
In the Matter of the Compensation of
JASON OSBORNE, Claimant
WCB Case No. 14-04466
ORDER ON REVIEW
Julene M Quinn LLC, Claimant Attorneys
MacColl Busch Sato PC, Defense Attorneys

Reviewing Panel: Members Curey, Weddell, and Somers. Member Weddell dissents.

Claimant requests review of Administrative Law Judge (ALJ) Jacobson's order that: (1) declined to award additional temporary disability benefits; and (2) declined to assess penalties and attorney fees for allegedly unreasonable claim processing. On review, the issues are claim processing, temporary disability, penalties, and attorney fees. We affirm.

FINDINGS OF FACT

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

On October 4, 2013, claimant, a temporary worker, injured his right knee. On October 5, 2013, he sought emergency room treatment. Dr. Kranz, an emergency room physician, evaluated a right knee effusion. (Ex. 1). He imposed the following restrictions on claimant's work activity: "Sit or stand as needed (limited use of right leg). Modified duty as described above until released. You may walk and bear weight as tolerated." (Ex. 2). He directed claimant to a health clinic and an orthopedist for follow-up care. (Ex. 1).

On October 11, 2013, claimant consulted Dr. Kung, an orthopedist, who became his attending physician.¹ Dr. Kung assessed a medial meniscus tear. (Exs. 4, 8). He did not address claimant's work status or disability.

On October 25, 2013, the employer reported in its portion of the 801 form that claimant had returned to modified work at regular hours and wages on October 14, 2013. (Ex. 6).

On November 4, 2013, Dr. Kung recommended right knee surgery. (Ex. 8-2). Again, he did not address claimant's work status or disability.

¹ The insurer does not dispute Dr. Kung's "attending physician" status.

The insurer paid interim compensation from November 4, 2013 to December 2, 2013. (Ex. 8A). On December 2, 2013, the insurer denied the claim and stopped temporary disability payments. (Ex. 10).

On February 11, 2014, the insurer asked Dr. Kung if he could verify claimant's inability to work after December 3, 2014, in light of the fact that claimant had not been examined after November 4, 2013. (Ex. 11). Dr. Kung responded by checking the "no" box. (*Id.*) Dr. Kung added that he was "hoping for auth[orization] for surgery[.]" (*Id.*)

On August 8, 2014, a prior ALJ's order set aside the insurer's denial and remanded the claim to it for processing. (Ex. 13).

On August 23, 2014, the insurer paid TTD benefits from December 2, 2013 to December 4, 2013. (Ex. 8A-3).

On August 25, 2014, the insurer accepted a disabling right knee sprain/strain and medial meniscus tear. (Ex. 14). The insurer also notified claimant that his claim would be closed unless he established that treatment had resumed or the reasons for not treating were outside of his control. (Ex. 16).

On August 27, 2014, claimant responded to the insurer's letter by stating that he had seen Dr. Kung on August 25, 2014. (*Id.*) On August 28, 2014, claimant's attorney responded to the insurer's notification. (Ex. 17). Underlining the phrase "reasons for not treating were outside of your control," claimant's attorney wrote: "claim was in denied status; could not get treatment." (Ex.17).

On September 25, 2014, Dr. Kung operated on claimant's right knee. (Ex. 20).

Claimant requested a hearing, seeking temporary disability benefits from December 4, 2013 through August 7, 2014, as well as penalties and attorney fees for unreasonable claim processing.

CONCLUSIONS OF LAW AND OPINION

The ALJ concluded that, under ORS 656.262(4)(d), the insurer was not liable for temporary disability benefits. In doing so, the ALJ reasoned that Dr. Kung was unable to verify claimant's inability to work during the disputed period.²

² The parties stipulated that claimant did not work between December 4, 2013 and August 7, 2014. (Tr. 2).

On review, claimant contends that the insurer's suspension of temporary disability benefits was improper because Dr. Kranz's authorization was open-ended and the claim denial prevented him from seeking treatment. *See* ORS 656.262(4)(d); OAR 436-060-0020(3). We conclude that claimant is not entitled to the disputed temporary disability benefits for the following reasons.

Only an "attending physician" may authorize the payment of temporary disability compensation. ORS 656.245(2)(b)(B). As a general rule, a physician who provides care in a hospital emergency room and refers the worker to a primary care physician for follow-up care and treatment is not authorized to serve as an "attending physician." ORS 656.005(12)(c). However, ORS 656.245(2)(b)(B) makes an exception for such physicians in allowing them to authorize temporary disability benefits for a maximum of 14 days. Under ORS 656.262(4)(h), a carrier may unilaterally suspend payment of temporary disability benefits at the expiration of that period until temporary disability is reauthorized by an attending physician.

Here, on October 5, 2013, Dr. Kranz provided care for claimant's injury in a hospital emergency room and referred him to a primary care physician and orthopedist for follow-up care and treatment. Therefore, under ORS 656.245(2)(b)(B), Dr. Kranz's ability to authorize temporary disability benefits expired on October 19, 2013. Dr. Kranz did not have statutory authority to issue an "open-ended" or "ongoing" work release. Instead, under ORS 656.262(4)(h), the insurer had the authority to unilaterally suspend payment of temporary disability benefits on October 19, 2013, until such benefits were reauthorized by an attending physician.³ *See Ana Galvan, 67 Van Natta 1055, 1057 (2015)* (finding the carrier's termination of temporary disability benefits justified under ORS 656.262(4)(h), where the claimant's attending physician was a physician assistant, who was unable to authorize temporary disability benefits for a period exceeding 30 days under ORS 656.245(2)(b)(B)).

³ The dissent contends that the insurer was not authorized to suspend temporary disability benefits because it did not comply with its claim processing obligations under ORS 656.262(4)(d) and OAR 436-060-0020(3) (requiring the carrier to obtain confirmation of the attending physician's inability to verify

the claimant's inability to work before suspending payment of temporary disability benefits). Yet, under the circumstances presented here, the formalities required by ORS 656.262(4)(d) and OAR 436-060-0020(3) do not apply. Instead, where, as here, a medical provider's authority to authorize the payment of temporary disability benefits is statutorily limited, ORS 656.262(4)(h) gives the carrier the authority to unilaterally suspend the payment of temporary disability benefits without the formalities required by OAR 436-060-0020(3).

Dr. Kung, who became claimant's attending physician on October 11, 2013, did not authorize payment of temporary disability benefits. Although he recommended surgery, his chart notes do not impose any restrictions on claimant's activity or make any reference to his work status.⁴ (Exs. 4, 8). Under these circumstances, the record does not establish that an objectively reasonable carrier would understand contemporaneous medical records to excuse claimant from work. See *Lederer v. Viking Freight, Inc.*, 193 Or App 226, *modified on recons*, 195 Or App 94 (2004) (a carrier's obligation to pay temporary disability begins when an objectively reasonable carrier would understand contemporaneous medical reports to signify such approval); cf. *James D. Chandler*, 57 Van Natta 966, 969 (2005) (a physician's statement that the claimant should be able to return to light duty two weeks after surgery was reasonably interpreted as a projected return from total disability and constituted an attending physician's time loss authorization under *Lederer*).

Accordingly, claimant is not entitled to temporary disability benefits from December 4, 2013 to August 7, 2014. Therefore, we affirm.

ORDER

The ALJ's order dated January 22, 2015 is affirmed.

Entered at Salem, Oregon on August 5, 2015

Member Weddell dissenting.

The majority finds that Dr. Kung did not authorize the payment of temporary disability benefits. Because I would find otherwise, I respectfully dissent.

⁴ The dissent interprets Dr. Kung's authorization/recommendation for surgery as his contemporaneous approval excusing claimant from work. We disagree. See *Robert Dubray*, 57 Van Natta 2035, *recons*, 57 Van Natta 2279, 2281 (2005) (without some indication from the claimant's attending physician demonstrating contemporaneous approval excusing the claimant from work, a recommendation for surgery or surgery in and of itself did not represent such approval). The dissent also argues that the insurer's payment of interim compensation supports this interpretation of Dr. Kung's authorization/recommendation for surgery. Yet, ORS 656.262(4)(g) specifically states that temporary disability compensation is not due and payable for any period of time not authorized by the attending physician. Moreover, merely paying or providing compensation is not considered an admission of liability for such benefits. ORS 656.262(10); *Karl C. Meink*, 53 Van Natta 942, 945 (2001).

Dr. Kung, claimant's attending physician, did not explicitly reauthorize the payment of temporary disability benefits. Yet, an attending physician's temporary disability authorization need not be explicit. Rather, when an objectively reasonable carrier would understand contemporaneous medical records to excuse an injured worker from work, the carrier is obligated to pay such benefits. *See Lederer v. Viking Freight, Inc.*, 193 Or App 226, *modified on recon*, 195 Or App 94 (2004).

Here, Dr. Kung's surgery recommendation on November 4, 2013 was sufficient to establish a contemporaneous confirmation that claimant was unable to work due to his knee condition.⁵ Further confirming the insurer's understanding of this surgery recommendation, it paid interim compensation from November 4, 2013 through its December 2, 2013 denial.⁶ (Exs. 8-2, 8A, 10). Finally, in February 2014, the insurer contacted Dr. Kung for the purpose of suspending claimant's temporary disability benefits under ORS 656.262(4)(d).⁷ (Ex. 11). Subsequently, when a prior ALJ's order set aside the insurer's denial, the insurer paid temporary disability benefits only through December 4, 2013, based on Dr. Kung's response that he could not verify claimant's inability to work beyond December 3, 2013, due to the lack of examinations. (Exs. 8A, 11). The most reasonable interpretation of Dr. Kung's response is that he had excused claimant from work up to December 3, 2013. *Id.*

Under ORS 656.262(4)(d), the insurer was authorized to withhold temporary disability benefits if it requested attending physician verification of claimant's inability to work and the attending physician was unable to verify that inability,

⁵ The parties stipulated that claimant did not work between December 4, 2013 and August 7, 2014. (Tr. 2).

⁶ Interim compensation is paid on the carrier's receipt of notice of a claim and an attending physician's authorization for the payment of disability compensation until the claim is accepted or denied. ORS 656.262(4)(a); *Jones v. Emanuel Hosp.*, 280 Or 147, 151 (1977).

⁷ ORS 656.262(4)(d) provides:

“Temporary disability compensation is not due and payable for any period of time for which the insurer or self-insured employer has requested from the worker's attending physician or nurse practitioner authorized to provide compensable medical services under ORS 656.245 verification of the worker's inability to work resulting from the claimed injury or disease and the physician or nurse practitioner cannot verify the worker's inability to work, unless the worker has been unable to receive treatment for reasons beyond the worker's control.”

unless the worker had been unable to receive treatment for reasons beyond his control. Similarly, OAR 436-060-0020(3)⁸ required the insurer to request attending physician verification of an inability to work due to the work injury, to receive confirmation that the attending physician could not provide such verification, and to ask claimant whether a reason beyond his control prevented him from receiving treatment *before* suspending temporary disability benefits.

Here, the insurer asked Dr. Kung for verification of claimant's inability to work and received his response that he could not provide such verification. The insurer did not ask claimant if he had been unable to receive treatment for reasons beyond his control.⁹ Because the insurer did not fully comply with its claim processing obligations under ORS 656.262(4)(d) and OAR 436-060-0020(3), the insurer was not authorized to suspend temporary disability benefits for the period in question. *See Michael Arnold*, 62 Van Natta 2854, 2856 (2010) (the carrier was not authorized to suspend TTD where it did not contact both the claimant and the attending physician before suspending TTD).

The case law requiring strict compliance with procedures for suspending temporary disability benefits is well-settled. *See Fairlawn Care Center v. Douglas*, 108 Or App 698 (1991) (substantial compliance with the administrative rule is not sufficient to authorize the carrier to terminate TTD). We have

⁸ OAR 436-060-0020(3) provides in part:

“No temporary disability is due and payable for any period of time where the insurer has requested from the worker's attending physician or authorized nurse practitioner verification of the worker's inability to work and the physician or authorized nurse practitioner cannot verify it under ORS 656.262(4)(d), unless the worker has been unable to receive treatment for reasons beyond the worker's control. Before withholding temporary disability under this section, the insurer must inquire of the worker whether a reason beyond the worker's control prevented the worker from receiving treatment. * * * If the attending physician or authorized nurse practitioner is unable to verify the worker's inability to work, the insurer may stop temporary disability payments and, in place of the scheduled payment, must send the worker an explanation for stopping the temporary disability payments.”

⁹ On August 25, 2014, the insurer notified claimant that his claim would be closed unless he established that treatment had resumed or that the reasons for not treating were outside his control. (Ex. 16). Yet, in doing so, the insurer did not notify claimant, as required by OAR 436-060-0020(3), that his temporary disability benefits would be suspended for his failure to treat or inquire whether a reason beyond his control had prevented him from treating.

previously held that carriers must “strictly comply” with OAR 436-060-0020(3) and its requirement “to contact both the claimant and the attending physician *before* suspending TTD.” *Arnold*, 62 Van Natta at 2856 (emphasis in original).

Under the circumstances as described above, I would award claimant TTD benefits, as well as penalties and attorney fees for the insurer’s unreasonable claim processing. *See* ORS 656.262(11)(a).