
In the Matter of the Compensation of
NAOMI R. HOPPER, Claimant
WCB Case No. 12-00309
ORDER ON REVIEW
Shlesinger & DeVilleneuve, Claimant Attorneys
Julie Masters, SAIF Legal, Defense Attorneys

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

The SAIF Corporation requests review of Administrative Law Judge (ALJ) Naugle's order that set aside its "noncooperation" denial of claimant's injury claim pursuant to ORS 656.262(15). On review, the issue is claim processing. We reverse.

FINDINGS OF FACT

We adopt the ALJ's findings of fact, with the following summary and supplementation.

Claimant, age 21, is a swing shift manager for the employer. She testified that she injured her back at work on September 14, 2011. She sought medical treatment on September 19, 2011, and filed a claim. (Exs. 1, 2).

Claimant lives with her mother, Ms. Kunnuk, and her brother Malachi. Claimant testified that her mother generally gets the mail and places it on a table. (Tr. 8-9). Claimant pays the household water and electricity bills. (Tr. 8).

On September 26, 2011, SAIF wrote to claimant and provided information regarding her claim. The letter explained that she might be contacted to discuss her claim and that she was responsible for responding to any requests for information. The letter also explained that the failure to respond promptly to all forms and phone calls could result in a delay of benefits and/or claim processing. (Ex. 5).

Claimant explained that she first received mail from SAIF in September 2011. (Tr. 7-8). Her first phone call from SAIF was in late September 2011, although she did not recall with whom. (Tr. 15-16). At hearing, claimant was asked whether the SAIF employee told her about the need to talk with an investigator and provide a statement. (Tr. 16). Claimant replied: "Yes. Which I failed to do." (*Id.*)

On October 9, 2011, claimant's brother Joseph died unexpectedly. On October 11, 2011, claimant and Ms. Kunnuk went to his apartment, where Ms. Kunnuk found his body. Claimant explained that Joseph overdosed on drugs and they later found out that his cancer had recurred. (Tr. 11, 25; Ex. 10).

Claimant and Ms. Kunnuk were responsible for Joseph's funeral arrangements and for cleaning his apartment. (Tr. 11-12). They finished cleaning his apartment the first week of November 2011. (Tr. 12). Ms. Kunnuk testified that it was "chaos" after Joseph died and that it "shook me up so hard." (Tr. 25). She had difficulty going through Joseph's belongings and testified that "most of the time I just didn't go there." (*Id.*) Ms. Kunnuk explained that after Joseph's death, claimant "just was never the same." She testified that claimant "took it really hard because it was [the] first death in her immediate family." (Tr. 26). Claimant missed one day of work and could not afford to take more time off. (Tr. 12).

By letter dated October 17, 2011, SAIF sent claimant a letter explaining that she had an appointment for an interview on October 21, 2011. (Ex. 6). Claimant testified that she did not look at that letter at the time. (Tr. 17-18). When she was asked why she did not go to SAIF's interview, claimant explained that she did not look at the mail right away and was really depressed. (Tr. 22). By the time she looked at the letter, it was already past the day of the interview. (*Id.*)

By letter dated November 2, 2011, SAIF wrote to the Workers' Compensation Division (WCD), requesting a suspension of claimant's benefits for her failure to attend or cooperate in an interview. (Ex. 7). The letter indicated that a copy of the letter was provided to claimant by certified and regular mail. (Ex. 7-2).

On November 3, 2011, claimant was involved in a motor vehicle accident (MVA), when another driver rear-ended her vehicle. (Tr. 12, 13). She sought medical treatment the day after the MVA and filed a claim with her automobile insurance company. (Tr. 12-13, 20-21).

On November 4, 2011, WCD wrote to claimant, advising her that it had sufficient evidence documenting her failure to cooperate with SAIF's investigation. Consequently, claimant was warned that her compensation would be suspended within five working days unless she either documented that her failure to cooperate was reasonable or she contacted SAIF and cooperated with the investigation. (Ex. 8). The certified letter receipt was signed by "Malachi Hopper." (Ex. 8-3).

By letter dated November 8, 2011, SAIF wrote to claimant, explaining that she had 30 days from WCD's notification to cooperate with SAIF's investigation or her claim would be denied. (Ex. 12). Claimant testified that she received the November 8, 2011 letter "[a]nd I just never followed up on it." (Tr. 19-20).

On November 16, 2011, WCD issued an order suspending claimant's benefits based on her failure to reasonably cooperate with an investigation of a claim. (Ex. 13).

Ms. Brady, SAIF's claim adjuster, testified that she returned claimant's November 21, 2011 phone message and informed her that her claim had been suspended pending a statement being taken. Ms. Brady gave claimant the investigator's phone number so that she could give her statement. Ms. Brady also testified that she told claimant to make sure to call the investigator because her claim would remain suspended and ultimately be denied if she did not give a statement. (Tr. 28-29). She explained that claimant appeared to understand the conversation. (Tr. 28).

On December 5, 2011, SAIF issued a denial of the claim based on claimant's failure to cooperate with the investigation of her claim. (Ex. 14). Claimant requested a hearing.

CONCLUSIONS OF LAW AND OPINION

The ALJ set aside SAIF's denial, reasoning that claimant's failure to cooperate was for reasons beyond her control. The ALJ explained that claimant had learned of her brother Joseph's death under distressing circumstances on October 11, 2011, and that her testimony, as well as her mother's testimony, reflected that Joseph's death and attending to his affairs had a significant emotional impact on claimant. The ALJ also noted that claimant was involved in an MVA on November 3, 2011, which required medical attention. The ALJ reasoned that claimant had no control over the aforementioned circumstances.

On review, SAIF argues that the evidence does not establish that claimant failed to cooperate with its investigation for reasons beyond her control. SAIF contends that there was no medical evidence establishing that claimant was too depressed to call SAIF, nor did she testify that she was unable to respond to the multiple notices that she received from SAIF. SAIF argues that claimant failed to read her mail and when she did, she did not respond. SAIF contends that claimant's conduct amounted to a lack of diligence.

Claimant responds that she was overwhelmed by the cumulative effect of her brother's death and handling of his affairs, as well as her MVA, and that, due to the toll of the stress from those events, she was not capable of cooperating with the claim investigation.¹

ORS 656.262(14) provides that injured workers have the duty to cooperate and assist the carrier in the investigation of claims for compensation. Injured workers shall submit to and fully cooperate with personal and telephonic interviews and other information gathering techniques. A carrier may deny a claim because of the worker's failure to cooperate with an investigation involving an initial claim. ORS 656.262(15). To set aside a "noncooperation" denial, claimant must prove one of the following: (1) that she fully and completely cooperated with SAIF's investigation; (2) that she failed to cooperate for reasons beyond her control; or (3) that SAIF's investigative demands were unreasonable. *See* ORS 656.262(15).

Here, the parties agree that the issue is whether claimant failed to cooperate with SAIF's investigation for reasons beyond her control.

Claimant testified that, before her brother's death, based on a phone call from SAIF in late September 2011, she was aware that she needed to talk to an investigator and provide a statement. (Tr. 16). The record includes a letter from SAIF to claimant dated September 26, 2011, which provided additional information regarding her responsibilities to respond to SAIF's calls or letters requesting information. (Ex. 5; Tr. 7-8).

Shortly after claimant found out about her brother's death, SAIF wrote to her, explaining that she had an appointment for an interview on October 21, 2011. The letter stated that the investigator had been unable to obtain an agreeable date and time to interview her. The letter further stated that, if the time and place was not convenient for claimant, she could call and arrange a more convenient time and place, as long as the interview was completed within 14 days. (Ex. 6). Claimant testified that she did not look at that letter at the time. (Tr. 17-18). When she was asked why she did not go to the interview, claimant explained that she did not look at the mail right away and was really depressed. (Tr. 22). By the time she looked at the letter, it was already past the day of the interview. (*Id.*) However, claimant did not explain why she did not contact the investigator to explain those circumstances after she read the letter.

¹ Claimant also asserts that she was concerned about verbal and potentially physical abuse from her other brother. (*See* Ex. 2). However, claimant did not provide any testimony in that regard, nor did she indicate that was a reason that she failed to cooperate with SAIF's investigation.

We acknowledge that the death of claimant's brother Joseph was distressing to claimant. Nevertheless, after the November 3, 2011 MVA, claimant reported the accident to her automobile insurance company. (Tr. 20-21). She also got behind on the household electricity bill, but she was aware of her billing cycles. (Tr. 18). Thus, notwithstanding her grief, claimant was able to continue paying bills and to handle her automobile insurance claim.

Although claimant testified that she did not respond to SAIF's initial appointment letter because she was depressed, she did not explain why she did not respond to any of the other written notices from SAIF. Claimant received SAIF's November 8, 2011 letter "[a]nd I just never followed up on it." (Tr. 19). Moreover, the record does not include an explanation for claimant's failure to give a statement after her phone conversation with Ms. Brady in late November. Claimant did not rebut Ms. Brady's testimony that she was told to make sure to call the investigator because her claim would remain suspended and ultimately be denied if she did not give a statement. (Tr. 28-29).

Claimant argues that she was overwhelmed by the cumulative effects of her brother's death, handling his affairs, and her MVA. According to claimant, she was too emotionally drained to handle the claim process for her work injury. Based on this record, however, we are unable to reconcile claimant's ability to pay her bills and file an automobile insurance claim, with her purported inability to respond to SAIF's request for an investigative statement.

Under such circumstances, we are not persuaded that claimant has sustained her burden of proving that she failed to cooperate for reasons "beyond her control." *See Jolene A Karns*, 56 Van Natta 860 (2004) (although the claimant did not anticipate receiving communication from the insurer about her claim, it was within her control to check for mail, and her lack of diligence regarding a matter within her control was the reason she did not fully cooperate with the insurer's investigation); *Rawley O. Stohr*, 55 Van Natta 4016 (2003), *aff'd without opinion*, 196 Or App 352 (2004) (because the claimant should have anticipated receiving communication about his claim and it was within his control to maintain contact with his attorney and facilitate timely responses to the carrier's investigative demands, his lack of diligence was the reason he did not fully cooperate with the claim investigation of his claim); *cf. Lisa R. Ensworth*, 58 Van Natta 2330 (2006) (although the claimant made every effort to comply with the carrier's requests, the investigator's failure to receive messages and the limitations in the insurer's telephone system were circumstances beyond claimant's control).

After reviewing the record, we conclude that, like the claimants in *Karns* and *Stohr*, claimant's conduct represents a lack of diligence. Moreover, such conduct establishes that she failed to cooperate with the investigation of her claim and that her failure was not due to reasons beyond her control.

Consequently, because claimant failed to cooperate with SAIF's reasonable investigation, for reasons within her control, we reinstate the "noncooperation" denial. *See* ORS 656.262(15). Accordingly, we reverse the ALJ's order.

ORDER

The ALJ's order dated March 2, 2012 is reversed. SAIF's denial is reinstated and upheld. WCD's suspension order is affirmed. The ALJ's \$2,500 assessed attorney fee award is also reversed.

Entered at Salem, Oregon on October 3, 2012

Member Weddell dissenting.

The majority finds that claimant failed to cooperate with the investigation of her claim and that her failure was not due to reasons beyond her control. Because I disagree with the majority's evaluation of the evidence, I respectfully dissent.

SAIF argues that there is no medical evidence establishing that claimant was either too depressed to call its claim adjuster or that she was psychologically incapable of cooperating with the claims investigation. In order to set aside a noncooperation denial, however, medical evidence is not required. Rather, claimant must prove that she failed to cooperate for reasons beyond her control. ORS 656.262(15). We must consider the totality of the circumstances in evaluating the evidence.

Here, claimant, age 21 at hearing, had to deal with the circumstances of her brother's death, less than one month after she filed a claim. Not only did claimant have to deal with the fact of her brother's overdose, but she found out after his death that his cancer had recurred. Joseph had battled cancer the last two years before he died. (Tr. 11, 25). Furthermore, claimant was at her brother's apartment when her mother, Ms. Kunnuk, discovered that Joseph was dead. (*Id.*) Thus, claimant was not simply dealing with the unexpected death itself, but the trauma involved in the discovery of his death.

The traumatic events continued. During the time SAIF attempted to contact claimant for an interview, she and Ms. Kunnuk were responsible for Joseph's funeral arrangements and for cleaning his apartment. Ms. Kunnuk testified that it was "chaos" after Joseph died and that it "shook me up so hard." (Tr. 25). She had difficulty going through Joseph's belongings and testified that "most of the time I just didn't go there." (*Id.*) They finished cleaning his apartment the first week of November 2011. On November 3, 2011, claimant was involved in a MVA.

Claimant testified that she did not go to the interview with SAIF because she did not look at the mail right away and was "really depressed." (Tr. 22). By the time she looked at the letter, it was already past the day of the interview. (*Id.*) Ms. Kunnuk testified that claimant "just was never the same" after Joseph's death. She explained that claimant "took it really hard because it was [the] first death in her immediate family." (Tr. 25, 26).

There is no evidence rebutting claimant's testimony that she was depressed after her brother's death, nor is there evidence rebutting Ms. Kunnuk's testimony that claimant took the death "really hard." I agree with the ALJ's reasoning that claimant's unusual situation involving her brother's death and her MVA provided reasons beyond her control for the failure to cooperate with SAIF's investigation. This is not a simple situation where claimant merely failed to open and read her mail. *See Jolene A Karns*, 56 Van Natta 860 (2004) (because the claimant's failure to open and read her own mail were matters within her control, her lack of diligence in that regard was the reason that she did not fully cooperate with the investigation of her claim).

Instead, after reviewing the totality of the circumstances, including claimant's age, grief, and the tragic events involving her brother's death, I would conclude that she failed to cooperate for reasons beyond her control. It does not take much imagination to envision that the cumulative effect of these circumstances could overwhelm anyone. This case should be decided on the merits, not this procedural issue. I would affirm the ALJ's order and set aside the noncooperation denial.