
In the Matter of the Compensation of
ADAN R. GALLARDO, Claimant
WCB Case No. 05-02226
ORDER ON REVIEW
James W Moller, Claimant Attorneys
Julie Masters, SAIF Legal, Defense Attorneys

Reviewing Panel¹: Members Langer, Kasubhai, Biehl and Lowell.
Members Kasubhai and Biehl concurring. Members Langer and Lowell dissenting
in part.

The SAIF Corporation requests review of that portion of Administrative Law Judge (ALJ) Herman's order that interpreted the terms of a Stipulation Order as requiring SAIF to pay certain medical bills. In his respondent's brief, claimant contests that portion of the ALJ's order that declined to award penalties and attorney fees pursuant to ORS 656.262(11) for an allegedly unreasonable resistance to payment of compensation. On review, the issues are claim processing, penalties, and attorney fees.

We affirm by an equally divided Board. *See Darren K. Tirral*, 58 Van Natta 2108 (2006), citing *Bailey v. Lewis Farm, Inc.*, 207 Or App 112 (2006) (affirmed by an equally divided court).

Claimant's attorney is entitled to an assessed 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 claim processing issue is \$1,500, 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, and claimant's counsel's uncontested attorney fee request), the complexity of the issue, the value of the interest involved, and the risk that counsel may go uncompensated.

ORDER

The ALJ's order dated July 18, 2005 is affirmed. For services on review, claimant's attorney is awarded an assessed fee of \$1,500, payable by SAIF.

Entered at Salem, Oregon on October 30, 2006

¹ Pursuant to ORS 656.718(3)(d), Board Chair Herman did not participate in this decision.

Members Kasubhai and Biehl concurring.

We agree with the ALJ's conclusion that SAIF is required to pay the disputed medical bills. However, we write separately to provide our reasoning. We begin our discussion with a summary of the facts.

Claimant was compensably injured on January 2, 2001, and SAIF accepted several strain injuries. On June 3, 2002, SAIF issued a "Modified Notice of Acceptance and Partial Denial." (Ex. 5). In that notice, SAIF accepted a "combined condition" and indicated that as of September 11, 2001, claimant's compensable injury was no longer the major contributing cause of his combined condition. Claimant requested a hearing.

Claimant underwent left shoulder arthroscopic surgery on April 23, 2002, and again on January 27, 2003. The disputed medical bills include bills relating to these surgeries. (Exs. 24, 25).

On May 12, 2003, SAIF issued a "Modified Notice of Acceptance and Current Combined Condition Denial," indicating that as of April 23, 2002, claimant's compensable injury was no longer the major contributing cause of his combined condition. (Ex. 11). That denial became final by operation of law.

On December 1, 2003, the ALJ approved a Stipulation and Order ("stipulation") where SAIF agreed to rescind its June 3, 2002 denial and pay the medical bills that were denied solely because of the June 3, 2002 denial.² (Ex. 14).

² Specifically, the December 1, 2003 stipulation provided, in relevant part:

"Claimant filed a claim for left shoulder, cervical and thoracic strains sustained on or about January 2, 2001. SAIF Corporation accepted the following conditions: left shoulder (combined condition), cervical strain (combined condition) and thoracic strain (combined condition).

"Thereafter, on June 3, 2002, SAIF Corporation denied the current combined condition of left shoulder, cervical and thoracic strains as of and after September 11, 2001. Claimant filed a Request for Hearing to appeal the denial and raise other issues.

"The parties agree to settle all issue(s) raised, including interest accrued on benefits pending appeal, if any, at this time as follows:

"SAIF Corporation agrees to rescind the June 3, 2002 current combined condition denial. Nothing in this agreement modifies the current

In February, July, and October 2004, claimant requested payment of medical bills incurred prior to the May 12, 2003 denial. (Exs. 17, 22, 24). Thereafter, claimant requested a hearing, seeking payment of those medical bills. The ALJ found that claimant was entitled to payment of all medical bills related to the compensable injury prior to SAIF's issuance of the May 2003 denial.

On review, SAIF contends that it has no obligation to pay the disputed medical bills based on the stipulation. Specifically, SAIF argues that the stipulation provided that SAIF would only pay the bills in its file that were denied solely because of the rescinded June 2002 denial. We disagree with SAIF's interpretation of the stipulation and reason as follows.

The terms of a written agreement to settle a workers' compensation claim are interpreted using the standard rules of contract construction. *See Good Samaritan Hospital v. Stoddard*, 126 Or App 69, *rev den*, 319 Or 572 (1994) (applying law of contracts to workers' compensation settlement agreement). Whether a contract is ambiguous is a matter of law. *Timberline Equip. v. St. Paul Fire and Mar. Ins.*, 281 Or 639, 643 (1978). In *Milne v. Milne Construction Co.*, 207 Or App 382 (2006), the court recently outlined the process used to determine whether a contract is ambiguous:

“The threshold to show ambiguity is not high. A contract provision is ambiguous if it has no definite significance or is capable of more than one plausible – that is, sensible and reasonable – interpretation.

“In determining whether a contract is ambiguous, parol evidence is admissible to explain the circumstances under which it was made. Although the evidence may not vary the terms of the written agreement, it can place the judge “in the position of those

combined condition denial issued May 12, 2003 which has now become final by operation of law.

“Claimant's attorney is allowed a fee of \$2,500.00 for prevailing on the denied claim, payable in addition to compensation.

“SAIF Corporation agrees to pay the bills in its file which were denied solely because of this now rescinded June 3, 2002 denial.” (Ex. 14).

whose language is being interpreted.”
[Quoting *Deerfield Commodities v. Nerco, Inc.*, 72 Or App 305, 317, *rev den*, 299 Or 314 (1985)].

“We interpret the agreement as a whole, not word by word or sentence by sentence. In summary, for a term to be legally ambiguous, it must be susceptible to two plausible interpretations when examined in the context of the contract as a whole and the circumstances of contract formation, such as communications and overt acts.”
Milne, 207 Or App at 388-89 (citations omitted).

Thus, in deciding whether an ambiguity exists we are not limited to mere text and context but may consider parol and other evidence. *Milne*, 207 Or App at 388; *Abercrombie v. Hayden Corp.*, 320 Or 279, 292 (1994). The parol evidence rule allows three express exceptions for consideration of extrinsic evidence: (1) to establish an ambiguity based on circumstances surrounding formation of the agreement; (2) to explain an ambiguity, intrinsic or extrinsic; or (3) to show fraud or illegality. *Harris v. Warren Family Properties, LLC*, 207 Or App 732, 739 n3 (2006); *Batzer Construction, Inc v. Boyer*, 204 Or App 309, 314, *rev den*, 341 Or 566 (2006). Only if the terms are ambiguous do we proceed to the second step: the “determination of the ‘objectively reasonable construction of the terms’ in the light of the parties’ intentions and other extrinsic evidence.” *Taylor v. Cabax Saw Mill*, 142 Or App at 125 (quoting *Williams v. Wise*, 139 Or App 276, 281 (1996)).

The ALJ determined that the terms of the stipulation were not ambiguous. In making this determination, the ALJ found that, by the explicit terms of the stipulation, SAIF agreed to rescind its June 3, 2002 current combined condition denial and to pay the bills in its file denied because of the June 2002 denial. The ALJ reasoned that the question became what bills were not paid by virtue of the June 2002 denial. The ALJ determined that the answer to that question consisted of bills incurred after September 11, 2001 and in existence when the June 2002 denial issued and bills incurred subsequent to the June 2002 denial, reasoning that such bills would not have been paid because claimant’s current combined condition was denied. Therefore, the ALJ found under the terms of the stipulation that SAIF was required to pay the disputed medical bills.

The ALJ also reasoned that the purpose of the stipulation was to resolve issues raised by claimant's request for hearing appealing the June 2002 denial. The ALJ found that this purpose was accomplished by having the denial set aside and by providing for the payment of bills. Finally, the ALJ reasoned that the stipulation did not address the legal effect of the May 2003 denial on that obligation. We acknowledge that the ALJ's interpretation is one reasonable and sensible interpretation.

However, SAIF argues that the stipulation should not be so narrowly interpreted, and an interpretation of the stipulation should include acknowledging the effect of the "finality" of the May 2003 denial, which the parties explicitly agreed was not modified by the stipulation. Reviewing the stipulation on its face, both interpretations are plausible. Nevertheless, because we find more than one reasonable and sensible interpretation, we find the language of the agreement ambiguous.

Because the terms of the stipulation are ambiguous, we would look to extrinsic evidence of the parties' intentions to determine the "objectively reasonable construction" of the terms of the agreement. *See Taylor*, 142 Or App at 125; *Williams*, 139 Or App at 281. "The extrinsic evidence available to resolve a contract ambiguity includes evidence of the circumstances and conduct of the parties during the life of the agreement." *Harris*, 207 Or App at 738 (emphasis in original) (citing *Yogman v. Parrott*, 325 Or 361 (1997)).

Here, there is extrinsic evidence that in February, July, and October 2004, claimant continuously requested payment of the medical bills incurred before the May 12, 2003 denial, contending that based on the stipulation SAIF was obligated to pay all the bills in its file up to the May 2003 denial. (Exs. 17, 22, 24). Such action indicates that claimant understood, under the terms of the stipulation at issue, that SAIF was responsible for all medical bills up to the May 12, 2003 denial.

To the extent the dissent infers that such letters were not factually relevant, we disagree. The letters from claimant's attorney to SAIF specifically evince what claimant understood the agreement to cover. Therefore, they are relevant to this dispute.

SAIF argues that it is clear by the terms of the stipulation that based on the May 2003 denial, it was only obligated to pay the bills up to April 23, 2002. However, we do not find the May 2003 denial clear regarding which conditions were accepted or which bills were to be paid based on the denial. Specifically, we note that the May 2003 denial includes the following language:

“Your claim was originally accepted for left shoulder strain, cervical strain and thoracic strain. On June 3, 2002, SAIF Corporation *conditionally* accepted left shoulder rotator cuff tear, subacromial impingement, tendinosis of supraspinatus tendon, hypertrophic change of left acromioclavicle *conditioned* upon the outcome of litigation in WCB case 01-09444.” (Ex. 11; emphasis added).

Thus, the scope of what was accepted or denied is not fully contained in the May 2003 denial, but contingent upon the outcome of litigation. After a hearing before an ALJ, SAIF requested review. (Ex. 12). We affirmed the ALJ in part, holding that the only issue before the ALJ was the compensability of a left shoulder rotator cuff tear, and to the extent the Opinion and Order addressed other conditions on the merits, we reversed, holding that the compensability of those other conditions was not before the ALJ. *Adan R. Gallardo*, 55 Van Natta 1733 (2003). Thus, the May 2003 denial does not specify how the conditionally-accepted conditions would be treated with the outcome of litigation. Therefore, because it is not clear what conditions were accepted, it is unclear what impact the stipulation agreement had on the obligation to pay certain medical bills.

In addition, in January 2004, the parties were circulating an unexecuted Claim Disposition Agreement (CDA) that stated: “SAIF Corporation accepted the following conditions: left shoulder strain (combined condition), cervical strain (combined condition) and thoracic strain (combined condition).” (Ex. 15-2). The record also contains an executed CDA in February 2004 that recites: “SAIF Corporation accepted the following conditions: left shoulder rotator cuff tear, subacromial impingement, tendinosis of the supraspinatus tendon, hypertrophic change of the left acromioclavicle, left shoulder strain (combined condition), cervical strain (combined condition) and thoracic strain (combined condition).” (Ex. 18-2).

Significantly, the additional accepted conditions listed in the executed CDA as compared to the unexecuted CDA (“left shoulder rotator cuff tear, subacromial impingement, tendinosis of the supraspinatus tendon, hypertrophic change of the left acromioclavicle”) are *not* identified as “combined conditions.” Instead, by the executed CDA, SAIF acknowledged acceptance of these conditions outright, without qualification. Of significance is that this CDA was executed after the parties entered into the stipulation at issue. Moreover, because medical services are the only “matter regarding a claim” that cannot be bargained away in a CDA,

this language evidences the parties' intent that SAIF is responsible for these conditions and any liability for medical services related to these conditions. ORS 656.236(1)(a); *Marilyn London*, 43 Van Natta 1689 (1991).

After reviewing the executed CDA, which acknowledges acceptance of multiple shoulder conditions, including the conditions SAIF argues the May 2003 denial allegedly denied, combined with the letters from claimant's counsel requesting payment of medical bills, we find that the preponderance of the evidence establishes that the parties, when entering into the stipulation agreement, intended to have all medical bills prior to the May 2003 denial paid by SAIF.

Alternatively, we apply a rule of construction by which the question of the meaning of the term is resolved by construing the term against the drafter. *See Hoffman Construction Co. v. Fred S. James & Co.*, 313 Or 464, 470 (1992). Thus, to the extent that this evidence discussed above compounds the ambiguity, we construe the stipulation against SAIF, the party that drafted it. Under that construction, we agree with the ALJ that claimant is entitled to payment of medical bills prior to the May 12, 2003 denial. Consequently, we affirm.

We turn to the penalty issue. A penalty may be assessed under ORS 656.262(11)(a) if a carrier unreasonably resists the payment of compensation. The standard for determining an unreasonable resistance to the payment of compensation is whether, from a legal standpoint, the carrier had a legitimate doubt as to its liability. *International Paper Co. v. Huntley*, 106 Or App 107 (1991). If so, the refusal to pay is not unreasonable. "Unreasonableness" and "legitimate doubt" are to be considered in light of all the evidence available to the insurer. *Brown v. Argonaut Ins.*, 93 Or App 588, 591 (1988).

Here, we agree, for the reasons expressed by the ALJ, that SAIF had a legitimate doubt as to its liability for payment of medical bills on and after April 23, 2002 under the stipulation agreement. Therefore, we affirm the ALJ's order.

Members Langer and Lowell dissenting in part.

This decision affirms the ALJ's order by an equally divided panel. Although we agree with the ALJ that claimant is not entitled to penalties under ORS 656.262(11)(a), we disagree that claimant is entitled to the payment of the disputed medical bills. In addition, we find that the parties' stipulation agreement is not ambiguous. Accordingly, we dissent in part.

Quoting *Milne v. Milne Construction Co.*, 207 Or App 382 (2006), the concurrence points out that the “threshold to show ambiguity is not high.” We do not dispute that point. Here, however, claimant does not achieve even the low threshold of showing ambiguity. We base our decision on the following reasoning.

Claimant initiated this action to enforce the stipulation agreement he believed obligated SAIF to pay certain medical bills. These disputed bills concern two surgeries to treat claimant’s shoulder on April 23, 2002, and January 27, 2003. The contested issue is whether the stipulation the parties executed on December 1, 2003, effectively discharged SAIF’s responsibility for payment of those bills. We agree with SAIF that it did.

By its terms, the stipulation (1) rescinded SAIF’s June 3, 2002 denial, (2) documented SAIF’s agreement to pay the medical bills that were denied solely because of the June 3, 2002 denial, and (3) did not affect the May 12, 2003 denial. These terms of the parties’ agreement are not ambiguous. Accordingly, their construction is a matter of law. *See Robuck v. SAIF*, 207 Or App 761 (2006) (agreement that settled all issues “raised or raisable” was not ambiguous; therefore, its construction was a matter of law).

Furthermore, “where an agreement is reduced to writing *and there is no ambiguity to be explained*, the writings are ‘considered as containing all those terms, and therefore there can be, between the parties and their representatives or successors in interest no evidence of the terms of the agreement, other than the contents of the writing.’” *Harris v. Warren Family Properties, LLC*, 207 Or App 732, 738 (2006) (emphasis in original) (quoting ORS 41.740 (parol evidence rule)).

Here, the stipulation was reduced to writing and there is no ambiguity to be explained. Therefore, the stipulation contains all the terms of the parties’ agreement and extrinsic evidence may not be used to define the terms of the stipulation.

The parties center their argument on the legal effect of the May 12, 2003 denial. That denial, which was unappealed, unambiguously denied compensability of claimant’s combined shoulder condition on and after April 23, 2002. As a result, the disputed bills, which involve treatment rendered on and after April 23, 2002, were incurred when claimant’s combined condition no longer was compensable. Because the stipulation unambiguously did not alter the legal effect of the unappealed May 2003 denial, SAIF is not responsible for the disputed bills.

Claimant argues that the medical bills could not have been denied by the May 2003 denial, because it had not yet been issued at the time the bills were incurred. Yet, as previously stated, the May 2003 denial was unappealed, became final long before the December 2003 stipulation, and explicitly denied claimant's combined shoulder condition "on and after April 23, 2002." Moreover, the stipulation unambiguously provides that the May 2003 denial was not modified by the parties' agreement. Finally, claimant provides no authority for the proposition that a denial cannot be retroactively effective. To the contrary, it is not uncommon for a carrier's denial to deny a specified combined condition as of a particular date, as SAIF did here. ORS 656.262(6)(c); *Stockdale v. SAIF*, 192 Or App 289 (2004); *Sylvia S. Ronning*, 58 Van Natta 1738 (2006); *Jonathan F. Stewart*, 57 Van Natta 2854 (2005). Instead, claimant argues that "[t]he issue is not whether the disputed medical bills would fall within the terms of the May 2003 denial[.]" (Resp. Br. 4; emphasis in original). Contrary to that argument, however, that is precisely at issue.

After finding the stipulation ambiguous, the concurrence looks to extrinsic evidence of the parties' intentions. Specifically, the concurrence finds relevant claimant's attorney's letters of February, July and October, 2004 and a February 2004 CDA that lists accepted conditions. (Ex. 18). Claimant's repeated requests in February, July and October 2004, for payment of the disputed bills merely demonstrate that claimant did not realize the retroactive effective date of the May 2003 denial. However, that denial's effective date is clear on its face, and does not establish ambiguity in the December, 2003 stipulation.

The concurrence also examines the terms of the conditional acceptance that preceded the denial of the combined condition and states that, because it is not clear what was accepted, it is unclear what impact the stipulation had on the payment of the medical bills. What is clear, however, is the May 2003 denial. It unequivocally denies compensability of claimant's combined shoulder condition as it existed on April 23, 2002. No one disputes that the bills in question, which relate to medical services provided on and after April 23, 2002, are related to this combined shoulder condition. The denial of this combined condition became final when it was not appealed.

The concurrence further examines the terms of a CDA that the parties executed after the stipulation. The concurrence interprets the CDA to show that SAIF accepted some shoulder conditions outright, without qualification as "combined conditions." In effect, the concurrence is modifying *sua sponte* the May 2003 final denial and the December 2003 stipulation. Such an action is not

only in direct contravention of the express, unequivocal terms of the parties' stipulation, but also overreaches the scope of this proceeding and the parties' contentions. Neither party even remotely suggests that the CDA modified their prior agreement that the May 2003 denial remain in full effect.

Moreover, if the terms of the CDA were relevant, we would disagree with the concurrence's interpretation of the acceptances. There were multiple shoulder conditions listed, followed by a parenthetical "(combined condition)." That same parenthetical construction is applied to cervical and thoracic strains in the CDA. There is no evidence to indicate that SAIF intended to accept certain conditions outright, after having previously accepted them as "combined conditions," and, as discussed above, claimant does not make this contention.

To summarize, the terms and the legal effect of the stipulation are unambiguous. As such, the stipulation contains all the terms of the parties' agreement and extrinsic evidence may not be considered to define the terms. Under the terms of the stipulation, the June 2002 denial is rescinded, and the May 2003 denial remains in effect. The May 2003 denial denies retroactively compensability of the disputed medical bills.

We would reverse that portion of the ALJ's order that interpreted the terms of a Stipulation Order as requiring SAIF to pay the disputed medical bills. Therefore, we respectfully dissent.