

FILED: September 10, 2014

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Naomi R. Hopper, Claimant.

NAOMI R. HOPPER,
Petitioner,

v.

SAIF CORPORATION and JESME, INC. - MD SANDERS,
Respondents.

Workers' Compensation Board
1200309

A152765

Argued and submitted on June 06, 2014.

Julene M. Quinn argued the cause for petitioner. With her on the briefs was Kryger Alexander Carlson PC.

Holly C. O'Dell argued the cause and filed the brief for respondents.

Before Duncan, Presiding Judge, and Wollheim, Judge, and Lagesen, Judge.

LAGESEN, J.

Affirmed.

1 LAGESEN, J.

2 SAIF Corporation (SAIF) denied claimant's claim for workers'
3 compensation benefits for failure to cooperate with its investigation of her claim after
4 claimant did not comply with SAIF's multiple requests that she complete an interview
5 with its investigator. The Workers' Compensation Board (the board) upheld that denial
6 under ORS 656.262(15), determining that claimant failed to prove that her failure to
7 cooperate was "for reasons beyond [her] control." ORS 656.262(15). On review of the
8 board's order under ORS 656.298, we affirm, concluding that the board's decision rests
9 on a correct interpretation of ORS 656.262 and is supported by substantial evidence.

10 I. BACKGROUND

11 Claimant injured her lower back at work in September 2011 and filed a
12 claim for workers' compensation for the injury. Shortly after claimant filed the claim,
13 SAIF sent claimant a letter explaining the claims process and informing claimant of her
14 obligation under ORS 656.262(14) to cooperate with that process. Around the same time,
15 SAIF contacted claimant by phone to alert her that she would need to make a statement
16 about her claim to a SAIF investigator. Claimant did not take any affirmative steps to
17 contact SAIF's investigator.

18 A few weeks later, on October 17, SAIF sent a letter to claimant stating that
19 she had an appointment for an interview on October 21. Claimant did not attend the
20 interview or otherwise contact SAIF. On November 2, SAIF sent a letter to the Workers'
21 Compensation Division (WCD) of the Department of Consumer and Business Services

1 and requested that claimant's benefits be suspended based on her failure to participate in
2 an interview. That letter was copied to claimant. Two days later, on November 4, WCD
3 sent claimant a letter by certified mail stating that her benefits would be suspended within
4 five working days unless she cooperated with SAIF or demonstrated to WCD that her
5 failure to cooperate with SAIF was reasonable. A member of claimant's household
6 signed for the letter upon delivery, but claimant did not follow up with either WCD or
7 SAIF.

8 Four days later, on November 8, SAIF sent claimant a letter stating that she
9 had 30 days from the date of WCD's November 4 letter to cooperate with its interview
10 request, or claimant's claim would be denied. On November 16, claimant's benefits were
11 suspended in accordance with WCD's letter, effective November 14.

12 On November 21, claimant left a phone message with a SAIF claims
13 adjuster. The adjuster returned claimant's call and told claimant that her claim had been
14 suspended and would remain suspended and, ultimately, be denied, if claimant did not
15 contact one of SAIF's investigators. The adjuster gave claimant the number for the
16 investigator on her claim. Claimant did not follow up with the investigator or otherwise,
17 and, on December 5, SAIF denied claimant's claim for failure to cooperate with the
18 claims process.

19 More than a month later, claimant requested, and was granted, an expedited
20 hearing under ORS 656.262(15) and ORS 656.291 on SAIF's denial. Claimant's theory
21 as to why the denial should be set aside was that claimant "did completely and fully

1 cooperate with the investigation and that if she didn't, it was for reasons beyond her
2 control." In support of that theory, claimant testified that her brother died unexpectedly
3 on October 9, and that two days later, her mother discovered her brother's body at his
4 apartment while claimant waited outside the apartment. Claimant further testified that
5 she was depressed as a result of her brother's death and that she had not opened the letter
6 notifying her of the October 21 interview until after the date had passed. Claimant
7 acknowledged that she had received the other communications from SAIF regarding the
8 need for an interview, but had not followed up. Claimant also reported that she had been
9 in a motor vehicle accident on November 3 in which she sprained her spine. Claimant
10 did not miss any work because of the accident; claimant reported that she had missed one
11 day of work in connection with her brother's death. Claimant also testified that, after she
12 had her motor vehicle accident, she had contacted her insurance company, and the
13 company had been paying her medical bills incurred as a result of the accident.
14 Claimant's mother also testified that claimant's brother's death had been "really hard" for
15 claimant "because it was the first death in her immediate family."

16 Following the hearing, the Administrative Law Judge (ALJ) issued an order
17 setting aside SAIF's noncooperation denial. The ALJ found that claimant had not proved
18 that she cooperated with SAIF's request for an interview or that SAIF's request for an
19 interview was unreasonable. However, the ALJ found that claimant's brother's death and
20 claimant's motor vehicle accident, which the ALJ found were both beyond claimant's
21 control, were the reasons for claimant's failure to comply with SAIF's interview request.

1 review to determine whether the board "erroneously interpreted" that provision. ORS
2 183.482(8)(a). To the extent that assignment of error contests the board's factual finding
3 that the reason for claimant's noncooperation was her lack of diligence--not her brother's
4 death and the motor vehicle accident--we review for substantial evidence. ORS
5 183.482(8)(c). "Substantial evidence exists to support a finding of fact when the record,
6 viewed as a whole, would permit a reasonable person to make that finding." *Id.* We are
7 not permitted to substitute our judgment for that of the board with respect to any issue of
8 fact. ORS 183.482(7). The issue before us is not whether we--or another reasonable
9 factfinder--reasonably could have found the facts differently; the issue is whether the
10 board found the facts reasonably.

11 III. ANALYSIS

12 ORS 656.262(15) governs the denial of a workers' compensation claim
13 based on a claimant's failure to cooperate with the investigation of the claim. It provides
14 that, when an insurer or self-insured employer denies a claim for failure to cooperate, a
15 claimant may request a hearing for the purpose of demonstrating that the denial should be
16 set aside. ORS 656.262(15). To prevail, the claimant must prove one of three things: (1)
17 that claimant, in fact, "fully and completely cooperated with the investigation"; (2) that
18 claimant "failed to cooperate for reasons beyond the [claimant's] control"; or (3) that
19 SAIF's "investigative demands were unreasonable." *Id.*

20 On review, claimant contends that the board erred in sustaining SAIF's
21 denial because, in her view, she proved (1) that she fully and completely cooperated with

1 SAIF's investigation; (2) that SAIF's investigative demands were unreasonable; and (3)
2 that any failure to cooperate was due to reasons beyond her control. However, claimant
3 did not challenge the ALJ's finding that claimant had failed to cooperate with SAIF's
4 investigative demands before the board. In addition, claimant did not contest the
5 reasonableness of SAIF's investigative demands before either the ALJ or the board. As a
6 result, claimant did not exhaust those arguments before the board, and they accordingly
7 provide no grounds for us to review (or reverse) the board's order because the board did
8 not have the opportunity to rule on them. As we have explained,

9 "[t]he workers' compensation scheme reflects the well-established
10 principle that a party must exhaust his or her administrative remedies
11 before seeking further review. * * * [A] party does not exhaust his or her
12 administrative remedies 'simply by stepping through the motions of the
13 administrative process without affording the agency an opportunity to rule
14 on the substance of the dispute.'"

15 *Everett v. SAIF*, 179 Or App 112, 118-19, 38 P3d 952, *rev den*, 334 Or 76 (2002)
16 (quoting *Mullenaux v. Dept. of Revenue*, 293 Or 536, 541, 651 P2d 724 (1982)).

17 That leaves claimant's contention that the board erred when it determined
18 that claimant had not proved that her failure to cooperate was "for reasons beyond [her]
19 control." ORS 656.262(15). To the extent that claimant argues that the board's order
20 rests on a misinterpretation of the statute, we disagree. The board's order reflects that it
21 interpreted the statute to require claimant to show that reasons beyond claimant's control
22 were the cause of claimant's failure to cooperate with SAIF's investigation. That
23 interpretation is consistent with the plain text of the statute. ORS 656.262(15) states that
24 a worker must show that any failure to cooperate was "*for* reasons beyond the worker's

1 control." (Emphasis added.) The ordinary meaning of the word "for" in this context is
2 "because of" or "on account of." *Webster's Third New Int'l Dictionary* 886 (unabridged
3 ed 2002). The statute thus, by its terms, requires a worker to prove that any failure to
4 cooperate was *because of*--in other words, causally connected to--reasons beyond the
5 worker's control. That is how the board interpreted it, as evidenced by the board's factual
6 inquiry into whether claimant's brother's death and the motor vehicle accident
7 (circumstances beyond claimant's reasonable control) were the cause of claimant's failure
8 to cooperate, or if, instead, claimant's lack of diligence was the cause of her failure to
9 cooperate.

10 To the extent that claimant challenges the board's factual finding that
11 claimant's failure to cooperate was because of her lack of diligence, and not because of
12 her brother's death and the motor vehicle accident, our standard of review is dispositive.
13 That is so because the whole record in this case does not *compel* a particular finding
14 regarding the reason for claimant's failure to cooperate with SAIF's request for an
15 interview. True, a reasonable factfinder could infer on this record, as the ALJ and
16 dissenting board member did, that claimant's failure to cooperate stemmed from the
17 traumatic events that she confronted and, thus, was for reasons beyond her control.
18 However, the record also permits the contrary inference reached by the board: that
19 claimant's lack of diligence, rather than those events beyond her control, caused her
20 failure to cooperate.

21 In particular, as the board observed, claimant testified only that she was

1 depressed around the time that SAIF's October 17 letter arrived and did not open that
2 letter promptly. But claimant provided no explanation for why she did not contact SAIF
3 after she did open the letter and for why she otherwise failed to follow up on SAIF's
4 request for an interview over the ensuing month and a half. With respect to SAIF's
5 subsequent communications regarding the interview, claimant's only explanation was that
6 she "just never followed up on it." Claimant also testified that she had missed only one
7 day of work as a result of her brother's death and that she had not missed work at all as a
8 result of her motor vehicle accident. She further testified that she was able to initiate the
9 claims process with her insurance company in connection with the motor vehicle
10 accident, and that, as a result, her insurance company was paying her medical bills.
11 Based on that testimony, a reasonable factfinder could infer that claimant's brother's death
12 and her motor vehicle accident did not interfere with her ability to cooperate with SAIF's
13 interview request, and that, instead, claimant's failure to cooperate with SAIF resulted
14 from her own lack of diligence. As a result, the board's finding that claimant's failure to
15 cooperate was "for" lack of diligence, rather than "for reasons beyond [her] control," is
16 supported by substantial evidence. We cannot substitute our judgment for that of the
17 board as to that supported factual determination, ORS 183.482(7), and, therefore, affirm.

18 Affirmed.