
In the Matter of the Compensation of
CARL W. HAMILTON, Claimant
WCB Case No. 12-01235
ORDER ON REVIEW
Ronald A Fontana, Claimant Attorneys
Radler Bohy et al, Defense Attorneys

Reviewing Panel: Members Lanning, Langer, and Herman. Member Langer specially concurs.

Claimant requests review of Administrative Law Judge (ALJ) Brown's order that: (1) did not award additional temporary disability benefits; and (2) declined to assess penalties and attorney fees for allegedly unreasonable claim processing. On review, the issues are temporary disability, penalties and attorney fees. We reverse in part and affirm in part.

FINDINGS OF FACT

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

The second paragraph on page two is replaced as follows: "On October 21, 2011, the employer reported that claimant's records had been forwarded to Dr. Weeks, an orthopedic surgeon, for review. (Ex. 129). After reviewing those records, Dr. Weeks opined that the 'September 1, 2008 injury' was medically stationary. (Ex. 130)."

In addition, the employer received Dr. Baltins's November 29, 2011, January 3, 2012, and March 1, 2012 chart notes on April 23, 2012. (*See Exs. 135, 138, 144*).

CONCLUSIONS OF LAW AND OPINION

On December 2, 2008, claimant began treating for his compensable injury in California with Dr. Baltins, an orthopedic surgeon. Dr. Baltins performed left knee surgeries in 2009 and 2010. He opined that claimant would need considerable physical therapy thereafter. On July 7, 2011, Dr. Baltins stated that claimant had not reached permanent stationary status. (Ex. 124).

On November 29, 2011, Dr. Baltins reported that claimant “remains disabled.” (Ex. 135). On January 3, 2012, he indicated that claimant “remains temporarily disabled.” (Ex. 138). Neither chart note included a time period or ending date for the disability. The employer received those chart notes on April 23, 2012. (*Id.*)

On February 22, 2012, the employer notified claimant that Dr. Baltins had not responded to its request for medical records and that Dr. Baltins was no longer approved as “attending physician.”¹ (Ex. 142).

In a March 1, 2012 chart note, Dr. Baltins reported that claimant remained disabled. (Ex. 144). The employer received this chart note on April 23, 2012. (*Id.*)

On March 9, 2012, the employer wrote to claimant indicating that, effective February 25, 2012, his temporary disability benefits would end. The employer explained that Dr. Baltins was no longer authorized as the attending physician and claimant had not obtained a new attending physician. (Ex. 146).

On March 15, 2012, Dr. Baltins reported that claimant remained disabled. (Ex. 147). On April 3, 2012, Dr. Baltins reported that he would seek authorization for additional knee surgery, stating that claimant remained totally temporarily disabled. (Ex. 148). The employer received this information on April 23, 2012. (Exs. 147, 148).

On April 26, 2012, the Workers’ Compensation Division (WCD) issued an order holding that the employer was authorized to discontinue its approval of Dr. Baltins as claimant’s attending physician. (Ex. 151). On May 9, 2012, WCD adhered to its decision. (Ex. 154).

Claimant requested a hearing, seeking ongoing temporary disability benefits beginning February 27, 2012. On April 16, 2012, before the scheduled June 6, 2012 hearing, the employer paid temporary disability benefits from February 27, 2012 through April 29, 2012. (Exs. 150, 155-1). On May 15, 2012, the employer paid temporary disability benefits between April 30, 2012 and May 13, 2012. (Ex. 155-1).

¹ The record does not establish when claimant received this letter.

The ALJ reasoned that because Dr. Baltins was no longer authorized to be claimant's attending physician as of February 22, 2012, the employer was not required to pay temporary disability benefits as of and after February 27, 2012.² The ALJ also found no basis for a penalty or a related attorney fee for the employer's claim processing.

On review, claimant contends that Dr. Baltins's time loss authorization continued after his disapproval as his attending physician. He also seeks penalties and attorney fees, asserting that the employer's initial refusal to pay temporary disability after February 27, 2012, was unreasonable, and that a May 15, 2012 temporary disability payment was late.

For the following reasons, we agree that claimant is entitled to the disputed temporary disability. However, we do not consider its conduct to have been unreasonable.

Under ORS 656.262(4)(g), "Temporary disability compensation is not due and payable * * * after the worker's attending physician ceases to authorize temporary disability or for any period of time not authorized by the attending physician * * *." When an objectively reasonable carrier would understand contemporaneous medical reports to excuse an injured worker from work, a carrier is obligated to pay temporary disability benefits. *Lederer v. Viking Freight, Inc.*, 193 Or App 226, 237, *recons*, 195 Or App 94 (2004); *Brian Courchesne*, 57 Van Natta 1593, 1596 (2005). In addition, when an attending physician authorizes ongoing "open-ended" time loss, the physician must take an affirmative step to "put a stop to" the prior authorization. *Dedera v. Raytheon Eng'rs & Constr.*, 200 Or App 1, 7, *rev den*, 339 Or 406 (2005) (use of the verb "cease" in ORS 656.262(4)(g) indicates the legislature's intention to require the attending physician to take an affirmative step to "put a stop to" or "halt" any prior authorization).

Here, the employer disapproved Dr. Baltins's attending physician status as of February 25, 2012. (*See Ex. 146*). Thus, the issue is whether Dr. Baltins authorized "open-ended" time loss benefits extended beyond February 26, 2012, the date the employer stopped paying such benefits.³ Based on the following reasoning, we conclude that he did.

² Because these temporary disability benefits had already been paid to claimant, the ALJ's order, in effect, found an overpayment.

³ Because the disputed temporary disability compensation has already been paid, the employer's position contesting entitlement to that compensation amounts to a claim of overpayment, *i.e.*, future offset authorization under ORS 656.268(13).

The record establishes (and the parties do not dispute) that Dr. Baltins was claimant's attending physician between November 2011 and January 2012. During that time (and thereafter), Dr. Baltins provided left knee treatment and reported that claimant remained temporarily disabled. (See Exs. 135, 138, 144). Thus, we find that an objectively reasonable employer would understand that Dr. Baltins (acting as claimant's attending physician) contemporaneously excused claimant from working as early as November 29, 2011.⁴ (Ex. 135). See *Randal M. Wells*, 63 Van Natta 945, 950 (2011) (attending physician's opinion that the claimant had been "unable to work even in a modified way" due to his accepted condition sufficient to authorize temporary disability); *Kenneth L. Culp*, 62 Van Natta 798, 803 (2010) (attending physician's statement that the claimant "remains disabled from work" sufficient to authorize temporary disability).

Accordingly, based on this authorization, we conclude that the employer was obligated to pay temporary disability compensation. See *Lederer*, 193 Or App at 237. Moreover, because Dr. Baltins's November 2011 and January 2012 chart notes did not specify when claimant's temporary disability would end (they only indicated that he "remained" disabled), the time loss authorization was ongoing and "open-ended." (Exs. 135, 138); see *Dedera*, 200 Or App at 7; *Steven R. Holmes*, 59 Van Natta 1989, 1992 (2007) (physician's authorization was "open-ended" because it was not limited to a specific period, or until the occurrence of a specific event); *Charlene Y. Pearce*, 55 Van Natta 728, 730 (2003) (same).

Finally, this "open-ended" time loss authorization remained effective after the employer disapproved Dr. Baltins's "attending physician" status because no other attending physician terminated that authorization. See *Dedera*, 200 Or App at 7-8 (an attending physician's "open-ended" time loss authorization does not expire when another physician assumes attending physician status and does not take "steps to put a stop to or halt" the prior authorization); *Alvin L. Devi*, 64 Van Natta 400 (2012) (physician's "open-ended" time loss authorization did not "cease" when she stopped functioning as the attending physician); *Debra D. Osler*, 53 Van Natta 343 (2001) (physician's withdrawal as attending physician did not cause previous temporary disability authorization to expire).

⁴ On August 4, 2011, Dr. Baltins stated that claimant was unable to return to work until about August 26, 2011. (Ex. 127). Thus, the August 2011 authorization was not "open-ended." (See also Ex. 145). Nevertheless, on November 29, 2011, Dr. Baltins reported that claimant "remains disabled." (Ex. 135). Because Dr. Baltins did not provide a termination date for claimant's "re-authorized" temporary disability, we find that the November 29, 2011 authorization was "open-ended." See *Charlene Y. Pearce*, 55 Van Natta 728, 730 (2003) (physician's authorization was "open-ended" because it was not limited to a specific period, or until the occurrence of a specific event).

In sum, after the November 29, 2011 “open-ended” authorization, Dr. Baltins did not take any steps to put a stop to or halt claimant’s time-loss authorization during the period that he served as claimant’s attending physician, and no subsequent attending physician took steps to halt that authorization. *See Dedera*, 200 Or App at 7. Consequently, the employer was not authorized to terminate claimant’s temporary disability benefits as of February 27, 2012. *See Devi*, 64 Van Natta at 404; *Holmes*, 59 Van Natta at 1993 (resignation of the attending physician is not one of the events enumerated in ORS 656.268(4) that terminates temporary disability); *Osler*, 53 Van Natta at 344.

Because our order results in increased compensation, claimant’s counsel is 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.⁵ ORS 656.386(4); OAR 438-015-0055(1).

Finally, claimant seeks a penalty and attorney fees based on the employer’s allegedly unreasonable February 27, 2012 “termination” of temporary disability benefits. Claimant also requests a penalty and attorney fee for an allegedly

⁵ As previously noted, through his attorney, claimant filed a hearing request (on March 12, 2012), seeking reinstatement of temporary disability benefits effective February 27, 2012. That hearing request was accompanied by an executed retainer agreement. The hearing request included claimant’s counsel’s certification that a copy had been provided to the employer and its counsel. Notwithstanding this notification, on April 16, 2012, April 27, 2012, and May 15, 2012, before the June 6, 2012 scheduled hearing, the employer paid claimant temporary disability for the period beginning February 27, 2012, without contacting claimant’s counsel and making arrangements for the payment of an “out-of-compensation” attorney fee payable from such benefits for counsel’s services in obtaining this increased compensation.

To remedy this situation, we direct the employer to pay an “out-of-compensation” attorney fee based on the temporary disability benefits paid on those dates. *See Howard E. Benjamin*, 65 Van Natta 215, 218 n 2 (2013) (directing the insurer to pay the attorney fee that should have been paid to the claimant’s counsel out of recalculated temporary disability paid before the hearing and authorizing the insurer to recover this “overpayment” from the claimant’s future benefits); *Khamphouk Thanasouk*, 59 Van Natta 816, 821 (2007) (“ORS 656.386(2) does not specifically require that a hearing be held, or that an ALJ issue an order, to trigger payment of an “out-of-compensation” attorney fee.”); *Josie A. Bevard*, 47 Van Natta 2016, 2018-19 (1995) (“out-of-compensation” attorney fee based on benefits paid without a hearing, if, “at the time of the payment, the carrier was aware of the claimant’s hearing request and of the existence of an executed retainer agreement providing for an approved fee payable out of the paid compensation.”); *Nancy E. O’Neal*, 45 Van Natta 1490, *recons*, 45 Van Natta 1591, *recons*, 45 Van Natta 2081 (1993), *aff’d*, 134 Or App 338 (1995) (if a claimant’s compensation is increased prior to hearing, the claimant’s counsel is entitled to an “out-of-compensation” attorney fee from the increased compensation). Finally, consistent with the aforementioned case precedent, the employer is authorized to recover the overpayment created by the attorney fee award from claimant’s future compensation in the manner prescribed by law.

untimely May 15, 2012 temporary disability payment. Based on the following reasoning, we decline those requests.

Under ORS 656.262(11)(a), if a carrier unreasonably delays or unreasonably refuses to pay compensation, or unreasonably delays acceptance or denial of a claim, the carrier shall be liable for an additional amount up to 25 percent of the amount “then due,” plus “penalty-related” attorney fees. See *Ronald E. Sullivan*, 61 Van Natta 108 (2009); *Richard L. Wilson*, 56 Van Natta 407, *recons*, 56 Van Natta 1614 (2004). “Unreasonableness” and “legitimate doubt” are to be considered in light of all of the evidence available. *Brown v. Argonaut Ins. Co.*, 93 Or App 588, 591 (1988). In addition, continuation of a denial may become unreasonable if new medical evidence destroys any legitimate doubt about liability. *Id.* at 592.

Here, we have determined that claimant is entitled to the disputed temporary disability compensation. However, the record does not establish that the employer received Dr. Baltins’s November 2011 ongoing “open-ended” time loss authorization until April 23, 2012, *i.e.*, after it reinstated temporary disability payments retroactive to February 27, 2012.

Moreover, considering that WCD had affirmed the employer’s disapproval of Dr. Baltins as claimant’s attending physician, we are persuaded that it had a legitimate doubt regarding its further responsibility for paying temporary disability based on Dr. Baltins’s authorization.

Consequently, we conclude that the employer’s claim processing actions were not unreasonable. Accordingly, penalties and related attorney fees are not warranted.

ORDER

The ALJ’s order dated September 27, 2012 is reversed in part and affirmed in part. Claimant is awarded temporary disability benefits effective February 27, 2012, payable until such benefits can be terminated pursuant to law. 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. The employer is authorized to offset this “out-of-compensation” attorney fee award from claimant’s future benefits in the manner prescribed by law. The remainder of the ALJ’s order is affirmed.

Entered at Salem, Oregon on May 21, 2013

Member Langer specially concurring.

Because I agree that case law supports, albeit marginally, the result the majority reaches, I concur with its conclusion that claimant is entitled to the disputed temporary disability benefits. I write separately, however, to express a concern about the interpretation and application of the “open-ended time loss authorization” concept under the circumstances of this case.

One of the basic principles of the workers’ compensation law is that entitlement to temporary disability compensation is only due when authorized by an attending physician. *See* ORS 656.262(4)(g) (“Temporary disability compensation is not due and payable * * * after the worker’s attending physician ceases to authorize temporary disability or for any period of time not authorized by the attending physician * * *.”). It is undisputed that Dr. Baltins was no longer qualified as claimant’s attending physician after February 25, 2012, and that claimant was given a choice but did not select a new attending physician, but instead continued to treat with Dr. Baltins. (Exs. 142, 146, 151, 154, 147, 148). Thus, the precise issue here is whether temporary disability benefits are due and payable based on an “open-ended” authorization, issued by a physician who ceased to be attending physician, for a period in which claimant had no attending physician.

Claimant relies on *Dedera v. Raytheon Engineers & Construction*, 200 Or App 1, *rev den*, 339 Or 406 (2005). There, an attending physician, who filed an aggravation claim on behalf of the claimant and authorized temporary disability, referred the claimant to a specialist who assumed treatment but made no attempt to authorize temporary disability. The court interpreted ORS 656.262(4)(g) to resolve a question of whether the initial physician’s time-loss authorization expired when the claimant changed attending physicians. The court held that, when an attending physician authorizes ongoing “open-ended” time loss, the authorization is effective until an attending physician “ceases” to authorize temporary disability, or takes an affirmative step to “put a stop to” it. *Id.* at 6-7. Finding no indication that either physician took any steps to put a stop to or halt the claimant’s time-loss authorization, the court concluded that the first part of ORS 656.262(4)(g) (no temporary disability due after the worker’s attending physician ceases to authorize it) was not satisfied.

The court next addressed the second part of ORS 656.262(4)(g) (whether there was “any period of time not authorized by the attending physician”). Because the statute imposed no requirement that a physician be the claimant’s

attending physician not only at the time of the authorization but also at the time that benefits are paid, and the second attending physician assumed this role while the first attending physician's time-loss authorization was still in effect, the court concluded that the second ground also was not satisfied. Accordingly, the court held that "ORS 656.262(4)(g) does not provide that an attending physician's authorization of temporary disability expires *when another physician assumes that role.*" *Id.* at 8 (emphasis added).

I find *Dedera* distinguishable. There, the question was whether a valid time-loss authorization expired when the claimant changed attending physicians. Here, in contrast, the question is whether an "open-ended" time-loss authorization remained valid and effective during the period that claimant had *no* attending physician.

I would also distinguish *Alvin L. Devi*, 64 Van Natta 400 (2012). There, the primary issue was whether the employer's unilateral suspension of benefits pursuant to ORS 656.262(4)(d) and OAR 436-060-0020 complied with requirements for requesting information from the attending physician.⁶ We held that the employer's suspension of temporary disability benefits was procedurally improper, because the employer did not strictly comply with the administrative rule. *Id.* at 404-05. Citing *Dedera*, we further noted that, although a physician who issued an "open-ended" time-loss authorization ceased being the claimant's attending physician, the physician's "open-ended" time-loss authorization did not cease when the physician stopped functioning as the attending physician. *Id.* at 405. Unlike here, however, the claimant in *Devi* relied on another physician as his attending physician and, furthermore, the Director's order identified that physician as the attending physician before the employer suspended temporary disability benefits. *Id.* at 401, 404. Accordingly, we did not face the same issue as here, where, by virtue of the final WCD order, Dr. Baltins was no longer authorized to act as attending physician and no other physician assumed that role during the disputed period.

Nonetheless, in *Kevin E. Dedera*, 55 Van Natta 2048 (2003), which the Court of Appeals subsequently reversed, 240 Or App 1, we discussed and rejected the claimant's reliance on *Debra D. Osler*, 53 Van Natta 343 (2001). We explained:

⁶ ORS 656.262(4)(d) provides that no temporary disability compensation is due and payable for any period of time for which the employer has requested from the worker's attending physician verification of the worker's inability to work.

“In *Osler*, the ALJ had concluded that [the] claimant had established entitlement to temporary disability (TTD) beginning June 27, 2000, based on the attending physician’s chart note of that date, authorizing TTD. On review, the employer did not dispute the ALJ’s finding that TTD was authorized on June 27, 2000; rather, the employer contended that because the claimant’s attending physician withdrew as the attending physician on June 27, 2000, that her authorization of TTD benefits expired on that date. *Id.* at 343. We disagreed with the employer’s contention that the claimant’s entitlement to TTD ended when the attending physician ceased to be the attending physician. *Id.* at 344. Citing ORS 656.262(4)(a) and (g), we stated that, ‘a claimant is entitled to temporary disability for those periods of time for which there is authorization from an attending physician.’ Additionally, we held that the claimant’s entitlement to temporary disability should continue based on our finding that ‘resignation of the attending physician [was] not one of the events enumerated in ORS 656.268(4).’ * * *.

“The facts in *Osler* are distinguishable from the present case. In *Osler*, the record did not reflect that the claimant established treatment with a new attending physician after the resignation of her attending physician on June 27, 2000.” 55 Van Natta at 2048-49.

Thus, *Osler* supports a conclusion that a worker may continue to receive temporary disability payments even when the worker does not have an attending physician. Were I deciding this case on a clean slate, however, I would have concluded that the two requirements for entitlement to temporary disability compensation, an attending physician and valid authorization, must coexist during every period of disability for which that compensation is sought. In my view, even though an “open-ended” time-loss authorization does not necessarily expire when the physician who issued it ceases to be the attending physician primarily responsible for the worker’s treatment, the worker *must* obtain another attending physician in order to rely on the prior physician’s authorization.

Under the circumstances of this case, in the absence of another medical provider who could have assumed the role of claimant's attending physician and expressly or impliedly adopted Dr. Baltins's time-loss authorization, I would have concluded that the period of time at issue was "not authorized by the attending physician." ORS 656.262(4)(g); *see also* ORS 656.245(2)(b)(B) (A medical service provider who is not an attending physician cannot authorize the payment of temporary disability compensation.). Our contrary decision dictated by precedent results in a dichotomy of compensable benefits--while treatment Dr. Baltins provided to claimant is not compensable after he was disapproved as his attending physician, disability compensation he authorized for the same period is. I do not believe this is a result the legislature intended.