
In the Matter of the Compensation of
NEIL J. HOPKINS, Claimant
WCB Case No. 02-00688
ORDER ON REVIEW
Robert E Nelson, Claimant Attorneys
Alice M Bartelt, SAIF Legal, Defense Attorneys

Reviewing Panel: Members Biehl and Lowell.

The SAIF Corporation requests review of that portion of Administrative Law Judge (ALJ) Hoguet's order that set aside its denial of claimant's right shoulder bursitis and tendonitis conditions. Claimant cross-requests review of those portions of the ALJ's order that: (1) declined to award interim compensation; and (2) declined to assess penalties for allegedly unreasonable claim processing. On review, the issues are compensability, interim compensation and penalties.¹ We affirm.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact" and "Ultimate Findings of Fact" with the following modification and supplementation.

We modify the first paragraph of the "Findings of Fact" to read as follows:

"Claimant is 34 years old. He has a compensable injury claim, under date of July 20, 2001, for 'foreign body right eye' as a result of a metal shaving/shard blowing into his right eye while he was working as a painter for the employer. The claim was initially accepted as a non-disabling claim; however, it had been reclassified as disabling at the time of claim closure. (Exs. 4; 32). The right eye portion of claimant's claim was closed by a Notice of Closure on November 15, 2001 with no time loss or PPD awarded. (Ex. 31)."

¹ Claimant moved to dismiss SAIF's request for Board review for failure to file an appellant's brief. However, filing of briefs is not jurisdictional, so the failure to file an appellate brief will not result in a party's request for review being dismissed. OAR 438-011-0020(1); *See Barbara J. Barnett*, 54 Van Natta 616 (2002); *Lura F. Carter*, 51 Van Natta 2038 (1999); *Bonnie J. Heisler*, 39 Van Natta 812 (1987). Accordingly, we deny claimant's motion to dismiss, as well as his request for payment of the "stayed compensation" which was based on the unsuccessful dismissal motion.

On November 30, 2001, claimant sought treatment with Dr. Puziss, an orthopedic surgeon who was not a physician within claimant's Managed Care Organization (MCO). Dr. Puziss did not authorize temporary disability at that time, nor at any subsequent appointment. (Exs. 34A; 37A).

On January 11, 2002, in response to SAIF's November 20, 2001 letter seeking specification of a so-called "unspecified condition" claim, claimant identified the condition as an "abscess in right shoulder due to tetanus shot," (referring to Dr. Beals' January 4, 2002 diagnosis). (Ex. 36). SAIF received this written statement on January 16, 2002 and issued a denial the same day. (Exs. 36; 37).

On March 15, 2002, SAIF acknowledged its March 11, 2002 receipt of claimant's March 8, 2002 letter requesting acceptance of "right shoulder bursitis/abscess/tendonitis." (Ex. 38). SAIF denied the right shoulder bursitis and tendonitis conditions on April 3, 2002. (Ex. 41).

From March 11, 2002 to April 3, 2002, no physician had authorized temporary disability for claimant's right shoulder bursitis and tendonitis conditions.

CONCLUSIONS OF LAW AND OPINION

Compensability

We adopt and affirm the ALJ's order regarding the compensability of claimant's right shoulder bursitis and tendonitis conditions.²

Interim Compensation/Penalties

The ALJ found that claimant was not entitled to interim compensation concerning his right shoulder condition. The ALJ reasoned that: (1) claimant's November 2001 request had not specified a particular condition; (2) claimant's January 2002 right shoulder abscess claim had been denied the same day of its receipt; and (3) at the time of SAIF's denial of March 2002 for claimant's right

² Claimant does not contest that portion of the ALJ's order which upheld SAIF's denial of claimant's right shoulder abscess condition. However, claimant contends that he is entitled to interim compensation for any time loss incurred as a result of his right shoulder problems up to March 11, 2002.

shoulder bursitis and tendonitis conditions, SAIF had not received authorization for time loss from an attending physician.

On review, claimant contends that he is entitled to interim compensation as a result of his consequential right shoulder condition. We disagree for the following reasons.

To receive temporary disability benefits under ORS 656.262(4)(a) for his right shoulder condition, claimant was first required to request, in writing, that SAIF accept the new medical condition. *See* ORS 656.262(6)(d); ORS 656.267(1); *Johansen v. SAIF*, 158 Or App 672, 679 (1999), *adhered to on recon* 160 Or App 579, *rev den* 329 Or 528 (1999); *Anna Zacharias*, 54 Van Natta 2297, 2298 (2002).

On January 16, 2002, SAIF received claimant's written request for acceptance of his right shoulder abscess condition. (Ex. 36). Because SAIF denied the right shoulder abscess condition before expiration of the 14 day period under ORS 656.262(4)(a), no interim compensation payments were due. Therefore, it follows that SAIF's conduct was not unreasonable. Consequently, a penalty is not warranted. ORS 656.262(11)(a).

Claimant's attorney is entitled to an assessed fee for services on review. ORS 656.382(2). After considering the factors 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 \$1,000, payable by SAIF. In reaching this conclusion, we have particularly considered the time devoted to the issue (as represented by claimant's respondent's brief), the complexity of the issue, and the value of the interest involved.

ORDER

The ALJ's order dated May 6, 2002 is affirmed. For services on review, claimant's attorney is awarded \$1,000, payable by SAIF.

Entered at Salem, Oregon on March 19, 2003