In the Matter of the Compensation of
DARYL R. GABRIEL, DCD, Claimant
WCB Case No. 08-05759
ORDER ON REVIEW
Bennett Hartman Morris & Kaplan, Claimant Attorneys
Sather Byerly & Holloway, Defense Attorneys

Reviewing Panel: Members Lowell and Biehl.[1]

Claimants,[2] two surviving children of the decedent, request review of that portion of Administrative Law Judge (ALJ) Brazeau's order that dismissed their request for hearing as untimely under ORS 656.319(6). On review, the issue is timeliness of the request for hearing.

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

In April 1988, the decedent sustained compensable head injuries. In September 1994, he was determined to be permanently and totally disabled. (Ex. 3). On June 22, 2003, he died. At that time, his permanent total disability (PTD) award was still in effect, although the employer had initiated a review of that status.

After the decedent's death, the employer paid survivor benefits to his surviving spouse, as well as to claimants. The checks for claimants were sent in the care of their biological mother, who, at all material times, was divorced from the decedent. (Tr. 11; Exs. 26, 27).

On June 25, 2003, the employer issued a Notice of Closure that rescinded the decedent's PTD award, and replaced it with an award of 29 percent unscheduled permanent disability for his low back. (Ex. 11). The surviving spouse challenged that action. (*See* Exs. 13, 14).

A September 18, 2003 Order on Reconsideration set aside the closure notice and reinstated the decedent's PTD status. (Ex. 14). On March 21, 2006, after additional litigation, we approved a Claim Disposition Agreement (CDA) and

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[1] Member Weddell has recused herself from participating in this review. *See* OAR 438-011-0023.

[2] Because one claimant was under 18 years of age when the instant action was filed and at the time of hearing, his claim was brought by his biological mother, the former spouse of the decedent.

stipulation between the employer and the decedent's surviving spouse. (Exs. 22, 23, 24, 25). The parties agreed that the employer's award of 29 percent unscheduled permanent disability would be reinstated, and that the surviving spouse would receive the compensation set forth in the CDA, releasing all "non-medical service" benefits. (*Id.*) Neither the CDA nor the stipulation expressly mentioned claimants.

Effective March 21, 2006, the employer ceased sending benefit payments on behalf of claimants to the decedent's former spouse. (Tr. 11). After those benefits stopped, the decedent's ex-wife contacted the employer, who told her to contact the attorney for the decedent's surviving spouse. (Tr. 15). The employer never resumed benefit payments to claimants.

On August 3, 2006, claimants retained counsel. On November 1, 2007, claimants' counsel filed an unjust enrichment action in Multnomah County Circuit Court. (Ex. 26).

On September 16, 2008, claimants filed a request for hearing, asserting entitlement to survivors' benefits.[3] The employer moved to dismiss the request for hearing as untimely under ORS 656.319(6).

The ALJ granted the dismissal request, reasoning that claimants' request for hearing (on September 16, 2008) came more than two years after the employer ceased benefit payments to claimants (in March 2006).

On review, claimants assert that the two-year period under ORS 656.319(6) has not yet begun because there has been no triggering "action or inaction" by the employer as required by that statute. We disagree with claimants' contention, reasoning as follows.

ORS 656.319(6) provides:

> "A hearing for failure to process or an allegation that the claim was processed incorrectly shall not be granted unless the request for hearing is filed within two years after the alleged action or inaction occurred."

[3] On November 6, 2008, the Multnomah County Circuit Court issued a Removal Order, stating that the dispute could not proceed to trial because of: (1) the pending status of claimants' workers' compensation dispute; and (2) incomplete discovery. (Ex. 30).

In *French-Davis v. Grand Central Bowl*, 186 Or App 280 (2003), the court addressed the statute's requirement that a request for hearing based on a carrier's failure to process a claim be filed within two years "after the alleged action or inaction occurred." Reasoning that "inaction" refers to something that does not occur, and, therefore, lacks a beginning or an end, the court concluded that the purpose of the statute would be frustrated if the two-year time period were deemed to be triggered simply by the absence of the required action. *Id.* at 286. Therefore, the court determined that the "inaction" contemplated by the statute must be an "affirmative inaction," *i.e.*, a failure to perform a time-specific, discrete duty, request, or obligation. *Id.* at 285. In that case, such "affirmative inaction" occurred when the carrier did not respond to the claimant's request for closure within 10 days as required by ORS 656.268(5)(b). *Id.* at 287.

Subsequent to *French-Davis*, we decided *Terrizino D. Williams*, 58 Van Natta 1487 (2006). In *Williams*, the carrier allegedly did not include supplemental temporary disability in the claimant's temporary disability payment. That alleged shortage occurred on February 12, 2003. Despite the claimant's assertion that he was owed more money, the alleged underpayment was not corrected. On February 23, 2005, the claimant requested a hearing challenging the lack of supplemental temporary disability.

We held that the claimant's request for hearing was untimely under ORS 656.319(6). In doing so, we found that, unlike *French-Davis*, the claimant in *Williams* did not allege a failure to process the claim, but rather alleged that the employer processed the claim incorrectly by not including supplemental temporary disability in his initial temporary disability payment. Thus, the issue in *Williams* "was not a failure to process, as was true in *French-Davis*, but rather concern[ed] incorrect claim processing." 58 Van Natta at 1490. Therefore, we found that the two-year period under ORS 656.319(6) was triggered by the February 12, 2003 "action" (as opposed to the "inaction" in *French-Davis*) of not correctly including the claimant's supplemental temporary disability in his temporary disability payment. *Id.* Because the claimant's request for hearing was more than two years after that triggering action, we dismissed his request as untimely. *Id.*

Here, we find that the employer's cessation of monthly survivor benefits, which it had been paying to claimants for approximately 32 months, and its refusal to resume such payments after being contacted by claimants' biological mother (in whose care the benefits had been sent), constituted the triggering "action or inaction" within the meaning of ORS 656.319(6).

In doing so, we disagree with claimants' assertion that the cessation of benefit payments amounted only to the type of "ongoing, long term, and passive" inaction that the *French-Davis* court held did not trigger the two-year limitations period in ORS 656.319(6). Claimants do not dispute that, on the decedent's death, the carrier was required to pay them "monthly" survivor benefits. *See* ORS 656.204(2); ORS 656.208(1). Indeed, it was the employer's nonpayment of such monthly benefits that formed the basis for claimants' hearing request, and their assertion of entitlement to the payment of benefits, penalties and attorney fees. Thus, the employer's cessation of the timely payment of those monthly benefits (in March 2006) constituted an "identifiable, discrete event or occurrence, in particular a failure to perform a time-specific duty." *See French-Davis*, 186 Or App at 285. Such "affirmative inaction" triggered claimants' obligation to file a request for hearing regarding the employer's claim processing within the two-year period prescribed in ORS 656.319(6).

In finding that the employer's claim processing arose to an "affirmative inaction," we disagree with claimants' assertion that the employer had no legal, time-specific duty to pay benefits once the CDA was approved. Such an assertion misidentifies the nature of claimants' request for hearing and requested relief. Specifically, claimants challenge the employer's decision to cease monthly benefits, not the validity of the CDA agreement reached between the employer and another beneficiary.[4] Because claimants challenge the employer's alleged failure to perform the time-specific duty of paying monthly benefits to which they are purportedly entitled, ORS 656.319(6) applies. Therefore, as set forth above, claimants were required to file their request for hearing within two years of the employer's alleged failure to perform that duty.[5] Because claimants waited approximately 2 years and 8 months to file such a request, their claim is untimely.

Moreover, like *Williams*, the employer's cessation of benefits here could also be characterized as an "action" within the meaning of ORS 656.319(6). The employer affirmatively paid survivor benefits to claimants until the execution of the CDA and stipulation in March 2006. The employer then took the "action" of stopping those benefit payments, and refusing to pay such benefits even after being contacted by claimants' biological mother to challenge that claim processing.

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[4] Under ORS 656.236(2), a Board-approved CDA "is not subject to review."

[5] We express no opinion on the merits of claimants' requested relief and the preclusive effect of the CDA on their entitlement to survivor benefits. Rather, our decision is confined to a determination that the hearing request was untimely under ORS 656.319(6).

In other words, this is not a situation where a carrier performed no "action," but merely passively failed to process a claim. Rather, the employer took the action of ceasing monthly benefits that it had previously been paying. Such conduct is akin to the incorrect processing "action" in *Williams*. Thus, like the carrier's incorrect claim processing in *Williams* (erroneously not including supplemental temporary disability in the temporary disability payment), we find that the employer's affirmative act of stopping the payment of benefits, and its unequivocal refusal to renew such payments after being contacted by claimants' biological mother on their behalf, also constitutes a triggering "action" within the meaning of ORS 656.319(6). Because, as set forth above, claimants waited more than two years to file their request for hearing, the ALJ properly dismissed their hearing request as untimely.

ORDER

The ALJ's order dated March 24, 2009 is affirmed.

Entered at Salem, Oregon on September 30, 2009