

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

WCB Case No. 11-00306

ORDER ON REMAND

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Reviewing Panel: Members Johnson and Lanning.¹

This case is before the Board on remand from the Court of Appeals. *Scott v. Liberty Northwest Ins. Corp.*, 268 Or App 325 (2014). Applying ORS 656.262(4), the court vacated our prior order, *Jackie A. Scott*, 63 Van Natta 2375 (2011), which had held that claimant was not entitled to temporary disability benefits regarding her new/omitted medical condition claim for “surgical scarring.” Finding that her attending physician had indicated that any disability attributable to the “surgical scarring” condition was permanent (rather than temporary) and that the condition was medically stationary, we previously concluded that claimant was not entitled to temporary disability benefits. The court disagreed with our analysis, stating that the medical evidence that claimant’s disability from the “surgical scarring” condition might be permanent did not preclude her entitlement to begin receiving temporary benefits on the open claim (where the medically stationary date on the claim had not yet been determined by means of claim closure). Consequently, the court remanded for a determination as to whether the attending physician’s opinion that claimant was disabled from work related to the “surgical scarring” condition and, if so, the duration of her entitlement to temporary disability benefits. Having received the parties’ supplemental briefs, we proceed with our review.

FINDINGS OF FACT

We republish our previous “Findings of Fact,” as summarized and supplemented below.

Claimant compensably injured her low back on January 29, 2007. The insurer accepted a left L4-5 disc protrusion/extrusion. (Ex. ff).

¹ Members Langer and Biehl initially participated as reviewing panel members. However, because they are no longer members of the Board, Members Johnson and Lanning have participated in this review.

Claimant subsequently underwent three lumbar surgeries, culminating in a fusion at the L4-5 level. (Ex. ll). In June 2008, she came under the care of Dr. McNabb, who diagnosed chronic lumbar pain, sciatica, arachnoiditis, and chronic lumbar radiculopathy. (Ex. ss).

On September 18, 2008, Dr. McNabb opined that claimant's condition was medically stationary. (Ex. bbb). He restricted her work capacity for lifting to a "light category." (*Id.*)

An October 16, 2008 Notice of Closure awarded temporary disability benefits through September 18, 2008 and permanent disability (impairment and work disability). (Ex. eee).

On November 20, 2008, claimant initiated a new/omitted medical condition claim for "arachnoiditis." (Ex. iii). The insurer denied the claim in January 2009. (Ex. mmm).

That same month, Dr. Tsai, a neurosurgeon, examined claimant at the insurer's request. According to Dr. Tsai, a January 2008 MRI did not show arachnoiditis, but rather scar formation surrounding the L4-5 thecal sac. (Ex. nnn-10, -15).

On June 5, 2009, Dr. McNabb agreed with Dr. Tsai's findings regarding the January 2008 MRI. (Ex. ppp). Dr. McNabb also stated that claimant "still ha[d] significant permanent partial disability due to her scarring and nerve damage that occurred associated with her radiculopathy." (*Id.*)

On October 7, 2009, Dr. McNabb did not believe that claimant was "ever going to get back to work" and further opined that "she probably is unable to do work because of the chronic [back] pain and the amount of pain medication she is on[.]" (Ex. 1-2).

On October 13, 2009, an earlier ALJ approved the parties' "Stipulation," which provided for the insurer's acceptance of "surgical scarring." (Ex. 2).

In December 2009, Dr. McNabb opined that the "surgical scarring" condition had been medically stationary on September 18, 2008. (Ex. 3).

On January 7, 2010, Dr. McNabb stated that claimant continued to have “chronic lumbar radiculopathy with scarring.” (Ex. 1-2). Believing that “there [wa]s no way she [wa]s going to be able to work on her current level of narcotic medication required for pain control,” he recommended that she be evaluated for a spinal cord stimulator. (*Id.*)

On January 18, 2011, claimant requested a hearing, seeking temporary disability (procedural entitlement), as well as penalties and attorney fees for the insurer’s failure to pay that compensation.² (Hearing file; Tr. 1).

CONCLUSIONS OF LAW AND OPINION

The ALJ awarded temporary disability benefits from September 18, 2008 through April 12, 2011, the date of hearing.³ In doing so, the ALJ reasoned that by June 5, 2009, an objectively reasonable insurer would have understood that Dr. McNabb had authorized temporary disability benefits for claimant’s surgical scarring condition since September 18, 2008. The ALJ further determined that Dr. McNabb’s authorization was “open-ended” and applied through the date of the April 12, 2011 hearing. Claimant’s counsel was also awarded an “out-of-compensation” attorney fee payable from the temporary disability award. Lastly, concluding that the insurer lacked legitimate doubt about its liability to pay temporary disability benefits since September 18, 2008, the ALJ assessed penalties and attorney fees for unreasonable claim processing.

On review, we concluded that claimant was not entitled to temporary disability benefits (even assuming that her disability was due to “surgical scarring”). *Scott*, 63 Van Natta at 2377. In reaching our conclusion, we reasoned that claimant’s attending physician’s comments had indicated that the surgical scarring condition was medically stationary in September 2008 and any disability attributable to that condition was permanent (rather than temporary) when the insurer accepted the condition in October 2009. *Id.*

On claimant’s appeal, the court disagreed. *Scott*, 268 Or App at 325. Citing *Lederer v. Viking Freight, Inc.*, 193 Or App 226, 237, *adh’d to as modified on recons*, 195 Or App 94 (2004), and noting that as of the date of the hearing,

² Claimant initially sought temporary disability benefits beginning in January 2009. However, at hearing, she sought temporary disability benefits beginning on September 18, 2008. (Tr. 1).

³ The ALJ closed the record on April 12, 2011.

the claim remained open and none of the bases set forth in ORS 656.268(4) for terminating temporary disability benefits had occurred, the court concluded that the medical evidence that claimant's disability from surgical scarring might be permanent did not preclude her entitlement to begin receiving temporary disability benefits on that claim. Consequently, the court remanded for a determination as to whether the attending physician's opinion that claimant was disabled from work related to the "surgical scarring" condition and, if so, the duration of her entitlement to temporary disability benefits.⁴

Consistent with the court's rationale, we proceed with that determination.

To begin, the court has addressed Dr. McNabb's authorizations, observing that "[t]here are several reports in the record that reflect that claimant was disabled from work as a result of surgical scarring at the time the board approved the parties' stipulation and [the insurer's] acceptance of that condition." *Scott*, 268 Or App at 328. Specifically, the court noted that Dr. McNabb's June 5, 2009 report addressed the surgical scarring condition in the context of claimant's permanent disability and, on October 7, 2009, expressed the view that claimant would never go back to work. *Id.* at 328-29.

On remand, the insurer argues that Dr. McNabb's October 7, 2009 authorization was insufficient to authorize temporary disability benefits because it related to chronic back pain, rather than to "surgical scarring." For the following reasons, we conclude that Dr. McNabb's authorizations related, at least in part, to her compensable surgical scarring condition.

Temporary disability benefits are due and payable only for those periods authorized by the attending physician. ORS 656.262(4)(a), (h). A temporary disability authorization must relate to the compensable condition. *See James E. Harper*, 54 Van Natta 852 (2002), *aff'd without opinion*, 191 Or App 148 (2003) (TTD benefits not awarded when attending physician's authorization related to bursitis/adhesive capsulitis, not to the compensable rotator cuff tear). However, the authorization is still valid if it concerns unclaimed or unaccepted conditions, so long as the authorization is due in part to the accepted conditions. *See Vincent O. Robison*, 67 Van Natta 938, 939 (2015) (temporary disability benefits awarded when attending physician's authorization pertained in part to an unclaimed asthmatic condition, but also pertained to the accepted conjunctivitis condition);

⁴ In light of its disposition, the court did not address claimant's request for penalties and attorney fees under ORS 656.262(11)(a).

Michael R. Vlcek, 54 Van Natta 1781, 1783 (temporary disability benefits awarded when attending physician's authorization pertained in part to a noncompensable degenerative condition and in part to the accepted condition).

Here, Dr. McNabb's disability authorizations preceded his diagnosis of "surgical scarring." Specifically, on September 18, 2008, he imposed pain-related work restrictions. (Exs. aaa, bbb). In October 2008, he attributed claimant's pain to "arachnoiditis." (Ex. fff).

However, on June 5, 2009, Dr. McNabb recognized that claimant's January 2008 MRI showed scar tissue formation, not arachnoiditis, and he reported that she had "significant permanent partial disability due to her scarring and nerve damage that occurred associated with her radiculopathy." (Ex. ppp). Therefore, on October 7, 2009, when he opined that claimant was unable to work because of chronic pain and her pain medication consumption, his temporary disability authorization reasonably encompassed claimant's "surgical scarring" condition. (Ex. 1-2). Additionally, on July 7, 2010, he reported that claimant continued to have chronic lumbar radiculopathy with scarring and was unable to work. (Ex. 1-2).

Based on our review of these records, we conclude that Dr. McNabb's disability authorizations since September 18, 2008, were due, at least in part, to "surgical scarring." Cf. *Corey J. McEldowney*, 62 Van Natta 1718, 1721 n 1 (2010) (although a physician's authorization was ineffective because it related to an unaccepted condition, this initial misdiagnosis did not preclude a later clarification that a temporary disability authorization was for a condition ultimately determined to be compensable). In reaching this conclusion, we note that there is no indication that Dr. McNabb intended to limit his disability authorizations to other conditions to the exclusion of the "surgical scarring" condition. See *Robison*, 67 Van Natta at 940 (although attending physician's records referred to accepted and unaccepted conditions, his time loss authorizations were due in part to accepted conditions where the authorizations were not limited to specific conditions to the exclusion of other conditions).

Considering the court's explanation that the insurer's obligation to begin paying temporary disability benefits depended on whether Dr. McNabb had determined that claimant was disabled from work as a result of the surgical scarring condition, we find that an objectively reasonable carrier would have understood that he was excusing claimant from work due, at least in part, to pain from "surgical scarring." *Lederer*, 193 Or App at 237.

Furthermore, because Dr. McNabb did not provide a termination date for claimant's disability, the authorizations were "open-ended." *See Charlene Y. Pearce*, 55 Van Natta 728, 730 (2003) (physician's authorization was "open-ended" because it was not limited to a specific period, or until the occurrence of a specific event). Consequently, on remand, we agree with the ALJ's conclusion that claimant was procedurally entitled to temporary disability benefits, payable from September 18, 2008 through April 12, 2011.⁵

However, that does not end our inquiry. An October 1, 2012 Notice of Closure determined that claimant's "surgical scarring" condition was medically stationary on September 18, 2008 and awarded no temporary disability benefits. That closure has become final.⁶

Under these circumstances, although we retain jurisdiction to address the procedural temporary disability benefits arising from the hearing request, we do not have authority to award such benefits beyond those granted by the final closure order. *See Lebanon Plywood v. Seiber*, 113 Or App 651 (1992) (Board not authorized to award procedural temporary disability benefits beyond medically stationary date determined by final closure order); *Charles Marsing*, 52 Van Natta 2218, 2219 (2000) (where the claimant requested a hearing seeking temporary disability benefits but did not appeal a Notice of Closure's temporary disability award, the ALJ/Board had authority to address the claimant's entitlement to such benefits, but not to impose a procedural overpayment by awarding temporary disability benefits beyond the date determined by the closure notice).

Claimant argues that the circumstances of this case (*i.e.*, the delayed implementation of the ALJ's order awarding temporary disability benefits caused by the appeals) are not addressed in *Seiber*, and raise equitable and policy issues that distinguish it from *Seiber*. She contends that *Seiber* creates a "loophole" that allows carriers to avoid claim closure and withhold temporary disability benefits with impunity. We do not agree.

In *Seiber*, the carrier did not pay temporary disability benefits on an accepted aggravation claim because the claimant was receiving unemployment benefits. The claim was subsequently closed by a determination order. We had

⁵ The parties do not dispute the dates for which these benefits were procedurally available.

⁶ The October 1, 2012 Notice of Closure was not admitted into the hearing record. However, there is no dispute that the Notice of Closure issued, did not award temporary disability benefits, and was not appealed.

ordered the carrier to pay temporary disability benefits after the medically stationary date. In reversing our order, the court stated: “Payment of temporary disability benefits beyond the medically stationary date is a consequence of the administrative process of claim closure and is not an entitlement. If processing delay does not result in an overpayment, the Board has no authority to impose one.” 113 Or App at 654. The *Seiber* court further explained that if a carrier unreasonably delays or refuses to pay temporary disability benefits, “it is subject to penalties, which is the appropriate way to induce compliance.”⁷ *Id.*

Here, the October 1, 2012 Notice of Closure determined that claimant’s “surgical scarring” condition was medically stationary on September 18, 2008 and that claimant was not entitled to temporary disability benefits. Because that determination has become final, we are not authorized to award “procedural” temporary disability benefits. Doing so would create an “administrative overpayment,” which is contrary to the *Seiber* rationale. Consequently, on remand, we reverse the ALJ’s temporary disability and “out of-compensation” attorney fee awards.

We turn to claimant’s request for penalties and attorney fees. Although we are not authorized to award claimant temporary disability benefits, the insurer may be liable for penalties and attorney fees under ORS 656.262(11)(a) if its delay or refusal to pay compensation was unreasonable. *See Seiber*, 113 Or App at 654 (imposition of penalties will induce compliance with the carrier’s obligation to pay temporary disability benefits); *Pascual Zaragoza*, 45 Van Natta 1221, 1223 (1993), *aff’d without opinion*, *Zaragoza v. Liberty Northwest Ins. Co.*, 126 Or App 544 (1994) (imposition of penalties was the appropriate sanction where the carrier unreasonably delayed or refused to pay temporary disability benefits).

The standard for determining an unreasonable resistance to the payment of compensation is whether, from a legal standpoint, the insurer had a legitimate doubt about its liability. *International Paper Co. v. Huntley*, 106 Or App 107 (1991). “Unreasonableness” and “legitimate doubt” are to be considered in light of all the evidence available to the insurer at the time of its conduct. *Brown v. Argonaut Ins. Co.*, 93 Or App 588, 591 (1988).

Here, the ALJ concluded that the insurer would have had no legitimate doubt since at least June 5, 2009, that it was liable for temporary disability benefits for surgical scarring for the period beginning September 18, 2008. In reaching that

⁷ We also note that ORS 656.268(5)(b) provides a mechanism for a worker to request claim closure and, if a carrier unreasonably refuses to close a claim, ORS 656.268(5)(d) provides a penalty.

conclusion, the ALJ reasoned that Dr. McNabb authorized modified work restrictions on September 18, 2008 and, on June 5, 2009, reported that claimant had developed surgical scarring prior to September 18, 2008, which had caused significant permanent disability.

On remand, the insurer argues that its conduct was not unreasonable as evidenced by our 2011 order. For the following reasons, we agree.

When claimant was procedurally entitled to temporary disability benefits, his condition was medically stationary. Furthermore, Dr. McNabb reported that claimant had “permanent” disability and would never work again, both comments indicative of “permanent,” rather than “temporary,” disability.

Under these particular circumstances, we find that the insurer had a legitimate doubt about its obligation to pay temporary disability benefits. For the reasons subsequently explained by the court, the insurer’s claim processing decisions were not permissible. Yet, we do not find them to be unreasonable based on the information available to the insurer at the time of its actions. Therefore, the assessment of penalties and attorney fees is not warranted.

On remand, the ALJ’s order dated May 11, 2011 is reversed. The ALJ’s temporary disability award is reversed. The ALJ’s penalty, \$2,800 penalty-related, and “out-of-compensation” attorney fee awards are also reversed.

IT IS SO ORDERED.

Entered at Salem, Oregon on August 4, 2015