

In the Matter of the Compensation of
FORD A. CHENEY, Claimant
Own Motion No. 16-00009OM
OWN MOTION ORDER
Alvey Law Group, Claimant Attorneys
Liberty Mutual Ins, Carrier

Reviewing Panel: Members Johnson, Lanning, and Somers. Member Johnson dissents in part.

Claimant requests Own Motion relief, seeking temporary disability benefits for this reopened “post-aggravation rights” new/omitted medical condition claim (collapse of the L5-S1 disc space with nerve root compression, L5-S1 disc herniation, and nerve root entrapment at L5-S1). He also seeks penalties and attorney fees for the insurer’s allegedly unreasonable claim processing. Based on the following reasoning, we direct the insurer to begin paying claimant temporary disability benefits effective August 14, 2012, but do not consider the insurer’s claim processing to be unreasonable.

FINDINGS OF FACT

On March 14, 1989, claimant sustained a compensable injury, which the insurer accepted for right knee strain, low back strain, and right groin strain. (Ex. 12-2). Claimant’s aggravation rights expired on October 17, 1996. (Ex. 13-6).

Subsequently, claimant moved to the Houston, Texas area and was certified as a special education teacher. (Ex. 32-3). In March and May 2011, he sought treatment for low back and bilateral leg pain from Drs. Nash and Cartwright, respectively, who both reported that he was “retired.” (Exs. 1-1, 2-1).

On July 14, 2011, claimant sought treatment for low back and bilateral leg pain from Dr. Mohr, who became his attending physician. Dr. Mohr noted that claimant’s “patient history information sheet” indicated that he was employed as a teacher. (Ex. 3-1). Dr. Mohr considered claimant to be a candidate for surgery (anterior lumbar interbody fusion at L5-S1) after ruling out any neoplastic activity and reviewing his test results. (Ex. 3-4).

On August 3, 2011, after reviewing claimant's test results, Dr. Mohr recommended surgery (anterior lumbar interbody fusion at at L4-5 and L5-S1). (Ex. 4-5). He also discussed with claimant the length of the hospital stay and the recovery period for that surgery. (Id.)

On August 15, 2011, claimant responded to the insurer's inquiry about his work force status, checking a box indicating that he was not currently employed, noting that he had last worked on May 22, 2011, and that the reason for his unemployment since that date was his "back injury." (Ex. 6-1). He also identified a Houston, Texas area school district as his "current employer." (Id.)

On August 29, 2011, claimant sent the insurer a correction to its previous inquiry, stating that he had mistakenly checked the wrong box on that form. (Ex. 7-1). He noted that he was currently a full-time substitute teacher employed by a Houston area school district "since 2006-2011." (Id.) He also attached a "check history report" dated August 18, 2011 from that school district listing paychecks issued to him. (Ex. 7-2). That report documented that claimant was paid for three days work for the period ending April 14, 2011, eight and a half days work for the period ending May 12, 2011, and four and a half days work for the period ending June 14, 2011. (Id.)

On March 23, 2012, the insurer denied claimant's "post-aggravation rights" new/omitted medical condition claim (collapse of the L5-S1 disc space with nerve root compression, L5-S1 disc herniation, and nerve root entrapment at L5-S1). (Ex. 11). Claimant requested a hearing.

On July 5, 2012, an Administrative Law Judge (ALJ) set aside that denial. (Ex. 12). The insurer requested review. On July 19, 2012, the insurer recommended against reopening claimant's Own Motion claim for the aforementioned "post-aggravation rights" new/omitted medical conditions claim based on its appeal of the ALJ's compensability decision and its contention that claimant was not in the work force at the time of disability. (Ex. 13).

On August 6, 2012, claimant returned to Dr. Mohr, who again recommended surgery (anterior posterior spinal decompression and fusion at the L4-5 and L5-S1 levels). (Ex. 15-4). He noted that the surgery would "require several days in the hospital and that the overall recovery time for [the] fusion likely [would] be at least 3-4 months but could potentially take up to a year." (Id.)

On August 14, 2012, Dr. Mohr performed fusion surgery at L4-5 and L5-S1. (Ex. 16).

On August 18, 2012, Ms. Nyman, manager of a Houston, Texas area school district's "Substitute Office," reported that claimant "works as a long-term substitute" teacher in that school district. (Ex. 17). She stated that claimant was in constant demand by teachers on 89 campuses. She also provided claimant's daily wage and noted that it was anticipated that he would work 20 to 21 days per month. (Id.)

On November 18, 2012, Dr. Mohr gave claimant a "note to resume work and advance activities as tolerated." (Ex. 19-3). On December 17, 2012, claimant stated that he was "'not ready' to return to work as yet as a teacher." (Ex. 20-3). During subsequent follow-up visits with Dr. Mohr that continued through March 7, 2016, claimant reported that he did not feel that he could return to work as a teacher. (Exs. 24-2, 26-2, 27-2, 28-3, 29-3, 30-3, 31-3, 34-3, 36-3, 39-3, 43-3). Beginning with the December 12, 2013 follow-up visit, Dr. Mohr listed claimant's "job status" as "disabled." (Exs. 30-2, 34-2, 36-2, 39-2, 43-2).

On January 2, 2013, we affirmed the ALJ's compensability determination. *Ford A. Cheney*, 65 Van Natta 11 (2013). That same date, we reopened claimant's Own Motion claim for the "post-aggravation rights" new/omitted medical conditions (collapse of the L5-S1 disc space with nerve root compression, L5-S1 disc herniation, and nerve root entrapment at L5-S1) and directed the insurer to provide benefits in accordance with law. *Ford A. Cheney*, 65 Van Natta 1 (2013). (Ex. 21).

On February 27, 2013, claimant responded to the insurer's "Income Questionnaire," indicating that he had not been released to work, he was not working, and he had no "current employer." (Ex. 25). He also reported that he was receiving SSDI the "last two months." (Id.) On March 25, 2013, Dr. Mohr noted: "Will continue OOW as per WC note."¹ (Exs. 24-3, 26-3).

In April 2014, claimant was examined by Dr. Binder, psychologist, Dr. Toal, orthopedist, and Dr. Green, neurologist, on behalf of the insurer to determine if there were contraindications for implantation of a spinal cord stimulator for the control of chronic pain. (Exs. 32, 33). Dr. Binder stated that claimant had memory

¹ It is unclear to what these abbreviations refer. Although "WC" may refer to "workers' compensation," we find no "WC note" in the record to which this March 2013 notation may refer.

problems regarding his work history, noting that he reported that he last worked sometime between 1993 and 1996, but that he also stated that he worked as a substitute teacher until 2011. (Ex. 32-3). Dr. Binder noted that claimant stated that he had been offered a full-time teaching job without full benefits, but he declined that offer because of his back problems. (Id.) Dr. Binder also reported that claimant stated that he had been receiving SSDI benefits since 2000 and worked part-time while receiving those benefits, until he was unable to continue working after reinjuring his back three years before the April 2014 exam. (Ex. 32-3, -8).

In contrast to the aforementioned history, in April 2014, Drs. Toal and Green noted that claimant was “currently employed as a special education teacher.” (Ex. 33-7).

On October 14, 2015, Ms. Bates, assistant director of a Houston, Texas area school district’s “Substitute Office,” reported that claimant “was employed” as a substitute teacher with that school district. (Ex. 40). She stated that his hire date was October 1, 2006, and he worked on an “as needed” basis. She noted that his “last paid date” was October 14, 2011, and that he left the position as a substitute teacher in good standing with the school district. (Id.)

In a November 22, 2015 affidavit, claimant attested that he had not withdrawn from the work force. (Ex. 41-1). He also stated that he was contracted as a school teacher with a Houston, Texas school district for the 2011-2012 school year, but was unable to begin that contract because he had been continuously disabled by his compensable condition since August 3, 2011. (Id.)

CONCLUSIONS OF LAW AND OPINION

The insurer recommended against reopening claimant’s Own Motion claim for the “post-aggravation rights” new/omitted medical conditions (collapse of the L5-S1 disc space with nerve root compression, L5-S1 disc herniation, and nerve root entrapment at L5-S1) based, in part, on its contention that claimant was not in the work force at the time of disability. However, because there is no “work force” requirement for the reopening of an Own Motion claim for a “post-aggravation rights” new/omitted medical condition, we reopened that claim and directed the insurer to provide benefits in accordance with law. *See Cheney*, 65 Van Natta at 1; *Charles Klutsenbeker*, 55 Van Natta 2244 (2003). We also stated that claimant’s presence in the work force for purposes of receiving temporary disability benefits arising from the reopening of an Own Motion claim is a claim processing matter

that may occur following the issuance of a Board “claim reopening” decision. *See Cheney*, 65 Van Natta at 1 n 1; *Duane L. Leafdahl*, 54 Van Natta 1796, 1799 (2002).

Following our “claim reopening” order, the insurer did not pay any temporary disability benefits. Claimant seeks temporary disability benefits for this reopened Own Motion claim for the aforementioned “post-aggravation rights” new medical conditions. Based on the following reasoning, we grant claimant’s request.

Temporary disability compensation is not payable “for periods of time during which the claimant did not qualify as a ‘worker’ pursuant to ORS 656.005(30).”² ORS 656.278(2)(b); OAR 438-012-0035(2); *Henry D. Desamais*, 64 Van Natta 652 (2012); *Robert Dubray*, 57 Van Natta 2035, *recons*, 57 Van Natta 2279 (2005). A worker is in the work force at the time of disability if he or she is: (1) engaged in regular gainful employment; or (2) not employed, but willing to work and making reasonable efforts to obtain employment; or (3) not employed, but willing to work, but not making reasonable efforts to obtain employment because a work-related injury has made such efforts futile. *Dawkins v. Pacific Motor Trucking*, 308 Or 254, 258 (1989).

Work force status is determined at the time of disability. *Dawkins*, 308 Or at 258; *Weyerhaeuser Co. v. Kepford*, 100 Or App 410, 414, *rev den* 310 Or 71 (1990). The “date of disability” for the purposes of determining work force status in an Own Motion claim for a “post-aggravation rights” new/omitted medical condition is the date the claimant’s condition: (1) resulted in a partial or total inability to work; and (2) required (including a physician’s recommendation for) hospitalization, inpatient or outpatient surgery, or other curative treatment. ORS 656.278(1)(b); *Butcher v. SAIF*, 247 Or App 684, 689-90 (2012); *Henry D. Desamais*, 64 Van Natta 652, 653 (2012). The “date of disability” is the date on which both of these factors are satisfied. *Arthur D. Kiser*, 57 Van Natta 1128, 1130 (2005); *Robert J. Simpson*, 55 Van Natta 3801 (2003).

² ORS 656.005(30) defines “worker” and provides, in relevant part:

“‘Worker’ means any person * * * who engages to furnish services for a remuneration, subject to the direction and control of an employer * * *. For the purpose of determining entitlement to temporary disability benefits or permanent total disability benefits under this chapter, ‘worker’ does not include a person who has withdrawn from the workforce during the period for which benefits are sought.”

The relevant time period for which claimant must establish he was in the work force is the time prior to the “date of disability.” *See generally Wausau Ins. Companies v. Morris*, 103 Or App 270 (1990); *SAIF v. Blakely*, 160 Or App 242 (1999); *Benjamin A. Vandeman*, 66 Van Natta 1762, 1763 (2014).

Here, on August 3, 2011, Dr. Mohr, claimant’s attending physician, recommended lumbar fusion surgery and did not subsequently retract or change that recommendation.³ (Ex. 4-5). He also discussed the length of the hospital stay and the recovery period for that surgery. (*Id.*) We find that such discussion established claimant’s inability to work at the time of the surgery. Specifically, as of August 3, 2011, Dr. Mohr did not indicate that claimant’s condition *currently* resulted in an inability to work. Instead, he discussed the length of the hospital stay and the recovery period in the context of the recommended fusion surgery, which eventually took place on August 14, 2012. (Exs. 4-5, 16). Therefore, the “date of disability” is August 14, 2012. *Kiser*, 57 Van Natta at 1130. Thus, the relevant time period for which claimant must establish that he was in the work force is the time before August 14, 2012. *Vandeman*, 66 Van Natta at 1763.

In March and May 2011, Drs. Nash and Cartwright, respectively, stated that claimant was “retired.” (Exs. 1-1, 2-1). We do not find those statements persuasive. In this regard, claimant’s August 15, 2011 response to the insurer’s inquiry, as corrected on August 29, 2011, provided that he was currently a substitute teacher employed by a Houston area school district “since 2006-2011.” (Exs. 6, 7). He also provided a “check history report” from that school district listing paychecks issued to him, with the last listed check dated “06/14/11.” (Ex. 7-2). In addition, on August 18, 2012, Ms. Nyman, manager of a Houston, Texas area school district’s “Substitute Office,” reported that claimant “works as a long-term substitute” teacher in that school district. (Ex. 17). In support of this report, Ms. Nyman provided details of claimant’s employment, including his daily wage and anticipated work schedule.

Based on Ms. Nyman’s August 2012 report, we find that claimant was in the work force as of August 14, 2012, the date of disability. We next proceed to address claimant’s entitlement to temporary disability benefits.

³ On July 14, 2011, Dr. Mohr had considered that claimant would be a candidate for lumbar fusion surgery *after* ruling out any neoplastic activity and reviewing his test results. (Ex. 3-4). However, Dr. Mohr first recommended surgery on August 3, 2011, following his review of test results. (Ex. 4-5). *See Loyd E. Garoutte*, 56 Van Natta 416, 424 (2004) (“possibility” of surgery did not establish that the claimant required (which would include a recommendation for) surgery).

There are several requirements for the payment of temporary disability benefits for a claim reopened under ORS 656.278(1)(b). First, the claimant must require (including a physician's recommendation for) hospitalization, inpatient or outpatient surgery, or other curative treatment (treatment that relates to or is used in the cure of disease, tends to heal, restore to health, or to bring about recovery). Second, temporary disability benefits are payable from the date the attending physician authorizes temporary disability related to the hospitalization, surgery, or other curative treatment, which may be the date the requisite treatment is recommended. Third, temporary disability benefits are payable under ORS 656.210, ORS 656.212(2), and ORS 656.262(4). *Butcher v. SAIF*, 247 Or App 684, 689 (2012); *James M. Kleffner*, 57 Van Natta 3071 (2005); *David L. Hernandez*, 56 Van Natta 2441 (2004).

In *Lederer v. Viking Freight, Inc.*, 193 Or App 226, *recons*, 195 Or App 94 (2004), the court held that ORS 656.262(4)(a) obligates the payment of temporary disability benefits when an objectively reasonable carrier would understand contemporaneous medical reports to signify an attending physician's contemporaneous approval excusing an injured worker from work. Because ORS 656.262(4) applies when determining eligibility to temporary disability benefits for claims in Own Motion status, *Lederer* has applicability for determining the adequacy of time loss authorization from an attending physician under ORS 656.278(1)(b). *Hernandez*, 56 Van Natta at 2448. Additionally, because this is an Own Motion claim, the temporary disability authorization must be "for the hospitalization, surgery or other curative treatment." ORS 656.278(1)(b).

Here, claimant seeks temporary disability benefits from August 3, 2011, the date Dr. Mohr recommended lumbar fusion surgery. However, for the reasons addressed below, we find that he is entitled to temporary disability benefits effective August 14, 2012.

Although Dr. Mohr recommended surgery on August 3, 2011, he did not authorize temporary disability on that date. Instead, on August 3, 2011, Dr. Mohr discussed with claimant the length of the hospital stay and the recovery period for the recommended surgery. (Ex. 4-3). Similarly, on August 6, 2012, Dr. Mohr again recommended lumbar fusion surgery, noting that this surgery would "require several days in the hospital and that the overall recovery time for [the] fusion likely [would] be at least 3-4 months but could potentially take up to a year." (Ex. 15-4).

Under these circumstances (and in the absence of contrary evidence), we find that Dr. Mohr's discussion of the length of hospitalization and recovery period for the recommended surgery establishes the attending physician's

contemporaneous approval excusing claimant from work as of the date of surgery; *i.e.*, August 14, 2012. *Lederer*, 193 Or App at 234. This finding is further supported by Dr. Mohr's November 18, 2012 statement that he gave claimant a "note to resume work and advance activities as tolerated," which indicates that he considered his earlier discussion regarding hospitalization and recovery to constitute a release from work. (Ex. 19-3).

In reaching this conclusion, we acknowledge that a recommendation for surgery or surgery in and of itself is not sufficient to satisfy the requirement for payment of temporary disability under ORS 656.278(1)(b). *See Dubray*, 57 Van Natta at 2281; *Laura A. Heisler*, 57 Van Natta 188 (2005). Nevertheless, here, Dr. Mohr's reports extended beyond a surgery recommendation or the surgery itself, to expressly include the length of hospitalization and recovery period for that surgery. Consistent with *Lederer*, we find that an objectively reasonable carrier would understand Dr. Mohr's contemporaneous medical reports to signify an attending physician's contemporaneous approval excusing an injured worker from work as of the date of the surgery. Moreover, Dr. Mohr's discussion of the length of hospitalization and recovery time for the surgery satisfies the requirement of the attending physician's authorization of temporary disability benefits "for the hospitalization, surgery or other curative treatment." ORS 656.278(1)(b).

Accordingly, the insurer is directed to begin paying claimant temporary disability benefits on August 14, 2012, and to continue the payment of such benefits until they can be terminated in accordance with law. Claimant's counsel is awarded an "out-of-compensation" attorney fee equal to 25 percent of any increased compensation created by this order, not to exceed \$1,500, payable by the insurer directly to claimant's attorney. ORS 656.386(2); OAR 438-015-0080(1).

Finally, although we find that claimant is entitled to temporary disability benefits beginning August 14, 2012, we find that, on this record, the insurer had legitimate doubt as to its liability for such benefits. ORS 656.262(11)(a); *International Paper Co. v. Huntley*, 106 Or App 107 (1991); *Jeremy W. Sitzman*, 64 Van Natta 586 (2012). Consequently, penalties and related attorney fees are not warranted.

IT IS SO ORDERED.

Entered at Salem, Oregon on October 14, 2016

Member Johnson dissenting in part.

I agree with the majority that, on this record, penalties and related attorney fees are not warranted. However, because I disagree with the majority's evaluation of the work force issue, I respectfully dissent. For the following reasons, I find that claimant was not in the work force at the date of disability; therefore, he is not entitled to temporary disability benefits.

I agree with the majority's reasoning and conclusion that claimant's "date of disability" is August 14, 2012. Furthermore, the relevant time period for which claimant must establish he was in the work force is the time prior to the "date of disability," when his condition worsened resulting in an inability to work and requiring requisite medical treatment under ORS 656.278(1)(a). *See generally Wausau Ins. Companies v. Morris*, 103 Or App 270 (1990); *SAIF v. Blakely*, 160 Or App 242 (1999); *Benjamin A. Vandeman*, 66 Van Natta 1762, 1763 (2014). Therefore, claimant must establish that he was in the work force before August 14, 2012.

For the reasons explained by the majority, I find unpersuasive the March and May 2011 statements from Drs. Nash and Cartwright that claimant was "retired." (Exs. 1-1, 2-1, 6, 7).

On August 18, 2012, Ms. Nyman, manager of a Houston, Texas area school district's "Substitute Office," reported that claimant "works as a long-term substitute" teacher in that school district. (Ex. 17). However, on October 14, 2015, Ms. Bates, assistant director of a Houston, Texas area school district's "Substitute Office," reported that claimant "was employed" as a substitute teacher with that school district. (Ex. 40). She also reported that claimant had been hired on October 1, 2006, had worked on an "as needed" basis, and that he had left the position as a substitute teacher in good standing with the school district. (*Id.*) Finally, she reported that his "last paid date was 10/24/2011." (*Id.*)

Reading these school district documents as a whole, I find that claimant last worked as a substitute teacher on October 24, 2011. Thus, based on this record, I am persuaded that he was in the work force until October 24, 2011. Nevertheless, the record does not establish that he was in the work before the time of disability; *i.e.*, August 14, 2012. I reason as follows.

Because claimant was not working as of August 14, 2012, to establish that he was in the work force, he must either be willing to work and making reasonable efforts to obtain employment, or willing to work but not making reasonable efforts to obtain employment because a work-related injury has made such efforts futile. *Dawkins v. Pacific Motor Trucking*, 308 Or 254, 258 (1989).

Claimant's assertions that he had not withdrawn from the work force support his willingness to work. (Ex. 41). Nonetheless, the record does not establish that, in the time period before August 14, 2012, he was making reasonable efforts to obtain employment nor does the record support his contention that his compensable condition made it futile for him to work or look for work since he last worked on October 24, 2011. *See Cherry L. Donaldson*, 65 Van Natta 1558, 1560 (2013) (the claimant was not in the work force after six week gap following her most recent job search efforts and her "date of disability"); *Joanne M. Abshire*, 63 Van Natta 549 (2011) (the claimant was not in the work force where there was an eight week gap between her departure from work and her "date of disability"); *compare Mike J. Perkins*, 62 Van Natta 2005 (2010) (approximately four week period between last employment and "date of disability" insufficient to establish that the claimant had withdrawn from the work force); *Jennifer L. Williams*, 61 Van Natta 2161 (2009) (same - approximately three week period).

Here, there was almost a 10-month gap between claimant's October 24, 2011 departure from work and his August 14, 2012 disability date. Under such circumstances, I am not persuaded that he was in the work force before his August 14, 2012 date of disability. *See Dwayne L. Minner*, 61 Van Natta 1919, *recons*, 61 Van Natta 2544 (2009) (12-week gap between last employment and subsequent worsening not so brief so as to relieve the claimant of the burden of proving that he remained in the work force at "date of disability").

Furthermore, whether it would be futile for claimant to seek work is not a subjective standard; rather it is an objective standard determined from the record as a whole, especially considering persuasive medical evidence regarding his ability to work and/or seek work. *Seferino C. Hernandez*, 58 Van Natta 821, 822 (2006); *Jackson R. Shrum*, 51 Van Natta 1062, 1063 (1999). In other words, the question is whether the compensable injury made it futile for claimant to make reasonable efforts to seek work at the relevant time, not whether he believes it to be futile.

The record does not demonstrate that it would have been futile for claimant to work before the time of disability, *i.e.*, August 14, 2012. Specifically, although Dr. Mohr found that claimant could not work as of August 14, 2012 (the date of surgery), he did not opine that it was futile for claimant to work *before* August 14, 2012, the date of disability.

Consequently, I find that the record does not establish that claimant was in the “work force” as of the date of disability. Accordingly, he is not entitled to temporary disability benefits. Because the majority finds otherwise, I respectfully dissent.