
In the Matter of the Compensation of
DUSTIN E. HALL, Claimant
WCB Case Nos. 15-02765, 15-01900
ORDER ON REVIEW
Hollander & Lebenbaum et al, Claimant Attorneys
SAIF Legal, Defense Attorneys

Reviewing Panel: Members Johnson and Weddell.

Claimant requests review of that portion of Administrative Law Judge (ALJ) Lipton's order that upheld the SAIF Corporation's denial of claimant's injury claim for a hernia and lumbosacral strain. In its respondent's brief, SAIF contests those portions of the ALJ's order that: (1) awarded interim compensation; and (2) assessed penalties and attorney fees for allegedly unreasonable claim processing. On review, the issues are compensability, interim compensation, penalties, and attorney fees. We affirm.

FINDINGS OF FACT

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

Claimant, a welder/fabricator, began working for the employer in October 2013. (Tr. 8). His April 2014 employee evaluation stated that work days had been missed due to illness or "family medical" matters.¹ (Ex. E-2, -3). His November 2014 employee evaluation stated, "must always [be] on time at beginning of shift. Over the year [there] has been much time off, due to other priorities." (Ex. F-2).

On January 13, 2015, the employer gave claimant a written warning notice for "no call no show for scheduled shift" on January 9, 2015. (Ex. 3). The notice advised claimant that further infractions would result in a second warning. (*Id.*)

¹ The employee handbook stated,

"A2 Fabrication, Inc. views attendance as one of the most important facets of your job performance review. All unapproved absences are noted in the employee's personnel file. Excessive absences, including for sick leave, will result in disciplinary action, up to and including termination. If you are sick it is your responsibility to call in prior to the start of your shift, and you are required to do this for each individual day you are out." (Ex. 2-1).

On February 25, 2015, claimant developed right hip/groin pain. (Tr. 14). He did not identify a specific injury, but he and a coworker had lifted and moved 24 passenger handrails for a light rail station that day. (Tr. 12, 14). The following day, claimant told his employer that he was unable to finish the job because he was “pretty tore up from the day prior of all that lifting.”² (Tr. 15).

On March 12 and 13, 2015, claimant missed work because his child was sick. (Ex. G-23; Tr. 19). On March 16, 2015, the employer told claimant that his employment was being terminated due to his excessive absences. (Tr. 18, 48).

On March 24, 2015, claimant saw Dr. Kane, a physiatrist, for evaluation of low back and right inguinal pain that claimant attributed to the work activity on February 25, 2015. Dr. Kane diagnosed a lumbosacral strain and a possible right inguinal hernia. (Ex. 4-2). Claimant signed an 827 form, describing the work activity on February 25, 2015 and reporting pain in his lumbar spine. (Ex. 6).

On March 31, 2015, Dr. Kane approved a “modified-welder” job description for claimant. (Ex. 8). The employer documented that the job would have been offered to claimant, had he not been terminated for violation of work rules or other disciplinary reasons. (Ex. 7).

SAIF paid temporary disability benefits for March 30, 2015. (Ex. 14). Claimant requested a hearing, seeking procedural temporary disability benefits from April 1, 2015, as well as penalties and attorney fees. (Hearing File).

An April 7, 2015 right groin ultrasound showed a direct hernia, an indirect hernia, and a possible third hernia. (Ex. 11-1).

On April 8, 2015, claimant signed a second 827 form, initiating a claim for a right inguinal hernia. (Ex. 12).

On April 24, 2015, Dr. Kane opined that claimant’s work activities probably caused the lumbosacral strain and suspected right inguinal hernia. (Ex. 19-1). He reasoned that heavy repetitive lifting/maneuvering frequently precipitates those conditions. (*Id.*)

² Claimant testified that, after February 25, 2015, he performed only modified work. (Tr. 16). In contrast, the employer testified that claimant worked “light-duty” for one day and then, saying that his back was better, worked regular duty without any limitation on his work activities. (Tr. 44).

A May 2, 2015 lumbar MRI showed L5-S1 retrolisthesis and central canal and foraminal stenoses (moderately severe at L5-S1), due to disc and facet degeneration and congenital pedicle shortening. (Ex. 20).

On May 26, 2015, Dr. Toal, an orthopedic surgeon, performed an examination at SAIF's request. Dr. Toal concluded that claimant had severe preexisting lumbosacral spondylosis, which had been diagnosed and treated before the injury. (Ex. 23A-10). Dr. Toal also opined that the preexisting spondylosis combined with the work event to cause and prolong disability/need for treatment and was the major cause of the need for treatment when claimant first sought care after the work incident. (Ex. 23A-10, 11).

Also, on May 26, 2015, Dr. Blumberg, a surgeon, performed an examination at SAIF's request. Dr. Blumberg assessed a small direct inguinal defect without herniation. (Ex. 23-3). He opined that the work activities on February 25, 2015 did not contribute to claimant's right groin problems. (Ex. 23-4).

On May 29, 2015, SAIF issued a denial, asserting that claimant's back and groin conditions were not compensably related to his employment. (Ex. 24). Claimant requested a hearing.

In a July 16, 2015 sworn statement, Dr. Kane opined that the lumbosacral strain was a "stand-alone process," rather than a combined condition. (Ex. 25-9).

On July 20, 2015, Dr. Toal reviewed medical records showing that claimant had treatment for low back pain in 2004 and 2006 and a lumbar x-ray in 2006 showing disc space narrowing at L5-S1. (Ex. 27-12). Dr. Toal considered this to be additional evidence of claimant's preexisting lumbar spondylosis. (*Id.*)

At the scheduled July 21, 2015 hearing, the ALJ excluded the records that Dr. Toal had reviewed regarding claimant's prior back problems, which SAIF had submitted as proposed exhibits.³ (Tr. 3). The ALJ allowed SAIF's motion for a continuance to obtain rebuttal evidence on its "combined condition" defense. (Tr. 1, 5).

Claimant testified that he was told that he was being discharged because of his attendance, but denied that he had been disciplined or warned for taking too much sick time. (Tr. 18).

³ SAIF acknowledged that it had not timely provided discovery. (Tr. 3).

Claimant's supervisor, Mr. LeMaster, testified that claimant's absenteeism became excessive and was affecting the shop. (Tr. 32). He stated that he talked to claimant about missed work, but, except for the "no-call no-show" on January 9, 2015, he did not issue a written warning notice. (Tr. 31, 32). He acknowledged that, except for that one instance, claimant always sent a text message when his illness or his child's illness resulted in an absence. (Tr. 34).

Ms. Schmidt, the company founder, testified that claimant's employment was terminated because of his repeated absences. (Tr. 48). She stated that the employer addressed claimant's absenteeism by talking to him rather than undertaking a formal disciplinary process. (*Id.*)

In a "post-hearing" report, Dr. Toal opined that claimant's preexisting sacroiliac arthritis was the likely explanation of his right hip/groin complaints.⁴ (Ex. 29-5). He also maintained that, to the extent that the work activity made any contribution to claimant's low back treatment, it would have combined with preexisting lumbar spine and right sacroiliac joint arthritis, but was never the major cause of the need for treatment of the combined condition. (Ex. 29-7).

CONCLUSIONS OF LAW AND OPINION

The ALJ upheld SAIF's hernia denial, determining that the evidence did not establish the existence of a hernia. Regarding claimant's low back condition, the ALJ concluded that, even if claimant had an "otherwise compensable injury," it was not the major contributing cause of the combined condition. The ALJ also found that claimant had not been terminated for a work rule violation or other disciplinary reason. Accordingly, the ALJ awarded temporary disability benefits (interim compensation) and assessed a penalty and penalty-related attorney fee.

On review, claimant challenges the ALJ's evaluation of the medical evidence, asserting that Dr. Kane's opinion is more persuasive than those of Dr. Toal (who considered the excluded records) and Dr. Blumberg. In its respondent's brief, SAIF contends that claimant was discharged for violation of work rules. For the following reasons, we affirm the ALJ's order.

⁴ Dr. Toal described the disease process in the sacroiliac joint as involving inflammation in the joint, elicited by destruction of tissues due to metabolic and constitutional causes, resulting in breakdown, degeneration, or structural change in the joint. (Ex. 29-4).

Compensability

To establish the compensability of his injury claim, claimant has the initial burden to prove that his work injury was a material contributing cause of the disability or need for treatment related to his low back condition and right inguinal hernia. ORS 656.005(7)(a); ORS 656.266(1); *Albany Gen. Hosp. v. Gasperino*, 113 Or App 411, 415 (1992). Claimant must also prove the existence of the claimed conditions.⁵ See *Jaymin Nowland*, 63 Van Natta 1377, 1378 n 1 (2011) (in an initial injury claim, where a claimant has expressly requested acceptance of a particular diagnosis and condition, which the carrier has denied, the claimant must establish that the claimed condition exists).

If claimant carries his initial burden, and the “otherwise compensable injury” combined with a “preexisting condition” to cause or prolong disability or a need for treatment, SAIF must prove that the otherwise compensable injury was not the major contributing cause of the disability or need for treatment of the combined condition. ORS 656.005(7)(a)(B); ORS 656.266(2)(a); *SAIF v. Kollias*, 233 Or App 499, 505 (2010); *Jack G. Scoggins*, 56 Van Natta 2534, 2535 (2004). The “otherwise compensable injury” is the work-related injury incident. See *Brown v. SAIF*, 262 Or App 640 (2014), *rev allowed*, 356 Or 397 (2014). For injury claims, a “preexisting condition” is an injury, disease, or condition that contributes to disability or need for treatment, which has been diagnosed or treated before the injury or is arthritis or an arthritic condition. ORS 656.005(24)(a).

Because of the conflicting medical opinions, expert medical opinion must be used to resolve this compensability dispute. *Barnett v. SAIF*, 122 Or App 279 (1993). Where the medical evidence is divided, we give more weight to those medical opinions that are well reasoned and based on complete and accurate information. *Somers v. SAIF*, 77 Or App 259, 263 (1986).

Here, Dr. Kane considered the lumbosacral strain to be a “stand-alone process” (rather than a combined condition) because he did not “see much in the way of midline pain[,]” which is what he would expect if the “spinal condition were influenced by the work injury.” (Ex. 25-9).

⁵ At hearing, claimant identified the compensability issue as SAIF’s denial of “his hernia condition and lumbosacral strain.” (Tr. 5).

Dr. Toal specifically disagreed, noting that when claimant first treated with Dr. Kane, he reported pain in the lumbar spine and Dr. Kane documented tenderness in the lumbar spine. (Ex. 29-6). Dr. Toal concluded that, to the extent that the work activities on February 25, 2015 made any contribution to claimant's low back treatment, the work activities would have combined with preexisting spondylosis and would never have been the major cause of the need for treatment of the combined low back condition. (Ex. 29-7).

Claimant argues that Dr. Toal considered records of prior low back complaints, which were ultimately excluded. Yet, on May 26, 2015, before Dr. Toal considered those records, claimant told Dr. Toal that he was seen in an emergency room for similar symptoms in October 2014. (Exs. 23A-2). Specifically, when Dr. Toal asked claimant to compare his low back complaints in 2014 to his low back pain after the work activities on February 25, 2015, claimant told him they were the same. (Ex. 27-2). On May 26, 2015, Dr. Toal also reviewed claimant's October 19, 2014 lumbar x-rays and radiologist's report. (Ex. 23A-3, -6). Based on that information, Dr. Toal determined that severe preexisting lumbosacral spondylosis had been diagnosed and treated before the injury. (Ex. 23A-10). He also concluded that there was a combined condition and the severe preexisting pathology was the major cause of the need for treatment. (Ex. 23A-11). Because of claimant's delay in seeking medical care after the work incident, and the recent previous care for non-work related low back pain, Dr. Toal questioned whether the February 25, 2015 work exposure was even a material cause of claimant's need for treatment. (Ex. 23A-10).

Dr. Toal's subsequent review of the excluded documents reinforced, but did not change, his opinion that claimant's preexisting low back condition was diagnosed and treated before the work event. (Ex. 27-2, -6). Therefore, we do not find Dr. Toal's opinion to be less persuasive because he reviewed documents that were later excluded.

Additionally, Dr. Toal's observations are consistent with Dr. Kane's March 24, 2015 chart note, which documented claimant's first "post-injury" treatment for lumbar spine pain and tenderness. (Exs. 4-1, -2, 29-6). Under these circumstances, we agree with the ALJ's conclusion that the opinion of Dr. Toal was more persuasive than that of Dr. Kane, who did not consider claimant's preexisting condition or October 2014 diagnosis or treatment.

Accordingly, we adopt the ALJ's conclusion that, even if there was an "otherwise compensable injury," Dr. Toal's opinion persuasively establishes that the otherwise compensable injury combined with preexisting spondylosis and was not the major contributing cause of the disability/need for treatment of the combined condition.

Next, we address the hernia condition. For the following reasons, we conclude that even if there was a hernia, the medical evidence does not persuasively establish that the work activity on February 25, 2015 was a material contributing cause of the disability/need for treatment of the hernia.

Dr. Kane opined that claimant's heavy lifting activities on February 25, 2015, probably caused the "suspected" right inguinal hernia. (Ex. 19-1). He reasoned that heavy repetitive lifting/maneuvering is frequently a precipitant for abdominal wall injuries/hernias. (*Id.*) He endorsed that mechanism of injury, reasoning that welding/fabrication is physically demanding work and there was no alternate explanation. (Ex. 25-14). Yet, when he was asked about claimant's delay in seeking treatment, Dr. Kane responded that he did not know if claimant sought treatment elsewhere and, "[i]f not, that would certainly merit some explanation." (Ex. 25-17, -18). He further stated that this was a "legitimate question" and that he did not "like a latency of four weeks in assigning cause." (Ex. 25-18). He suggested reviewing claimant's ability to continue doing the job or looking for other reports or complaints that might corroborate the claim that the symptoms began with the alleged injury. (*Id.*)

In fact, claimant did not seek treatment for about four weeks. Furthermore, the record does not show that his ability to work after February 25, 2015 was limited by his hernia conditions or other reports or complaints that would corroborate a hernia. Under these circumstances, we do not find Dr. Kane's tentative opinion persuasive.

Moreover, in concluding that claimant did not have a hernia related to his work activity on February 25, 2015, Dr. Blumberg reasoned that a traumatic hernia would be a memorable event that would produce immediate pain, swelling, and discomfort (*i.e.*, burning and aching in the groin), which did not occur. (Ex. 26-11). Rather, he surmised that claimant's groin pain "was referred from the back problem, particularly in light of fact the examining physician *one month later* found no hernia on examination." (Emphasis in original). (Ex. 26-12).

Dr. Kane did not respond to these points. Therefore, we find his opinion unpersuasive for this reason as well. *See Janet Benedict*, 59 Van Natta 2406, 2409 (2007), *aff'd without opinion*, 227 Or App 289 (2009) (medical opinion unpersuasive when it did not address contrary opinion). Accordingly, in the absence of a persuasive opinion concerning the claimed hernia condition, we conclude that claimant has not carried his burden of proving the compensability of that condition.

In sum, for the foregoing reasons, we affirm the ALJ's order upholding SAIF's denial of claimant's low back and groin conditions.

Interim Compensation

Applying ORS 656.325(5)(b),⁶ the ALJ determined that claimant had not been terminated for violation of a work rule. Accordingly, the ALJ awarded temporary disability benefits (interim compensation), as well as a penalty and a penalty-related attorney fee.

On review, SAIF contends that it was authorized to convert temporary total disability benefits (TTD) to temporary partial disability benefits (TPD) under ORS 656.325(5)(b) because claimant was terminated for violation of a work rule. For the following reasons, we disagree.

Employment termination for "violation of work rules or other disciplinary reasons" is a condition precedent to the application of ORS 656.325(5)(b). *See Robert P. Krise*, 54 Van Natta 911, 915 (2002), *aff'd on other grounds*, *SAIF v. Krise*, 196 Or App 608 (2004) (based on a factual finding that the claimant had not violated a work rule, the carrier was not authorized under ORS 656.325(5)(b) to terminate TTD benefits).

⁶ ORS 656.325(5)(b) provides:

"If the worker has been terminated for violation of work rules or other disciplinary reasons, the insurer or self-insured employer shall cease payments pursuant to ORS 656.210 and commence payments pursuant to ORS 656.212 when the attending physician or nurse practitioner authorized to provide compensable medical services under ORS 656.245 approves employment in a modified job that would have been offered to the worker if the worker had remained employed, provided that the employer has a written policy of offering modified work to injured workers."

Although we are not authorized to resolve the propriety of a termination,⁷ we are required by ORS 656.325(5)(b) to examine the factual reasons for the termination to determine whether the claimant was, in fact, terminated for a work rule violation or other disciplinary reason. *Id.*; *Vicki L. Danforth*, 50 Van Natta 2168, 2170 (1998) (interim compensation awarded where the claimant was not terminated for violation of a work rule or other disciplinary reasons).

Here, the record does not support a conclusion that claimant was terminated for violation of the employer's work rules. We reason as follows.

The employer's attendance policy stated that excessive absences would result in disciplinary action, up to and including termination. (Ex. 2). Unapproved absences would be noted in the employee's personnel file. (*Id.*) Sick employees were required to call the employer before the start of a scheduled shift. (*Id.*) Neither "excessive absences" nor "unapproved absences" were defined.

The record shows that claimant missed work when he was sick and when his child was sick. On those days, he usually sent his supervisor a text message. (Tr. 34). On the one occasion that he had not done so, the employer issued a written warning notice for "no call no show for scheduled shift." (Ex. 3). The warning notice directed claimant to "be on time and at work for all scheduled shifts[.] [I]f sick or late 'call' 30 minutes before start of shift." (*Id.*) The notice, (which provided for a first warning, second warning, and final warning), checked the box for "first warning," and warned that the consequences of further infractions would be a second warning. (*Id.*)

The record shows that claimant "called in sick" on February 5, 2015 and left work early due to illness on February 27, 2015. (Ex. G-20, -21). On March 12 and 13, 2015, claimant missed work because his child was sick. (Ex. G-23). Claimant's employment was terminated on March 16, 2015.

Ms. Schmidt testified that the reason for the termination was repeated absences. (Tr. 48). Yet, the record does not show that the employer considered claimant's absences after January 9, 2015 to be "further infractions" or that it

⁷ Issues concerning whether an employer's action in terminating a claimant's employment was "unreasonable, unjustified, discriminatory or unlawful" are not within the purview of the workers' compensation law. *See Kenneth A. Meyer*, 50 Van Natta 2302, 2304 (1998). Rather, unlawful employment practices are governed by other laws, including the provisions of ORS Chapter 659A and the procedures set forth in the administrative rules promulgated by the Bureau of Labor and Industries.

issued the “second warning” described in its written “first warning” notice. In fact, Ms. Schmidt adamantly denied that staying home with a sick child was an “unauthorized absence” pursuant to the employer’s work rules. (Tr. 47). Moreover, there was no explanation of why the employer terminated claimant’s employment, in lieu of the second or final warning notice.

After reviewing the employer’s policies and testimony, we are unable to determine that claimant was terminated for violation of work rules or other disciplinary reason. Accordingly, because the condition precedent to the application of ORS 656.325(5)(b) was not satisfied, SAIF was not authorized to convert TTD to TPD under ORS 656.325(5)(b). See *Jonna L. Niles*, 65 Van Natta 1502 (2013) (the record did not establish violation of a work rule where the employer’s attendance policy required “regular” and “acceptable” attendance, but did not define those terms, and the employer told the claimant not to come to work when illness prevented her from performing work activity); *Danforth*, 50 Van Natta at 2170 (where the record did not explain why the claimant’s absences due to illness were “unauthorized absences” pursuant to the employer’s work rules, the claimant was awarded TTD benefits). Therefore, claimant is entitled to TTD benefits (*i.e.*, interim compensation).

We turn to the penalty and penalty-related attorney fee awards. For the following reasons, we affirm the ALJ’s order.⁸

Under ORS 656.262(11)(a), if a carrier unreasonably delays or unreasonably refuses to pay compensation, the carrier shall be liable for an additional amount up to 25 percent of the amount “then due.” The standard for determining an unreasonable resistance to the payment of compensation is whether, from a legal standpoint, the carrier had a legitimate doubt about its liability. *Int’l Paper Co. v. Huntley*, 106 Or App 107, 110 (1991). “Unreasonableness” and “legitimate doubt” are to be considered in light of all the evidence available to the carrier. *Brown v. Argonaut Ins.*, 93 Or App 588, 591 (1988).

We have found that the statutory prerequisite for ceasing TTD benefits under ORS 656.325(5)(b) was not present. Because the record does not identify any other basis for terminating TTD benefits, SAIF unreasonably resisted the payment of compensation. See *Ricky J. Morin*, 68 Van Natta 1067, (2016)

⁸ Because claimant did not respond to SAIF’s arguments regarding the interim compensation, penalty, and attorney fee issues, no attorney fee for services on review is warranted. See *Shirley M. Brown*, 40 Van Natta 879 (1988).

(a carrier's conversion of TTD to TPD benefits was unreasonable where the statutory prerequisite was not present); *Peggy J. Baker*, 49 Van Natta 40 (1995) (penalty for a carrier's unreasonable failure to pay TTD benefits was assessed because the carrier was legally imputed with the employer's knowledge and conduct regarding the reasons for the claimant's employment termination). Therefore, we affirm the penalty and penalty-related attorney fee awarded by the ALJ's order.

ORDER

The ALJ's order dated December 4, 2015 is affirmed.

Entered at Salem, Oregon on September 12, 2016