
In the Matter of Reimbursement for Death Benefits,

Brian C. Smallwood, Deceased Worker

Contested Case No: 07-075H

FINAL ORDER

August 14, 2008

SAIF CORPORATION, Petitioner

WORKERS' COMPENSATION DIVISION, Respondent

Before Cory Streisinger, Director of the Department of Consumer and Business Services

The Workers' Compensation Division, represented by attorney Carol A. Parks, timely filed exceptions to Workers' Compensation Board Administrative Law Judge (ALJ) Kirk Spangler's November 21, 2007 Proposed and Final Order. Insurer SAIF Corporation, represented by attorney Julie Masters, timely responded. This matter comes before the director for a final order under ORS 656.704(2)(a). The issue is whether the division correctly denied reimbursement under the Reopened Claims Program for death benefits paid to the deceased worker's surviving spouse. I do not adopt the ALJ's proposed order and issue this final order in its place.

I review de novo. OAR 436-001-0225.

On January 29, 2007, division auditor Renee' Lehner notified insurer in writing that its request for reimbursement in the amount of \$3,269.91 under the Reopened Claims Program for the fourth quarter of 2006 was denied because fatal benefits do not qualify for reimbursement under ORS 656.278.¹ Insurer requested a hearing. ALJ Spangler ordered that SAIF be reimbursed, concluding that amounts paid in a voluntary claim reopening under ORS 656.278 must be reimbursed under ORS 656.625(1).

The worker, Brian Smallwood, was injured in a work-related motor vehicle accident on February 11, 1998. Insurer accepted as compensable conditions right ear laceration, acute C-2 spinal fracture, concussion, and headache. The worker died on January 30, 2005, and a claim for survivor benefits was made on behalf of his surviving spouse and child. Insurer denied the claim. ALJ Somers, in the October 30, 2006 Opinion and Order, set aside the denial, finding that the worker's surviving spouse had met her burden of proving that the worker's compensable injury was the major contributing cause of his death.² Insurer then issued a Notice of Voluntary

¹ The relevant statutory provisions are set forth below.

² The ALJ analyzed the worker's death as a consequential condition under ORS 656.005(7)(a), which provides, in part:

“A ‘compensable injury’ is an accidental injury, or accidental injury to prosthetic appliances, arising out of and in the course of employment requiring medical services or resulting in disability or death; an injury is accidental if the result is an accident, whether or not due to accidental means, if it is established by medical evidence supported by objective findings, subject to the following limitations:

Reopening on November 28, 2006 reopening the claim for fatal benefits. Insurer requested reimbursement from the Workers' Compensation Division under the Reopened Claims Program. The division denied reimbursement and insurer requested a hearing. On June 8, 2007 the Workers' Compensation Board issued an Order on Review affirming ALJ Somers' Opinion and Order finding that the worker's surviving spouse is entitled to survivor benefits under ORS 656.204.

The relevant statutes are as follows. The Workers' Benefit Fund is created by ORS 656.605. That section provides, in part:

“(1) The Workers' Benefit Fund is created in the State Treasury, separate and distinct from the General Fund. * * *

“* * * * *

“(2) *Moneys in the Workers' Benefit Fund may be expended for the following purposes:*

“(a) *Expenses of programs under ORS 656.445, 656.506, 656.622, 656.625, 656.628 and 656.630.*

“* * * * *

“(3) Subject to the following provisions, all moneys in the fund are appropriated continuously to the Director of the Department of Consumer and Business Services *to carry out the activities for which the fund may be expended:*

“* * * * *

“(b) Moneys received pursuant to ORS 656.506 and the transfers of unexpended and unobligated moneys in the Retroactive Reserve, Reemployment Assistance Reserve, Reopened Claims Reserve and Handicapped Workers Reserve referred to in ORS 656.506, 656.622, 656.625 and 656.628 (All 1993 Edition) may be expended only to carry out the programs referred to in ORS 656.506, 656.622, 656.625, 656.628 and 656.630.

“(4) Notwithstanding any other provision of this chapter, if the director determines at any time that there are insufficient moneys in the Workers' Benefit Fund to pay the expenses of programs for

“(A) No injury or disease is compensable as a consequence of a compensable injury unless the compensable injury is the major contributing cause of the consequential condition.

“* * * * *”

which expenditure of the fund is authorized, the director may reduce the level of benefits payable accordingly.”

(Emphasis added.) One of the statutory purposes of the fund is to reimburse insurers for payments made under the Reopened Claims Program under ORS 656.625. That section provides:

“(1) There is established a Reopened Claims Program for the purpose of reimbursing the additional amounts of compensation payable to injured workers that results from any award made by the Workers’ Compensation Board or voluntary claim reopening pursuant to ORS 656.278 after January 1, 1988.

“(2) Notwithstanding any other provision of law, any reimbursement from the Workers’ Benefit Fund for the purposes of the Reopened Claims Program shall be in such amounts payable to an injured worker pursuant to ORS 656.278 and only to the extent that moneys are available in the fund as determined by the Director of the Department of Consumer and Business Services.

“(3) The director, by rule, shall prescribe the form and manner of requesting reimbursement under this section, the amount payable and such other matters as may be necessary for the administration of this section.”

(Emphasis added.) The division has adopted rules, at OAR 436-045, that describe the criteria for eligibility for reimbursement and the process and requirements for requesting reimbursement.

Under the language of ORS 656.625, the Reopened Claims Program provides reimbursement for compensation payable as a result of an award made by the board or a voluntary claim reopening “pursuant to ORS 656.278.” Reimbursement is limited to “amounts payable to an injured worker pursuant to ORS 656.278.” That section provides:

“(1) Except as provided in subsection (7) of this section, the power and jurisdiction of the Workers’ Compensation Board shall be continuing, and it may, upon its own motion, from time to time modify, change or terminate former findings, orders or awards if in its opinion such action is justified in those cases in which:

“(a) There is a worsening of a compensable injury that results in the inability of the worker to work and requires hospitalization or inpatient or outpatient surgery, or other curative treatment prescribed in lieu of hospitalization that is necessary to enable the injured worker to return to work. In such cases, the payment of temporary disability compensation in accordance with ORS 656.210, 656.212 (2) and 656.262 (4) may be provided from the time the attending physician authorizes temporary disability

compensation for the hospitalization, surgery or other curative treatment until the worker's condition becomes medically stationary;

“(b) The worker submits and obtains acceptance of a claim for a compensable new medical condition or an omitted medical condition pursuant to ORS 656.267 and the claim is initiated after the rights under ORS 656.273 have expired. In such cases, the payment of temporary disability compensation in accordance with the provisions of ORS 656.210, 656.212 (2) and 656.262 (4) may be provided from the time the attending physician authorizes temporary disability compensation for the hospitalization, surgery or other curative treatment until the worker's condition becomes medically stationary, and the payment of permanent disability benefits may be provided after application of the standards for the evaluation and determination of disability as may be adopted by the Director of the Department of Consumer and Business Services pursuant to ORS 656.726; or

“(c) The date of injury is earlier than January 1, 1966. In such cases, in addition to the payment of temporary disability compensation, the payment of medical benefits may be provided.

“(2) Benefits provided under subsection (1) of this section:

“(a) Do not include vocational assistance benefits under ORS 656.340;

“(b) Do not include temporary disability compensation for periods of time during which the claimant did not qualify as a “worker” pursuant to ORS 656.005 (30);

“(c) Do not include medical services provided pursuant to ORS 656.245 except as provided under subsection (1)(c) of this section; and

“(d) May include permanent disability benefits for additional impairment to an injured body part that has previously been the basis of a permanent partial disability award, but only to the extent that the permanent partial disability rating exceeds the permanent partial disability rated by the prior award or awards.

“(3) An order or award made by the board during the time within which the claimant has the right to request a hearing on aggravation under ORS 656.273 is not an order or award, as the case may be, made by the board on its own motion.

“* * * * *

“(5) The insurer or self-insured employer may voluntarily reopen any claim to provide benefits allowable under this section or to grant additional medical or hospital care to the claimant. The board shall establish procedures for the resolution of disputes arising out of a voluntary reopening of a claim under this section.

“* * * * *”

ORS 656.204 provides for payments to the deceased worker’s surviving spouse, children, and dependents “if death results from the accidental injury.”

Insurer argued that because the worker’s death was found compensable as a consequential condition it was a new medical condition for purposes of own motion reopening and therefore reimbursement from the reopened claims program is appropriate. Alternatively, insurer argued that because it voluntarily reopened the claim under ORS 656.278 to pay death benefits, it is entitled to reimbursement under ORS 656.625 for additional compensation.

The division argued that ORS 656.204 does not provide for reimbursement of death benefits paid. Further, the threshold requirements for receiving benefits under ORS 656.278(1) were not met and, even if they were, that provision does not provide for death benefits. In addition, according to the division, voluntary reopening under ORS 656.278(5) is only to allow benefits provided by ORS 656.278, which does not include death benefits. Finally, ORS 656.625 limits reimbursements to amounts payable pursuant to ORS 656.278.

ALJ Spangler ordered reimbursement to insurer for the death benefits it paid to the worker’s surviving spouse as it was ordered to do by both the ALJ and the board. The ALJ found that the only means possible for insurer to comply with the board’s order to pay survivor benefits under ORS 656.204 was to voluntarily reopen claimant’s claim under ORS 656.278. The ALJ found the legislature’s directive and intent to be clear in ORS 656.625(1), declining the division’s “invitation to conclude that the legislature intended ORS 656.625(1) to be applied in an absurdly narrow manner that would deprive [insurer] of reimbursement.” The ALJ concluded that the legislature intended that amounts paid by way of a voluntary claim reopening under ORS 656.278 must be reimbursed, citing *EBI Companies v. Dept. of Ins. and Fin.*, 114 Or App 356 (1992).

In its exceptions the division argues that ALJ Spangler failed to apply the provisions of ORS 656.625; that death benefits are not payable under ORS 656.278; that ORS 656.278 only provides for payment of benefits in two specific circumstances, neither of which are applicable here; and that even if the claim did qualify for reopening under own motion, insurer is not entitled to reimbursement for death benefits.

Insurer responds that if a claim for death benefits under ORS 656.204 is filed after the worker’s aggravation rights expire, then the claim is in own motion status. Insurer further argues

that once the board orders payment of benefits, they are reimbursable. Finally, insurer argues that even if the board was in error to order death benefits, under *EBI Companies v. Department of Ins. and Fin.* the WBF must reimburse insurer.

ALJ Somers and the board determined that the worker's death was a compensable consequence of the compensable injury and set aside insurer's denial of the worker's surviving spouse's claim for survivor's benefits under ORS 656.204. Neither ALJ Somers nor the board specified the process insurer was to follow to pay the benefits. Insurer issued a "Notice of Voluntary Reopening Own Motion Claim Pursuant to ORS 656.278(5)," presumably because the worker's aggravation rights had expired and insurer knew of no other mechanism to reopen his claim to pay his surviving spouse the benefits that had been ordered due under ORS 656.204.

While the parties make their respective arguments regarding the propriety of the "own motion" reopening and whether death benefits ordered by the board are payable under ORS 656.278, I limit the scope of my decision to the issue of whether the division has authority to reimburse insurer under the Reopened Claims Program for benefits paid under ORS 656.204.

Benefits payable under ORS 656.278 include temporary disability compensation and permanent disability benefits. Death benefits or survivor's benefits are not specifically payable under ORS 656.278. Without explicit statutory language providing that death benefits are payable under ORS 656.278 or that death benefits are reimbursable under the Reopened Claims Program, I find that the division auditor did not err in denying reimbursement.

I disagree with the ALJ that the legislature's intent on this matter is clear. It is clear that the legislature intended that temporary disability compensation and permanent disability benefits paid under ORS 656.278 be reimbursed from the Reopened Claims Program. It is not clear that the legislature intended, or even contemplated, that death benefits would be paid under ORS 656.278 or reimbursed under ORS 656.625. The statute is silent in that regard. Insurer argues there is no clear mechanism for a worker's surviving spouse to pursue a claim for the worker's death after the worker's claim has been closed. Insurer argued that because it followed the mechanism for reopening claims that is provided in the statute, the payments it made for death benefits "should" be considered compensation under ORS 656.278(1)(b) and "should" qualify for reimbursement under ORS 656.625. Without specific statutory language, though, I am not inclined to assume that the legislature intended that insurer be reimbursed under these circumstances.

Insurer and ALJ Spangler cite *EBI Companies v. Department of Ins. and Fin.* for the proposition that the division must reimburse insurer even if the board ordered insurer to do something that it was not authorized to do. The division distinguishes *EBI Companies* on its facts. I also find the case distinguishable. In *EBI Companies*, the board ordered EBI to reopen the claimant's claim and pay permanent disability benefits. EBI paid the benefits and requested reimbursement. The Court of Appeals subsequently held that the board lacked own motion authority to make a permanent disability award under changes to ORS 656.278 that became effective January 1, 1988. See *Independent Paper Stock v. Wincer*, 100 Or App 625 (1990). The department denied reimbursement to EBI. EBI challenged the department's denial of reimbursement. The Court of Appeals reversed, concluding that EBI was entitled to

reimbursement. The court reasoned that although the award of permanent disability benefits “resulted from an erroneous exercise of the Board’s authority, it still was an award ‘pursuant’ to [ORS 656.278]” and was therefore reimbursable under ORS 656.625(1). The court further stated, “it is unlikely that the legislature would have intended to preclude an insurer that complied with the Board’s order from obtaining reimbursement because the Board, not the insurer, erred.”

The case is distinguishable for two reasons. First, at issue in *EBI* was reimbursement of permanent disability benefits paid to the injured worker. At issue here is reimbursement of survivor benefits paid to the worker’s surviving spouse. Second, in *EBI* it was the board acting within its own motion authority that ordered insurer to reopen the worker’s claim and pay the benefits. Here, the board ordered that the worker’s surviving spouse’s claim for death benefits under ORS 656.204 was compensable. The board’s Order on Review contains no statement that it was being issued under the board’s own motion authority, and the board did not explicitly order insurer to reopen the worker’s claim under ORS 656.278 to pay the benefits.

I do not draw any conclusions or make any judgment regarding the insurer’s authority to reopen a claim for the payment of death benefits, the board’s authority to order the payment of death benefits in a post-aggravation rights claim, or the worker’s surviving spouse’s entitlement to death benefits. I simply find that the statute does not support reimbursement under these facts.

IT IS HEREBY ORDERED the November 21, 2007 Proposed and Final Order is not adopted. The division’s denial of reimbursement to insurer under the Reopened Claims Program for death benefits paid to the worker’s surviving spouse is affirmed.

DATED this 14th day of August, 2008.