
In the Matter of the Compensation of
ALVIN L. DEVI, Claimant
WCB Case No. 11-01627
ORDER ON REVIEW
Carney Buckley Hays & Marsh, Claimant Attorneys
Sather Byerly & Holloway, Defense Attorneys

Reviewing Panel: Members Weddell, Lowell, and Herman. Member Lowell concurs in part and dissents in part.

Claimant requests review of Administrative Law Judge (ALJ) Mills's order that: (1) found that the self-insured employer's suspension of temporary disability compensation was statutorily authorized; and (2) declined to award a penalty and attorney fee for allegedly unreasonable claim processing. On review, the issues are claim processing, temporary disability, penalties and attorney fees. We reverse.

FINDINGS OF FACT

Claimant was compensably injured in January 1998, resulting in accepted right knee conditions and a major depressive disorder. (Ex. B). He was awarded permanent disability benefits for his right knee in April 1999. The claim was reopened on July 9, 2002 for an aggravation, and the claim remains open. (*See* Exs. 9-2, 26E-1).

On September 4, 2008, the employer ceased paying temporary disability benefits. (Ex. 9-6). In November 2008, Dr. Koscińska, claimant's then-attending physician, authorized time loss from May 3, 2008 to an unknown future date. (*Id.*) On December 3, 2008, an earlier ALJ approved the parties' stipulation that reinstated claimant's temporary disability benefits, effective September 4, 2008. (*Id.*)

On November 11, 2010, the employer sent claimant a series of four letters. (Exs. 21-24). One letter stated that claimant had selected a total of three attending physicians, with Dr. Koscińska being the "current attending physician of record." (Ex. 21). The letter advised claimant that it must obtain the employer's approval before selecting a different attending physician. (*Id.*)

Another letter, however, asserted that Dr. Koscińska was no longer treating claimant for injuries related to his workers' compensation claim, and that claimant had not selected a new qualifying attending physician. (Ex. 24). The letter requested that claimant select a new attending physician "as soon as possible." (*Id.*)

An additional letter stated that claimant had not sought treatment in 30 days, and that a “[f]ailure to seek medical treatment will result in administrative closure of your claim, and possible loss or reduction of a disability award, if any.” (Ex. 22). Another letter requested that claimant complete an “Earnings Questionnaire.” (Ex. 23).

On November 12, 2010, claimant treated with Dr. Lowder for, *inter alia*, chronic right knee pain and depression. (Ex. 25).¹

On November 16, 2010, claimant responded to the employer’s November 11, 2010 letters. Claimant reiterated that Dr. Lowder was his attending physician, and that, if the employer objected to that selection, to state the basis for any such objection. (Ex. 25A).

On January 12, 2011, the employer requested approval from the Director to conduct an additional “Independent Medical Examination” (IME) in accordance with OAR 436-010-0265 to “obtain sufficient information to rate impairment and close [claimant’s] claim.”² (Ex. 26B-1). In that letter, the employer’s counsel averred that she had contacted claimant’s identified attending physician, Dr. Lowder, “concerning claimant’s permanent impairment.” (*Id.*) The employer’s counsel added that, in response, “Dr. Lowder’s office indicated [that] he ‘does not perform disability exams to evaluate permanent impairment.’” (*Id.*) Although the employer’s letter referenced correspondence to Dr. Lowder’s office, that correspondence is not in the record.

In a January 28, 2011 order, the Director disapproved the employer’s request for an additional IME. (Ex. 26E). That order identified Dr. Lowder as claimant’s attending physician, and noted that Dr. Lowder had not requested a closing examination. (Ex. 26E-2). That order has become final.

On February 23, 2011, the employer informed claimant that it was “prepared to cease payment of benefits based on [his] refusal to submit to treatment reasonably required to promote recovery--[his] failure to provide a timely response to multiple requests for information and undergo treatment with a qualified attending physician.” (Ex. 26F-1). The employer identified claimant’s “unacceptable actions” as not responding to the November 11, 2010 letters and not

¹ The first record of claimant treating with Dr. Lowder is October 4, 2010. (*See Ex. 20*).

² Subsequent to claim reopening in July 2002, the employer had obtained eight IMEs. (Ex. 26E-1).

“establish[ing] medical treatment for [his] compensable injuries with a qualified attending physician since 2009.” (*Id.*) The employer acknowledged that claimant identified Dr. Lowder as his attending physician in response to the November 11, 2010 letter, but the employer averred that Dr. Lowder “confirmed that he is not treating a workers’ compensation claim.” (*Id.*)

In that same letter, the employer asserted that it would apply to the Director for a suspension of benefits under ORS 656.325 and OAR 436-060-0105, if claimant did not: (1) “timely respond” to all of the employer’s letters requesting information; and (2) “establish medical treatment” for the compensable injuries “with a qualified attending physician” within thirty days. (Ex. 26F-2). The letter then provided a “notice” to claimant pursuant to OAR 436-060-0105. (*Id.*)

On February 24, 2011, Dr. Koscińska stated that she was not currently acting as claimant’s attending physician, and was not currently authorizing time loss. (Ex. 27). On March 2, 2011, Dr. Djergian stated that he was not currently acting as claimant’s attending physician, and was not currently authorizing time loss. (Ex. 28).

On March 28, 2011, the employer requested suspension of claimant’s workers’ compensation benefits from the Director, pursuant to ORS 656.325 and OAR 436-060-0105(5)(a). (Ex. 28A-1).

The following day, March 29, 2011, the employer informed claimant that “[n]o additional time loss benefits will be issued as provided under” OAR 436-060-0020 and ORS 656.262(4)(d). (Ex. 29-2). The letter asserted that claimant’s “attending physician of record, Dr. Djergian and Dr. Koscińska, * * * both indicate[d] that they [were] no longer [claimant’s] attending physician and [were] not authorizing time loss.” (Ex. 29-1).

Claimant requested a hearing concerning the employer’s unilateral suspension of temporary disability benefits under ORS 656.262(4)(d) and OAR 436-060-0020.³

³ Based on the hearing request, the Director declined to take action concerning the employer’s suspension request under ORS 656.325 and OAR 436-060-0105. (Ex. 31). Consequently, that “Director-related” matter is not before us. *See* ORS 656.325(2); ORS 656.704(3); OAR 436-060-0105.

CONCLUSIONS OF LAW AND OPINION

The ALJ found that the employer's suspension of benefits was authorized under ORS 656.262(4)(d), reasoning that, at the time of the suspension, claimant did not have an attending physician who could have authorized continued time loss benefits. On review, claimant contends that the employer did not comply with ORS 656.262(4)(d) and OAR 436-060-0020(3). We agree with claimant's contention, reasoning as follows.

Under ORS 656.262(4)(d):

“Temporary disability compensation is not due and payable for any period of time for which the insurer or self-insured employer has requested from the worker’s attending physician or nurse practitioner authorized to provide compensable medical services under ORS 656.245 verification of the worker’s inability to work resulting from the claimed injury or disease and the physician or nurse practitioner cannot verify the worker’s inability to work, unless the worker has been unable to receive treatment for reasons beyond the worker’s control.”

Thus, under the statute (as relevant here), the employer would be authorized to “suspend” or withhold temporary disability payments if: (1) it “has requested” attending physician verification of the worker’s inability to work due to the claimed injury; and (2) the attending physician “cannot” verify that inability. By its terms, this statutory provision applies when an attending physician “cannot” verify the worker’s inability to work. *Michael Arnold*, 62 Van Natta 2854, 2856 (2010). Thus, an attending physician’s mere lack of a response to a carrier’s inquiry concerning a claimant’s disability status does not establish that the physician “could not verify [a] claimant’s disability status.” *Id.* The statute concerns the suspension of temporary disability benefits and not claimant’s substantive entitlement to such benefits under ORS 656.268. *Sandoval v. Crystal Pine*, 118 Or App 640, 644, *rev den*, 317 Or 272 (1993).

Likewise, OAR 436-060-0020(3)⁴ also requires that, before suspending temporary disability benefits, a carrier must request attending physician verification of an inability to work due to the work injury, and the carrier must receive confirmation that the attending physician cannot provide such verification. We have previously held that carriers must “strictly comply” with this rule and its requirement “to contact both the claimant and the attending physician *before* suspending TTD.” *Arnold*, 62 Van Natta at 2856 (emphasis in original); *see also Trevor E. Shaw*, 46 Van Natta 1821, 1823 (1994); *Efrain C. Espinoza*, 45 Van Natta 348, 350-51 (1993).

Applying these principles to the instant matter, we are unable to conclude that the employer strictly complied with OAR 436-060-0020(3). Specifically, the record does not establish that the employer requested verification of claimant’s inability to work from his attending physician. On that point, we note that the employer does not identify claimant’s “attending physician” or assert that it requested such verification from the attending physician. To the contrary, the employer contends that various providers do not qualify, for one reason or another, as claimant’s “attending physician.” Such a contention, however, does not advance the employer’s position that it properly suspended claimant’s temporary disability benefits under ORS 656.262(4)(d) and OAR 436-060-0020(3), as those provisions require that, *before* suspending benefits, the employer must request *attending physician* verification of an inability to work. Likewise, the record does not establish that claimant’s “attending physician” could not verify an inability to work due to the claimed injury or disease. *See* ORS 656.262(4)(d); OAR 436-060-0020(3).

We emphasize that no party is asserting that either Dr. Koscinska or Dr. Djergian is claimant’s attending physician. (*See* Exs. 26, 27). The parties disagree as to whether Dr. Lowder is claimant’s attending physician, with the employer taking the position that Dr. Lowder is not primarily responsible for the treatment claimant’s compensable injury. *See* ORS 656.005(12)(b).

The employer’s position regarding Dr. Lowder’s status as attending physician does not support its assertion that it complied with ORS 656.262(4)(d) and OAR 436-060-0020(3) before unilaterally suspending claimant’s temporary disability benefits. As set forth above, those provisions require that the employer request attending physician verification of an inability to work due to the work injury, and receive confirmation that the attending physician cannot provide such

⁴ WCD Admin. Order 09-057, eff. January 1, 2010, applies to the employer’s March 29, 2011 suspension of benefits. OAR 436-060-0003.

verification. If the employer is correct that Dr. Lowder was not claimant's attending physician, its attempts to contact Dr. Lowder necessarily did not meet its obligations under ORS 656.262(4)(d) and OAR 436-060-0020(3), such that it could unilaterally suspend claimant's benefits. If it is the employer's position that the identity of claimant's attending physician is unclear, nothing in this order prohibits the employer from seeking Director permission to suspend claimant's temporary disability benefits, as opposed to unilaterally suspending those benefits under ORS 656.262(4)(d). Under such circumstances, the employer's suspension of temporary disability benefits was procedurally improper. *See Arnold*, 62 Van Natta at 2856-57.

We further note that temporary disability benefits are not due and payable under ORS 656.262(4)(g) where an attending physician "ceases to authorize" such benefits. Dr. Koscińska, claimant's attending physician in 2008, authorized time loss without an end date. (See Ex. 9-6). A December 2008 stipulation also provided that claimant was entitled to temporary disability benefits, effective September 4, 2008. (*Id.*) Although Dr. Koscińska ceased being claimant's attending physician at some point thereafter, Dr. Koscińska's open-ended time loss authorization did not "cease" when she stopped functioning as the attending physician. *Dedera v. Raytheon Engineers & Construction*, 200 Or App 1, 7 (2005). Moreover, although Dr. Koscińska indicated in February 2011 that she was not currently authorizing time loss, she did so with a simultaneous confirmation that she was not currently acting as claimant's attending physician. (Ex. 27-1).

Consequently, Dr. Koscińska did not take "steps to put a stop to or halt claimant's time-loss authorization during the period that [she] served as claimant's attending physician." *Dedera*, 200 Or App at 7 (emphasis added). Accordingly, Dr. Koscińska's comments did not provide the employer with authorization to unilaterally terminate claimant's temporary disability benefits.

Because our order results in increased compensation, claimant's counsel is also entitled to an "out-of-compensation" attorney fee equal to 25 percent of the increased temporary disability compensation created by this order, not to exceed \$5,000, payable directly to claimant's counsel. ORS 656.386(4); OAR 438-015-0055(1).

Under ORS 656.262(11)(a), if an insurer or self-insured employer unreasonably delays or unreasonably refuses to pay compensation, or unreasonably delays acceptance or denial of a claim, the insurer or self-insured employer shall be

liable for an additional amount up to 25 percent of the amount “then due,” plus “penalty-related” attorney fees. The standard for determining an unreasonable resistance to the payment of compensation is whether, from a legal standpoint, the carrier had a legitimate doubt as to its liability. *International Paper Co. v. Huntley*, 106 Or App 107 (1991). If so, the refusal to pay is not unreasonable. “Whether an insurer has a legitimate doubt concerning its processing obligations under the Workers’ Compensation Law must be based on the insurer’s knowledge at the time it acts.” *Liberty Northwest Ins. Corp. v. Hughes*, 197 Or App 553, 558, *rev den*, 338 Or 488 (2005).

In *Arnold*, we reiterated that an employer’s ability to unilaterally suspend temporary disability benefits under ORS 656.262(4)(d) and OAR 436-060-0020(3) was long settled under established case law. *See Arnold*, 62 Van Natta at 2857; *see also Shaw*, 46 Van Natta at 1823; *Espinoza*, 45 Van Natta at 350-51. Here, as set forth above, the employer has not strictly complied with those statutory and regulatory requirements. Consequently, we find that the employer did not have a legitimate doubt about its liability for such benefits. Consequently, the suspension of benefits was unreasonable and claimant is entitled to a penalty and attorney fee under ORS 656.262(11)(a). Accordingly, claimant is awarded a penalty in the amount of 25 percent of the “amounts then due,” *i.e.*, the amount of temporary disability benefits due as a result of this order.

In reaching a different conclusion on the penalty issue, the dissent asserts that the employer had a legitimate doubt regarding its entitlement to unilaterally suspend claimant’s benefits because the employer attempted to contact Dr. Lowder about claimant. The employer, however, has steadfastly maintained that Dr. Lowder is *not* claimant’s “attending physician.” Moreover, at most, the record establishes that the employer “requested records from Dr. Lowder” and requested “information concerning claimant’s permanent impairment.” (*See Ex. 26D-1*). In response, Dr. Lowder purportedly refused to provide the requested records and “advised” that he did not treat “workers’ compensation patients.” (*Id.*) “Dr. Lowder’s office” also purportedly “indicated” that Dr. Lowder did not “perform disability exams to evaluate permanent impairment.” (*Id.*)

Even accepting those representations by the employer as true, such representations do not establish that the employer had a legitimate doubt that it had complied with ORS 656.262(4)(d) and OAR 436-060-0020(3) in unilaterally suspending claimant’s temporary disability benefits. As set forth above, those provisions require that the employer request attending physician verification of an inability to work due to the work injury, and receive confirmation that the

attending physician cannot provide such verification. Here, even if we accepted the aforementioned representations from the employer, it would nevertheless not establish a legitimate doubt that it had asked claimant's attending physician to verify claimant's inability to work due to the work injury, or that it received confirmation that the attending physician could not provide such verification.

We reiterate that if it is the employer's position that it could not identify an "attending physician," it could have continued its request that the *Director* suspend benefits pursuant to ORS 656.325 and OAR 436-060-0105(5)(a). Alternatively, the employer could have advised claimant that it would close the claim under ORS 656.268(1), if he did not return for treatment to his "attending physician," as required by the statute. Because the employer instead elected to unilaterally suspend claimant's benefits in a manner at odds with the statute, administrative rules, and case precedent, its conduct was unreasonable and a penalty is warranted.

In addition, claimant is entitled to an attorney fee award under ORS 656.262(11)(a). Such an award shall be based on a reasonable amount that is proportionate to the benefit to claimant and that takes into consideration the factors set forth in OAR 438-015-0010(4), giving primary consideration to the results achieved and to the time devoted to the case. OAR 438-015-0110(1) and (2). After considering the factors set forth in OAR 438-015-0110 and applying them to this case, we find that a reasonable attorney fee under ORS 656.262(11)(a) is \$3,157, payable by the employer. In reaching this conclusion, we have given primary consideration to the benefit to claimant, the results achieved and the time devoted to the case (as represented by the record and claimant's counsel's uncontested attorney fee submission).

ORDER

The ALJ's order dated August 3, 2011 is reversed. Claimant is awarded temporary disability benefits effective March 29, 2011 (the date of the employer's unilateral termination of such benefits), to be paid until such benefits can be terminated/suspended pursuant to law. For services at hearing and on review, claimant's attorney is awarded an "out-of-compensation" attorney fee equal to 25 percent of the increased temporary disability compensation granted by this order, not to exceed \$5,000, payable directly to claimant's counsel. Claimant is awarded a penalty equal to 25 percent of the temporary disability benefits awarded by our order. Claimant's counsel is also awarded a penalty-related attorney fee of \$3,157, to be paid by the employer.

Entered at Salem, Oregon on March 1, 2012

Member Lowell concurring in part and dissenting in part.

Although I concur with the majority that the employer improperly terminated claimant's temporary disability benefits pursuant to ORS 656.262(4)(d) and OAR 436-060-0020, I would not award a penalty and penalty-related attorney fee under ORS 656.262(11)(a). Therefore, I dissent from that portion of the majority's opinion, reasoning as follows.

As noted by the majority, the standard for determining an unreasonable resistance to the payment of compensation is whether, from a legal standpoint, the carrier had a legitimate doubt as to its liability, with "legitimate doubt" being based on the insurer's knowledge at the time it acts." *Liberty Northwest Ins. Corp. v. Hughes*, 197 Or App 553, 558, *rev den*, 338 Or 488 (2005). Here, at the time that the employer acted (*i.e.*, suspended claimant's benefits on March 29, 2011), it had informed claimant of its intention to stop his benefits. (Ex. 26F).

Moreover, at the time that it suspended claimant's benefits, the information concerning Dr. Lowder's status as attending physician was equivocal. Accepting claimant's representation that Dr. Lowder was the attending physician, the employer contacted Dr. Lowder, who advised that he did "not treat workers' compensation patients" or "perform disability exams to evaluate permanent impairment." (Ex. 26B-1 *see also* Ex. 26F).⁵ Based on that response, I would find that the employer reasonably understood that Dr. Lowder, who claimant identified as his attending physician, could not verify claimant's inability to work due to the claimed injury. I would find this sufficient to establish that the employer had a legitimate doubt regarding its liability for further payments of temporary disability: namely, that it had requested attending physician verification of the worker's inability to work due to the claimed injury, and the attending physician could not verify that inability.

Therefore, I would not award a penalty or penalty-related fee under ORS 656.262(11)(a). Because the majority determines otherwise, I respectfully dissent from that portion of the majority's opinion.

⁵ Although the lack of supporting evidence from Dr. Lowder may be dispositive regarding the merits of the suspension of benefits under ORS 656.268(4)(d), I do not believe that such evidence is required to establish a legitimate doubt under ORS 656.262(11)(a).