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In the Matter of the Compensation of  
**ANA J. JOSÉ, Claimant**  
WCB Case Nos. 15-03076, 15-03189  
ORDER ON REVIEW  
Dodge and Associates, Claimant Attorneys  
SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Curey and Weddell.

The SAIF Corporation requests review of that portion of Administrative Law Judge (ALJ) Crummé's order that set aside its "noncooperation" denial of claimant's injury claim. On review, the issue is claim processing.

We adopt and affirm the ALJ's order with the following supplementation.<sup>1</sup>

In setting aside SAIF's "noncooperation" denial, the ALJ reasoned that SAIF had been using an incorrect phone number for claimant, even though she had listed her correct phone number on several forms submitted to SAIF. The ALJ also found that SAIF's (and the Workers' Compensation Division's (WCD's)) written communications to claimant were in English, despite SAIF's knowledge that claimant's preferred language was Spanish. Thus, the ALJ concluded that claimant's failure to cooperate in SAIF's claim investigation was for reasons beyond her control. *See* ORS 656.262(15); *Hopper v. SAIF*, 265 Or App 465, 469 (2014).

On review, SAIF asserts that claimant's failure to fully cooperate in its claim investigation was not for reasons beyond her control. According to SAIF, claimant received several letters from SAIF (and WCD) from which she understood that she needed to contact SAIF, but that she failed to do so. SAIF further contends that claimant's testimony that she had called its claim adjuster four or five times and left voice messages was inconsistent with the adjuster's testimony that she had not received any such messages. Moreover, SAIF disagreed with the ALJ's reasoning that it was likely that SAIF's claim adjuster was using an incorrect "971" phone number for claimant, because claimant admitted that she had received a message from SAIF in June or July at her correct "971" number.

After conducting our review, we agree with the ALJ's conclusion that claimant's failure to cooperate fully was for reasons beyond her control. We reason as follows.

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<sup>1</sup> We do not adopt the ALJ's last sentence on Page 7 and continuing onto Page 8.

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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 shall fully cooperate with personal and telephonic interviews and other formal or informal information gathering techniques.” (*Id.*) 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).<sup>2</sup>

To prevail against a “non-cooperation” denial, a claimant must prove one of the following: (1) that she “fully and completely cooperated with the investigation”; (2) that she “failed to cooperate for reasons beyond [her] control”; or (3) that the carrier’s “investigative demands were unreasonable.” *See* ORS 656.262(15);<sup>3</sup> *Hopper*, 265 Or App at 469; *Stephen D. Schmidt*, 66 Van Natta 2121, 2124 (2014).

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<sup>2</sup> ORS 656.262(15) provides in relevant part:

“If the director finds that a worker fails to reasonably cooperate with an investigation involving an initial claim to establish a compensable injury \* \* \*, the director shall suspend all or part of the payment of compensation after notice to the worker. If the worker does not cooperate for an additional 30 days after the notice, the insurer or self-insured employer may deny the claim because of the worker’s failure to cooperate.”

<sup>3</sup> ORS 656.262(15) further provides in relevant part:

“After such a denial, the worker shall not be granted a hearing or other proceeding under this chapter on the merits of the claim unless the worker first requests and establishes at an expedited hearing under ORS 656.291 that the worker fully and completely cooperated with the investigation, that the worker failed to cooperate for reasons beyond the worker’s control or that the investigative demands were unreasonable. If the Administrative Law Judge finds that the worker has not fully

cooperated, the Administrative Law Judge shall affirm the denial, and the worker’s claim for injury shall remain denied. If the Administrative Law Judge finds that the worker has cooperated, or that the investigative demands were unreasonable, the Administrative Law Judge shall set aside the denial, order the reinstatement of interim compensation if appropriate and remand the claim to the insurer or self-insured employer to accept or deny the claim.”

Here, the record shows that, more likely than not, SAIF had an incorrect telephone number for claimant in its system and, as a result, its adjuster had been unable to reach her by telephone. (*Compare* Exs. 1 and 2 with Ex. 6).<sup>4</sup> In so finding, we note that when SAIF completed the contact information for claimant on its questionnaire it recorded an inaccurate phone number beginning with a “971” prefix. (Ex. 7B-2). Also, although SAIF and WCD sent several letters to claimant, those letters were all in English, even though claimant had completed her portions of the 827 form in Spanish, which she indicated was her preferred language.<sup>5</sup> (Ex. 2). Moreover, her 801 form was entirely in Spanish. (Ex. 6).

Furthermore, claimant testified that she called SAIF’s claim adjuster four or five times before May 28, 2015, and left messages.<sup>6</sup> (Tr. 17). Claimant also stated that she called the adjuster on May 28, 2015, and left a voice message with her new phone number. (*Id.*) The adjuster confirmed that she received claimant’s voice message and returned the call that same day.<sup>7</sup> (Tr. 33). When claimant did not answer, the adjuster left her a voice message again indicating that SAIF needed to get her statement. (Tr. 14-16). Claimant acknowledged receiving the adjuster’s voice message, although it may have been sometime after May 28, 2015. (Tr. 18-19). She testified that she returned the call, but there was no answer.

(Tr. 19). She did not remember exactly when she returned the phone call and did not say whether she had left a message. (*Id.*) SAIF issued its “noncooperation” denial on June 3, 2015. (Ex. 21).

Like the ALJ, our review of the record establishes that it is more probable than not that the adjuster was initially attempting to contact claimant using an incorrect “971” phone number from the 801 form. Although claimant had completed other claim forms with her correct phone number, SAIF apparently did not notice the different phone numbers for claimant listed on the forms.

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<sup>4</sup> Claimant’s incident report (Ex. 1) and her 827 form (Ex. 2) have her correct “971” number. However, claimant’s 801 form (Ex. 6) also has a “971” phone number, but it is inaccurate and different from the “971” number on the earlier forms.

<sup>5</sup> Claimant testified that she does not understand English very well. (Tr. 25).

<sup>6</sup> Claimant also testified that, when she called from her “971” phone, the person on the other end would hang up on her, which made her think “they” did not want to talk with her (Tr. 16), and that when she called from her “971” phone, she was not able to connect with SAIF. (Tr. 17).

<sup>7</sup> The claim adjuster testified that she could not remember if she left voice messages for claimant in English or Spanish. (Tr. 32).

In this respect, the adjuster's attempts to contact claimant at an incorrect phone number is analogous to the mailing of a denial letter to an incorrect address when the carrier had a correct address previously provided by the claimant or had been notified of a correct address. *See Michael S. Belgarde*, 66 Van Natta 1424, 1428 (2014) (where the carrier's denial was not mailed to the address previously provided by the claimant to the carrier it was not mailed "to the claimant," as contemplated by ORS 656.319(1), and did not trigger the 60-day appeal period); *cf. Christopher J. Snyder*, 62 Van Natta 1514 (2010), *aff'd on other grounds*, 246 Or App 130 (2011) (when the denial was mailed to an incorrect address and the claimant had not provided the carrier with the correct address, the claimant did not establish good cause for an untimely filed request for hearing from the denial).<sup>8</sup> Under such circumstances, we conclude that claimant's failure to respond to SAIF's phone calls and voice messages was for reasons beyond her control.<sup>9</sup>

We acknowledge that SAIF also sent claimant several letters advising of her obligations to contact the adjuster and cooperate with SAIF's investigation. (Exs. 8, 9, 10, 11, 14, 19). However, none of SAIF's letters were either written in Spanish, claimant's preferred language, or contained a "Spanish" notice alerting claimant to the importance of the letter.<sup>10</sup> Yet, in her 827 form (which was dated March 18, 2015), claimant completed her portions in Spanish, expressly specifying that Spanish was her preferred language. (Ex. 2). Moreover, claimant's 801 form was completed entirely in Spanish. (Ex. 6). Notwithstanding these notices, SAIF's written communications to claimant neither included a Spanish translation nor a Spanish notice alerting claimant of the letter's importance and advising her to refer the letter to an English speaker. (Exs. 8, 9, 10, 11, 14, 19).

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<sup>8</sup> Our decision in *Jamie Conness*, 68 Van Natta 416 (2016), upholding a non-cooperation denial is factually distinguishable. In *Conness*, the claimant had not advised the carrier of her change of address and she had received the carrier's mail sent to her former address. *Id.* at 417-18. Here claimant *did* notify SAIF of her correct phone number.

<sup>9</sup> Although claimant admitted that she had received a voice message from SAIF at her "971" phone number on July 10, 2015 (Tr. 16), the record does not persuasively establish that the adjuster had been using claimant's correct phone number in April and May of 2015. Moreover, the adjuster did not attempt to contact claimant through her employer, even though claimant was working during this time. (Tr. 10, 37). In contrast, claimant had asked for help from the employer's human resources department, but was told only that she needed to contact SAIF, which she had already been trying to do without success. (Tr. 21-22).

<sup>10</sup> WCD's letters began with a short notice in Spanish listing a contact number for assistance in Spanish. (Exs. 17, 18).

In support of its position, SAIF relies on *Lisa R. Ensworth*, 58 Van Natta 2330, 2331-32 (2006). However, the facts of that case are more supportive of claimant's position. In *Ensworth*, the claimant was in her manager's office on the prearranged date and time of a mandatory interview. *Id.* at 2330. She waited for the investigator to call for four hours. *Id.* at 2331. During that time, she attempted to call the investigator five times without success. (*Id.*) Furthermore, the claimant's testimony was corroborated by her manager. (*Id.*) Under those circumstances, we found that the claimant had made every effort to comply with the carrier's requests, and that the investigator's failure to receive messages and the limitations in the carrier's telephone system were circumstances beyond her control. *Id.* at 2332.

Similarly, here, as previously discussed, until at least May 28, 2015, SAIF's adjuster most likely was using an incorrect telephone number for claimant, even though claimant had provided the correct phone number on several claim forms. The adjuster also could not recall if she left voice messages in Spanish or English. (Tr. 32). Moreover, the written communications to claimant from SAIF were in English, even though claimant had advised SAIF that her preferred language was Spanish. And, claimant said she had called the adjuster on four or five occasions and left messages, but received no response. (Tr. 17).

Under such circumstances, consistent with the *Ensworth* rationale, we conclude that claimant's failure to cooperate was for reasons beyond her control. *See* ORS 656.262(15); *Hopper*, 265 Or App at 471; *Ensworth*, 58 Van Natta at 2331. Consequently, as supplemented above, we agree with the ALJ's decision setting aside SAIF's "noncooperation" denial. Accordingly, we affirm.

Claimant's attorney is entitled to an assessed fee for services on review. ORS 656.382(2). After considering the factors set forth in OAR 438-015-0010(4) and applying them to this case, we find that a reasonable fee for claimant's attorney's services on review is \$5,000, payable by SAIF. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by claimant's respondent's brief), the complexity of the issue, the value of the interest involved, and the risk that claimant's counsel might go uncompensated.

Finally, claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the denial, to be paid by SAIF. *See* ORS 656.386(2); OAR 438-015-0019; *Gary Gettman*, 60 Van Natta 2862 (2008). The procedure for recovering this award, if any, is prescribed in OAR 438-015-0019(3).

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ORDER

The ALJ's order dated October 19, 2015 is affirmed. For services on review, claimant's attorney is awarded an assessed fee of \$5,000, payable by SAIF. Claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the denial, to be paid by SAIF.

Entered at Salem, Oregon on April 29, 2016