
In the Matter of the Compensation of
REBECCA L. WOLFE, Claimant
WCB Case No. 01-01278
ORDER ON REVIEW
Ernest M Jenks, Claimant Attorneys
Thaddeus J Hettle & Assoc, Defense Attorneys

Reviewing Panel: Members Phillips Polich, Bock, and Haynes. Member Haynes dissents.

The self-insured employer requests review of that portion of Administrative Law Judge (ALJ) Davis' order that awarded claimant a \$750 assessed attorney fee under ORS 656.382(1). On review, the issue is attorney fees.

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

Claimant filed a claim for right elbow and forearm conditions on November 9, 2000. (Ex. 2). On February 14, 2001, claimant requested a hearing, designating as issues *de facto* denial, penalties and attorney fees. On February 16, 2001, the employer's processing agent accepted claimant's claim for disabling right elbow tendinitis. (Ex. 6).

At hearing, the parties stipulated that the claim was not accepted or denied within the 90 days provided in ORS 656.262(6)(a). (Tr. 7). As of February 16, 2001, the employer's processing agent had received a total of \$1,304.23 (audited) in outstanding medical bills. Due to an error by the processing agent's billing service, these bills were not paid until May 2, 2001. (Tr. 15).

The ALJ assessed a penalty on the untimely paid medical bills under ORS 656.262(11). The employer does not contest that portion of the ALJ's order. The ALJ also awarded claimant an attorney fee under ORS 656.382(1) for the employer's admittedly late acceptance.

On review, the employer first contends that assessment of an attorney fee under ORS 656.382(1) was inappropriate because, at the time of its February 16, 2001 acceptance, no medical bills were "due" for at least 14 days. *See* OAR 436-009-0030(4) (Medical bills must be paid within 14 days of "any action causing the service to be payable" or 45 days of the carrier's receipt of the bill, whichever is later). We disagree.

ORS 656.382(1) provides that an attorney fee may be awarded when the carrier “unreasonably resists the payment of compensation.” A claimant is not entitled to an attorney fee under ORS 656.382(1) (*i.e.*, there is no “unreasonable resistance to compensation”) when there are no amounts due at the time of the unreasonable delay. *See Wacker Siltronic v. Satcher*, 103 Or App 513 (1990); *Barbara A. Hasse*, 53 Van Natta 771 (2001); *Lloyd A. Humpage*, 49 Van Natta 1784 (1997).

ORS 656.382(1) requires an “unreasonable resistance to the payment of compensation.” Here, it is undisputed that the carrier did not accept or deny the claim within the 90 days mandated by ORS 656.262(6)(a). In addition, there were unpaid medical bills as of the employer’s untimely February 16, 2001 acceptance, the time of the employer’s unreasonable delay. (Ex. 8; Tr. 20-22). *Cf. Lloyd A. Humpage*, 49 Van Natta at 1785 (Board reversed ALJ’s attorney fee award under ORS 656.382(1), because, although the carrier did not accept or deny within 90 days, the claimant conceded that there were no “amounts due” at the time of the unreasonable delay). Together, these circumstances constitute an unreasonable resistance to the payment of compensation as described in ORS 656.382(1), irrespective of the administrative rule allowing 14 days (after the employer’s untimely acceptance of the underlying claim) for the payment of medical bills.

Moreover, the employer was assessed a separate penalty under ORS 656.262(11)(a) for the untimely payment of medical bills. The ALJ awarded an attorney fee under ORS 656.382(1) for the employer’s specific “misconduct” of the late acceptance of claimant’s underlying claim, not for the untimely payment of medical bills. The basis for the attorney fee under ORS 656.382(1) was thus not the untimely payment of medical bills and it is immaterial whether those bills were “untimely” pursuant to the administrative rule as of February 16, 2001.

Finally, the employer contends that the ALJ erred in both awarding an attorney fee under ORS 656.382(1) and assessing a penalty under ORS 656.262(11) for the same violation (untimely payment of medical bills). *See Corona v. Pacific Resource Recycling*, 125 Or App 47, 50 n1 (1993) (two separate instances of “misconduct” are prerequisite for assessment of both an attorney fee under ORS 656.382(1) and a penalty under *former* ORS 656.262(10)). We disagree.

The ALJ awarded claimant a penalty-based attorney fee under ORS 656.382(1) for the employer’s admittedly late acceptance of the underlying right elbow and forearm claim. (Tr. 7). In contrast, the ALJ assessed a penalty

under ORS 656.262(11)(a) based on untimely paid medical bills. Accordingly, we find that there were two separate instances of misconduct justifying imposition of an attorney fee under ORS 656.382(1) and a penalty under ORS 656.262(11)(a). *Corona*, 125 Or App at 50 n1.

ORDER

The ALJ's order dated June 8, 2001 is affirmed.¹

Entered at Salem, Oregon on January 31, 2002

Board Member Haynes, dissenting.

Unlike the majority, I believe that awarding an attorney fee under ORS 656.382(1) was inappropriate here. At the time of the employer's February 16, 2001 acceptance, no medical bills were "due" for at least 14 days.² See OAR 436-009-0030(14). On this record, I would find no "unreasonable resistance" to compensation. Accordingly, I respectfully dissent.

ORS 656.382(1) provides that an attorney fee may be awarded only when the carrier "unreasonably resists the payment of compensation." There is no unreasonable resistance to the payment of compensation in the absence of evidence of unpaid compensation. *SAIF v. Condon*, 119 Or App 194, *rev den* 317 Or 163 (1993); *Barbara A. Hasse*, 53 Van Natta 771 (2001). OAR 436-009-0030(14) provides that medical bills must be paid within 14 days of any "action causing the service to be payable" or 45 days of the carrier's receipt of the bill, whichever is later.

"Unreasonable resistance" is judged as of the date of the allegedly unreasonable act; *i.e.*, here, the untimely acceptance of the underlying claim on February 16, 2001. See *Ramiro R. Rangel*, 53 Van Natta 1271 (2001); *Michael D. Quinton*, 48 Van Natta 477, 480 (1996). Here, at the time the claim was accepted, I would find that there was no compensation due and owing, because the employer was well within its time frame for payment of medical bills pursuant to the administrative rule. As of February 16, 2001, the employer had at least 14 days

¹ Because the only issue on review involved attorney fees, claimant is not entitled to an attorney fee under ORS 656.382(2). *Dotson v. Bohemia*, 80 Or App 233, *rev den* 302 Or 35 (1986).

² I note that there is no evidence of any unpaid compensation other than the medical bills of approximately \$1,300.

within which to pay medical bills that had accrued on claimant's claim. OAR 436-009-0030(14).

It is true that the medical bills were ultimately paid late. However, there is no relationship between the carrier's late acceptance of claimant's claim and its incidental or "beside the fact" processing error in failing to pay the bills timely. The timing of the carrier's acceptance had nothing to do with the timing of its payment of bills. Although the majority notes that the employer has also been separately penalized for the late payment of bills under another statute, that fact only serves to reinforce the notion that the timing of the acceptance and the payment of medical bills were unrelated.

Under these particular circumstances, I would find that the employer's late acceptance does not constitute an "unreasonable resistance to compensation." ORS 656.382(1). Therefore, I would reverse the ALJ's attorney fee award.

For these reasons, I respectfully dissent.