

In the Matter of the Compensation of
SHANDA M. DALHAUG, Claimant

WCB Case No. 03-06536

ORDER ON REVIEW

Cary et al, Claimant Attorneys

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Reviewing Panel: Members Langer and Kasubhai.

The SAIF Corporation requests review of that portion of Administrative Law Judge (ALJ) Poland's order directing it to pay claimant temporary disability benefits commencing April 1, 2003. On review, the issue is temporary disability. We reverse.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact," with the following summary and supplementation.

In the summer of 2002, claimant, a medical records clerk, injured her low back at work while lifting x-rays out of a basket and putting them on a shelf. (Ex. 17). In mid-July, she was treated by Dr. Matteri, an orthopedic surgeon, who diagnosed an L5-S1 disc herniation. (Exs. 3; 4). Dr. Koseck, M.D, provided follow-up treatment from late September 2002 through mid-November 2002. (Exs. 11; 12; 14 thru 16; 21; 23). In early December 2002, Dr. Kitchel, an orthopedic surgeon, assumed responsibility for claimant's care. (Exs. 25; 26; 33; 40; 45; 46; 51).

In May 2002, before the reported time of her injury, claimant was advised by one of her supervisors that she needed to route her files faster and more frequently. (Ex. 2).

Claimant did not report her low back injury to the employer, and she continued to perform her regular work routing patient files and pulling x-rays. Sometime in August 2002, however, claimant told her supervisor that she had a back condition that prevented her from performing her job duties as required. Claimant was then transferred out of routing to "outside records." (Tr. 11, p. 52). She continued in this position until she was terminated. (*Id.*)

On August 5, 13, 20, and 21, 2002, claimant was informed by her supervisor of alleged deficiencies in her performance. These deficiencies included not getting the assigned work completed in a timely manner, needing help from coworkers to complete assigned work, being tardy, excessive talking with coworkers and taking personal phone calls during work hours. On September 5, 2002, claimant was given a written warning that failure to improve in these areas within 90 days would result in termination. (Ex. 6).

The week following the warning, claimant's supervisor noted that things were "going better this week," and that claimant reported that she was able to get more done because she was doing less visiting. However, in subsequent weeks, claimant's work was not completed or was not completed accurately. (Ex. 22-2).

On September 19, 2002, Dr. Matteri authorized a full work release for claimant. (Exs. 8; 9).

On October 9, 2002, Dr. Kosek provided the employer with a modified work authorization for claimant from October 10 to December 10, 2002, for four hours a day, with no lifting over 20 pounds, no bending at over a 30 degree angle, and no continuous sitting for more than one hour. (Ex. 16). On October 10, 2002, claimant began working four hours a day with light duty restrictions as described by Dr. Kosek. (Exs. 18; 55).

On October 18, 2002, claimant filed a claim with the employer for her low back injury. This claim was the employer's first notice that claimant's disc herniation occurred at work. (Ex. 17).

On October 24, 2002, claimant's work duties obtaining outside records were modified. The heavier lifting duties were eliminated and she was only responsible for calling outside facilities to obtain records and retrieving and filing incoming faxes. (Tr. II, p. 51-53; Exs. 55-2; 56-2; 57-4).

On November 4, 2002, in conjunction with the written notice of September 5, 2002, claimant was put on probation for not completing her modified work assignments in a timely manner. Specifically, the probation notice stated:

"Your hours have been reduced per the restrictions from your doctor and your duties have been adjusted to meet your prescribed work restrictions. However, the expectation remains that you *will* complete those

assigned duties within your scheduled hours as agreed in the September 5 Written Warning. Through the month of October, 2002, all your assigned duties were not accurately completed.” (Ex. 22-1; emphasis in original).

During the period October 14 through December 6, 2002, claimant regularly exceeded Dr. Kosek’s work restriction by working up to five hours a day. (Ex. 32).

On December 6, 2002, Dr. Kitchel noted that he would “continue [claimant’s] restriction at the four hours of light duty work a day.” (Ex. 25-3). He also completed a separate work authorization slip for “light duty w/ restrictions of over 20 lbs, no stooping, twisting, no bending until further notice on next f/u appt.” (Ex. 26). Thereafter, claimant returned to full-time work for the employer with light duty restrictions. (Exs. 26; 32).

On December 11, 2002, SAIF accepted claimant’s injury claim for an L5-S1 disc herniation. (Ex. 27).

On December 19, 2002, claimant’s supervisor signed a performance evaluation that gave claimant an overall rating of “meets job requirements,” and authorized a pay increase for claimant “as long as [she] continues to improve.” (Ex. 28).

On January 7, 2003, Dr. Kitchel noted that claimant was not getting much benefit from physical therapy and “may continue to work at light duty.” (Ex. 33). On March 3, 2003, Dr. Kitchel noted that claimant “continues on work restrictions.” (Ex. 40; 45).

On March 7, 2003, claimant was put back on probation for deficiencies in performance during the period February 12 through March 6, 2003. At that time, claimant was cited for not completing her work assignments in a timely manner, for not notifying others before leaving work that these tasks had not been completed, for requiring help from co-workers to complete her assigned duties, for excessive talking with a co-worker, for not helping co-workers with their own work when asked, and for not processing a subpoena for documents. It was noted that performance issues had recurred shortly after claimant came off a previous probation for similar issues. (Ex. 36).

On March 31, 2003, SAIF's insured terminated claimant's employment. (Ex. 44). When SAIF paid temporary partial disability (TPD) at the rate of zero, claimant requested a hearing.

On April 1, 2003 and May 22, 2003, Dr. Kitchel continued to authorize restricted work duty. (Exs. 45; 46).

CONCLUSIONS OF LAW AND OPINION

Applying OAR 436-060-0030(8),¹ the ALJ determined that the insurer did not terminate claimant for violation of work rules or for other disciplinary reasons. Rather, the ALJ concluded that claimant was terminated because of her inability to perform work because of her compensable injury. Thus, the ALJ found that claimant was entitled to "post-termination" disability at the full temporary total disability (TTD) rate.

On review, SAIF contends that claimant was terminated from her modified employment for "other disciplinary reasons," and is therefore not entitled to TPD paid at the full TTD rate as of the date of her termination.² Specifically, SAIF argues that, because claimant did not give "systematic, willing and purposeful attention to the performance of assigned tasks," her employment was terminated for a "disciplinary" reason as that term is defined in *Kevin H. Fisher*, 56 Van Natta 3173 (2004). According to SAIF, claimant was not terminated because she was unable to perform her job due to her compensable injury, but because she was *not* doing her job, even though she was physically capable of performing it. For the following reasons, we agree.

¹ OAR 436-060-0030(8) provides, in relevant part:

"Temporary partial disability shall be paid at the full temporary total disability rate as of the date a modified job no longer exists or the job offer is withdrawn by the employer. This includes, but is not limited to, termination of temporary employment, layoff or plant closure. A worker who has been released to and doing modified work at the same wage as at the time of injury from the onset of the claim shall be included in this section. For the purpose of this rule, when a worker who has been doing modified work quits the job or the employer terminates the worker for violation of work rules or other disciplinary reasons it is not a withdrawal of a job offer by the employer, but shall be considered the same as the worker refusing wage earning employment pursuant to ORS 656.325(5)(a)."

² As stipulated at hearing, SAIF paid claimant TTD benefits from the date of her back surgery on October 8, 2003, until she was released to work on January 4, 2004. (Tr. II, p. 89).

First, claimant was “doing modified work” at the time of her March 31, 2003 termination. Accordingly, we are authorized to make a limited inquiry into whether the termination was for a “violation of work rules or other disciplinary reasons” under OAR 436-060-0030(8). *Robert P. Krise*, 54 Van Natta 911, 915 (2002), *aff’d on other grounds*, *SAIF v. Krise*, 196 Or App 608 (2004); *Oren D. Hawksford*, 54 Van Natta 2237, 2239 (2002); *Vicki L. Danforth*, 50 Van Natta 2168, 2170 (1998).

In *Fisher*, we stated that, as defined in *Webster’s Third New International Dictionary* (1993), “disciplinary” means: “designed to correct or punish breaches of discipline.” We further noted in *Fisher* that “discipline” is defined as “prompt and willing obedience to the orders of superiors: systematic, willing, and purposeful attention to the performance of assigned tasks: orderly conduct.” It also means “conduct in accordance with a self-imposed rule or set of rules: SELF-CONTROL, SELF-RESTRAINT.” 56 Van Natta at 3174.

After reviewing this record, we conclude that claimant was terminated because she did not give “purposeful attention to the performance of assigned tasks.” See *Webster’s Third New Int’l Dictionary*, 644 (unabridged ed. 1993). Claimant’s modified job as an “outside records” clerk was restricted (due to her physical limitations caused by her compensable injury) to the following duties: (1) making calls to request records and x-rays for upcoming appointments; (2) notifying the scheduler if records or x-rays will not be at the clinic in time for an appointment; (3) checking the records into the computer; (4) obtaining reports from physicians; and (5) pulling and separating incoming faxes. (Ex. 57-4).

When claimant was placed on probation for the second time on February 25, 2003, the employer cited her failure to complete assigned tasks and to notify others before leaving work that she was unable to complete her assigned tasks. (Ex. 36-1). Because claimant’s performance regarding these matters did not improve, she was terminated on March 31, 2003 for failing to check telephone messages, failing to regularly check the fax machine, failing to properly route a subpoena, and failing to properly file patient materials. (Exs. 42; 44; 56-4). Under these circumstances, we conclude that claimant’s termination was for “other disciplinary reasons” as defined above.

In determining that claimant’s termination was primarily due to decreased physical capacity associated with her work injury, the ALJ noted that the deficiencies in claimant’s job performance did not begin until after her work injury and that such deficiencies were due to her exceeding the restrictions authorized by her treating physicians. However, the behaviors cited as grounds for claimant’s

probation and termination were not related to her physical restrictions. There is no medical evidence that claimant could not make telephone calls, check a fax machine, file chart notes or lift less than 20 pounds. Nor did claimant testify that her physical limitations hindered her ability to perform the job duties cited as reasons for her termination.

In sum, the record establishes that the duties claimant did not perform in a satisfactory manner, which ultimately led to her termination, were within her restrictions. When claimant first mentioned her back pain to the employer, she was immediately transferred to a more sedentary position. After the employer received claimant's modified work release notifications, it modified her job duties to accommodate her restrictions. However, claimant was still unable to satisfactorily perform her duties. The employer was not required to retain claimant as an employee when she did not perform her modified job duties as expected after repeated warnings. As such, claimant was terminated for "other disciplinary reasons" because she did not give "systematic, willing and purposeful attention to the performance of assigned tasks." Because we find that claimant was terminated for "other disciplinary reasons," she is ineligible for TTD pursuant to OAR 436-060-0030(8). See *Fisher*, 56 Van Natta at 3175.

ORDER

The ALJ's order dated November 20, 2004 is reversed in part and affirmed in part. That portion of the order that awarded temporary disability is reversed. Claimant's counsel's "out-of-compensation" attorney fee is also reversed. The remainder of the order is affirmed.

Entered at Salem, Oregon on July 5, 2005