

In the Matter of the Compensation of
TAMMY L. SMITH, Claimant

WCB Case No. 01-03995, 00-08476

ORDER ON REVIEW

Coughlin Leuenberger & Moon PC, Claimant Attorneys

Johnson Nyburg & Andersen, Defense Attorneys

Bruce A Bornholdt, SAIF Legal, Defense Attorneys

Reviewing Panel: Members Biehl, Bock, and Phillips Polich.¹

The SAIF Corporation requests review of Administrative Law Judge (ALJ) Kekauoha's order that: (1) set aside its denial of claimant's injury claim for her current low back condition; and (2) assessed SAIF a penalty for an allegedly unreasonable denial. On review, the issues are compensability and penalties. We reverse in part and affirm in part.

FINDINGS OF FACT

We adopt the ALJ's Findings of Fact.

CONCLUSIONS OF LAW AND OPINION

The ALJ found that claimant's current low back condition was compensable. Relying on the opinion of Dr Smith (claimant's treating neurosurgeon), the ALJ reasoned that claimant's August 2000 work incident was the major contributing cause of her need for treatment or disability for her L5-S1 disk herniation.

SAIF contends that claimant suffered from preexisting degenerative disk disease which combined with her August 2000 injury to cause a disability and need for treatment. An insurer-arranged medical examiner, neurologist Dr. Thompson, opined that claimant's preexisting condition was the major contributing cause of her low back condition. SAIF further asserts that the opinion of claimant's treating neurosurgeon, Dr. Smith, was unreliable as it was based upon an inaccurate medical history and was expressed in conclusory terms.

¹ After consultation with the Department of Justice, this Board has chosen to exercise its right to issue orders as a panel of three pursuant to ORS 656.718(2) and (3).

Assuming for the sake of argument that Dr. Smith's opinion is not entitled to deference as the treating physician, we still agree with the ALJ that the opinion of Dr. Smith is the most persuasive. In reaching this conclusion, we consider Dr. Smith's opinion thorough, well reasoned and based upon the most complete information. *See Somers v. SAIF*, 77 Or App 259, 263 (1985).

Dr. Smith examined claimant, reviewed x-rays and a MRI, diagnosed her condition as L5-S1 disk extrusion, and performed an L5-S1 diskectomy. The sequence of Dr. Smith's chart notes, reports and responses describing claimant's preexisting condition as trivial and insignificant persuades us that Dr. Smith considered the potential contributors to claimant's current condition and concluded that the August 2000 work incident was the major contributing cause of her condition. (Exs. 41, 42-1). In response to Dr. Thompson's initial report indicating that claimant's disk herniation could not have been caused by her work activities because no trauma had been described, Dr. Smith cogently explained that trauma was not required, only lifting with an associated rotational component. His response made clear that he had considered alternate causes for claimant's condition. (Ex. 42-3).

In addition, Dr. Thompson acknowledged that he was handicapped by the inability to review Dr. Smith's operative report. His report was, therefore, based upon incomplete information and may be discounted. *See Miller v. Granite Construction Co.*, 28 Or App 473, 476 (1977); *Carlos S. Cobian*, 45 Van Natta 1582 (1993).

SAIF argues that Dr. Smith erroneously relied on an inaccurate representation that claimant's pain was unremitting from its onset on August 20, 2000. In fact, based on the history given to Dr. Thompson, as well as claimant's testimony, claimant's pain abated with medication for an interval in September 2000. (Ex. 39-1, Tr. 11, 22-24). However, before rendering his final opinion, Dr. Smith reviewed and responded to Dr. Thompson's first report, which contained an accurate history as to the brief remission of symptoms. Thus, Dr. Smith had the correct information before finally addressing the medical causation issue.

Because we find Dr. Smith's opinion to be the most persuasive and conclude that it was sufficient to satisfy the greater "major contributing cause" standard, we need not decide whether ORS 656.005(7)(a) or ORS 656.005(7)(a)(B) applies.

We turn to the penalty issue. The ALJ assessed a penalty against SAIF, finding that its “October 26, 2000” denial was unreasonable. Based on the following reasoning, we reverse.

On October 26, 2000, SAIF denied responsibility for claimant’s low back condition. On January 17, 2001, Dr. Thompson submitted a report attributing claimant’s low back condition to a preexisting degenerative disk condition. On July 11, 2001 (the day before the scheduled hearing), SAIF “amended” its denial to include compensability.

At the July 12, 2001 hearing, the following colloquy occurred:

“[ALJ:] Okay. Now the – that basis for a penalty was raised in your earlier hearing request, so are you limiting the –

“[Counsel for claimant:] Well the –

“[ALJ:] -- issues to this July 11 Denial?

“[Counsel for claimant:] Yeah. Yeah, I’ll do that. The issues with respect to the time when the Hearing Request was issued compensability was not at issue at that time, so we will withdraw the earlier request for a penalty.

“[ALJ:] Okay, and again to clarify, this penalty is requested against SAIF only?

“[Counsel for claimant:] Against SAIF only.

“[ALJ:] All right.

“[Counsel for claimant:] And specifically their Denial marked Exhibit 52 dated July 11, 2001.”

(Tr. 2-3)

Based on claimant’s counsel’s representations, we find that the penalty issue raised by claimant was based on SAIF’s July 11, 2001 compensability denial.

Thus, the ALJ's conclusion that the October 26, 2000 responsibility denial was unreasonable extended beyond the penalty issue that was raised and clarified at the hearing.

A claimant is entitled to a penalty if the insurer "unreasonably delays or unreasonably refuses to pay compensation, or unreasonably delays the acceptance or denial of a claim." ORS 656.262(11)(a). The standard for determining an unreasonable resistance to payment of compensation is whether, from a legal standpoint, the insurer had a legitimate doubt as to its liability. *International Paper Co. v. Huntley*, 106 Or App 107 (1991). "Unreasonableness" and "legitimate doubt" are to be considered in light of all the evidence available to the insurer at the time of the denial. *Brown v. Argonaut Insurance Company*, 93 Or App 588, 591 (1988); *Ginter v. Woodburn United Methodist Church*, 62 Or App 118, 122 (1983).

SAIF received Dr. Thompson's January 17, 2001 report before submitting its July 11, 2001 denial of compensability. Dr. Thompson concluded that claimant's preexisting degenerative disk changes combined with her work activity to cause disk herniation, and that the preexisting condition was the major contributing cause of her current condition.

Under these circumstances, we find that Dr. Thompson's report was sufficient to establish a legitimate doubt as to the compensability of claimant's current low back condition. In other words, Dr. Thompson supported a conclusion that claimant's preexisting condition, rather than her work activities for SAIF's insured, was the major contributing cause of her current low back condition. If proven, such evidence would have resulted in the upholding of SAIF's denial. *See* ORS 656.005(7)(a)(B). Consequently, we conclude that SAIF's July 11, 2001 denial was not unreasonable and that a penalty therefore was inappropriate. Accordingly, we reverse that portion of the ALJ's order that assessed a penalty for unreasonable denial.

Claimant's counsel is entitled to an assessed attorney 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 attorney's services on review regarding the compensability issue is \$1,200, to be paid by SAIF. In reaching this conclusion, we have particularly considered the time devoted to this issue (as represented by claimant's respondent's brief), the complexity of the issue, and the value of the interest involved. Claimant is not entitled to an attorney fee for her counsel's services on

review devoted to the penalty issue. *Saxton v. SAIF*, 80 Or App 631, *rev den* 302 Or 159 (1986).

ORDER

The ALJ's order dated August 13, 2001 is reversed in part and affirmed in part. That portion of the ALJ's order that assessed a penalty is reversed. The remainder of the order is affirmed. For services on review regarding the compensability issue, claimant's counsel is awarded an assessed attorney fee of \$1,200, to be paid by SAIF.

Entered at Salem, Oregon on April 24, 2002