
In the Compensation of
Ronald G. Kraft, Claimant
Contested Case No: 07-087H
PROPOSED & FINAL ORDER

October 18, 2007

RONALD G. KRAFT, Petitioner
LIBERTY NW INSURANCE CORPORATION, Respondent
Before Robert Brazeau, Administrative Law Judge

A hearing in this matter was scheduled for October 10, 2007 in Pendleton, Oregon before Administrative Law Judge Brazeau. Claimant is represented by Adian Martin, Attorney at Law. Northwest Metal Fabrication, Inc. and Liberty Northwest Insurance Corporation are represented by Kent Day, Attorney at Law.

Prior to the hearing, it was agreed that this matter would be submitted on the documentary record and closing arguments. Therefore, no hearing was held. The record closed on October 10, 2007.

Exhibits 1 through 38 are hereby admitted into evidence.

ISSUE

Pursuant to OAR 436-001-0019(6), claimant requests a limited hearing, asserting that his request for hearing from a May 15, 2007 Administrative Order on Remand should be allowed.

FINDINGS OF FACT

Claimant suffered a compensable injury to his low back in August 1995. The insurer accepted his claim for an L4-5 herniated disc on September 18, 1995 and closed the claim in May 1996 with an award of permanent disability compensation. The claim was later reopened and various administrative actions followed thereafter regarding claimant's temporary and permanent disability awards through a Board Order on review dated January 16, 2003.

In May 2004, the Department notified the insurer that claimant had filed a complaint, alleging that the insurer had failed to satisfy unpaid medical bills. The insurer responded that the claimed medical billings were not compensably related to claimant's accepted conditions. The Department ultimately held the insurer liable for the billings through an Administrative Order dated September 29, 2004. The insurer requested a hearing from that Order and the matter went before an administrative law judge on January 6, 2005. The judge reversed the Administrative Order via her Proposed and Final Contested Case Hearing Order dated January 13, 2005. Claimant sought judicial review of the judge's order and the court remanded the matter to the Department for further proceedings. The Department then referred the matter to the Workers' Compensation Board Hearings Division under ORS 656.704(2)(a).

Claimant's attorney through the date of the foregoing proceedings was Aukjen Ingraham, who was associated with the firm of Ransom, Gilbertson, Martin and Ratliff until sometime in August 2005. On October 13, 2006, Ingraham wrote to the Workers' Compensation Division, advising them that the attorney was no longer associated with the Ransom firm and that claimant's file remained with the firm upon Ingraham's departure. In the letter, Ingraham specifically requested that the Department send any future correspondence regarding claimant's case to Adian Martin, a partner in the Ransom firm.

On October 18, 2006, the Board sent to claimant and the Ransom law firm copies of a Notice of Hearing, announcing the scheduled hearing on referral from the Department. The Notice of Hearing was sent to claimant's address at 1932 NW Prickly Pear Drive, Hermiston, Oregon 97838. The Notice was sent to the Ransom firm's Portland address. An amended Notice of Hearing was later sent to claimant and the Ransom firm on November 13, 2006. The reason for the amendment was to acknowledge claimant's change of address to P.O. Box 67 in Meacham, Oregon 97859. It is unknown whether claimant or any other person advised the Department of this change of address. The Department had theretofore mailed all correspondence to claimant at his Hermiston address.

On March 9, 2007, a Workers' Compensation Board Hearings Division administrative law judge issued a Proposed and Final Order, finding that the Department's September 29, 2004 medical review order was "insufficient for purposes of review" and remanded the matter back to the Department for further proceedings. The Board's ALJ sent a copy of his order to claimant's Meacham, Oregon address and to the Ransom firm at its Portland, Oregon address.

On May 15, 2007, the Department issued an Administrative Order on Remand, finding that the insurer was not responsible for the medical billings asserted to be compensable by claimant. The Department sent copies of its order to claimant at his Hermiston, Oregon address and to Aukjen Ingraham, who had previously advised the Department that he no longer represented claimant as of August 2005. The Department did not send a copy of the order to the Ransom firm.

On June 19, 2007, Adian Martin, Attorney at Law and partner in the Ransom firm, wrote to the Department, requesting a hearing from the Department's May 15, 2007 Administrative Order on remand. Martin explained that the request was filed outside the time limit allowed for requesting a hearing because the Department's Order was not sent to claimant's current address or to the Ransom firm. Martin further advised that he had not received a copy of the Department's Order until June 19, 2007.

On June 28, 2007, the Department responded to Attorney Martin's request for hearing, advising the Department's position that the request for hearing was untimely filed. The Department also advised Martin of claimant's right to request a limited hearing on the issue of timeliness. Martin did, then, file a request for a limited hearing and the matter was referred to the Board's Hearings Division on July 10, 2007.

CONCLUSIONS OF LAW AND OPINION

The sole issue is whether or not claimant's request for hearing from the Department's May 15, 2007 Administrative Order on Remand was timely and if not, whether there was good cause for the untimely request for hearing. The insurer requests that claimant's request for hearing be dismissed for having been untimely filed.

OAR 436-001-0246(2)(a) provides that an appeal from a director's order must be filed with the administrator within 30 days of the mailing date of the proposed and final order. Here, the pertinent administrative order was filed on May 15, 2007. Claimant requested review of that order on June 19, 2007, or more than 30 days after the issuance of the administrative order. Therefore, the request for hearing was untimely under the pertinent rule.

Claimant argues, however, that he had good cause for filing a late request for hearing. As noted in *Anderson v. Publishers Paper Co.*, 78 Or App 513, *rev den* 301 Or 666 (1986), the test for determining whether good cause exists has been equated to the standard of "mistake, inadvertence, surprise or excusable neglect" recognized under ORCP 71B(1) and former ORS 18.160. *See also Brown v. EBI Cos.*, 289 Or 455 (1980). Lack of due diligence does not constitute good cause. *Cogswell v. SAIF*, 74 Or App 234 (1985).

Claimant contends that the fact that the Department's administrative order was sent to his former address and to an attorney who no longer represented him constitutes good cause for his failure to timely appeal the administrative order. The insurer responds that claimant appears to have failed to send notice of his updated address to the Department and, therefore, should not be allowed to use that failure as an argument for good cause. The insurer cites *Charles R. Fritz*, 43 Van Natta 403 (1991), in support of its argument.

In *Fritz*, the worker worked for a company based in the state of Washington. While working for that employer in Oregon, the worker suffered an injury. He filed a claim in Washington first and later filed a claim in Oregon, as well. Although the worker was represented by an attorney in Washington, he had not retained counsel in Oregon at the time he filed his claim. The insurer denied his claim for benefits in Oregon and sent a certified letter in that regard to the worker's last known address in Milwaukie, Oregon. The insurer did not send a copy to an attorney because the worker was not represented in Oregon. The letter was returned unclaimed, indicating that the worker had changed addresses to Cottage Grove, Oregon. The insurer then re-mailed the letter to the worker's new address. The worker ultimately filed a request for hearing from the insurer's denial, but it was filed outside the statutory time period allowed for filing. A hearings Referee dismissed the worker's request for hearing as untimely and the worker requested review by the Board. On review, the Board upheld the dismissal, holding that the worker's failure to keep the insurer informed of his current address did not constitute "good cause" for his failure to timely file his request for hearing.

Fritz does not control the present case, however. Unlike the worker in *Fritz*, the present worker was represented by an Oregon attorney throughout the time after his original injury. Up to August 2005, he was represented by Ingraham. After he had left the Ransom firm, however, Ingraham specifically advised the Department of that and requested that all future correspondence be sent to the Ransom firm. For unknown reasons, the Department either disregarded Ingraham's directive or mistakenly failed to enter the updated information into

claimant's records. I find that both claimant and his later attorney, both of whom received copies of Ingraham's letter to the department, were entitled to rely on the information contained therein and to believe that the Department would thereafter mail correspondence regarding claimant's case to the Ransom firm. That the department failed to do that, I conclude, is not attributable to any neglect by either the worker or his attorney. While claimant could have, and should have, advised the Department of his change of address, the Department's failure to mail correspondence to his correct attorney was the direct reason that neither the worker nor his attorney was timely advised of the pertinent administrative order. Under these circumstances, I conclude that the worker had good cause for his failure to timely request a hearing from the Department's order.

ORDER

The Department's June 28, 2007 notice to claimant, denying his request for hearing from that Order, is reversed. Claimant's request for hearing from the Administrative Order on Remand dated May 15, 2007 is hereby reinstated.