
In the Matter of the Compensation of
MISTY R. FOX, Claimant
WCB Case No. 15-00978
ORDER ON REVIEW
Pancic Law, Claimant Attorneys
SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Lanning and Curey.

Claimant requests review of that portion of Administrative Law Judge (ALJ) Ogawa's order that declined to award additional temporary disability benefits from October 9, 2014 through April 13, 2015. On review, the issue is temporary disability. We reverse.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact," with the following corrections and summary of pertinent facts. In the first sentence of the first full paragraph on page 2 of the ALJ's order, we change the date to "March 23, 2012." The first sentence of the second full paragraph on page 2 is deleted.

Claimant was compensably injured on March 23, 2012.¹ (Exs. 1, 3). In a letter dated June 14, 2012, and addressed to claimant at "1894 Cedarcrest Dr S, Salem, OR 97306," the SAIF Corporation informed claimant that she had been enrolled in a managed care organization (MCO).² (Ex. 5). The letter further advised that because her current physician (Dr. Hook) was an authorized MCO provider, she was not required to change physicians at that time. A notation at the bottom of the letter stated "REGULAR MAIL." (*Id.*)

On October 24, 2012, Dr. Hursey (a non-MCO physician) became claimant's attending physician. (Ex. 7). Dr. Hursey restricted claimant's work and released her to light/modified duty starting November 8, 2012, which continued until March 22, 2015. (Exs. 9, 11, 17, 24, 29, 65-25).

¹ Her claim was ultimately accepted for a thoracic contusion, thoracic strain, lumbar strain and sciatica. (Exs. 4, 6, 56).

² The MCO letter was sent to the wrong address and there is no evidence claimant ever received it. (Ex. 5). Also, correspondence from SAIF to claimant was mailed to the wrong address through November 2012. (Exs. 4, 6, 11A).

Two years later, in a letter dated October 1, 2014, addressed to claimant at “1874 Cedarcrest Dr S, Salem, OR 97306,” SAIF advised claimant of her prior enrollment in the MCO and informed her that “time loss benefits, if any, are discontinued effective October 1, 2014. Benefits will resume only after you seek care from an eligible MCO attending physician or authorized nurse practitioner.” (Ex. 57). The letter indicated that it was being sent by “CERTIFIED AND REGULAR MAIL.” (*Id.*) SAIF’s claim adjuster described the letter as an “enforcement letter.” (Tr. II-13).

Claimant testified that in June 2012, she was not “to [her] knowledge” enrolled in an MCO. (Tr. II-24). She added that, on June 14, 2012, she did not live at “1894 Cedarcrest Drive South,” but that her correct address was “1874 Cedarcrest Drive South.” (Tr. II-27; emphasis added).

CONCLUSIONS OF LAW AND OPINION

In finding that SAIF was authorized to terminate temporary disability benefits on October 8, 2014 (seven days after the October 1, 2014 MCO “enforcement” letter), the ALJ disagreed with claimant’s contention that SAIF’s June 2012 “enrollment” letter was ineffective because it was sent to an incorrect address. To the contrary, the ALJ concluded that SAIF mailed the June 14, 2012 MCO enrollment letter on that date, and that claimant did not rebut the presumption that the letter was successfully mailed and that she was notified of her enrollment into the MCO.

On review, claimant renews her contention that she was not enrolled in an MCO because SAIF did not provide the requisite written notice to her regarding her MCO enrollment as required by ORS 656.245(4)(a). Therefore, she asserts that she is entitled to temporary disability benefits after October 8, 2014, based on Dr. Hursey’s valid work-release authorizations.³ For the following reasons, we agree.⁴

³ The parties stipulated that Dr. Hursey was claimant’s attending physician from March 6, 2013 (the date of SAIF’s claim denial) until October 8, 2014 (seven days after SAIF’s acceptance and the MCO “enforcement” letter). (Tr. I-3). On review, the parties do not dispute that Dr. Hursey provided valid work-release authorizations for that period, and continuing past October 2014.

⁴ Based on our conclusion, we need not address claimant’s argument regarding Dr. Hursey’s “come-along provider” status.

ORS 656.245(4)(a) provides, in relevant part, that “[a] worker becomes subject to the contract upon the worker’s receipt of actual notice of the worker’s enrollment in the managed care organization, or upon the third day after the notice was sent by regular mail by the insurer or self-insured employer, whichever event first occurs.”

Here, the record does not establish that claimant actually received the June 2012 MCO “enrollment” letter; *i.e.*, no documentary or testimonial evidence confirms that she received the letter (which was mailed to an incorrect address) and, if so, when. What the record does establish is that the June 2012 MCO “enrollment” letter was not sent to claimant’s correct address, and she testified that, in June 2012, she did not know she was enrolled in an MCO. (Tr. II-24). The reasonable interpretation of those facts is that claimant did not get actual notice of the June 2012 MCO letter.

However, under ORS 656.245(4)(a), without “actual notice,” claimant would become subject to the MCO contract “upon the third day after the [June 2012] notice was sent by regular mail.” For the following reasons, we are not persuaded that SAIF’s June 2012 “enrollment” letter satisfied this statutory requirement.

First, SAIF contends that neither receipt of the MCO enrollment notice by claimant nor mailing to the correct address are required to satisfy the “regular mail” element of the statute. According to SAIF, the text of the statute provides that MCO enrollment is effective either by actual notice or three days after the notice is mailed by regular mail, thus evidencing an intent that the two methods are in the alternative, and only the “actual notice” alternative requires that the worker actually receive the notice. For the following reasons, we disagree with SAIF’s interpretation of the requirements necessary to satisfy notice by “regular mail.”

The purpose of ORS 656.245(4)(a) is to provide notice to the worker of MCO enrollment. To effectuate that purpose, a reasonable assumption is that such notice by “regular mail” be accomplished by mailing to claimant at the proper address. OAR 436-010-0275(4) (WCD Admin. Order 12-051, eff. April 1, 2012) supports this interpretation. That rule mandates that, in enrolling a worker in an MCO, the carrier “must simultaneously provide written notice *to the worker*, the worker’s representative, all medical service providers, and the MCO of enrollment.” (Emphasis added).

Here, it is undisputed that the June 2012 MCO “enrollment” letter was mailed, but not to claimant’s correct address. Further, claimant testified that she did not know she was enrolled in an MCO in June 2012. (Tr. II-24). Consequently, because the enrollment letter was not properly mailed, notice by “regular mail” was not effectuated.⁵

Under such circumstances, we are persuaded that claimant did not receive notice, either via “actual notice” or by “regular mail,” of her MCO enrollment in June 2012.

Likewise, claimant did not receive notice of MCO enrollment by virtue of SAIF’s October 1, 2014 “enforcement” letter. That letter advised claimant of her prior enrollment in the MCO and informed her that “time loss benefits, if any, are discontinued effective October 1, 2014. Benefits will resume only after you seek care from an eligible MCO attending physician or authorized nurse practitioner.” (Ex. 57). Although addressed to claimant at the correct address, that letter did not include all of the information required by the Director’s rules for an MCO “enrollment” letter to be “complete.” OAR 436-010-0275(4)(a)-(h), (8) (WCD Admin. Order 14-053, eff. April 1, 2014).⁶ When a rule specifically and

⁵ ORS 40.135(1)(q) provides that it is a presumption that a “letter duly directed and mailed was received in the regular course of the mail.” However, here, because the June 2012 letter was sent to the incorrect address, it was not “duly directed.” Therefore, the “rebuttable presumption” of receipt of mailing under ORS 40.135(1)(q) was never triggered. See *Norton v. Comp. Dep’t*, 252 Or 75, 78 (1968) (while there is a presumption that a writing is truly dated, and that a letter directed and mailed was received in the regular course of the mail, there is no presumption that a letter is mailed on the day it is dated or on the day it is written); *Michael S. Belgarde*, 66 Van Natta 1424, 1429 (2014) (denial mailed to an incorrect address not effective, regardless of a claimant’s actual knowledge of the denial); cf. *David J. Lampa*, 66 Van Natta 1052, (2014) (statutory presumption of receipt by mail under ORS 40.135(1)(q) triggered where record established *when* the document was mailed).

⁶ Pursuant to OAR 436-010-0275(4)(a) through (h) (2014), an enrollment notice “must”:

- (1) provide the worker a written list of eligible attending physicians within the MCO or provide a Web address to access the list;
- (2) describe how the worker may obtain the names and addresses of the complete panel of MCO providers;
- (3) advise the worker of the manner in which he/she may receive medical services for compensable injuries within the MCO;
- (4) describe how the worker can receive compensable medical treatment from a “come-along” provider;
- (5) advise the worker of the right to choose the MCO when more than one MCO contract covers the employer, except when the employer provides a coordinated health care program;
- (6) provide the worker with the title, address and telephone number of the contact person at the MCO responsible for ensuring the timely resolution of complaints or disputes;
- (7) advise the worker of the time lines for appealing disputes beginning with the MCO’s internal dispute resolution process through administrative review before the Director, that disputes to the MCO must be in writing and filed within 30 days of the disputed action and with whom the dispute is to be filed, and that failure to request review to the MCO precludes further appeal; and
- (8) notify the MCO of any request by the worker for qualification of a primary care physician, chiropractic physician, or authorized nurse practitioner.

unambiguously requires the carrier to follow a certain procedure, substantial compliance is not sufficient. *SAIF v. Robertson*, 120 Or App 1 (1993); *Fairlawn Care Center v. Douglas*, 108 Or App 698, 701 (1991) (substantial compliance with the administrative rule is not sufficient to authorize the carrier to terminate TTD); *Eastman v. Georgia Pacific Corp.*, 79 Or App 610 (1986) (strict compliance required with administrative rule setting forth procedural requirements for terminating temporary disability); *Robin L. Smith*, 47 Van Natta 423, *recons*, 47 Van Natta 886 (1995) (carrier improperly refused to reimburse the claimant for medical and related expenses, where it failed to comply with administrative rules' notice requirements).

Therefore, even if properly mailed, the October 2014 “enforcement” letter did not authorize SAIF to unilaterally stop payment of temporary disability benefits due to an “MCO-related” matter because that letter did not strictly comply with the necessary requirements for an MCO notice to be complete under the Director’s rules.⁷

In summary, for the aforementioned reasons, the foundation for SAIF’s termination of temporary disability benefits after October 8, 2014, based on claimant’s failing to treat with an MCO-approved attending physician, is not established. Accordingly, that portion of the ALJ’s order that declined to award the dispute temporary disability benefits is reversed.

Claimant’s counsel is entitled to an assessed fee for services at hearing and on review for prevailing on the issue of entitlement to temporary disability benefits from October 9, 2014 through April 13, 2015. ORS 656.383(2) (2015).⁸ After

In addition, OAR 436-010-0275(8) (2014) provides that an enrollment notice is “complete” on the “date the notice is mailed when the notice *includes all required information * * **.” (Emphasis added).

⁷ SAIF cites the following cases in support of its argument: *Adrian Guzman*, 10 CCHR 459 (2005) (a carrier’s compliance with the notice requirements of ORS 656.245(4)(a) was sufficient to render a worker subject to an MCO, even if it failed to comply with the additional notification requirements in OAR 436-010-0275), *William Meier*, 16 CCHR 290 (2011) (MCO enrollment effective despite not being copied to the claimant’s attorney and all medical providers), and *Jennifer Butters*, 58 Van Natta 1952 (2006) (MCO enrollment effective though not sent by a certified claim adjuster). However, we find those cases distinguishable. Those cases dealt with whether notice was properly provided under ORS 656.245(4)(a), and did not address the question of whether the notice was otherwise deficient for not having strictly complied with the information requirements of OAR 436-010-0275(4)(a) through (h).

⁸ Because the attorney fees related to this temporary disability issue are “incurred” at the time this order issues, which is after January 1, 2016, the statutory amendments of House Bill 2764 (2015), Or Laws 2015, chapter 521, are applicable. See Or Laws 2015, ch 521, § 11; *Rodolfo Arevalo*, 68 Van Natta 1142 (July 27, 2016).

considering the factors set forth in OAR 438-015-0010(4) and applying them to this case, we find that a reasonable fee for claimant's attorney's services at the hearing level and on review concerning the temporary disability issue is \$9,000, payable by SAIF. In reaching this conclusion, we have particularly considered the time devoted to the issue (as represented by the record and claimant's appellant's brief), the complexity of the issue, the value of the interest involved, and the risk that claimant's counsel might go uncompensated.

ORDER

The ALJ's order dated November 17, 2015 is affirmed in part and reversed in part. That portion of the ALJ's order that did not award temporary disability benefits from October 9, 2014 through April 13, 2015 is reversed. SAIF is directed to pay temporary disability benefits for that period. For services at hearing and on review, claimant's counsel is awarded as assessed fee of \$9,000, payable by SAIF. The remainder of the ALJ's order is affirmed.

Entered at Salem, Oregon on August 2, 2016