WCB Case No. 01-09883
ORDER ON REVIEW
Robert J Guarrasi, Claimant Attorneys
Reinisch Mackenzie et al, Defense Attorneys

Reviewing Panel: Members Langer and Biehl.

Claimant requests review of Administrative Law Judge (ALJ) Brazeau's order that: (1) declined to award an attorney fee under ORS 656.386(1) for the self-insured employer's "pre-hearing" acceptance of a low back and left knee condition; (2) declined to assess a penalty for the employer's allegedly untimely acceptance; (3) declined to assess a penalty for the employer's allegedly untimely payment of temporary disability; and (4) assessed a penalty for the employer's untimely payment of some medical bills. On review, the issues are penalties and attorney fees.

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

FINDINGS OF FACT

We adopt the ALJ's findings of fact with the following modifications.

Paragraph one, sentence three, is changed to read as follows: "Dr. Self took claimant off work and referred him to Cascade Medical Associates for further evaluation and treatment, with an appointment scheduled for September 4, 2001." (Exs. 2, 3-2, 5).

Paragraph two, is changed to read as follows: "On September 4, claimant kept his appointment at Cascade Medical Associates, seeing Dr. Davis, who became claimant's attending physician. Dr. Davis indicated that claimant could do a sitting job and that he should not kneel, squat, crawl or climb. (Exs. 6, 7, 8). Following an MRI of the left knee, Dr. Davis referred claimant to Dr. Macha for follow up on the left knee. Dr. Davis remained claimant's treating physician for the neck and low back conditions. (Ex. 11-2)."

CONCLUSIONS OF LAW AND OPINION

Claimant injured his neck, low back and left knee on August 30, 2001. (Ex. 3). The employer had knowledge of the injury on the day it occurred. (Ex. 1). Temporary disability was first authorized on August 31, 2001. (Exs. 3-2, 5). The employer's processing agent made the initial payment of temporary disability (interim compensation) on September 26, 2001. (Ex. A-2).

On December 5, 2001, the employer accepted the claim for a disabling "cervical sprain." (Ex. 36).

Claimant requested a hearing on December 19, 2001, raising the issues of *de facto* denial of claimant's lumbar strain and left knee meniscal tear conditions, penalties and attorney fees. On two occasions in late January 2002, claimant's attorney wrote the employer's attorney to inquire whether the employer would be accepting the claims for lumbar strain and left medial meniscus tear. (Exs. 39, 40). On February 5, 2002, the employer modified its Notice of Acceptance to include lumbar strain and left medial meniscal tear. (Ex. 40A).

A hearing was scheduled for March 13, 2002. The parties agreed that the matter could be decided on the documentary record and closing arguments. The record was closed on April 8, 2002.

The ALJ held that: (1) claimant was not entitled to an attorney fee pursuant to ORS 656.386(1) because there was no "denied claim" as defined by ORS 656.386(1)(b)(A); (2) claimant was not entitled to an assessed penalty under ORS 656.262(11), or a penalty-related attorney fee under ORS 656.382(1) for untimely acceptance, because there were no "amounts due" in the seven days prior to acceptance upon which to base a penalty; (3) claimant was entitled to a penalty of 25 percent under ORS 656.262(11) for late payment of some of the medical billings (*i.e.*, those paid more than 45 days after the claim was accepted on December 5, 2001); and (4) claimant was not entitled to a penalty for late payment of time loss because there was no clearly identified "attending physician" until some time within 14 days prior to the employer's initial payment of compensation. Claimant requested Board review.

Attorney Fee/ORS 656.386(1)

Claimant contends that he is entitled to an attorney fee under ORS 656.386(1) because, by failing to accept the claim within 90 days, the

employer “de facto” denied the claim. The employer argues that an attorney fee cannot be awarded under ORS 656.386(1) because there was no “denied claim” as defined in ORS 656.386(1). We agree with the employer.

ORS 656.386(1)(1997) provides, in part:

“* * * In such cases involving denied claims where an attorney is instrumental in obtaining a rescission of the denial prior to a decision by the Administrative Law Judge, a reasonable attorney fee shall be allowed.

“(b) For purposes of this section, a ‘denied claim’ is:

“(A) A claim for compensation which an insurer or self-insured employer refuses to pay on the express ground that the injury or condition for which compensation is claimed is not compensable or otherwise does not give rise to an entitlement to any compensation;

“(B) A claim for compensation for a condition omitted from a notice of acceptance, made pursuant to ORS 656.262 (6)(d), which the insurer or self-insured employer does not respond to within 30 days; or

“(C) A claim for an aggravation or new medical condition, made pursuant to ORS 656.262 (7)(a), which the insurer or self-insured employer does not respond to within 90 days.”¹

This case involves an initial injury claim as opposed to a “new medical condition” claim or a condition omitted from a Notice of Acceptance. Thus, ORS 656.386(1)(b)(B) and (C)(1997) do not apply. Rather, the issue is whether the employer refused to pay “on the express ground that the injury or condition for which compensation is claimed is not compensable or otherwise does not give rise to an entitlement to any compensation.” ORS 656.386(1)(b)(A)(1997). We agree with the ALJ that the record does not establish that the employer failed to pay benefits on the ground that the claim was not compensable. Thus, an attorney fee

¹ The former version of the statute applies because the date of injury preceded January 1, 2002.

under ORS 656.386(1)(b)(A)(1997) is not warranted. *See Jennifer Pfeiffer*, 52 Van Natta 903 (2000); *Lidia A. Quintero*, 51 Van Natta 1221 (1998).

The record also does not establish that the employer “refused to pay on the express ground” that the condition was not compensable or otherwise did not give rise to an entitlement to compensation. In fact, the employer ultimately accepted claimant’s claim for the low back and left knee conditions. Under such circumstances, we are unable to conclude that there is a “denied claim.”

Furthermore, even if we interpreted this as an “omitted condition” claim, the employer accepted the low back and left knee conditions within 14 days of the “requests” that the “omitted conditions” be accepted.² Therefore, we also find no basis on which to award an attorney fee under ORS 656.386(1)(b)(B)(1997).

Penalties/Untimely Acceptance/Medical Bills

We adopt and affirm the ALJ’s opinion and conclusions regarding these issues.

Penalty/Time Loss

The ALJ found that claimant was not entitled to a penalty for late payment of temporary disability because there was confusion as to who was serving as the primary treating physician during the initial period between August 30 and September 12, 2001. Therefore, the ALJ found that the employer’s failure to initiate time loss during the first 14 days was reasonable. We disagree with the ALJ’s conclusion that there was no clearly identified “attending physician” prior to September 12, 2001; however, we agree with the ALJ that no penalty is due for the following reasons.

“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

² Claimant’s attorney wrote the employer’s attorney on January 25, 2002 and inquired as follows: “[p]lease tell me why your client is not willing to accept the back and meniscal tear relative to the left knee.” (Ex. 39). On January 29, 2002, claimant’s attorney inquired: “[a]t this point, is your client willing to accept the back and meniscal tear relative to the left knee.” (Ex. 40). The employer accepted the lumbar strain and left knee medial meniscus tear conditions on February 5, 2002. (Ex. 40A).

notice or knowledge of the claim, if the attending physician authorizes the payment of temporary disability compensation.” “Interim compensation” is due and payable beginning 14 days after the date upon the employer receives notice or knowledge of the claim *and* verification from the attending physician as to the worker’s injury-related inability to work. ORS 656.264(4)(a); *See Marvin J. Gregory*, 49 Van Natta 1253 (1997); *Stephen M. Snyder*, 47 Van Natta 956 (1995).” *Connie J. Barrs*, 51 Van Natta 1338, *on recon*, 51 Van Natta 1500 (1999). To trigger claimant’s entitlement to interim compensation, the attending physician’s authorization must relate claimant’s inability to work to a job-related injury or occupational disease. *See Metin Basmaci*, 54 Van Natta 465 (2002); *Teri L. Bernloehr*, 52 Van Natta 144 (2000); *Robert W. Fagin*, 50 Van Natta 1680 (1998).

“An ‘attending physician’ is the physician who is primarily responsible for the treatment of a worker’s compensable injury. ORS 656.005(12)(b). Whether a physician qualifies as an ‘attending physician’ is a question of fact. *See Sharon A. Gambrel*, 46 Van Natta 1881, 1884 (1994); *Paula J. Gilman*, 44 Van Natta 539 (1992).” *Debbie I. Jensen*, 48 Van Natta 1235, 1236 (1996).

Here, we find as follows: (1) the employer had notice of the claim on August 30, 2001; (2) Dr. Davis became claimant’s attending physician on September 4, 2001; (3) the employer knew that Dr. Davis was the attending physician no later than September 10, 2001; and (4) the employer knew that Dr. Davis had authorized temporary disability, but there is no evidence in the record that the employer received *verification* of temporary disability authorization prior to September 17, 2001. (Emphasis added). We base these conclusions on the following reasoning.

Claimant was initially seen by an Urgent Care physician, Dr. Self, on August 31, 2001. Dr. Self authorized time loss through September 4, 2001, when claimant was referred to Cascade Medical Associates for follow-up and further treatment. The employer’s processing agent received Dr. Self’s August 31, 2001 chart note and Work Status Report authorizing temporary disability, on September 26, 2001. (Exs. 3, 5). Dr. Self’s 827 form was received on September 17, 2001, but it did not indicate that temporary disability was authorized. (Ex. 2).

On September 4, 2001, claimant’s care was taken over by Dr. Davis of Cascade Medical Associates. Dr. Davis checked the box on the 827 form that modified work was authorized beginning September 4, 2001. The 827 form was

received by the processing agent on September 19, 2001. (Ex. 6). Dr. Davis's September 4, 2001 chart note was received by the processing agent on September 17, 2001. (Ex. 7).

The 801 form prepared by the employer on September 10, 2001, listed Dr. Davis as the attending physician.³ The processing agent received the 801 form on September 11, 2001. (Ex. 1). Therefore, the processing agent knew that Dr. Davis was the attending physician on September 11, 2001.

In conclusion, the employer had knowledge of the claim on August 30, 2001 and knew that Dr. Davis was claimant's attending physician on September 11, 2001. Nonetheless, the record establishes that the employer did not receive *verification* that the attending physician had authorized the payment of temporary disability until September 17, 2001. Under such circumstances, the first installment of interim compensation was due no later than October 1, 2001. *See* ORS 656.262(4)(a). Because the employer made the initial payment on September 26, 2001, we conclude that the employer did not unreasonably delay the initial payment of interim compensation.

ORDER

The ALJ's order dated May 3, 2002 is affirmed.

Entered at Salem, Oregon on November 21, 2002

³ An Occupational Health Injury Treatment form dated September 4, 2001, was signed by Dr. Davis. This form instructed claimant to "[p]lease bring this paper to your employer." (Ex. 8). Dr. Davis' chart note of September 19, 2001, indicated that the employer knew that claimant was released to modified work, but was unable to provide it. (Ex. 13). Therefore, we conclude that claimant brought the form to the employer at least by September 19, 2001. However, the employer paid the initial payment on September 26, 2001, which was within the 14 day period to begin payment of interim compensation.