

---

In the Matter of the Compensation of  
**CHRISTOPHER R. MCQUAW, Claimant**  
Own Motion No. 05-0319M  
OWN MOTION ORDER  
James Dodge, Claimant Attorneys  
Liberty NW Ins Corp, Insurance Carrier

Reviewing Panel: Members Biehl and Langer.

Claimant seeks Own Motion relief, contending that he is entitled to: (1) temporary disability compensation on his reopened "worsened condition" claim from January 24, 2005 through February 8, 2005; and (2) penalties for allegedly unreasonable claim processing due to the insurer's failure to pay temporary disability for that period.<sup>1</sup> Based on the following reasoning, we find that no temporary disability is due for the period requested and decline to assess penalties.

FINDINGS OF FACT

On March 9, 1998, claimant sustained a compensable low back injury that the insurer eventually accepted as a disabling lumbar strain and L4-5 disc herniation. This claim was first closed in April 1999, and claimant's aggravation rights expired in April 2004.

On January 24, 2005, claimant sought treatment for low back pain from Dr. Levanger, who released him to modified work, ordered an MRI, and prescribed pain medication. The MRI revealed a recurrent right L4-5 disc herniation.

Dr. Levanger referred claimant to Dr. Adler, neurosurgeon, who performed an L4-5 discectomy on February 9, 2005. On June 22, 2005, we issued an Own Motion Order reopening the claim. *Christopher B. McQuaw, 57 Van Natta 1683 (2005)*. The insurer paid temporary disability benefits for the period from February 9, 2005 through March 28, 2005, the date Dr. Adler released claimant to return to work.

---

<sup>1</sup> With his request for temporary disability benefits and penalties, claimant also seeks Own Motion relief for "low back arthritis caused by the accepted conditions and their sequela." This matter is separate from the issues related to the reopened "worsened condition" claim that are before us. Consequently, this matter will be handled separately. The Board's Own Motion staff has sent a letter to the parties seeking clarification regarding this matter.

On May 11, 2005, claimant returned to Dr. Adler for post-operative follow-up and reported increased pain. Dr. Adler ordered another MRI, which showed swelling of the right L5 nerve root. On May 17, 2005, Dr. Adler prescribed medication to treat this swelling and released claimant from work for the period from May 17, 2005 through May 31, 2005. The insurer paid temporary disability benefits for that period.

On July 5, 2005, the insurer noted that claimant had been released to return to work on March 28, 2005, and asked Dr. Levanger to indicate any additional time periods for which he had authorized temporary disability benefits. On July 19, 2005, Dr. Levanger responded: "I think Dr. Adler has this information – he is the one who actually performed the surgery, I did put [claimant] on work restrictions when I first saw him 24 Jan. 05."

### CONCLUSIONS OF LAW AND OPINION

Because the aggravation rights on claimant's March 1998 claim have expired, the claim is within our Own Motion jurisdiction. *Miltenberger v. Howard's Plumbing*, 93 Or App 475 (1988). Therefore, entitlement to temporary disability benefits is determined under ORS 656.278 and the Board's Own Motion rules enacted under that statute.

Entitlement to temporary disability benefits under ORS 656.278(1)(a) and (b) (2001) starts when the following requirements are satisfied. First, the claimant must require (including a physician's recommendation for) hospitalization, inpatient or outpatient surgery, or other curative treatment (treatment that relates to or is used in the cure of diseases, tends to heal, restore to health, or to bring about recovery). Second, temporary disability benefits are payable from the date the attending physician authorizes temporary disability related to the hospitalization, surgery, or other curative treatment, which may be the date the requisite treatment is recommended. Third, temporary disability benefits are payable under ORS 656.210, ORS 656.212(2), and ORS 656.262(4). *Mark A. Cavazos*, 55 Van Natta 3004 (2003) (where the claimant did not require hospitalization, surgery, or other curative treatment, the temporary disability authorized by the attending physician was not "for the hospitalization, surgery, or other curative treatment" as required under ORS 656.278(1)(a) (2001) and the Board authorized suspension of temporary disability); *David L. Hernandez*, 56 Van Natta 2441 (2004) (temporary disability commences with surgery recommendation *and* attending physician authorization, *Cavazos* followed); *Rodney M. Waldrip*, 56 Van Natta 1516 (2004).

In *Lederer v. Viking Freight, Inc.*, 193 Or App 226, *on recon*, 195 Or App 94 (2004), the court examined the question of the form an attending physician's time loss authorization must take. The court held that ORS 656.262(4)(a) obligates the payment of temporary disability benefits when an objectively reasonable carrier would understand contemporaneous medical reports to signify an attending physician's contemporaneous approval excusing an injured worker from work. Because ORS 656.262(4) applies in determining eligibility to temporary disability benefits for claims in Own Motion status, *Lederer* has applicability for determining the adequacy of time loss authorization from an attending physician under ORS 656.278(1)(a), (1)(b) (2001). *Hernandez*, 56 Van Natta at 2448.

However, for Own Motion claims, there are additional statutory requirements for eligibility to temporary disability benefits. One of those additional requirements is that the attending physician must authorize temporary disability benefits "for the hospitalization, surgery or other curative treatment." ORS 656.278(1)(a), (b) (2001); *Hernandez*, 56 Van Natta at 2449; *Loyd E. Garoutte*, 56 Van Natta 416, 424 (2004); *Nicholas McDonald*, 55 Van Natta 4100 (2003) *Cavazos*, 55 Van Natta at 3013.

Here, Dr. Levanger examined claimant regarding his increased low back pain on January 24, 2005, and released him to modified work as of that date. However, Dr. Levanger did not recommend hospitalization or surgery. Instead, he prescribed pain medication and ordered an MRI "to further evaluate this."

The question of whether treatment constitutes "curative treatment" presents a medical question that must be addressed by medical evidence. *SAIF v. Calder*, 157 Or App 224, 227-28 (1998) ("the Board is not an agency with specialized medical expertise entitled to take official notice of technical facts within its specialized knowledge"); *James P. Larson*, 57 Van Natta 2625 (2005). There is no medical evidence that the treatment claimant received prior to the February 9, 2005 surgery constituted "other curative treatment;" *i.e.*, treatment that relates to or is used in the cure of diseases, tends to heal, restore to health, or to bring about recovery. *Hernandez*, 56 Van Natta at 2448 (no medical evidence that isometric exercises, moist heat, and anti-inflammatory medication constituted "other curative treatment").

Thus, assuming that Dr. Levanger is claimant's attending physician, he did not authorize temporary disability benefits "for the hospitalization, surgery or other curative treatment," as required under ORS 656.278(1)(a) (2001), for a period that

preceded February 9, 2005. Accordingly, claimant is not entitled to temporary disability benefits for the period from January 24, 2005 through February 8, 2005. Finally, because claimant is not entitled to these benefits, the insurer's claim processing was not unreasonable and a penalty is not warranted.

IT IS SO ORDERED.

Entered at Salem, Oregon on December 22, 2005