In the Matter of the Compensation of
MICHAEL K. SPURGEON, Claimant
WCB Case No. 16-03087
ORDER ON REVIEW
Johnson Johnson Lucas & Middleton, Claimant Attorneys
Ronald W Atwood PC, Defense Attorneys

Reviewing Panel: Members Ousey and Johnson.

The self-insured employer requests review of Administrative Law Judge (ALJ) Donnelly's order that: (1) awarded temporary disability benefits; (2) assessed a penalty and a $2,500 penalty-related attorney fee; and (3) awarded a $4,000 attorney fee under ORS 656.383(2). On review, the issues are temporary disability, penalties, and attorney fees. We reverse.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact," which we summarize and supplement below.

On May 12, 2016, claimant was repairing door-lock bars on the rear of a trailer when he noticed unusual back pain. (Ex. 54-1). The following day, claimant was unable to walk and informed his manager, Mr. Baker, that he was unable to come to work that day. (Tr. 9).

On May 14, 2016, claimant was hospitalized for, among other things, "[l]umbar back pain with L5 radiculopathy." (Ex. 36-3).

Claimant testified that he informed Mr. Baker that he had been hospitalized, and that Mr. Baker had visited him in the hospital. (Tr. 9-10).

On May 16, 2016, the employer provided claimant with paperwork to be completed for purposes of the Family and Medical Leave Act (FMLA), which explained his eligibility for FMLA leave if his inability to work was due to his own serious health condition. (Ex. 53). The FMLA paperwork included a "CERTIFICATION BY EMPLOYEE'S HEALTH CARE PROVIDER FOR EMPLOYEE'S SERIOUS ILLNESS-FMLA/OFLA." (Ex. 53-4). This certification was completed and signed by Dr. Miller, claimant's orthopedic surgeon, on June 15, 2016. (*Id*.)

The record does not establish when the employer received Dr. Miller's completed and signed certification.[1]

Claimant had back surgery on May 23, 2016, and was discharged from the hospital on May 24, 2016. (Exs. 48-1, 50-1).

On May 27, 2016, claimant completed an 801 form notifying the employer of a low back injury on May 12, 2016. (Ex. 51-1). The employer acknowledged notice of the claim as of May 27, 2016. (Ex. 54-1).

Claimant testified that he kept in contact with Mr. Baker letting him know how the surgery went, what was going to be expected, and roughly how long his surgeon said he was going to be off work. (Tr. 10). He also testified that, after each of his medical appointments, he gave Mr. Baker "printouts" from his physician "saying not to return to work." (Tr. 21). However, those "printouts" are not included in this record.

On June 15, 2016, the employer requested claimant's medical records. (Exs. 58, 59). It received claimant's contemporaneous medical records on June 30, 2016. (Exs. 36 through 50). The employer denied claimant's claim on July 14, 2016. (Ex. 61).

Claimant requested a hearing, seeking interim compensation benefits, penalties, and attorney fees. (Hearing File; Tr. 1).

CONCLUSIONS OF LAW AND OPINION

The ALJ found that interim compensation was payable on May 27, 2016, the date claimant filed his claim. The ALJ reasoned that, by that date, the employer had notice of claimant's injury claim, knowledge of his hospitalization and surgery, and had provided him with FMLA paperwork acknowledging that he may be eligible for FMLA leave due to his own serious health condition.

[1] Claimant testified that he gave "paperwork" to his employer on May 31, 2016 that included the FMLA paperwork and a workers' compensation packet. (Tr. 20). Yet, the certification was not completed and signed until June 15, 2016. Consequently, the record does not establish that Dr. Miller's certification was included in the "paperwork" claimant gave the employer on May 31, 2016.

On review, the employer contends that its duty to pay interim compensation was not triggered until June 30, 2016, when it received claimant's contemporaneous medical records. According to the employer, at that time, it had receipt of *both* notice of claimant's claim and *medical verification* of his inability to work due to his work injury, which triggered its duty to pay interim compensation under ORS 656.262(4)(a). Because the employer denied claimant's claim on July 14, 2016, within 14 days of June 30, 2016, it contends that claimant was not entitled to interim compensation. For the following reasons, we agree.

A worker is entitled to interim compensation if he has suffered a loss of earnings as a result of a work-related injury or occupational disease. *RSG Forest Prods. v. Jansen*, 127 Or App 247 (1994). Interim compensation is paid on receipt of both notice of a claim and an attending physician's authorization for the payment of disability compensation and is due until the claim is accepted or denied. ORS 656.262(2); ORS 656.262(4)(a);[2] *see Jones v. Emanuel Hosp.*, 280 Or 147 (1977); *Metin Basmaci*, 54 Van Natta 465 (2002), *aff'd Basmaci v. The Stanley Works*, 187 Or App 337 (2003).

In *Lederer v. Viking Freight, Inc.*, 193 Or App 226, 237, *adh'd to as modified on recons*, 195 Or App 94 (2004), the court explained that interim compensation is due under ORS 656.262(4)(a), even without express authorization from an attending physician, when an objectively reasonable insurer or self-insured employer would understand contemporaneous medical reports to signify approval from the attending physician of the worker's inability to work. *See also Theresa E. Barnes*, 56 Van Natta 3598, 3599 (2004) ("When evaluating whether the carrier should have understood contemporaneous medical reports to excuse the injured worker from work, we evaluate the totality of the carrier's knowledge of the worker's condition at the time of the authorization."); *Venita A. Gallagher*, 52 Van Natta 716, 721, *recons*, 52 Van Natta 930 (2000).

Here, the employer acknowledged notice of claimant's injury claim by May 27, 2016. (Ex. 54-1). Based on claimant's testimony, we conclude that, at that time, the employer also had knowledge of his hospitalization and surgery for a low back condition. (Tr. 9-10). However, the employer had not yet received

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[2] ORS 656.262(4)(a) provides, in pertinent part:

> "The first installment of temporary disability compensation shall be paid no later than the 14th day after the subject employer has notice or knowledge of the claim and of the worker's disability, if the attending physician or nurse practitioner authorized to provide compensable medical services under ORS 656.245 authorizes the payment of temporary disability compensation."

from an attending physician any type of information or documentation sufficient to constitute the necessary *medical verification* of claimant's inability to work due to his work injury for purposes of ORS 656.262(4)(a).[3] The employer did not have the necessary medical verification until June 30, 2016, when it had received claimant's contemporaneous medical records.[4]

Under these particular circumstances, we conclude that claimant's entitlement to interim compensation was not triggered until June 30, 2016. On that date, the employer had both notice of claimant's claim and receipt of his contemporaneous medical records, which an objectively reasonable employer would understand as showing approval from the attending physician that claimant was unable to work due to his work injury. *Lederer*, 193 Or App at 237. Because the employer denied claimant's claim on July 14, 2016, within 14 days of June 30, 2016, claimant was not entitled to interim compensation. *Jones*, 280 Or at 151; *Daniel F. Yrigollen*, 59 Van Natta 897, 898 (2007) (no interim compensation due when the carrier denied the claim within 14 days of its receipt of medical verification of the claimant's inability to work due to his work injury); *Michael Winegart*, 54 Van Natta 2376, 2380 (2002) (payment of interim compensation benefits not untimely when record established that the carrier received medical verification within 14 days of its initial payment of benefits). Likewise, because no interim compensation benefits are granted, it follows that penalties and attorney fee awards are not warranted.

Accordingly, based on the aforementioned reasoning, we reverse the ALJ's order.

ORDER

The ALJ's order dated October 24, 2016 is reversed. The ALJ's 25 percent penalty, $2,500 penalty-related attorney fee award, and $4,000 attorney fee award are also reversed.

Entered at Salem, Oregon on November 6, 2017

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[3] As noted earlier, on this record, we are unable to determine when the employer received Dr. Miller's FMLA certification confirming claimant's inability to perform the essential duties of his job. (Ex. 53-4). Therefore, the certification does not establish when the employer's duty to pay interim compensation was triggered under ORS 656.262(4)(a).

[4] We acknowledge claimant's testimony that, after each of his medical appointments, he provided the employer with "printouts" documenting his inability to work due to his low back condition. (Tr. 20). However, because those "printouts" are not in the record, we are unable to confirm their contents or that the employer received them.