
In the Matter of the Compensation
RONNIE A. GROUT, Claimant
WCB Case No. 01-00781
ORDER ON REVIEW
Juli Hall, Claimant Attorneys
Johnson Nyburg & Andersen, Defense Attorneys

Reviewing Panel: Members Biehl and Langer.

Claimant requests review of Administrative Law Judge (ALJ) Menashe's order that: (1) upheld the insurer's denial of claimant's new medical condition claim for an L5-S1 disc condition; and (2) declined to award claimant an attorney fee based on the insurer's alleged partial rescission of its denial. On review, the issues are compensability and attorney fees.

We adopt and affirm the ALJ's order with the following supplementation on the attorney fee issue.

Claimant contends that his attorney is entitled to an attorney fee under ORS 656.386(1) because the insurer rescinded a portion of its denial of his low back condition in closing argument. We disagree.

Claimant has an accepted claim for an "intraforaminal disc herniation L4-5." (Ex. 13). In response to claimant's new medical condition claim for an "L5-S1" condition, on January 12, 2001, the insurer issued a denial which stated in pertinent part:

"We have recently been asked to amend our acceptance to include your L5-S1 complaint, diagnosed as disc degeneration at L5-S1. Medical evidence fails to establish that your L5-S1 degenerative disc disease is related to the above referenced injury and/or your employment with [the employer]." (Ex. 69).

Claimant requested a hearing from the denial. At hearing, claimant's counsel asked for clarification of the insurer's denial with regard to the accepted L4-5 condition and the radiculopathy, impingement or encroachment symptoms she alternately referred to as located at "S-1" or "5-1." (Tr. 1). Counsel for the insurer replied that he did not "have a problem" with construing the denial as

“encompassing” the L5-S1 “problem” as a result of the compensable L4-5 surgery. (Tr. 2).

During unrecorded closing arguments, the insurer’s counsel apparently acknowledged that “the L5 nerve injury flows from the L4-5 injury and is part of the accepted claim. [The insurer] maintains the L5 nerve involvement does not require a separate acceptance.” (*O&O* at 7). The ALJ upheld the insurer’s denial and denied claimant’s request for an attorney fee under ORS 656.386(1).

ORS 656.386(1) provides, in pertinent part: "In such cases involving denied claims where an attorney is instrumental in obtaining a rescission of the denial prior to a decision by the Administrative Law Judge, a reasonable attorney fee shall be allowed."

Recently, in *John J. Achmeller, Jr.*, 54 Van Natta 743 (2002), we held that the carrier’s amendment of its denial at hearing to include a period of acceptance constituted a partial rescission of its denial that warranted an attorney fee under ORS 656.386(1). We reasoned that by so amending its denial, the carrier effectively rescinded a portion of its denial; *i.e.*, it was no longer contending that the previously disputed condition was not compensable for a certain time period. In light of such circumstances, we found that the claimant's attorney was instrumental in obtaining additional benefits for the claimant and that an attorney fee was appropriate under ORS 656.386(1). 54 Van Natta at 746.

Here, however, we find no such amendment of the insurer’s denial. The insurer denied L5-S1 “disc degeneration” or “degenerative disc disease.” (Ex. 69). The insurer never rescinded that denial or a portion of that denial. At the beginning of the hearing, counsel for the insurer merely agreed that the issue could encompass whether the L5-S1 “problem” is a result of the “compensable L4-5 surgery.” (Tr. 2). The insurer did not thereby specifically expand its denial to deny any L5 “condition.” Instead, the insurer agreed that claimant could argue that the compensable L4-5 surgery had caused the (already denied) L5-S1 condition. (Tr. 2).

Although the closing arguments were unrecorded, according to the ALJ’s statement, the insurer’s counsel apparently acknowledged that the “L5 nerve injury” flows from the L4-5 accepted injury and is part of the accepted claim. (*O&O* at 7). That acknowledgement did not alter the insurer’s denial of the L5-S1 condition. In other words, the insurer did not agree that any portion of the denied condition at L5-S1 was compensable.

For these reasons, we agree with the ALJ's decision not to award claimant an attorney fee under ORS 656.386(1).

ORDER

The ALJ's order dated November 29, 2001, as reconsidered on January 3, 2002, is affirmed.

Entered at Salem, Oregon on August 30, 2002