

In the Matter of the Compensation of  
**JACKIE A. SCOTT, Claimant**

WCB Case No. 11-00306

**ORDER ON REVIEW**

Brian R Whitehead, Claimant Attorneys  
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Reviewing Panel: Members Langer and Biehl.

The insurer requests review of Administrative Law Judge (ALJ) Crummé's order that: (1) awarded temporary total disability (TTD); and (2) assessed penalties and attorney fees for allegedly unreasonable claim processing. On review, the issues are temporary disability, penalties, and attorney fees. We reverse.

FINDINGS OF FACT

On January 29, 2007, claimant injured her low back. The insurer accepted an L4-5 disc condition. Claimant underwent three lumbar surgeries, culminating in a fusion at that level. She eventually came under the care of Dr. McNabb, who initially diagnosed chronic lumbar pain, sciatica and arachnoiditis in June 2008. (Ex. ss). In July 2008, Dr. McNabb diagnosed chronic lumbar radiculopathy. *Id.*

The initial "L4-5 disc" claim was closed on October 16, 2008. Claimant requested acceptance of arachnoiditis in November 2008. The insurer denied the request in January 2009.

That same month, Dr. Tsai examined claimant at the insurer's request and addressed the claimed arachnoiditis condition. According to Dr. Tsai, a January 2008 MRI did not show evidence of arachnoiditis. In June 2009, Dr. McNabb agreed with Dr. Tsai that claimant did not have arachnoiditis, but believed that she had "significant permanent partial disability" due to scar tissue formation and nerve damage associated with radiculopathy. (Ex. ppp).

In July 2009, Dr. McNabb diagnosed chronic lumbar radiculitis/radiculopathy. (Ex. 1). On October 7, 2009, he diagnosed chronic low back pain, but did not believe that claimant was "ever going back to work and was probably unable to work due to chronic pain and her use of pain medication." (Ex. 1-2).

On October 13, 2009, an ALJ approved a “Stipulation” that upheld the denial of arachnoiditis, but provided that the insurer would accept “surgical scarring.” (Ex. 2).

In December 2009, Dr. McNabb opined that the surgical scarring condition was medically stationary on September 18, 2008. (Ex. 3). On March 24, 2010, claimant requested a hearing, seeking TTD under the new/omitted medical condition claim for surgical scarring, as well as penalties and attorney fees for allegedly unreasonable claim processing.<sup>1</sup>

### CONCLUSIONS OF LAW AND OPINION

The ALJ awarded TTD from September 18, 2008 through April 12, 2011, the date of hearing. The ALJ also assessed a penalty and attorney fees for unreasonable claim processing. We reverse, reasoning as follows.

Claimant has the burden of establishing entitlement to temporary disability. ORS 656.266(1); *Lisa M. Guerrero*, 62 Van Natta 1805, 1821 (2010). Only an “attending physician” may authorize the payment of temporary disability compensation.<sup>2</sup> ORS 656.245(2)(b)(B); ORS 656.262(4)(a), (h). 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). The authorization must relate to the compensable condition. *Corey J. McEldowney*, 62 Van Natta 1718, 1720 (2010); *James E. Harper*, 54 Van Natta 852 (2002), *aff’d without opinion*, 191 Or App 148 (2003).

Here, by virtue of the October 2009 stipulation, claimant’s surgical scarring is a compensable condition. Therefore, she is entitled to TTD if a reasonable carrier would understand that Dr. McNabb contemporaneously authorized temporary disability due to the scarring condition. *See Theresa E. Barnes*, 56 Van Natta 3598, 3599 (2004) (“When evaluating whether the carrier should have understood contemporaneous medical reports to excuse the injured worker from work, we evaluate the totality of the carrier’s knowledge of the worker’s condition at the time of the authorization.”).

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<sup>1</sup> Claimant initially sought TTD beginning in January 2009. However, at hearing, she sought TTD beginning on September 18, 2008. (Tr. 1).

<sup>2</sup> An “attending physician” is “a doctor, physician, or physician assistant who is primarily responsible for the treatment of a worker’s compensable injury.” ORS 656.005(12)(b). It is undisputed that Dr. McNabb is claimant’s attending physician.

In June 2009, Dr. McNabb opined that claimant had significant “permanent partial disability” due to scarring and nerve damage associated with radiculopathy. (Ex. ppp). On October 7, 2009 (six days before the ALJ approved the stipulation regarding the insurer’s acceptance of the scarring condition), Dr. McNabb opined that claimant was “never going back to work.” (Ex. 1-2). Dr. McNabb subsequently opined that claimant’s scarring condition had been medically stationary since September 2008. (Ex. 3).

Having reviewed the medical reports from Dr. McNabb, which indicated that claimant’s condition had reached maximum improvement in September 2008 and that any subsequent disability was permanent, we conclude that the record does not establish that claimant’s disability was *temporary* when the insurer accepted the scarring condition in October 2009. In other words, even assuming that Dr. McNabb’s comments were related to claimant’s scarring condition, we are not persuaded that they constitute an authorization of temporary disability.

Under such circumstances, we find that an objectively reasonable insurer would not interpret Dr. McNabb’s October 7, 2009 opinion as contemporaneous confirmation that claimant was *temporarily* disabled *due to* the compensable surgical scarring condition. Therefore, claimant did not become entitled to TTD under the compensable surgical scarring claim in October 2009, when that condition was accepted.<sup>3</sup>

In light of our conclusion that claimant was not entitled to temporary disability, it follows that the insurer’s claim processing was reasonable.

### ORDER

The ALJ’s order dated May 11, 2011 is reversed. The ALJ’s awards of temporary disability, penalties and attorney fees (“out-of-compensation” and \$2,800 insurer-paid) are reversed.

Entered at Salem, Oregon on November 29, 2011

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<sup>3</sup> The ALJ cited OAR 436-060-0020(10) in concluding that payment of temporary disability was required when the surgical scarring condition was accepted in October 2009 via the parties’ stipulation. That rule provides that when a denied claim is determined to be compensable, processing includes payment of temporary disability under ORS 656.262, including retroactive periods. However, the administrative rule does not affect the requirements that disability be temporary and due to the compensable condition.