
In the Matter of the Compensation of
GERARDO MEZA, Claimant
WCB Case No. 09-02983
ORDER ON REVIEW
Adams Day & Hill, Claimant Attorneys
Reinisch Mackenzie PC, Defense Attorneys

Reviewing Panel: Members Weddell and Lowell.

The self-insured employer requests review of that portion of Administrative Law Judge (ALJ) Naugle's order that awarded claimant's counsel a \$4,000 employer-paid attorney fee for the employer's "pre-hearing" rescission of its *de facto* denial of claimant's omitted medical condition claim for a head laceration and L5-S1 disc condition. On review, the issue is attorney fees. We affirm.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact," with the following addition: On August 5, 2009, claimant's attorney filed a Supplemental Request for Hearing, listing as issues a June 3, 2009 denial and a "May 25, 2009" *de facto* denial, as well as penalties and attorney fees. (Hearing file).

CONCLUSIONS OF LAW AND OPINION

In December 2008, the employer accepted claimant's November 2008 injury claim for sacroiliitis. (Exs. 13, 48). On March 23, 2009, claimant's attorney asked the employer to expand its acceptance to include a head laceration and contusion, cervical, thoracic, and lumbar strains, and an L5-S1 disc condition. (Ex. 44A). That written request was received by the employer on March 27, 2009. (Ex. 44B).

On May 26, 2009, 60 days after the employer's receipt of claimant's expansion request, claimant filed a request for hearing concerning a *de facto* denial of the above-mentioned conditions. (Hearing file). On June 3, 2009, the employer denied the claims for head contusion and cervical and thoracic strains. (Ex. 53). That same day, the employer modified its acceptance to include "head laceration and combined condition preexisting HNP/DDD L5-S1 in addition to the lumbar strain and sacroiliitis as disabling."¹ (Ex. 54).

¹ HNP/DDD refers to herniated nucleus pulposus/degenerative disc disease.

Claimant filed “amended” and “supplemental” hearing requests on June 11, 2009, and August 5, 2009, respectively. (Hearing file). The June 2009 request referred to the June 3, 2009 denial (along with penalties and attorney fees), while the August 2009 request, in addition to those issues, referenced a “May 25, 2009” *de facto* denial² and an attorney fee for that denial.

The employer argued that claimant’s first hearing request (on May 26, 2009) was premature, and therefore void. The ALJ disagreed, finding that claimant’s initial hearing request was filed on the 60th day after the employer received his request to accept additional conditions. *See* ORS 656.262(6)(a). Because the employer had neither accepted nor denied the claim by that date, the ALJ concluded that claimant’s hearing request was timely filed.

Alternatively, the ALJ reasoned that, even if the request *was* premature, claimant subsequently filed an amended hearing request addressing an assessed attorney fee for the *de facto* denial of the head laceration and the L5-S1 disc condition. Because the employer did not timely respond to the claim for those conditions, the ALJ concluded that claimant’s counsel was entitled to an employer-paid attorney fee. *See* ORS 656.386(1)(b)(B). We agree with the ALJ’s ultimate conclusion. However, our determination is based on the following reasoning.

We find that claimant’s initial request for hearing was premature. “Filing” means the physical delivery of a thing to any permanently staffed office of the Board, *or the date of mailing*. OAR 438-005-0046(1)(a) (Emphasis added). Because the envelope containing claimant’s hearing request was postmarked on May 26, 2009, the record establishes that the request was “filed” on that day. *See Truc Nguyen*, 60 Van Natta 3240, 3241 (2008). Yet, May 26 was the 60th day after the employer received claimant’s request to accept the additional medical conditions. Therefore, the statutory 60-day period to accept or deny the claim did not expire until the following business day. Consequently, claimant’s initial request for hearing, insofar as it concerned a *de facto* denial of the additional claimed conditions, was prematurely filed.

² Because the statutory 60-day period to respond to the omitted medical condition claim ran until May 26, 2009, the “date” of the *de facto* denial would more likely be May 27, 2009, not May 25, 2009. Nonetheless, it is apparent that claimant’s August 2009 hearing request referred to the additional conditions, including a head laceration and L5-S1 disc condition, for which the employer received a claim on March 27, 2009. (*See* Ex. 44A-2).

Nevertheless, after the expiration of the aforementioned 60-day period, and following the employer's acceptance of the claimed head laceration and L5-S1 disc condition on June 3, 2009, claimant filed a supplemental hearing request. Among the issues raised in the request was an attorney fee concerning the employer's *de facto* denial. That request was neither barred statutorily nor via the initial "premature" request.³ Consequently, the ALJ was authorized to determine whether claimant's attorney was instrumental in obtaining a pre-hearing rescission of the *de facto* denial. ORS 656.386(1)(a).

We turn to the merits of the attorney fee issue. On March 27, 2009, the employer received claimant's counsel's request for expansion of its Notice of Acceptance to include the head laceration and L5-S1 disc condition. ORS 656.262(6)(d). As such, this expansion request constituted a claim for omitted medical conditions. *See* ORS 656.386(1)(b)(B). Because the employer did not respond to this claim during the statutory 60-day period, it constitutes a "denied claim." (*Id.*); *Ann M. Carstens*, 57 Van Natta 2865, 2867 (2005). On June 3, 2009 the employer subsequently modified its acceptance to include the claimed head laceration and L5-S1 disc condition.

Under such circumstances, we find that claimant's counsel was instrumental in obtaining a rescission of the employer's *de facto* denial without a hearing. Accordingly, based on the above reasoning, we agree with the ALJ's decision to award claimant's attorney an assessed fee under ORS 656.386(1)(b)(B). Thus, we affirm.

Because the issue on review is attorney fees, claimant's counsel is not entitled to a fee for services on review. *Dotson v. Bohemia, Inc.*, 80 Or App 233, *rev den*, 302 Or 35 (1986); *Deborah L. Rettmann*, 60 Van Natta 1849 (2008).

ORDER

The ALJ's order dated June 7, 2010 is affirmed.

Entered at Salem, Oregon on December 27, 2010

³ The employer argues that claimant's counsel is not entitled to an attorney fee award because the allegedly *de facto* denied conditions had been accepted. Nevertheless, the statutory deadline for claimant to file a request for hearing based on the employer's actions/inactions is two years. ORS 656.319(6). Thus, claimant's supplemental hearing request was neither statutorily nor procedurally barred.