
In the Matter of the Compensation of
BASIL D. YAUGER, Claimant
WCB Case Nos. 14-05824, 14-05176
ORDER ON REVIEW
Hollander & Lebenbaum et al, Claimant Attorneys
Scott H Terrall & Associates, Defense Attorneys

Reviewing Panel: *En Banc*; Members Johnson, Lanning, Curey, Weddell, and Somers.

The self-insured employer requests review of Administrative Law Judge (ALJ) Wren's order that: (1) found that claimant timely filed a hearing request concerning the employer's "non-cooperation" denial regarding his injury claim for a left hand/finger condition; (2) found that claimant had cooperated in the employer's claim investigation within the 30-day period following a Workers' Compensation Division's (WCD's) "suspension" order; and (3) set aside the employer's denial. Claimant cross-requests review, contending that the ALJ's order neglected to include a "costs" award under ORS 656.386(2). On review, the issues are the timeliness of claimant's hearing request, claim processing, and costs. We affirm.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact," and provide the following summary.

On August 9, 2014, claimant sustained an allegedly compensable injury to his left hand. The employer initially completed an 801 form. (Ex. 2).

Claimant did not attend a September 4, 2014 deposition. On September 10, 2014, the employer requested a WCD order suspending benefits pursuant to ORS 656.262(15). (Ex. 17).

On September 19, 2014, the WCD sent claimant a notice that his benefits would be suspended after five days if he did not contact the employer and cooperate in the investigation of his claim. The notice was mailed to a Utah address, which had been provided to the employer by a "change of address" notice from the U.S. Postal Service, although claimant had not moved to the Utah address. (Ex. 21-1).

On September 30, 2014, when no response was received from claimant, the WCD issued an Order Suspending Compensation pursuant to ORS 656.262(15). The suspension order concluded: “[I]f the worker does not cooperate for an additional 30 days after the division’s September 19, 2014 notice, the insurer or self-insured employer may deny the claim because of the worker’s failure to cooperate.” (Ex. 23).

On October 1, 2014, the Ombudsman e-mailed claimant a copy of the September 16, 2014 suspension notice with contact information for the claim adjuster. (Ex. 23B).

On October 1, 2014 (and again on October 2, 2014), claimant e-mailed the employer’s claim administrator at its general e-mail address (with a copy to the employer and the Ombudsman) acknowledging his receipt of the WCD’s September 16 suspension notice. (Exs. 23C, 23D). In those e-mails, claimant indicated that he had been willing to cooperate with the investigation (although not at property he deemed unsafe), contended that he had no knowledge of the September 4 deposition, and requested a copy of his recorded phone interview with a supervisor. (Exs. 23C, 23D)

On October 16, 2014, claimant signed a medical release that the employer’s claim administrator had originally mailed to the Utah address on September 30, 2014. (Ex. 25-1, -3). On that same date, claimant sent an e-mail to the claim administrator’s general e-mail address requesting an update regarding his claim. (Ex. 25B). Asserting that he had fulfilled all of his required documentation and completed a medical release, claimant concluded his message as follows: “Is there anything else that a reasonable person could do after being attacked, and injured while on the job? If so—please advise.” (*Id.*) The e-mail was forwarded to the claim adjuster responsible for claimant’s claim on October 20, 2014.

On October 21, 2014, the employer issued a “non-cooperation” denial to claimant at the Utah address. (Ex. 27). On October 22, 2014, the employer reissued the denial to claimant at his Washington address. (Ex. 28).

The employer’s October 21 and October 22, 2014 denials did not include the “Notice of Hearing Rights” paragraph for “non-cooperation” denials. *See* OAR 438-005-0055(1), (2). On October 24, 2014, the employer issued a “corrected” denial that included the required notice for “non-cooperation” denials. (Ex. 29).

On October 27, 2014, claimant sent an e-mail to the Board's designated address, stating that he was "requesting a hearing regarding the denial of workers compensation" and referring to the employer's claim number and the August 9, 2014 "date of injury/attack." (Ex. 30A).

On October 31, 2014, claimant's former counsel filed a hearing request form that identified the employer's claim number and the August 9, 2014 date of injury and checked the boxes for "denial" and "compensability – complete claim denial," but did not provide a denial date or check the box for "worker non-cooperation." (Ex. 30D-1).

On November 7, 2014, claimant sent a second e-mail to the Board's designated "e-mail" address stating that he had just received a letter from Sedgwick dated "10/22/14." He also stated that Sedgwick had mailed "their denial letter to an incorrect address (again)" and asked that this be considered his "2nd request for hearing," stating that he was "sure" that his attorney had also made the same request. (Ex. 33).

On November 21, 2014, claimant's former counsel filed a second hearing request form that checked the boxes for "denial" (providing the date of 10/22/2014) and "temporary disability." (Ex. 35).

On December 3, 2014, claimant's former counsel filed a third hearing request form that checked the boxes for "denial" (providing the date of 10/22/2014), "worker non-cooperation," and "other," stating, "claimant requests expedited hearing 656.291." (Hearing File).

CONCLUSIONS OF LAW AND OPINION

Jurisdiction

Reasoning that claimant's e-mails were sufficient to request a hearing under ORS 656.283(1), the ALJ concluded that claimant had filed a timely request for hearing of the October 24, 2014 denial. On review, the employer asserts that claimant filed a request for hearing only as to the October 22, 2014 denial, not the October 24, 2014 denial.

Under ORS 656.319(1), a claimant has an obligation to request a hearing in response to each denied claim. *Naught v. Gamble, Inc.*, 87 Or App 145, 149 (1987). In other words, a request for hearing must be referable to a particular denial. *Guerra v. SAIF*, 111 Or App 579, 584 (1992) (the claimant was not entitled

to rely on her request for hearing against one carrier as an effective request for hearing from another carrier's denial). To determine whether a hearing request is referable to a particular denial, we consider the request itself, read as a whole and in the context in which it was submitted. *Kevin C. O'Brien*, 44 Van Natta 2587, 2588 (1992), *recons*, 45 Van Natta 97 (1993).

Here, the denials referred to the same claim and date of injury and contained the same description of claimant's alleged failure to cooperate in the employer's investigation of his claim. The only "correction" made in the October 24, 2014 denial was the substitution of the "Notice of Hearing Rights" paragraph required by OAR 438-005-0055(2) for non-cooperation denials. Because the October 21 and October 22, 2014 denials did not provide the "Notice of Hearing Rights" paragraph required by OAR 438-005-0055(2) for non-cooperation denials, those denials were deficient. This deficiency was subsequently addressed by the employer's October 24, 2014 denial, which effectively superseded the October 21 and October 22, 2014 denials and included the correct "Notice of Hearings Rights" paragraph.

Thereafter, claimant's October 27, 2014 e-mailed hearing request identified the employer's claim number and the date of injury, and requested a hearing "regarding the denial of workers compensation." (Ex. 30A). We acknowledge that claimant's former counsel's October 31, 2014 hearing request form checked the box for "compensability," rather than "non-cooperation." (Ex. 30D-1). However, there were no "compensability" denials outstanding. Moreover, claimant's former counsel's December 3, 2014 hearing request checked the boxes for "worker non-cooperation," and requested an expedited hearing under ORS 656.291.

We further acknowledge that claimant's November 7, 2014 hearing request and his former counsel's November 21, 2014 and December 3, 2014 hearing requests referred to the October 22, 2014 denial. Yet, as discussed above, we have found that the October 22, 2014 denial was effectively replaced by the October 24, 2014 denial.

Under these circumstances, we find that claimant's e-mailed hearing requests and his former counsel's hearing requests were sufficient to encompass an appeal of the October 24, 2014 amended denial.

“Non-Cooperation” Denial

In setting aside the employer’s “non-cooperation” denial, the ALJ reasoned that claimant’s October 16, 2014 e-mail to the employer’s claim administrator’s general e-mail address (which was forwarded to its claim adjuster), was sufficient cooperation within 30 days of the September 19, 2014 Notice of Suspension to invalidate the “non-cooperation” denial.

On review, the employer contends that, because claimant conceded at hearing that he had not fully cooperated with the investigation, under the reasoning of *Hopper v. SAIF*, 265 Or App 465, 469 (2014), its denial must be upheld. For the following reasons, we disagree with the employer’s contention.

ORS 656.262(14) provides that injured workers have the duty to cooperate and assist the carrier in the investigation of claims for compensation. “Injured workers shall submit to and shall fully cooperate with personal and telephonic interviews and other formal or informal information gathering techniques.” (*Id.*) A carrier may deny a claim because of the worker’s failure to cooperate with an investigation involving an initial claim. ORS 656.262(15).¹

OAR 436-060-0135, relating to the suspension of benefits under ORS 656.262(15) provides, in pertinent part:

“(7) If the worker cooperates after the insurer has requested suspension, the insurer must notify the division immediately to withdraw the suspension request. The division will notify all the parties. An order may be issued identifying the dates during which the insurer’s obligation to accept or deny the claim was suspended.

“* * * * *

¹ ORS 656.262(15) provides in relevant part:

“If the director finds that a worker fails to reasonably cooperate with an investigation involving an initial claim to establish a compensable injury * * *, the director shall suspend all or part of the payment of compensation after notice to the worker. If the worker does not cooperate for an additional 30 days after the notice, the insurer or self-insured employer may deny the claim because of the worker’s failure to cooperate.”

“(9) If the worker has not documented that the failure to cooperate was reasonable, the division will issue an order suspending all or part of the payment of compensation to the worker. The suspension will be effective the fifth working day after notice is provided by the division as required by section (6) of this rule. The suspension of compensation shall remain in effect until the worker cooperates with the investigation. The worker and the insurer must notify the division immediately when the worker cooperates with the investigation. *If the worker makes no effort to reinstate compensation within 30 days of the date of the notice, the insurer may deny the claim under ORS 656.262(15) and OAR 436-060-0140(10).*” (Emphasis supplied).

Consistent with the administrative rule, the WCD’s Order of Suspension advised claimant that:

“The suspension of the worker’s compensation and the suspension of the insurer’s obligation to accept or deny the claim within 60 days shall each continue until the worker cooperates with the insurer’s investigation of the claim by contacting the insurer to arrange and submit to an interview.

“However, if the worker does not cooperate for an additional 30 days after the division’s September 19, 2014 notice, the insurer or self-insured employer may deny the claim because of the worker’s failure to cooperate.” (Ex. 23-4).

As noted earlier, after the WCD’s September 30, 2014 suspension order, on October 16, 2014, claimant sent an e-mail to the employer’s claim administrator’s general e-mail address (which was forwarded to its claim adjuster on October 20, 2014) requesting an update on his claim and indicating that he had completed his required documentation. (Ex. 25B). In his e-mail, claimant sought advice about what he should do next. (*Id.*)

Our initial inquiry is whether the employer's "non-cooperation" denial was procedurally valid under the applicable statutes and rules.² Under OAR 436-060-0135(9), the employer is not authorized to issue a "non-cooperation" denial unless "the worker makes no effort to reinstate compensation within 30 days of the date of the notice[.]" In other words, the employer may not issue a denial unless the worker has failed to cooperate for an additional 30 days from the notice of suspension.

Thus, an objective of the WCD's rule is to encourage the worker's cooperation in the carrier's claim investigation. To that end, OAR 436-060-0135(7) requires the carrier to notify the WCD if the worker cooperates after it has requested suspension. Moreover, under OAR 436-060-0135(9), the suspension of compensation remains effective only "until the worker cooperates with the investigation." If the worker *makes no effort* to reinstate compensation within 30 days of the suspension notice, then a carrier is authorized to deny the claim. OAR 436-060-0135(9).

Here, the WCD's "suspension" notice issued on September 19, 2014. Thus, the employer could not issue a "non-cooperation" denial until claimant had failed to cooperate for an additional 30 days following that notice.³

² The *Hopper* court held that to prevail against a "non-cooperation" denial, a claimant must prove one of the following: (1) that he "fully and completely cooperated with the investigation"; (2) that he "failed to cooperate for reasons beyond [his] control"; or (3) that the carrier's "investigative demands were unreasonable." However, for the reasons expressed above, we conclude that the *Hopper* analysis does not address the question presently before us, *i.e.*, whether the employer's "non-cooperation" denial was procedurally valid under ORS 656.262(15) and OAR 436-060-0135(9).

³ The following legislative history from Representative Mannix, concerning the 1995 statutory amendments adopted by Senate Bill 369, supports our conclusion that a "non-cooperation" denial is not authorized under ORS 656.262(15), unless a claimant fails to cooperate for an additional 30 days following the WCD's notice of suspension:

"First you have noncooperation. You have notice from the insurer or self-insured employer of noncooperation. That gives the worker an opportunity then, with notice, to cleanup the worker's act and cooperate and no further problems. You start cooperating, then you're okay. But if the worker doesn't cooperate *30 days more after this notice* * * * *Then they can deny.*" (Testimony of Representative Mannix, House Committee on Labor, March 6, 1995, Tape 46, Side A) (emphasis added); *see also Randy L. Kimball*, 55 Van Natta 3455, 3456 n 3 (2003).

As previously detailed, on October 16, 2014, claimant e-mailed the employer's claim administrator, asking what further actions he needed to take. Although the claim administrator received that e-mail, no specific response to claimant's message was provided. (Ex. 25B). Rather, on October 21, 2014, the employer issued its "non-cooperation" denial. (Ex. 27).

Moreover, the record reflects other efforts by claimant to cooperate. For instance, in an October 22, 2014 e-mail to the claim adjuster, claimant stated that he had attempted to contact her several times, but that she had not returned his calls. (Ex. 28A). The record does not contradict claimant's representation.⁴

Consistent with its administrative rules, the WCD's suspension order stated that, if the worker does not cooperate for an additional 30 days following the WCD's September 19, 2014 notice, the employer may deny the claim because of the worker's failure to cooperate. (Ex. 23-4). Here, the record persuasively establishes that claimant contacted the employer within 30 days of the WCD's suspension notice asking what actions he needed to take. Thus, the prerequisites for the issuance of a "non-cooperation" denial were not satisfied.⁵ Accordingly, the employer's denial is procedurally invalid.

Because we have concluded that the employer was aware of claimant's attempts to cooperate, but elected to wait for the 30 days to expire and issue a "non-cooperation" denial instead of responding to his inquiry, we agree with the ALJ's decision setting aside the employer's "non-cooperation" denial. Accordingly, we affirm.

Claimant's attorney is entitled to an assessed fee for services on review. ORS 656.382(2). After 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

⁴ In addition, the Ombudsman also contacted the claim adjuster within 30 days of the WCD's "suspension" notice and before the "non-cooperation" denial. Specifically, on Thursday, October 16, 2014, the Ombudsman e-mailed claimant that she had "contacted [the claim adjuster who] said the claim is still in a deferral status at this time should be making a decision by Friday [October 17, 2014]." (Ex. 25A).

⁵ We acknowledge that claimant did not contact the employer specifically to arrange/submit to an interview. Consistent with the WCD's "suspension" order, such a contact would not satisfy the requirements for the termination of the suspension of claimant's benefits. However, under the particular circumstances of this case, we find that claimant's contact was sufficient to prevent the employer from issuing a procedurally valid "non-cooperation" denial.

attorney's services on review is \$4,500, payable by the employer. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by claimant's respondent's brief), the complexity of the issue, the value of the interest involved, and the risk that claimant's counsel might go uncompensated.

Finally, claimant is awarded reasonable expenses and costs, if any, incurred in prevailing over the denial, to be paid by the employer. *See* ORS 656.386(2); OAR 438-015-0019; *Gary E. Gettman*, 60 Van Natta 2862 (2008). The procedure for recovering this award, if any, is prescribed in OAR 438-015-0019(3).⁶

ORDER

The ALJ's order dated October 13, 2015 is affirmed. For services on review, claimant's attorney is awarded an assessed fee of \$4,500, payable by the employer. Claimant is awarded reasonable expenses and costs, if any, incurred in finally prevailing over the denial, to be paid by the employer.

Entered at Salem, Oregon on June 30, 2016

⁶ In his cross-request, claimant contends that the ALJ's order neglected to include a cost award. *See* ORS 656.386(2). In response, the employer asserts that claimant did not raise costs as an issue at hearing. Yet, our review of the record establishes that claimant sought a cost award. (Tr. 11).