
In the Matter of the Compensation of
VITALIY M. IZOTOV, Claimant
WCB Case No. 02-03029, 02-03028, 02-00707, 02-00706
ORDER ON REVIEW
Claimant Unrepresented
Johnson Nyburg & Andersen, Defense Attorneys

Reviewing Panel: Members Lowell and Biehl.

Claimant, *pro se*, requests review of Administrative Law Judge (ALJ) Herman's order that: (1) upheld the insurer's denials of claimant's occupational disease claims for right shoulder, left shoulder, neck and bilateral hearing loss conditions; (2) declined to award interim compensation; and (3) declined to assess penalties for allegedly unreasonable claim processing. On review, the issues are compensability, interim compensation and penalties. We modify in part and affirm in part.¹

FINDINGS OF FACT

We adopt the ALJ's findings of fact.

CONCLUSIONS OF LAW AND OPINION

We adopt and affirm the ALJ's reasoning and conclusions regarding the compensability and penalty issues. However, we disagree with the ALJ's disposition of the interim compensation issue.

The ALJ found that claimant was not entitled to interim compensation regarding his right shoulder claim because it was unknown whether or not claimant was receiving his regular wages during the relevant period or if the insurer had made any time loss payments.

"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). Temporary disability is due and payable only for those periods of time authorized

¹ Because claimant is unrepresented, he may wish to consult the Workers' Compensation Ombudsman, whose job it is to assist injured workers in such matters. He may contact the Workers' Compensation Ombudsman, free of charge, at 1-800-927-1271, or write to:

WORKERS' COMPENSATION OMBUDSMAN
DEPT. OF CONSUMER & BUSINESS SERVICES
PO BOX 14480
SALEM, OR 97309-0405

by the attending physician. ORS 656.245(2)(b)(B); ORS 656.262(4)(a),(h). We cannot infer entitlement to temporary disability in the absence of such authorization. *See Thomas R. Sledd*, 54 Van Natta 5 (2002); *Tamitha A. Barendrecht*, 53 Van Natta 1135, 1136-37 (2001); *Kerry Nguyen*, 52 Van Natta 688, 689 (2000) (the claimant was not entitled to temporary disability benefits for a period not authorized by attending physician; Board declined to “infer” entitlement from medical record).

Claimant’s right shoulder claim was filed on October 8, 2001 and denied on December 11, 2001. (Ex. 25). Claimant seeks interim compensation based on his right shoulder claim for two periods: (1) between October 8, 2001 and October 29, 2001; and (2) from December 6, 2001 until December 11, 2001.

On October 8, 2001, claimant was examined by Dr. MacDonald, an emergency room physician. Reporting that claimant was unable to return to his regular work, Dr. MacDonald released claimant to modified work, implementing assorted lifting, carrying, and other physician restrictions (frequency and weight). (Ex. 3). Dr. MacDonald also scheduled a follow-up appointment for October 18, 2003. (Ex. 1-4).

Although an emergency room physician, Dr. MacDonald’s recommendation for a follow-up exam (which included ordering x-rays, Ex. 4), in conjunction with the submission of an 827 form (which listed Dr. MacDonald as the attending physician), established that Dr. MacDonald was claimant’s attending physician. As such, Dr. MacDonald could authorize time loss. *Compare Lawrence V. Smith*, 54 Van Natta 1611, 1612 (2002) (where there was no indication that the claimant intended to return to an emergency room physician for treatment and a specialist would see the claimant the next day, emergency room physician was not considered attending physician).

Furthermore, on October 15, 2001, claimant began treating with Dr. Ackerman, who also submitted an 827 form and released claimant to modified work subject to limited use restrictions regarding the right shoulder. (Ex. 9). Thus, the record supports a conclusion that, effective October 15, 2001, Dr. Ackerman became primarily responsible for claimant’s treatment and, as such, became claimant’s attending physician. *See Lawrence V. Smith*, 54 Van Natta at 1612. On October 29, 2001, Dr. Ackerman released claimant to full duty. (Ex. 14).

There is no indication that claimant was offered either an “attending

physician-approved” modified job or that he returned to work at a modified job. Under such circumstances, we find that the modified work releases for this initial injury claim constitutes an authorization of temporary disability benefits. *Compare Lawrence V. Smith*, 54 Van Natta at 1613, n.1 (no time loss authorization found when attending physician reported that “the patient has modified work,” and the claimant was already on modified work when injury occurred).

Accordingly, claimant is entitled to interim compensation from October 8, 2001 when his then-attending physician, Dr. MacDonald, authorized it, until October 29, 2001, when claimant was released to full duty by his subsequent attending physician (Dr. Ackerman). The ALJ’s order is modified accordingly.

Regarding the second claimed period for interim compensation, the record establishes that claimant was released to full duty work on December 4, 2001. Under such circumstances, he is not entitled to interim compensation between December 6, 2001 and December 11, 2001.

ORDER

The ALJ’s order dated May 5, 2003 is modified in part and affirmed in part. Claimant is awarded interim compensation from October 8, 2001 until October 29, 2001. The remainder of the ALJ’s order is affirmed.

Entered at Salem, Oregon on November 25, 2003