

In the Matter of the Compensation of
CHRISTOPHER T. CAMARENA, Claimant

Own Motion No. 12-0026M

OWN MOTION ORDER

Philip H Garrow, Claimant Attorneys
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Reviewing Panel: Members Biehl, Langer, and Herman. Member Langer dissents.

Claimant seeks Own Motion relief, contending that he is entitled to: (1) temporary disability benefits as of August 16, 2011 on his reopened “post-aggravation rights” new/omitted medical condition claim (“mid back strain”); and (2) penalties and attorney fees for the SAIF Corporation’s allegedly unreasonable claim processing. SAIF opposes claimant’s request, asserting that the statutory requirements have not been satisfied. Based on the following reasoning, we award temporary disability, but not penalties and penalty-related attorney fees.

FINDINGS OF FACT

On March 31, 2003, claimant sustained a compensable left ankle injury. His aggravation rights have expired on that claim.

On August 15, 2011, claimant’s left ankle gave out, and he injured his mid back.¹ On November 8, 2011, SAIF voluntarily reopened the 2003 injury claim for a “post-aggravation rights” new/omitted medical condition (“mid back strain”).

On August 16, 2011, claimant treated with Dr. Vaughn, his attending physician. Diagnosing “mid back pain – spasms likely,” Dr. Vaughn prescribed pain medication, muscle relaxants, and heat. (Ex. 1). She also indicated that claimant’s condition was not medically stationary and released him from work until his follow-up examination. (*Id.*)

On September 12, 2011, Dr. Johnson, treating chiropractor, noted that claimant continued with full work restrictions. (Ex. 2).

¹ Claimant apparently also made a new injury claim with the employer regarding this August 15, 2011 incident. A December 15, 2011 1502 form indicates that interim compensation was paid for a period before the 2011 claim was denied. (Ex. 6).

On October 11, 2011, Dr. Vaughn submitted an 827 form, diagnosing “back pain secondary to ankle giving out” and noting that an MRI was scheduled. (Ex. 3). She also indicated that claimant’s condition was not medically stationary and he was released from work as of August 16, 2011, without indicating any “through date.” (*Id.*)

On November 11, 2011, Dr. Vaughn released claimant to light duty. On November 16, 2011, the employer provided a list of “light duty” work available for claimant. (Ex. 4).

On November 21, 2011, Dr. Vaughn noted that claimant was currently referred to physical therapy and released to “light duty.” (Ex. 5). On January 17, 2012, she reiterated that claimant had been “cleared for light duty since 11/11/11.” (Ex. 7).

On February 6, 2012, Dr. Vaughn stated that “when [claimant] is out for back pain and is feeling well to come back he can be released back to work at his own discretion.” (Ex. 8).

On February 8, 2012, claimant was examined by Dr. Wagner, consulting physician, who noted that his mid back pain symptoms ranged from “4/10 to 10/10” and were “[a]lleviated by sitting in his recliner, pain medications, chiropractic manipulation, massage, TENS unit.” (Ex. 9-1). Dr. Wagner found that claimant had failed to respond to trigger point injections, acupuncture, and physical therapy, although noting that he had only had one session of acupuncture and four sessions of physical therapy. (*Id.*) Dr. Wagner expected claimant’s mid back strain condition to have resolved, but considered that claimant had undergone minimal rehabilitation. (Ex. 9-4). He prescribed aggressive rehabilitation. (Ex. 9-3). Finally, he explained that the MRI was benign and recommended a thoracic SPECT scan to “rule out hot facets that may be amenable to steroid injection.” (*Id.*)

On March 7, 2012, following a SPECT scan that did not indicate facet problems, Dr. Wagner again expected claimant’s mid back strain to have resolved and considered the rehabilitation to have been inadequate. (Ex. 10-3). He recommended aggressive rehabilitation, with active physical therapy. (*Id.*)

On March 9, 2012, claimant returned to Dr. Vaughn, who noted that claimant had been using a TENS unit and going to physical therapy. (Ex. 11-1). She reported that he “is feeling better than he had been[.]” (*Id.*) She also reported that he had not been going to work. (*Id.*) She prescribed physical therapy and continued use of the TENS unit.

CONCLUSIONS OF LAW AND OPINION

Citing *Butcher v. SAIF*, 247 Or App 684, *rev den* 352 Or 25 (2012), claimant seeks temporary disability benefits on his reopened “post-aggravation rights” new/omitted medical condition claim (“mid back strain”) beginning August 16, 2011, the date his attending physician released him from work. SAIF counters that claimant has not established that his attending physician authorized temporary disability compensation for “curative treatment.” Based on the following reasoning, we grant claimant’s request.

In *Butcher*, the court held that the legislature did not intend to limit the availability of temporary disability for Own Motion claims regarding new/omitted medical conditions for curative treatment to only the curative treatment prescribed in lieu of hospitalization. 247 Or App at 690-91. Nevertheless, the *Butcher* court did not eliminate the statutory requirement under ORS 656.278(1)(b) for a reopened Own Motion claim for a new/omitted medical condition that “the payment of temporary disability compensation * * * may be provided from the time the attending physician authorizes temporary disability compensation for the hospitalization, surgery or *other curative treatment* * * *.” (Emphasis added). Further, we have previously defined “curative treatment” as “treatment that relates to or is used in the cure of diseases, tends to heal, restore to health, or bring about recovery.”² *Larry D. Little*, 54 Van Natta 2536, 2544 (2002); *see also David L. Hernandez*, 56 Van Natta 2441, 2446 (2004); *Loyd E. Garoutte*, 56 Van Natta 416, 423-24 (2004); *Mark A. Cavazos*, 55 Van Natta 3004, 3013 (2003). Palliative treatment is defined as “medical service rendered to reduce or moderate temporarily the intensity of an otherwise stable medical condition, but does not include those medical services to diagnose, heal or permanently alleviate or eliminate a medical condition.” ORS 656.005(20).

Consequently, consistent with the *Butcher* holding, entitlement to temporary disability benefits under ORS 656.278(1)(b) for a reopened Own Motion claim for a new/omitted medical condition begins when the following requirements are satisfied. 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

² The *Butcher* decision did not address the definition of “curative treatment.”

disability benefits are payable under ORS 656.210, ORS 656.212(2), and ORS 656.262(4). *Butcher*, 247 Or App at 689-90; *James M. Kleffner*, 57 Van Natta 3071 (2005); *Hernandez*, 56 Van Natta at 2449 (temporary disability commences with surgery recommendation and attending physician authorization; applying *Cavazos*, 55 Van Natta at 3013).

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 in 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.

Nevertheless, as addressed above, for Own Motion claims, there are additional statutory requirements for eligibility to temporary disability benefits. One of those additional requirements is that the attending physician must authorize temporary disability benefits "for the hospitalization, surgery, or other curative treatment." ORS 656.278(1)(b); *Butcher*, 247 Or App at 690; *Hernandez*, 56 Van Natta at 2449; *Cavazos*, 55 Van Natta at 3013. Further, the question of whether treatment constitutes "curative treatment" presents a medical question that must be addressed by medical evidence.

Here, the record does not establish that claimant required hospitalization or surgery. Therefore, the issue is whether the prescribed treatment constitutes "curative treatment," as defined above. Based on the following reasoning, we conclude that claimant's treatment was curative.

On August 16, 2011, releasing claimant from work, Dr. Vaughn, attending physician, considered his condition not medically stationary and prescribed pain medication, muscle relaxants, and heat. (Ex. 1). In October and November 2011, Dr. Vaughn continued to release claimant from regular work, recommending an MRI and prescribing physical therapy. (Exs. 3, 5, 7).

In February 2012, Dr. Wagner, consulting physician, noted that claimant's mid back pain symptoms were "[a]lleviated by sitting in his recliner, pain medications, chiropractic manipulation, massage, TENS unit." (Ex. 9-1). Dr. Wagner reported that claimant failed to respond to physical therapy, trigger point injections, and acupuncture. As a result, Dr. Wagner ordered a SPECT scan to rule out a facet condition that may be amenable to steroid injection. (Ex. 9-3).

Following a negative SPECT scan, Drs. Wagner and Vaughn prescribed aggressive rehabilitation, with active physical therapy. (Exs. 10, 11). Both physicians commented on claimant's difficulty healing.

Thus, neither physician expressly addressed the question of whether claimant's treatment was "curative" or "palliative." Nonetheless, considering Drs. Wagner's and Vaughn's opinions as a whole, we are persuaded that their descriptions and comments support a finding that claimant's medical care was directed toward healing claimant's mid back condition.³

Under such circumstances, we find that the medical record persuasively supports a conclusion that claimant received curative treatment. We are further persuaded that Dr. Vaughn's authorization for temporary disability benefits was for this curative treatment. ORS 656.278(1)(b).

Accordingly, claimant is awarded temporary disability benefits beginning August 16, 2011, and continuing until SAIF can lawfully terminate such benefits under OAR 438-012-0035.⁴ Claimant's attorney is allowed an approved fee in the amount of 25 percent of any increased temporary disability compensation resulting from this order, not to exceed \$1,500, payable by SAIF directly to claimant's counsel. OAR 438-015-0080(1).

Finally, considering that Drs. Vaughn and Wagner did not expressly describe claimant's treatment as curative, we find that SAIF had a legitimate doubt as to its liability for temporary disability benefits. *International Paper Co. v. Huntley*, 106 Or App 107 (1991). Therefore, we do not consider its claim processing to have been unreasonable. ORS 656.262(11)(a). Consequently, penalties and related attorney fees are not warranted.

IT IS SO ORDERED.

Entered at Salem, Oregon on June 15, 2012

³ For example, both physicians noted claimant's difficulty healing and prescribed aggressive rehabilitation, including active physical therapy, to resolve his condition. In the absence of contrary evidence, these comments are supportive of the proposition that the prescribed treatment was designed to heal or permanently alleviate or eliminate claimant's medical condition.

⁴ An injured worker is not entitled to receive any more than the statutory sum of benefits for a single period of temporary disability resulting from multiple disabling injuries. *See Fischer v. SAIF*, 76 Or App 656, 661 (1985); *Petshow v. Portland Bottling Co.*, 62 Or App 614 (1983), *rev den*, 296 Or 350 (1984); *Willie V. Bell*, 62 Van Natta 1157, 1166 n 5 (2010). Therefore, if any temporary disability compensation for a concurrent period between this claim and the 2011 injury claim is due claimant as a result of this order, SAIF may petition the Workers' Compensation Division for a pro rata distribution of payments. OAR 436-060-0020(7).

Member Langer dissenting.

Although I agree with the majority's statement of law, I disagree with their application of that law to the facts of this case. Therefore, I respectfully dissent.

As the majority explains, consistent with the holding in *Butcher v. SAIF*, 247 Or App 684, *rev den* 352 Or 25 (2012), entitlement to temporary disability benefits under ORS 656.278(1)(b) for a reopened Own Motion claim for a new/omitted medical condition begins when the following requirements are satisfied. 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).⁵ 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*, 247 Or App at 689-90; *James M. Kleffner*, 57 Van Natta 3071 (2005); *David L. Hernandez*, 56 Van Natta 2441, 2449 (2004) (temporary disability commences with surgery recommendation and attending physician authorization; applying *Mark A. Cavazos*, 55 Van Natta 3004, 3013 (2003)).

Here, because the record does not establish that claimant required hospitalization or surgery, the issue is whether the prescribed or provided treatment constitutes "curative treatment," as defined above. Further, the question of whether treatment constitutes "curative treatment" as we have defined it presents a medical question that must be supported by medical evidence. Finally, the court has cautioned us against reaching medical conclusions in absence of medical evidence. *See Benz v. SAIF*, 170 Or App 22, 25 (2000) (although the Board may draw reasonable inferences from the medical evidence, it is not free to reach its own medical conclusions in the absence of such evidence); *SAIF v. Calder*, 157 Or App 224, 227-28 (1998) (the Board is not an agency with specialized medical expertise and must base its findings on medical evidence in the record); *Jeremy W. Sitzman*, 64 Van Natta 586 (2012).

⁵ As the majority notes, we have previously defined "curative treatment" as "treatment that relates to or is used in the cure of diseases, tends to heal, restore to health, or bring about recovery." *See Larry D. Little*, 54 Van Natta 2536, 2544 (2002).

In other words, although “magic words” are not necessary, there must be medical evidence in the record from which we can determine that the treatment is “curative.” We are not free to simply list the prescribed or provided treatment and apply our own judgment to conclude that the treatment is “curative.” I respectfully submit that is what the majority has done in this case.

In contrast, after considering this record, I am not persuaded that the medical evidence supports a finding that the treatment constituted “other curative treatment” (*i.e.*, treatment that relates to or is used in the cure of disease, tends to heal, restore to health, or to bring about recovery). *See Christopher R. McQuaw*, 57 Van Natta 3201, 3203 (2005) (no medical evidence that prescription pain medication and MRI constituted “other curative treatment”); *Nicholas McDonald*, 55 Van Natta 4100, 4104 (2003) (no medical evidence that medication, physical therapy, self-directed exercise, and various diagnostic tests (including x-rays, an MRI, and a “block” at L5) constituted “other curative treatment”).

To the extent that the physicians addressed the various treatments, they appeared to focus on symptomatic relief, rather than any curative purpose.⁶ In the absence of further explanation or clarification from a medical expert, the record does not establish that symptomatic relief constitutes “curative treatment.” *See Calder*, 157 Or App at 227-28 (“the board is not an agency with specialized medical expertise entitled to take official notice of technical facts within its specialized knowledge”). Such symptomatic relief is just as likely to result from “palliative care,” which is defined as “medical service rendered to reduce or moderate temporarily the intensity of an otherwise stable medical condition, but does not include those medical services to diagnose, heal or permanently alleviate or eliminate a medical condition.” ORS 656.005(20).

Because the record does not establish that claimant required “other curative treatment,” I would find that Dr. Vaughn’s authorization for temporary disability benefits was not “for the hospitalization, surgery, or other curative treatment.”⁷ ORS 656.278(1)(b). Accordingly, I would find that claimant has not satisfied his burden of proving entitlement to temporary disability benefits. ORS 656.266(1). Because the majority concludes otherwise, I respectfully dissent.

⁶ For example, Dr. Vaughn noted that claimant was “feeling better” following physical therapy and the use of a TENS unit. (Ex. 11-1). Likewise, Dr. Wagner noted alleviation of pain symptoms with various treatments, including a TENS unit. (Ex. 9-1).

⁷ I further note that, although claimant relied on *Butcher v. SAIF*, 247 Or App 684, *rev den* 352Or 25 (2012), he did not respond to SAIF’s argument that his treatment was not curative.