

In the Matter of the Compensation of
SAMUEL GOODWIN, II, Claimant
WCB Case No. 14-05977
ORDER ON RECONSIDERATION
Alvey Law Group, Claimant Attorneys
Gilroy Law Firm, Defense Attorneys

Reviewing Panel: Members Lanning and Curey.

On May 27, 2016, we withdrew our May 13, 2016 order that had reversed an Administrative Law Judge's (ALJ's) order that: (1) found that claimant timely filed a hearing request from the self-insured employer's denial of his injury claim for a C5-6 disc condition; (2) set aside the employer's denial; and (3) awarded penalties and attorney fees for an allegedly unreasonable denial. In reaching our conclusion, we declined to consider claimant's alternative contention that he had "good cause" for an untimely filed hearing request under ORS 656.319(1)(b), reasoning that the issue had not been raised at the hearing level. We abated our decision to consider claimant's reconsideration motion, which asserted that he had raised the "good cause" issue at the hearing level. Having received the employer's response and claimant's reply, we proceed with our reconsideration.

Claimant argues that the "good cause" issue was raised in his counsel's opening statement at hearing and that this record establishes that he had "good cause" for his untimely filed hearing request. For the following reasons, we conclude that claimant raised the issue, but he did not establish "good cause" for an untimely filed hearing request.

We briefly review the relevant facts. On September 30, 2014, the insurer denied claimant's new/omitted medical condition claim for "right C6 foramen disc rupture, however termed." (Ex. 83). On October 8, 2014, the Workers' Compensation Division (WCD) issued a notice suspending disability benefits and postponing a reconsideration proceeding.¹ (Ex. 86).

On November 17, 2014, claimant mailed a certified letter to the WCD, asking for help resolving issues involving his work-related injury, medical treatment, and current condition. (Ex. 92A-2, -3). The WCD Compliance office received the letter on November 20, 2014. (Ex. 92A-2). The Ombudsman for Injured Workers received the letter on November 26, 2014.² (*Id.*)

¹ Claimant had requested reconsideration of a July 31, 2014 Notice of Closure. (Exs. 77-1, 86). After he failed to attend a medical arbiter examination, the WCD suspended disability benefits, postponed the reconsideration proceeding, and directed him to submit evidence showing good cause. (Ex. 86).

² The Thanksgiving holiday was November 27 and 28, 2014.

On December 1, 2014, Ms. Benavidez (an Ombudsman representative) called claimant's father to determine the intentions of the letter.³ (Tr. 37, 38). Claimant's father explained that his son's claim had been denied and the Sanctions Office for WCD had sent a letter suspending benefits. (Tr. 37). When Ms. Benavidez explained the "appeal process" for the denial, claimant's father indicated that the letter was for that purpose. (*Id.*)

Ms. Benavidez then called claimant, also on December 1, 2014, who confirmed that it was his intention to appeal the denial. (Tr. 37). Ms. Benavidez stated that she would deliver the letter to the Board, but that he should write another letter to the Board, specifically appealing the denial. (Tr. 40, 41). She also told claimant that he had 60 days to do that, or up to 180 days if he could show good cause.⁴ (Tr. 41).

On December 3, 2014, claimant submitted to the WCD a certified mailing entitled "Appeal and Object." (Ex. 91). The document specifically referred to the July 31, 2014 closure notice and the October 7, 2014 suspension notice. (Ex. 91-1). The document also explained why claimant had not attended an insurer-arranged medical evaluation. (*Id.*) The document did not refer to the denial. (*Id.*) The WCD, as well as the Ombudsman's office, received the document on December 5, 2014. (*Id.*)

On December 5, 2014, Ms. Benavidez delivered to the Board: (1) claimant's certified letter and documents sent to the WCD on November 17, 2014; and (2) claimant's certified letter sent to the WCD on December 3, 2014.⁵ (Ex. 92A-1).

In his opening statement at the hearing, claimant's counsel responded to the employer's "untimely hearing request" defense by describing the sequence of events leading up to the Board's receipt of claimant's November 17, 2014 submission. (Tr. 14). Claimant's attorney asserted, "Under these circumstances, there was, A, a Request for Hearing that was filed timely, * * * and then misdirected, until it was ultimately received at the Board. And in the alternative to that, there was a late Request for Hearing that was made, and we've established good cause." (Tr. 14).

³ The 60-day appeal period for the denial expired on December 1, 2014. Ms. Benavidez placed a note on the November 17, 2014 letter, indicating the December 1, 2014 date. (Ex. 92A-2; Tr. 39).

⁴ Ms. Benavidez testified that she knew the time for appealing the denial was "running out." (Tr. 42).

⁵ The hearing file contains a copy of the September 30, 2014 denial, bearing only the WCD's October 15, 2014 date stamp and the Board's December 5, 2014 date stamp. (Hearing File).

In closing argument, claimant's counsel contended that the letter received by the WCD in November 2014, and delivered to the Board on December 5, 2014, constituted a timely hearing request under ORS 656.704(5).⁶

The ALJ determined that claimant's November 17, 2014 submission constituted a hearing request. In doing so, the ALJ reasoned that, although claimant's letter did not expressly mention the denial, claimant did discuss his surgery, which was directed at the disputed conditions, and he included a copy of the denial in the packet of supporting materials. The ALJ interpreted claimant's "plea for help in 'resolving these issues'" as a hearing request on the "denial letter that was enclosed."

In his respondent's brief on review, claimant maintained that his "hearing request" was timely filed when it was received by the WCD on November 20, 2014 and delivered to the Board's Salem office on December 5, 2014. (Resp. Br. at 4). Claimant also represented that his December 3, 2014 letter contained a copy of the denial and was received by the Board within 180 days of the denial. (*Id.*) Claimant argued that, in the event the first mailing was not a valid hearing request, he had established "good cause" for any untimely filed hearing request.

After conducting our review, we were not persuaded that the denial was enclosed with claimant's November 17, 2014 letter. Therefore, we concluded that the November 17, 2014 letter was not an effective hearing request from the denial. Turning to the December 3, 2014 letter, we observed that the letter did not raise compensability as an issue or refer to the denial.⁷ In any event, we noted that the letter was mailed after the 60-day appeal period expired. Finally, we declined to consider claimant's alternative "good cause" argument.

⁶ ORS 656.704(5) provides:

"If a request for hearing or administrative review is filed with either the director or the board and it is determined that the request should have been filed with the other, the dispute shall be transferred. Filing a request will be timely filed if the original filing was completed within the prescribed time."

⁷ Our May 13, 2016 order concluded that the December 3, 2014 letter did not raise a compensability issue or refer to the denial. *Id.* at 734. On reconsideration, claimant contends that our order found that a copy of the September 30, 2014 denial was enclosed with the December 3, 2014 letter, as evidenced by the Board's December 5, 2014 date stamp. We disagree.

Our May 13, 2016 order found that the hearing file contained claimant's November 17, 2014 and December 3, 2014 submissions and a copy of the denial bearing the WCD's October 15, 2014 date stamp and the Board's December 5, 2014 date stamp. *Id.* at 732. We concluded that the evidence did not establish that the denial was enclosed with the November 17, 2014 letter. *Id.* We did not make findings or draw conclusions as to whether the denial was enclosed with the December 3, 2014 submission.

On further review, we conclude that the “good cause” issue regarding claimant’s December 3, 2014 submission was raised by claimant’s counsel’s opening remarks. (Tr. 14). We also conclude, however, that the record does not persuasively establish “good cause” for claimant’s filing the request more than 60 days after the mailing of the denial. We reason as follows.

A request for hearing must be filed not later than the sixtieth day after the mailing of the denial to the claimant. ORS 656.319(1)(a). A hearing request that is filed after 60 days, but within 180 days, of a denial confers jurisdiction if the claimant establishes good cause for the late filing. ORS 656.319(1)(b). Claimant has the burden of proving good cause. *Hempel v. SAIF*, 100 Or App 68 (1990). The test for determining if there is good cause is whether there was “mistake, inadvertence, surprise or excusable neglect.” *Id.* Lack of diligence does not constitute good cause. *Cogswell v. SAIF*, 74 Or App 234, 237 (1984).

Here, the WCD received claimant’s initial letter on November 20, 2014, which was within 60 days of the September 30, 2014 denial.⁸ (Tr. 35, 36). On December 1, 2014 (the day the 60-day appeal period expired), Ms. Benavidez advised claimant and his father that they should also write another letter, to the Board, specifically appealing the denial, and that claimant had 60 days to do that, or up to 180 days if he could show “good cause.” (Tr. 40, 41). Claimant mailed the second letter on December 3, 2014, which was received by the WCD (and Ms. Benavidez) on December 5, 2014. (Ex. 91).

Claimant argues that he has shown “good cause” for the late filing, given his level of education and other difficulties. Specifically, he has a ninth grade education, cannot read, and does not write. (Tr. 49). Furthermore, his father

On further review, we are not persuaded that the denial was enclosed in the December 3, 2014 submission. The December 3, 2014 letter bears the WCD’s perforated date stamp for December 5, 2014. (Ex. 91; Hearing File). The September 30, 2014 denial bears only the WCD’s perforated date stamp for October 15, 2014 and the Board’s December 5, 2014 date stamp. (Hearing File).

Based on the date stamps, and in the absence of any testimony from claimant or his father that the denial was enclosed in the December 3, 2014 submission, this record suggests that the denial in the hearing file was received by the WCD independently of claimant’s mailings. In any event, even if the denial were included with the December 3 submission to the WCD, it would have been untimely filed. Furthermore, for the reasons expressed above, the record does not establish “good cause” for this untimely filed hearing request from the denial.

⁸ Although the initial letter was hand-delivered to the Board after the 60-day appeal period had expired, the document was timely filed with the WCD within the prescribed time. *See* ORS 656.704(5). Nonetheless, for the reasons expressed in our previous order, we adhere to our previous conclusion that the letter was not an effective “hearing request” from the insurer’s denial. *See Goodwin*, 68 Van Natta at 734.

testified that claimant is not “educated enough to deal with this situation, by no means.” (Tr. 24). Finally, claimant testified that his father and his cousin helped him write to the WCD, explaining that his father wrote down what he said and his cousin typed the letter. (Tr. 48).

Yet, when claimant was asked at hearing why he did not mail the second letter until December 3, 2014, he responded “I—as soon as [Ms. Benavidez] said appeal it with another letter stating in there such, that’s what we did. And we got it right to them as fast as we could.” (*Id.*) He did not contend that Ms. Benavidez misled him or that he did not understand that he had to appeal the denial by December 1, 2014. Rather, he confirmed that Ms. Benavidez told him that he “would have to rewrite a letter” and he “had just the amount of time to do it in, and had to get it there.”⁹ (Tr. 51).

Under these circumstances, we are not persuaded that there was “good cause” for claimant’s failure to file his request for hearing within 60 days after the September 30 denial has been established. *See* ORS 656.319(1)(b).

Accordingly, on reconsideration, as supplemented herein, we adhere to and republish our May 13, 2016 order. The parties’ rights of appeal shall begin to run from the date of this order.

IT IS SO ORDERED.

Entered at Salem, Oregon on September 12, 2016

⁹ Claimant’s father testified that Ms. Benavidez did not say that the deadline for appealing the denial was December 1, 2014. (Tr. 68). Nonetheless, his testimony was contradicted by that of claimant (the party to this proceeding), who was “pretty sure” that Ms. Benavidez told him he had 60 days from September 30, 2014. (Tr. 53). Given such circumstances, we are persuaded that claimant was notified of the need to file a hearing request from the employer’s denial within the requisite 60-day period, which was expiring the day of that conversation.