
In the Matter of the Compensation of
PAUL M. VANDERZANDEN, Claimant
WCB Case No. 08-01481, 08-01480, 07-08220
ORDER ON REVIEW
Hooton Wold & Okrent LLP, Claimant Attorneys
The Law Office of Gress & Clark LLC, Defense Attorneys
Sather Byerly & Holloway, Defense Attorneys

Reviewing Panel: Members Langer and Weddell.

Claimant requests review of those portions of Administrative Law Judge (ALJ) Rissberger's order that: (1) set aside that portion of the SAIF Corporation's responsibility denial, issued on behalf of Mick's Custom Cabinets (SAIF/Mick's), for claimant's low back condition; (2) upheld the denial of claimant's "new injury" claim for the same condition, issued by SAIF on behalf of Oak Grove Custom Cabinets (SAIF/Oak Grove); (3) upheld that portion of SAIF/Mick's denial which denied claimant's low back aggravation claim; (4) determined that SAIF/Oak Grove's denial exclusively pertained to responsibility; (5) declined to award an assessed attorney fee under ORS 656.386(1); and (6) determined that SAIF/Mick's was responsible for claimant's post-August 17, 2007 medical treatment under a 2003 low back injury claim. On review, the issues are responsibility, scope of issues, aggravation, and attorney fees. We affirm in part and reverse in part.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact."

CONCLUSIONS OF LAW AND OPINION

Responsibility

Claimant initially sustained a compensable low back injury in October 2003, while employed by SAIF/Mick's. The claim was accepted for a lumbar strain and an L5-S1 disc herniation.

Dr. Rosenbaum, a neurosurgeon, performed an L5-S1 discectomy in January 2004. Claimant was subsequently awarded 28 percent unscheduled permanent disability for the 2003 injury.

In December 2006, claimant sustained another low back injury while employed by SAIF/Mick's, this time accepted for a lumbar strain. SAIF/Mick's closed the claim in June 2007 without an award of permanent disability.

On August 17, 2007, claimant allegedly sustained a new compensable injury while employed by SAIF/Oak Grove, which denied the claim on October 29, 2007. On January 4, 2008, SAIF/Mick's denied responsibility under the 2003 and 2006 injury claims. SAIF/Mick's also denied that either compensable injury had compensably worsened. Claimant requested a hearing from the denials.

The ALJ found the medical opinion of Dr. Rosenbaum, the neurosurgeon who performed the L5-S1 discectomy in January 2004, to be more persuasive than the opinion of Dr. Kafrouni, a rehabilitation specialist who treated claimant in April and May 2007 in connection with the 2006 injury. Based on Dr. Rosenbaum's opinion, the ALJ found that claimant's preexisting condition was the major contributing cause of his need for treatment after August 17, 2007. Accordingly, the ALJ concluded that responsibility did not shift under ORS 656.308(1) from SAIF/Mick's to SAIF/Oak Grove. The ALJ further concluded that responsibility for claimant's "post-August 17, 2007" condition should lie under his 2003 injury claim with SAIF/Mick's. In reaching that conclusion, the ALJ reasoned that the compensable 2006 injury had resolved and was no longer a material factor in claimant's need for treatment.

On review, claimant contends that responsibility should shift from SAIF/Mick's to SAIF/Oak Grove because the latter cannot show that the otherwise compensable August 2007 injury was not the major contributing cause of claimant's disability or need for treatment. Citing *Multnomah County v. Obie*, 207 Or App 482 (2006), claimant argues that Dr. Rosenbaum's opinion only establishes that the preexisting condition heightened claimant's "susceptibility" to injury and was not an "actual" cause of his disability or need for treatment. For the following reasons, we do not find claimant's arguments persuasive.

In *Obie*, the court held that, in the context of an occupational disease claim for a mental disorder, the claimant's chronic depression could not be considered a statutory "preexisting condition" under ORS 656.005(24) because it was a predisposition. 207 Or App at 488-89. Because *Obie* concerned an occupational disease claim, rather than an industrial injury claim such as what is presented here,

it is of questionable relevance.¹ However, even assuming that *Obie* applies in this context, we are persuaded that Dr. Rosenbaum's opinion establishes that the preexisting condition was an actual cause, not a mere predisposition or susceptibility.

Dr. Rosenbaum testified that, while the August 2007 work activity was a material contributing cause of claimant's need for treatment, the preexisting condition was the major contributing cause of the combined lumbar condition. (Ex. 201-15, -17, -44, -60). Dr. Rosenbaum further testified that there was no difference between the major cause of the combined condition and of the need for treatment. *Id.* at 66. Having reviewed Dr. Rosenbaum's opinion, we are persuaded that the preexisting condition was an actual cause of the combined condition and was not a mere susceptibility, as claimant asserts.

Claimant also challenges the ALJ's decision to give greater weight to Dr. Rosenbaum's opinion because he is a neurosurgeon, whereas Dr. Kafrouni is a rehabilitation specialist. *See Abbott v. SAIF*, 45 Or App 657, 661 (1980) (greater weight given to physician who had more expertise regarding the condition at issue). We need not resolve the question of which doctor possesses greater expertise to address the causation issue. Dr. Rosenbaum treated claimant for the more serious 2003 injury, which included performing an injury-related surgery in 2004. He also examined claimant in October 2007, after the August 2007 injury. Dr. Kafrouni, on the other hand, treated claimant during April and May 2007 in connection with the less serious 2006 injury, but did not examine claimant again until February 2008. Under these circumstances, we conclude that Dr. Rosenbaum was in a better position to assess the causation issue.

Finally, claimant again argues that, if SAIF/Mick's is responsible for his "post-August 2007" condition, it should be under the 2006 claim that was accepted for a lumbar strain. We agree with the ALJ's reasoning that rejected this argument.

Aggravation

Claimant contends that the ALJ incorrectly found that neither of the SAIF/Mick's claims had compensably worsened. We agree with the ALJ's determination.

¹ No party contests the ALJ's determination that the August 2007 claim should be analyzed as an industrial injury, rather than as an occupational disease.

To establish a compensable aggravation claim with regard to the 2003 or 2006 injuries, claimant must prove an “actual worsening” of his compensable conditions since the last award or arrangement of compensation. ORS 656.273(1); *James E. Penland*, 58 Van Natta 138, 139 (2006). An “actual worsening” may be established either by direct proof of a pathological worsening or through inference of such a worsening based on increased symptoms. In the latter instance, a physician must make the inference. *SAIF v. Walker*, 330 Or 102, 118-19 (2000); *SAIF v. January*, 166 Or App 620, 624 (2000); *Anna L. Johnson*, 57 Van Natta 1396 (2005). In either instance, the finding of an actual worsening must be established by medical evidence supported by objective findings. ORS 656.273(1). A symptomatic worsening is an “actual” worsening only if it is more than the waxing of symptoms of the condition contemplated by the previous permanent disability award. ORS 656.273(8).

Dr. Rosenbaum, whose opinion we have found most persuasive, opined that claimant’s “post-August 2007” condition was consistent with a waxing and waning of his preexisting condition. (Ex. 199-3). He further testified that claimant has a chronic condition that waxes and wanes. (Ex. 201-57). Dr. Rosenbaum further testified that there had been no pathological worsening of claimant’s condition, but rather a return of symptoms from his previous condition. (Ex. 201-61). On this record, we are not persuaded that claimant experienced a compensable worsening of either the 2003 or 2006 claims for which SAIF/Mick’s was responsible.

Attorney Fees/Scope of Issues

At hearing, claimant argued that he was entitled to an attorney fee under ORS 656.386(1) because SAIF/Oak Grove’s denial also denied compensability. The ALJ rejected that argument, concluding that, based on the language of its denial, SAIF/Oak Grove intended only a denial of responsibility.

On review, claimant argues that SAIF/Oak Grove’s denial raised a compensability issue. For the following reasons, we agree.

The denial states in pertinent part:

“You filed a claim for an injury described as low back injury, which occurred on or about August 17, 2007, while you were employed at Oak Grove Custom Cabinets Inc. We are unable to accept your claim for the following reasons:

“Your low back injury is not compensably related to your employment.

“Your condition of low back injury is the responsibility of another employer and/or insurer. In order to protect the right to obtain benefits on the claim, you should file separate, timely claims against other potentially responsible insurers or self-insured employers, including other insurers for the same employer.

“Your denial was based in part on an insurer medical examination. Your attending physician has not commented on the findings of this examination.”
(Ex. 192).

A carrier is bound by the express language of its denial. *Tattoo v. Barrett Business Service*, 118 Or App 348, 351-52 (1993). Furthermore, extrinsic evidence may not be used to interpret the express language of a denial. *Gregg Muldrow*, 49 Van Natta 1866, 1867-68 (1997). Having reviewed the express language of the denial, without resort to extrinsic evidence, we conclude that SAIF/OAK Grove’s denial raised a compensability issue.

The denial stated that SAIF/Oak Grove was unable to accept the claim because the claimed low back injury was not “compensably related” to his employment. Moreover, the denial did not state that compensability was not at issue or state that it was a denial of responsibility only. *See Edward J. Demille*, 47 Van Natta 91, 92 (1995) (finding carrier’s denials, which did not state that compensability was not at issue, raised a compensability issue and entitled the claimant’s counsel to an attorney fee award under ORS 656.386(1)); *Linda K. Ennis*, 46 Van Natta 1142 (1994) (awarding attorney fee under ORS 656.386(1) where the carrier did not concede compensability until the hearing).

Based on our review of the relevant language of SAIF/Oak Grove’s denial, we are persuaded that the denial was not limited to the issue of responsibility. Therefore, we find that claimant’s attorney is entitled to an assessed fee under ORS 656.386(1) for services in securing a rescission of a compensability denial without a hearing.

After considering the factors in OAR 438-015-0010(4) and applying them to this case, we find that \$5,000 is a reasonable assessed attorney fee for claimant’s counsel’s pre-hearing services concerning the compensability issue. In reaching

this conclusion, we have particularly considered the time devoted to this issue (as represented by the record and claimant's counsel's uncontested request), the complexity of the issue, the value of the interest involved, and the risk that claimant's counsel might go uncompensated.

ORDER

The ALJ's order dated July 27, 2009, as reconsidered on September 11, 2009, is reversed in part and affirmed in part. That portion of the ALJ's order which declined to award an assessed attorney fee is reversed. Claimant's counsel is awarded an assessed attorney fee of \$5,000 under ORS 656.386(1) for services regarding the compensability issue, to be paid by SAIF/Oak Grove. The remainder of the ALJ's order is affirmed.

Entered at Salem, Oregon on May 14, 2010