

In the Matter of the Compensation of
STACEY C. ALLENSWORTH, Claimant

WCB Case No. 03-05798

ORDER ON REVIEW

Michael B Dye, Claimant Attorneys

Nancy C Marque, SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Langer and Kasubhai.

Claimant requests review of Administrative Law Judge (ALJ) Lipton's order that reversed a Director's order that reclassified claimant's injury claim from nondisabling to disabling. On review, the issue is classification. We reverse.

FINDINGS OF FACT

We adopt the ALJ's findings of fact with the following exception and supplementation. We do not adopt the fourth paragraph of the ALJ's findings of fact.

On February 13, 2003, the SAIF Corporation denied the compensability of claimant's claim for lead exposure. (Ex. 22-3). Claimant requested a hearing on that denial. The issues at the May 15, 2003 hearing included "[c]ompensability of claimant's lead exposure claim, on appeal from the insurer's February 13, 2003 denial." (Ex. 22-1). Following hearing, an ALJ issued a June 11, 2003 order that found the claim compensable, set aside SAIF's February 13, 2003 denial in its entirety, and remanded the claim to SAIF for processing in accordance with the law. (Ex. 22-4).

On June 25, 2003, SAIF issued a Notice of Acceptance that accepted as a nondisabling injury "[b]lood tests to monitor lead exposure for period of employment from 10-2-02 to 1-8-03." (Ex. 26-1).

CONCLUSIONS OF LAW AND OPINION

Claimant's employment with SAIF's insured exposed him to lead, which resulted in elevated levels of lead in his blood. On December 27, 2002, due to claimant's elevated blood lead level, Dr. Larsen, claimant's attending physician, released him to modified work, restricting him from any lead exposure. (Exs. 4, 6, 9, 11).

Claimant returned to modified work on January 6, 2003, and worked one day. On January 8, 2003, claimant reported to Dr. Larsen that, upon his return to work, he was put in an environment where he was exposed to lead. (Ex. 14). On January 8, 2003, Dr. Larsen released claimant from work due to his increased blood lead level. (Exs. 13, 14).

On January 20, 2003, Dr. Larsen approved a modified work offer and stressed that claimant was to have no lead exposure. (Ex. 16). Dr. Larsen continued to release claimant to modified work (no lead exposure) until June 18, 2003, at which time he found claimant medically stationary without permanent impairment and released him to regular work. (Ex. 25).

Claimant filed a claim for lead exposure, which SAIF denied on February 13, 2003. (Exs. 3, 22). Claimant requested a hearing. Relying on *K-Mart v. Everson*, 167 Or App 46, *rev den* 331 Or 191 (2000), a prior ALJ found that, although claimant did not have a diagnosable disease, Dr. Larson's recommendation of periodic blood tests to monitor his blood lead levels constituted medical services, which satisfied the requirements for a compensable injury claim for lead exposure under ORS 656.005(7)(a). (Ex. 22-3). As a result, the prior ALJ set aside SAIF's February 13, 2003 denial in its entirety. (Ex. 22-4). That order became final by operation of law.

On June 25, 2003, SAIF issued a Notice of Acceptance that accepted "[b]lood tests to monitor lead exposure for period of employment from 10-2-02 to 1-8-03" as a nondisabling injury. (Ex. 26-1). SAIF refused to reclassify the claim as "disabling" after claimant requested that it do so. Claimant requested review by the Director.

On August 8, 2003, the Director issued an order reclassifying the claim as "disabling." (Ex. 29). In doing so, the Director determined that temporary disability was due and payable, in part because SAIF did not fully comply with the requirements to notify claimant about the modified job offer under OAR 436-060-0030(5). SAIF requested a hearing from the Director's order.

The ALJ reversed the Director's order, finding that SAIF had accepted a "medical services only" claim consistent with the prior ALJ's order and that there was no evidence that the accepted medical services claim resulted in claimant missing any time from work or would likely cause permanent impairment.

On review, claimant argues that he prevailed over SAIF's denial of his lead exposure claim in prior litigation and, therefore, proper classification of his claim

does not depend on the condition that SAIF “chooses to accept.” SAIF counters that, as a result of the prior ALJ’s order, it accepted “[b]lood tests to monitor lead exposure for period of employment from 10-2-02 to 1-8-03.” Thus, SAIF argues, claimant must prove that he missed work due to the accepted blood tests and there is no evidence to that effect.

We agree with claimant regarding the effect of the prior ALJ’s order. That order set aside SAIF’s February 13, 2003 denial of claimant’s lead exposure claim in its entirety. (Ex. 22). Moreover, that order was not appealed. Therefore, claimant’s lead exposure claim is compensable. Under such circumstances, the classification of claimant’s compensable injury claim is not limited to the accepted medical services for blood tests.

ORS 656.005(7)(c) provides:

“A ‘disabling compensable injury’ is an injury which entitles the worker to compensation for disability or death. An injury is not disabling if no temporary benefits are due and payable, unless there is a reasonable expectation that permanent disability will result from the injury.”

There is no argument that claimant has a reasonable expectation of permanent disability. Therefore, the claim classification issue depends on whether there are temporary disability benefits due and payable. ORS 656.262(4)(a) and (h) provide that temporary disability compensation shall be paid if authorized by the attending physician.

There is no dispute that Dr. Larsen is claimant’s attending physician. Furthermore, Dr. Larsen released claimant from all work for the period from January 8, 2003 to January 20, 2003, and that release was due to the compensable lead exposure injury. (Exs. 13, 14, 16). Therefore, based on Dr. Larsen’s release from work, we find that temporary benefits are due and payable.¹ *Lederer v. Viking Freight, Inc.*, 193 Or App 226 (April 28, 2004) (under ORS 656.262(4)(a),

¹ Because claimant is entitled to temporary disability benefits based on this full release from work, we need not determine whether claimant is also entitled to temporary disability benefits for Dr. Larsen’s modified work releases. For the same reason, we need not address the adequacy of SAIF’s modified job offer under the Director’s rules.

“authorization [for temporary disability] connotes an attending physician’s contemporaneous approval excusing an injured worker from work”).

Accordingly, we conclude that claimant’s compensable injury claim should be reclassified as “disabling.”

For services on Board review, claimant’s counsel is entitled to an “out-of-compensation” attorney fee equal to 25 percent of the increased temporary disability compensation resulting from this order, not to exceed \$5,000, payable directly to claimant’s counsel. ORS 656.386(2); OAR 438-015-0055(1).

ORDER

The ALJ’s order dated February 12, 2004 is reversed. The claim is remanded to SAIF for further processing in accordance with law, including classification as disabling and the payment of temporary disability benefits. Claimant’s counsel is awarded an “out-of-compensation” attorney fee, payable from the increased temporary disability compensation created by this order, not to exceed \$5,000, payable directly to claimant’s counsel.

Entered at Salem, Oregon on June 14, 2004