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In the Matter of the Compensation of  
**LUTHER H. STINSON, DCD., Claimant**  
WCB Case No. 09-05026  
ORDER ON REVIEW  
Garrett Hemann et al, Claimant Attorneys  
Julie Masters, SAIF Legal, Defense Attorneys

Reviewing Panel: Members Langer, Biehl, and Herman. Member Langer dissents.

Claimant, a surviving beneficiary of the deceased worker, requests review of that portion of Administrative Law Judge (ALJ) Crummé's order that declined to award additional survivor benefits. On review, the issue is survivor benefits. We reverse.

FINDINGS OF FACT

We adopt the ALJ's findings of fact and provide the following summary.

The SAIF Corporation accepted a death claim for claimant's father's October 2003 fatal accident. (Ex. 4). SAIF began paying survivor benefits. (Ex. 9).

After his high school graduation, claimant began attending a community college in September 2008. (Exs. 21, 22). For the next four consecutive quarters (through fall quarter 2009), he continued his regular attendance at the community college. (Exs. 52, 55; Tr. 45-46).

After fall quarter ended on December 17, 2009, claimant decided not to attend classes at the community college for the winter quarter. (Tr. 44). Instead, he intended to work and to investigate registering at another college. (Tr. 44-45). At the March 16, 2010 hearing, claimant explained that he was signing up for classes at another college that day, with classes beginning March 29, 2010. (Tr. 44).

SAIF stopped claimant's survivor benefits, effective December 17, 2009. (Exs. 50, 51). As a policy, SAIF does not pay survivor benefits to a college student who does not attend higher education during the "summer months." (Tr. 37). However, when it receives verification that the student returns to college for the fall term, SAIF will reinstate survivor benefits retroactively to the date it stopped paying compensation. (Tr. 26). However, if the student chooses to take a

break during a term other than summer, SAIF will begin paying survivor benefits on the student's re-enrollment, but will not pay such benefits retroactive to when it had stopped paying such compensation. (Tr. 26-27, 38).

### CONCLUSIONS OF LAW AND OPINION

Finding that, effective December 17, 2009, claimant had ceased attending higher education, the ALJ held that SAIF was entitled to stop paying claimant's survivor benefits. Reasoning that claimant had not returned to attending higher education, the ALJ also determined that SAIF was not obligated to reinstate his survivor benefits.

On review, claimant argues that he is entitled to continued survivor benefits beginning December 17, 2009, and remains eligible for those benefits under ORS 656.204(8). SAIF responds that claimant did not prove that he continued to regularly attend higher education.

At the time of the decedent's death in 2003, ORS 656.204(8)(a)<sup>1</sup> provided that survivor benefits shall continue to be paid to a child or dependent attending higher education until he/she becomes 23 years of age, ceases attending higher education or graduates from an approved institute or program, whichever is earlier. Thus, the determinative issue is, under the particular facts present in this case, whether claimant "cease[d] attending higher education." Based on the following reasoning, we are not persuaded that claimant did so and, consequently, we conclude that he is entitled to the disputed survivor benefits.

It is undisputed that claimant attended five consecutive quarters from fall 2008 through fall 2009. It is likewise uncontested that he chose not to continue this practice for the winter 2010 quarter, in order to work and to investigate other higher educational options. Such intentions are further confirmed by claimant's un rebutted testimony that he would be registering at another college the day of the hearing, where classes would begin within the following two weeks.<sup>2</sup>

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<sup>1</sup> Claimant does not dispute SAIF's contention that the 2003 version of ORS 656.204(8) applies. See ORS 656.202(2) (except as otherwise provided by law, payment of benefits for injuries or deaths shall be in the amounts provided for "by the law in force at the time the injury giving rise to the right to compensation occurred"); *Bradley v. SAIF*, 38 Or App 559, 562 (1978), *rev den*, 287 Or 123 (1979) (a workers' compensation claim, including a claim for survivor's benefits, is governed by the law in force at the time of the injury). The legislature amended ORS 656.204(8) in 2009, but we do not apply those amendments here.

<sup>2</sup> Correspondence from his mother, as well as his counsel, further confirm claimant's intention to continue his education at another college, with the goal of a June 2013 graduation. (Exs. 39, 45).

Rather than reflecting an intention to end his attendance at a higher educational institute, this record is more indicative of claimant's decision to take a brief respite from his studies to replenish his monetary funds and to review the next stage of his scholastic career. In this respect, claimant's actions are essentially identical to those taken by an untold number of college students who do not attend classes during the summer, but rather return home to perform temporary jobs during their summer break. As SAIF acknowledged at hearing, had claimant chosen this same course of action for a summer quarter (rather than the winter quarter), his survivor benefits would have been retroactively reinstated on his return to "spring quarter" classes. Considering SAIF's stated policy, the fact that claimant's decision arose before a winter quarter (rather than the summer quarter) should not result in a determination that detrimentally affects his receipt of survivor benefits.<sup>3</sup>

In conclusion, after conducting our review of this particular record, we are not persuaded that claimant "cease[d] attending higher education." Therefore, claimant is entitled to the disputed survivor benefits beginning December 17, 2009.

Because the dispute concerns the amount of claimant's compensation, rather than the compensability of an injury or condition, there has been no "denied claim" for purposes of ORS 656.386(1). *See Short v. SAIF*, 305 Or 541, 545 (1988) (where the issue is the amount of compensation or the extent of disability, rather than whether the claimant's condition was caused by an industrial injury, ORS 656.386(1) is not the applicable attorney fee statute); *Jack A. Gates*, 44 Van Natta 2078 (1992), *aff'd without opinion*, 121 Or App 441 (1993). Consequently, claimant's counsel's fee is payable from the increased compensation resulting from this order. *See* ORS 656.386(4). Accordingly, claimant's counsel is awarded an "out-of-compensation" attorney fee equal to 25 percent of the increased compensation created by this order (*i.e.*, the unpaid survivor benefits beginning December 17, 2009, until such time as SAIF effectively reinstated these benefits),<sup>4</sup> not to exceed \$5,000, payable directly by SAIF from this compensation to claimant's counsel. *See* ORS 656.386(4).

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<sup>3</sup> We note the conspicuous absence of administrative rules prescribing the precise manner in which to process "higher education" survivor benefit claims. Although a SAIF's representative commented that its practice had been audited by the Workers' Compensation Division (without objection), it is not apparent that the "summer break suspension/retroactive reinstatement" procedure had specifically been examined. In any event, as this case vividly illustrates, explicit rules delineating the appropriate method for providing survivor benefits to "higher education" beneficiaries may be worthy of consideration.

<sup>4</sup> Based on its claim examiner's testimony, SAIF apparently intended to reinstate claimant's benefits upon receiving confirmation of his return to higher education. Should that be the case, claimant's counsel's attorney fee would be based on the unpaid compensation payable from December 17, 2009, until the effective date that SAIF reinstated claimant's survivor benefits.

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ORDER

The ALJ's order dated April 7, 2010 is affirmed in part and reversed in part. Claimant is awarded survivor benefits commencing December 17, 2009, until the effective date that claimant's survivor benefits were reinstated by SAIF. For services at hearing and review, claimant's counsel is awarded 25 percent of these additional benefits, not to exceed \$5,000, payable directly by SAIF from claimant's compensation to his counsel. The remainder of the order is affirmed.

Entered at Salem, Oregon on November 1, 2010

Member Langer dissenting.

The majority concludes that claimant did not cease "attending higher education" and is therefore entitled to survivor benefits beginning December 17, 2009. Because I disagree with the majority's analysis, I respectfully dissent.

SAIF paid claimant's survivor benefits after he graduated from high school and began attending a community college in September 2008. SAIF obtained verification of claimant's enrollment and paid survivor benefits for fall quarter 2008, winter quarter 2009, and spring, summer, and fall quarters of 2009. (Exs. 52, 55).

On December 17, 2009, SAIF requested claimant's enrollment verification for winter term 2010. (Ex. 51). Claimant did not respond to SAIF's request. (Tr. 21-22). SAIF obtained information from the National Student Clearinghouse that did not show claimant's enrollment in higher education after December 2009. (Ex. 52). SAIF stopped paying claimant's survivor benefits.

ORS 656.204(8)(a) (2003) provides that survivor benefits "shall be paid until the child or dependent becomes 23 years of age, ceases attending higher education or graduates from an approved institute or program, whichever is earlier." ORS 656.204(8)(b) (2003) defines "attending higher education" as "regularly attending community college, college or university, or regularly attending a course of vocational or technical training designed to prepare the participant for gainful employment."

At the March 16, 2010 hearing, claimant testified that he had last attended the community college in December 2009. (Tr. 44). He further expressed his intention to register at another college that day to commence classes on March 29, 2010. (Id.)

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As the party seeking compensation, claimant has the burden of establishing the nature and extent of his disability. ORS 656.266(1). My review of the documentary and testimonial record leads me to conclude that claimant did indeed “cease[] attending higher education” after the fall 2009 quarter. The record is clear; claimant stopped attending the community college in December 2009 and had not been admitted to another higher education institution. Furthermore, although he apparently planned to register at another school the day of the hearing with classes to begin some two weeks later, such evidence does not establish that he was “regularly attending” a community college, college or university between the end of the fall 2009 quarter (December 17, 2009) and the date of the hearing (March 16, 2010).

Consequently, unless and until claimant’s college registration was accepted and he began attending classes, this record does not establish his entitlement to the resumption of his survivor benefits. Accordingly, SAIF’s termination of claimant’s survivor benefits was justified and, likewise, it was under no obligation to reinstate such benefits.

The majority’s decision is premised on the concept that claimant’s stated intention to register for admission into another college persuasively overcomes the proposition that he “ceased attending higher education” from December 2009 through March 2010. Yet, the record conclusively confirms that he chose not to register for the 2010 winter term. Moreover, no matter how resolute in his convictions, his stated intention to register at another college to begin the 2010 spring term does not overcome the indisputable fact that he “ceased attending higher education” in December 2009 and, as of the March 2010 hearing, was not “attending higher education.”

In conclusion, for the reasons expressed above, I would conclude that the record does not support claimant’s request to reinstate his survivor benefits. Because the majority reaches a different conclusion, I respectfully dissent.