

In the Matter of the Compensation of
LINDSAY HANWAY, Claimant

WCB Case No. 10-06080

ORDER ON REVIEW

Colin Rockey Hackett, Claimant Attorneys
Cummins Goodman et al, Defense Attorneys

Reviewing Panel: Members Langer and Weddell.

Claimant requests review of those portions of Administrative Law Judge (ALJ) Otto's order that: (1) held that she was precluded from litigating an occupational disease claim regarding her left knee condition; (2) upheld the self-insured employer's denial of her October 2010 injury claim for a left knee condition; and (3) assessed sanctions against claimant's counsel under ORS 656.390 for a frivolous hearing request. In its brief, the employer seeks sanctions against claimant's counsel for an allegedly frivolous request for review. On review, the issues are jurisdiction, scope of issues, compensability, and sanctions. We deny the employer's request for sanctions on review, and affirm in part and reverse in part.

FINDINGS OF FACT

We adopt the ALJ's findings of fact with the following changes. We do not adopt the findings of ultimate fact. In the third full paragraph on page 3, we change the date of injury to "October 26, 2009." We replace the seventh full paragraph on page 3 with the following: "On October 7, 2010, claimant filed an 801 form related to a left knee condition that listed the 'date of injury or illness' as '10/3/10.' (Ex. 49)." On page 4, we replace the first full paragraph with the following:

"On October 27, 2010, the employer denied compensability of claimant's 'left knee pain' claim. (Ex. 59). Claimant requested a hearing, which was originally scheduled for January 25, 2011. By letter dated January 6, 2011, claimant wrote to the employer and explained that she was pursuing her claim under an occupational disease theory, but was not limited to that theory. (Ex. 65). On January 19, 2011, ALJ Mills granted the employer's request for postponement over claimant's objection.

“On March 8, 2011, the employer denied compensability of claimant’s occupational disease claim for a left knee condition. (Ex. 73). Claimant did not request a hearing regarding that denial.”

CONCLUSIONS OF LAW AND OPINION

Jurisdiction

After the hearing, the ALJ issued an “Interim Order” on August 30, 2011, which upheld the employer’s October 27, 2010 denial and granted the employer’s request for sanctions. The ALJ’s “Interim Order” also determined that the October 27, 2010 denial did not pertain to an occupational disease claim. In the “Interim Order,” the ALJ asked the employer’s counsel to submit a Statement of Services documenting the amount of time devoted to litigating the issues to assist the ALJ in determining an appropriate sanction. Claimant’s counsel was granted an opportunity to respond to the employer’s Statement of Services.

On September 15, 2011, claimant requested review of the “Interim Order,” acknowledging that the order was not final, but preserving her right to appeal in order to avoid any later confusion. After receiving the employer’s Statement of Services regarding the sanction amount, claimant’s counsel’s response, and the employer’s reply, the ALJ issued an Opinion and Order on October 14, 2011. The ALJ repeated the findings from the “Interim Order” and awarded a \$3,691 sanction against claimant’s counsel. Claimant timely requested review of the Opinion and Order.

Although the ALJ’s August 30, 2011 order was designated as an “Interim Order,” that order finally resolved claimant’s right and entitlement to compensation. The “Interim Order” did not include appeal rights, but claimant appealed that order for precautionary purposes. *See Oldham v. Plumlee*, 151 Or App 402, 404 (1997) (order that did not give the correct appeal rights was not final); *cf. Caitlin Van Houtin*, 62 Van Natta 2346 (2010) (because the ALJ’s order did not make a determination on the merits of the cost issue raised by the claimant’s hearing request, it was not a final order). Arguably, claimant’s request for review of the “Interim Order” deprived the ALJ of the authority to issue a subsequent Opinion and Order. Nevertheless, because claimant timely appealed the “Interim Order,” as well as the Opinion and Order, the Board has appellate review authority in any event.¹

¹ In order to avoid this potential jurisdictional problem, after the employer requested sanctions, the ALJ could have directed the employer’s counsel to submit evidence regarding the sanction amount

Scope of Denial

At hearing, claimant argued that the employer's October 27, 2010 denial denied compensability of her October 3, 2010 injury claim *and* her occupational disease claim. The employer responded that the October 27, 2010 denial was limited to the October 3, 2010 injury claim and contended that it did not deny an occupational disease claim until March 8, 2011. (Ex. 73).

The ALJ explained that on January 19, 2011, ALJ Mills convened a conference call and postponed the scheduled hearing over claimant's objection. The ALJ reasoned that ALJ Mills had postponed the hearing to allow claimant to file an occupational disease claim, which necessarily included a finding that no occupational disease had yet been processed or denied. Citing *Elmer F. Knauss*, 47 Van Natta 826, *recons*, 47 Van Natta 949 (1995), the ALJ declined to revisit ALJ Mills's determination that as of January 19, 2011, no occupational disease claim had been denied. Consequently, the ALJ did not address the merits of claimant's argument that the October 27, 2010 denial pertained to an occupational disease claim.

On review, claimant disagrees with the ALJ's interpretation of ALJ Mills's postponement ruling and argues that *Knauss* is inapposite. She contends that the October 27, 2010 denial encompassed an occupational disease. The employer argues that the October 27, 2010 denial did not put an occupational disease claim at issue.

We disagree with the ALJ's analysis, reasoning as follows.

We find that the ALJ's reliance on *Knauss* is misplaced. In *Knauss*, we explained that for reasons of administrative efficiency, a prior litigation order may be given precedential effect, even though adjudication of the initial claim is not final due to an appeal. We concluded that it was appropriate to give precedential effect to the prior ALJ and Board orders that set aside the carrier's denial of the claimant's cardiovascular condition. 47 Van Natta at 827-28; *see Michael S. Barlow*, 46 Van Natta 1627 (1994) (it was appropriate for a subsequent referee to give precedential effect to the prior referee's order, notwithstanding the fact that the first order had been appealed).

and allowed claimant's counsel a right to respond. After those submissions were filed, the ALJ could have issued one final Opinion and Order. Such an approach would have avoided the potential jurisdictional issues from claimant's request for review of the "Interim Order."

Unlike *Knauss*, which relied on prior ALJ and Board orders that had been appealed, the ALJ in this case relied on a prior ALJ's postponement ruling, which pertained to an interim issue that was not appealable. We acknowledge that, as a practical matter, an ALJ may be inclined to abide by a prior procedural ruling of another ALJ. Nonetheless, because the procedural ruling is an interim matter, it has no preclusive effect and can be reconsidered. *See generally Frank Ingram*, 55 Van Natta 93 (2003), *aff'd without opinion*, 194 Or App 48 (2004).

We turn to the merits regarding the scope of the employer's October 27, 2010 denial. On review, claimant argues that the denial was not limited to an injury claim. Rather, she contends that the denial included language that referred to compensability of her left knee condition as both an injury and an occupational disease.

The employer argues that claimant's October 3, 2010 claim did not allege an occupational disease. According to the employer, claimant's 801 form reflected an intent of filing an injury claim.

An employer is bound by the express language of its denial. *Tattoo v. Barrett Bus. Serv.*, 118 Or App 348, 351 (1993); *see Sound Elevator v. Zwingraf*, 181 Or App 150, 154-55, *rev den*, 334 Or 693 (2002) (where an employer issued a denial in response to an improperly filed claim, it was bound by the denial and the claimant was entitled to request a hearing).

For the following reasons, we conclude that the employer's October 27, 2010 denial included an occupational disease claim.

The denial explained that the employer had received claimant's claim for "left knee pain," but it was not accepting the claim because there was insufficient medical evidence that the left knee condition arose out of and in the course and scope of her employment. The employer also stated that the medical records indicated that the work activities were not the major contributing cause of her left knee condition. (Ex. 59).

The employer's statement that there was insufficient medical evidence that claimant's left knee condition arose out of and in the course and scope of her employment is not specific to an injury claim. Rather, such language pertains to injury *and* occupational disease claims. *See* ORS 656.005(7)(a); ORS 656.802(1)(a). The employer's statement that claimant's work activities were not the major contributing cause of her left knee condition could pertain to an occupational disease claim or an injury claim involving a combined condition. *See* ORS 656.005(7)(a)(B); ORS 656.802(2).

Thus, based on the language of the October 27, 2010 denial, we conclude that the denial pertained to an injury and occupational disease claim. Under such circumstances, it was not unreasonable for claimant to contest the denial as a denial of an occupational disease, as well as an injury. Therefore, notwithstanding claimant's failure to appeal the employer's March 8, 2011 denial of an occupational disease claim, an occupational disease claim was properly before the ALJ in light of the October 27, 2010 denial.

Occupational Disease

The ALJ determined that claimant's occupational disease claim was barred because the employer's October 27, 2010 denial did not address an occupational disease claim and she did not appeal the employer's March 8, 2011 denial. Alternatively, the ALJ also addressed the merits of the occupational disease claim. We adopt and affirm that portion of the ALJ's analysis that concluded that the medical evidence did not establish that claimant's work activities were the major contributing cause of her left knee condition.

Sanctions

The employer requested sanctions against claimant's counsel for an allegedly frivolous request for hearing. The ALJ explained that even though one issue is raised without a reasonable prospect of prevailing, if another aspect of a request for hearing has a reasonable prospect of prevailing, the overall request for hearing is not frivolous. *See Arlene J. Bond*, 50 Van Natta 2426, 2427 (1998). The ALJ evaluated each of claimant's arguments and determined that she had no prospect of prevailing over any aspect of her request for hearing challenging the October 27, 2010 denial. In reaching that conclusion, the ALJ reiterated that the employer's October 27, 2010 denial did not pertain to an occupational disease claim.

On review, claimant argues that the employer is not entitled to sanctions. She contends that she had a reasonable prospect of prevailing under an occupational disease theory because the employer denied an occupational disease claim on October 27, 2010, and she filed a request for hearing on that denial. She also argues that Dr. Loch's opinion supported compensability under an occupational disease theory. Based on the following reasoning, we conclude that sanctions are not warranted.

ORS 656.390(1) provides that if a party requests a hearing and the ALJ finds that the appeal was frivolous or was filed in bad faith or for the purpose of harassment, the ALJ may impose an appropriate sanction upon the attorney who filed the request for hearing. “Frivolous” means that the matter is not supported by substantial evidence or is initiated without reasonable prospect of prevailing. ORS 656.390(2).

Claimant requested a hearing, arguing, among other things, that the employer’s October 27, 2010 denial pertained to an occupational disease claim. For the reasons discussed above, we have concluded that the October 27, 2010 denial pertained to an injury *and* an occupational disease claim and, therefore, an occupational disease claim was properly before the ALJ. Thus, claimant had a reasonable prospect of prevailing on the procedural argument that the employer denied an occupational disease on October 27, 2010. Consequently, claimant’s request for hearing was not frivolous. *See David Thomas*, 55 Van Natta 284, 287 n 1 (2003) (it was not necessary to determine whether the claimant’s request for hearing was frivolous regarding the merits of the aggravation claim, because it was not frivolous regarding the claim perfection issue); *Stacey A. Pendergast*, 53 Van Natta 164 (2001) (because the carrier was successful on one aspect of its request for review, the request for review was not frivolous); *Bond*, 50 Van Natta at 2427 (request for hearing not frivolous if party had a reasonable prospect of prevailing on at least one issue raised by its request).

Alternatively, even if we were required to consider whether claimant’s argument that the occupational disease claim was compensable was frivolous, we also find that she had a reasonable prospect of prevailing. Dr. Loch, who performed claimant’s left knee surgery, opined after a deposition that her “three work injuries combined were also the major cause of [her] chronic left patellar instability.” (Ex. 89-6). That portion of Dr. Loch’s opinion, if found persuasive, could arguably support the conclusion that claimant had a series of traumatic events or occurrences that required medical services or resulted in physical disability, pursuant to ORS 656.802(1)(a)(C). We acknowledge that other portions of Dr. Loch’s opinion support a conclusion that claimant’s left knee condition was attributable, in major part, to a specific July 2009 injury. Nevertheless, we find that claimant presented colorable arguments that were sufficiently developed to create a reasonable prospect of prevailing. Although claimant’s arguments regarding the merits of her occupational disease claim did not ultimately prevail, we do not agree that her request for hearing was frivolous.

Accordingly, we conclude that claimant's request for hearing was not frivolous. Consequently, we reverse that portion of the ALJ's order that awarded a sanction against claimant's counsel.²

ORDER

The ALJ's order dated October 14, 2011 is affirmed in part and reversed in part. The ALJ's \$3,691 sanction against claimant's counsel is reversed. The remainder of the ALJ's order is affirmed.

Entered at Salem, Oregon on April 23, 2012

² For the same reasons, claimant's request for review was not frivolous. Therefore, sanctions for a frivolous request for review are not warranted.