

In the Matter of the Compensation of
CHARLES M. LYDALL, Claimant

WCB Case Nos. 09-01042, 09-00182

ORDER ON REVIEW

Malagon Moore & Jensen, Claimant Attorneys
Julie Masters, SAIF Legal, Defense Attorneys

Reviewing Panel: Members Langer and Weddell.

Claimant requests review of that portion of Administrative Law Judge (ALJ) Donnelly's order that upheld the SAIF Corporation's denial of his injury claim for a combined low back condition. In its respondent's brief, SAIF contests that portion of the ALJ's order that awarded a penalty-related attorney fee for allegedly unreasonable claim processing. On review, the issues are compensability and attorney fees.

We adopt and affirm the ALJ's order with the following supplementation to address the attorney fee issue.

SAIF acknowledges that its denial was untimely under ORS 656.262(6)(a). It argues, however, that its delay in denying this medically complex claim was reasonable, and that therefore no penalty-based attorney fee should be awarded. *See* ORS 656.262(11)(a) (if a carrier unreasonably delays acceptance or denial of a claim, the carrier shall be liable for an additional amount up to 25 percent of the amounts then due plus any attorney fees assessed).

As reflected in the ALJ's discussion of the medical opinions, the compensability issue was medically complex. Nevertheless, the record lacks either documentary or testimonial evidence explaining how that complexity contributed to SAIF's admittedly untimely issuance of its denial. Under such circumstances, we conclude that SAIF's delayed claim processing was unreasonable. *See Chris Seiger*, 59 Van Natta 334, 351 (2007) (unexplained untimely denial found unreasonable); *Pamela J. Peacock*, 52 Van Natta 835, 836 (2000) (same).

SAIF also argues that, even if its denial was unreasonable, no penalty-related attorney fee may be awarded because there were no “amounts then due.” In advancing this argument, SAIF acknowledges that we decided to the contrary in *Nancy Ochs*, 59 Van Natta 1785 (2007). We decline SAIF’s request that we revisit and overrule that decision.¹

ORDER

The ALJ’s order dated August 26, 2009 is affirmed.

Entered at Salem, Oregon on March 25, 2010

¹ No attorney fee is available for claimant’s counsel’s services devoted to defending the ALJ’s attorney fee award. *Dotson v. Bohemia*, 80 Or App 233, *rev den*, 302 Or 35 (1986).