

In the Matter of the Compensation of
JAVIER CACERAS, Claimant
WCB Case No. 01-05587
ORDER ON REVIEW
Welch Et Al, Claimant Attorneys
Sather Et Al, Defense Attorneys

Reviewing Panel: Members Langer, Bock, and Biehl. Member Biehl declined to sign the order.

Claimant requests review of Administrative Law Judge (ALJ) Otto's order that declined to award an attorney fee under ORS 656.386(1) for claimant's counsel's services in obtaining a rescission of the insurer's denial. On review, the issue is attorney fees.

We adopt and affirm the ALJ's order with the following supplementation.

On April 5, 2000, the insurer accepted claimant's claim for a nondisabling left shoulder strain injury. On July 11, 2001, the insurer issued a denial, asserting that "the cause of [claimant's] current need for treatment is not related to [the] accepted Left Shoulder Strain." (Ex. 14). The denial also stated, "we are issuing this current condition denial for your current diagnosis of Somatic Dysfunction to the Cervical and Thoracic regions with radiating symptoms to the Left Shoulder." (*Id.*)

On July 17, 2001, claimant's attorney requested a hearing challenging the denial. On October 15, 2001, the day before the October 16, 2001 hearing, the insurer accepted claimant's left shoulder labral tear.

At hearing, claimant sought an attorney fee under ORS 656.386(1) for his counsel's services in obtaining a rescission of the insurer's "current condition" denial insofar as it pertained to the labral tear condition. The ALJ found that the insurer did not deny a claim for the left shoulder labral tear, but rather, had expressly denied a claim for somatic dysfunction to the cervical and thoracic regions with radiating symptoms to the left shoulder and denied that claimant's current condition was related to the accepted left shoulder strain. Noting that the labral tear was not diagnosed until after the denial issued and that claimant did not file a "new" or "omitted" medical condition claim under ORS 656.262(6)(d) or (7)(a) for that condition, the ALJ reasoned that claimant was not entitled to an

attorney fee under ORS 656.386(1) for his counsel's services regarding the acceptance of the labral tear condition.

On review, claimant contends that the insurer's "pre-hearing" acceptance of the left shoulder labral tear condition constitutes a partial rescission of its "current condition" denial. As such, claimant argues that his counsel is entitled to an insurer-paid attorney fee under ORS 656.386(1). Based on the following reasoning, we disagree.

Under ORS 656.386(1)(a), claimant's attorney is entitled to an attorney fee "in cases involving denied claims where an attorney is instrumental in obtaining rescission of the denial prior to a decision by the Administrative Law Judge." The statute defines a "denied claim" as "a claim for compensation which an insurer or self-insured employer refuses to pay on the express ground that the injury or condition for which compensation is claimed is not compensable or otherwise does not give rise to an entitlement to compensation." See ORS 656.386(1)(b)(A).

The issue in this case is governed by *Longview Inspection v. Snyder*, 182 Or App 530 (2002). In *Longview Inspection*, the court reversed the Board's order in *Mark A. Snyder*, 53 Van Natta 786 (2001), that had set aside a carrier's denial of the claimant's current cervical and right shoulder condition. The Board had found that the carrier's "current condition" denial (which had asserted that the claimant's accepted right shoulder and cervical strain injury was no longer the major contributing cause of his previously accepted combined condition, but rather that his preexisting degenerative disease was the major cause) was broad enough to encompass a facet joint condition (which the carrier had become aware of after its denial, but before the hearing). Based on its finding, the Board had concluded that the claimant had no obligation to file a new medical condition claim for the facet joint condition and, as such, the compensability of the condition could be litigated at the hearing regarding the "current condition" denial.

On appeal, the carrier argued that its denial did not encompass the facet joint condition because, although the condition *existed* at the time of its denial, it did not know about it until after its denial had issued. Asserting that the facet joint condition was "new" and required the filing of a "new condition" claim, the carrier contended that the "unclaimed" condition should not have been considered over its procedural objections.

The court agreed with the carrier's contention. Addressing the carrier's denial, the court observed that the denial as a whole unambiguously referred to the

claimant's condition only insofar as it encompassed his "right shoulder and cervical strain" in combination with preexisting degenerative diseases. Reasoning that the phrase "current cervical and right shoulder condition" was qualified by all that appeared before it, the court determined that the denial was not of a condition so general and broad that it could be deemed to include all of the underlying conditions that might cause it.

In reaching its determination, the court distinguished *Sound Elevator v. Zwingraf*, 181 Or App 150, 152 (2002), where a carrier's "current condition" denial was found to be all-inclusive because it did not list specific causes. The court further distinguished *Zwingraf*, noting that, unlike the present carrier, the carrier in *Zwingraf* knew of the "unmentioned injury when it issued its general denial." 181 Or App at 152, 155. In light of such circumstances, the court declined to hold that a limited and specific denial puts at issue all relevant medical conditions that exist at the time it is rendered, even if the carrier does not know of them. Finally, the court reversed the Board's attorney fee award pursuant to ORS 656.386(1) as the claimant had not "finally" prevailed over the carrier's denial.

In the present case, the insurer denied claimant's "current condition," but specified it was a denial of the current diagnosis of "Somatic Dysfunction to the Cervical and Thoracic regions with radiating symptoms to the Left Shoulder." Because of that specificity, we do not interpret the denial's reference to "current condition" as extending to the "post-denial" diagnosis of labral tear. Consequently, the insurer's subsequent acceptance of the labral tear does not constitute a partial rescission of its "current condition" denial. Accordingly, claimant is not entitled to an attorney fee for his counsel's pre-hearing services under ORS 656.386(1).

Finally, the insurer accepted the newly diagnosed condition within 12 days of receipt of Dr. Di Paola's report relating the labral tear to the March 2000 industrial injury.¹ Therefore, assuming, without deciding, that the doctor's report could satisfy the statutory requirements for either a "new" or "omitted" medical condition claim under ORS 656.262(6)(d) or (7)(a), we agree with the ALJ's conclusion that the insurer's acceptance within 12 days of receipt of the report does not entitle claimant to an attorney fee under ORS 656.386(1)(b)(B)(C).

¹ Dr. Di Paola diagnosed two conditions caused by the March 2, 2000 industrial injury; *i.e.*, a left shoulder sprain, which resolved, and a labral tear which required further medical treatment. *See* Exs. 21, 22.

ORDER

The ALJ's order dated December 14, 2001 is affirmed.

Entered at Salem, Oregon on August 19, 2002