
In the Matter of the Compensation of
GERARDO T. RAMIREZ, Claimant
WCB Case No. 02-00046
ORDER ON REVIEW
Raymond Bradley, Claimant Attorneys
Alice M Bartelt, SAIF Legal, Defense Attorneys

Reviewing Panel: Members Lowell, Phillips Polich, and Bock. Member Phillips Polich chose not to sign the order.

The SAIF Corporation requests review of Administrative Law Judge (ALJ) Peterson's order that: (1) found that claimant had established "good cause" for his untimely hearing request regarding SAIF's denial; and (2) set aside SAIF's "noncooperation" denial. In its reply brief, SAIF moves to strike claimant's brief as untimely filed.¹ On review, the issues are motion to strike, timeliness of the hearing request, and the propriety of the denial. We deny the motion to strike and reverse.

FINDINGS OF FACT

On July 11, 2001, claimant filed a claim for an injury to his right ankle that occurred on July 10, 2001. He began receiving treatment from Dr. Privitera, a chiropractor, on July 13, 2001.

Five days after his injury, claimant moved to a different address. Although claimant reported his change of address to the Department of Motor Vehicles, he did not advise the U.S. Postal Service or SAIF of his address change. (Ex. 14-4). Claimant has a 3rd grade education and lived most of his life in rural Mexico before moving to Oregon. He is unable to read, write or speak English.

On July 27, 2001, SAIF wrote to claimant requesting that he provide information regarding his injury. (Ex. 2). On July 31, 2001, SAIF's claims adjuster wrote claimant indicating that she had been unsuccessfully attempting to contact him and requesting that he telephone her. (Ex. 6). On August 7, 2001, the claims adjuster again wrote claimant advising him that additional information was needed regarding his claim and that if he did not cooperate his compensation

¹ Because our decision on the merits of SAIF's appeal would be the same regardless of whether claimant's respondent's brief was considered, we need not resolve the motion to strike issue.

could be suspended. (Ex. 7). This letter was sent by certified mail and was returned to SAIF unclaimed. (Ex. 8).

On August 22, 2001, SAIF wrote to the Workers' Compensation Division (WCD) seeking suspension of claimant's benefits. (Ex. 9). On August 24, 2001, WCD wrote claimant notifying him that his benefits would be suspended if he did not cooperate. (Ex. 10). WCD suspended claimant's benefits on September 5, 2001. (Ex. 11).

On September 24, 2001, SAIF mailed its denial letter, which was based on claimant's failure to cooperate in the investigation of the claim, to his former address, which was the only address that SAIF had for claimant. (Ex. 12). The denial, which was sent by certified mail, was returned to SAIF as undeliverable. A copy of the denial was mailed to Dr. Privitera, who spoke with SAIF's claims adjuster by telephone regarding the denial. Dr. Privitera told claimant several days later that the claim had been denied.

On October 10, 2001, claimant sought legal advice from an attorney, who wrote to SAIF's claims adjuster indicating that claimant had difficulties communicating with SAIF regarding his claim. The attorney's letter to SAIF also indicated that claimant had not received his mail until "long after he had moved." The letter noted that claimant's claim had been denied on the basis of noncooperation and also indicated that claimant's attorney would be requesting an expedited hearing and that a signed retainer agreement would be sent to SAIF "as soon as possible." (Ex. 13).

On December 20, 2001, SAIF's claims adjuster received a request from claimant's attorney's office to fax a copy of the denial. (Tr. 25). SAIF's claims adjuster faxed a copy of the denial to claimant's attorney that same day.

On January 4, 2002, claimant filed a request for hearing regarding the September 24, 2001 denial. (Ex. 14). Claimant did not see the September 24, 2001 denial until he met with his attorney on January 3, 2002, at which time he signed a retainer agreement. (Ex. 14-4).

CONCLUSIONS OF LAW AND OPINION

The ALJ found that claimant had established good cause for his failure to timely request a hearing within 60 days of SAIF's denial. The ALJ reasoned that claimant had moved five days after his industrial injury and did not receive the

denial letter within the 60-day appeal period. Although claimant was advised of the denial by his chiropractor within the appeal period, the ALJ determined that claimant did not receive an actual copy of the denial until January 3, 2002, well after the expiration of the 60-day appeal period. On this basis, the ALJ found “good cause” for the late hearing request. Finding that claimant had fully cooperated with SAIF’s investigation, the ALJ then set aside SAIF’s “noncooperative” denial.

On review, SAIF contends that claimant failed to establish “good cause” for his failure to timely request a hearing from its denial. For the following reason, we agree.

Claimant's request for hearing was filed more than 60 days, but fewer than 180 days, following SAIF’s denial. Therefore, under ORS 656.319(1)(b), claimant has the burden of proving "good cause" for the late filing of his request for hearing. *See Cogswell v. SAIF*, 74 Or App 234 (1985). In this context, good cause means “mistake, inadvertence, surprise or excusable neglect,” as defined under ORCP 71B(1). *Hempel v. SAIF*, 100 Or App 68, 70 (1990). Lack of diligence does not constitute good cause. *Cogswell*, 74 Or App at 237.

Here, claimant did not receive the denial because he moved without notifying SAIF of his new address or arranging with the Post Office to have his mail forwarded. Thus, we are not persuaded that claimant could not have filed a timely hearing request had he exercised due diligence in advising SAIF of his new address. In addition, the record establishes that claimant was advised of the denial by his chiropractor well within the 60-day appeal period. Claimant also sought legal advice regarding his claim within the appeal period and the record establishes that claimant and the attorney he later retained were aware of the denial as of October 10, 2001 (only 16 days after the denial issued). (Ex. 13).

Although claimant has only a 3rd grade education and cannot speak, read or write English, we have previously held that an inability to read English does not establish good cause sufficient to excuse an untimely request for hearing. *See Tuan A. Ho*, 45 Van Natta 2413 (1993). Moreover, we have found that good cause did not exist where a claimant did not receive a denial of his claim because he failed to notify the insurer of his new address and where the claimant received notice of the denial before the expiration of the 60-day period. *See Charles R. Fritz*, 43 Van Natta 403 (1991). In *Fritz*, we concluded that the claimant could have filed a timely request with reasonable diligence.

Similarly, here, we find that claimant could have filed a timely hearing request had he exercised reasonable diligence in advising SAIF of his address change. In addition, the record reflects that both claimant and his attorney were aware that the claim had been denied by October 10, 2002, only 16 days after the denial. The record does not reflect that claimant or his attorney attempted to obtain a copy of the denial prior to December 20, 2001, when claimant's attorney received a faxed copy of the denial. Under such circumstances, we do not find "good cause" for claimant's late hearing request. Accordingly, we conclude that claimant's hearing request should be dismissed.

ORDER

The ALJ's order dated February 11, 2002 is reversed. Claimant's request for hearing is dismissed.

Entered at Salem, Oregon on November 6, 2002