

In the Matter of the Compensation of
PATRICK M. BERKOWITZ, Claimant
WCB Case No. 10-03803, 10-01875, 09-03985
ORDER ON REVIEW

Robert J Guarrasi, Claimant Attorneys
James B Northrop, SAIF Legal, Defense Attorneys
Cummins Goodman et al, Defense Attorneys

Reviewing Panel: Members Langer and Biehl.

Claimant requests review of that portion of Administrative Law Judge (ALJ) Smith's order that awarded a \$2,630.91 carrier-paid attorney fee under ORS 656.308(2)(d) for claimant's counsel's services in prevailing over the Special Districts Association of Oregon's (SDAO's) responsibility denial of claimant's occupational disease claim for a right shoulder condition. SDAO cross-requests review of those portions of the ALJ's order that: (1) admitted several medical reports over its objection; (2) set aside its aforementioned denial; and (3) upheld the SAIF Corporation's denial of claimant's occupational disease claim for the same condition. On review, the issues are evidence, responsibility, and attorney fees.¹ We reverse in part and affirm in part.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact," as summarized below.

Claimant began working for the employer as a physical education (PE) teacher and volleyball and baseball coach in 1999. (1 Tr. 11-12).² He had previously worked in a similar job for approximately ten years. (Exs. 60-1, 67-5).

¹ Claimant also moves for an order directing SDAO's counsel to produce time records and billing statements, as well as to admit such documents into the evidentiary record. Because our review is limited to the record developed at hearing, we treat such a request as a motion to remand for further development of the record. ORS 656.295(5). To begin, the relevance of claimant's request to a determination of his counsel's attorney fee award is not readily apparent. In any event, the record does not establish that claimant made such a request at the hearing level. Under such circumstances, we find no compelling reason to remand this case for further development. Accordingly, claimant's request is denied.

² The record includes transcripts of the July 19, 2011 hearing and the October 31, 2011 recorded closing arguments. We refer to the July 19, 2011 and October 31, 2011 transcripts as 1 Tr. and 2 Tr., respectively.

Before July 1, 2001, Liberty was the employer's workers' compensation insurer. (Ex. 78). On July 1, 2001, SAIF became the employer's workers' compensation insurer. (*Id.*)

In 2003, SAIF accepted a nondisabling right elbow strain. (Ex. 9). A November 15, 2004 closing examination found claimant's right elbow condition to have resolved. (Ex. 26-2).

In 2005, claimant sought treatment for right shoulder pain. (Ex. 28). An August 2005 MRI was interpreted as showing "mild low-grade active arthrosis." (Ex. 29). In September 2005, claimant was diagnosed with persistent rotator cuff impingement syndrome. (Ex. 31-2). In December 2005, claimant was also diagnosed with possible right shoulder rotator cuff tendinitis or right shoulder labrum tear or instability. (Ex. 34-2). Claimant continued to work and attempted to strengthen his shoulder, and his symptoms waxed and waned, without resolving. (1 Tr. 22-24).

On July 1, 2008, SDAO became the employer's workers' compensation claims administrator. (Ex. 78).

With the beginning of a new school year in September 2008, claimant began to perform work activities involving his shoulder at reduced intensity. (1 Tr. 24-25). On December 15, 2008, he felt a "twinge" in his right shoulder as he picked up a volleyball net. (1 Tr. 26). He did not think the December 15, 2008 work incident significant at the time, but he continued to experience worsened right shoulder symptoms that did not resolve. (*Id.*)

Claimant sought treatment for his worsened right shoulder symptoms on February 20, 2009. (Ex. 44). A February 26, 2009 right shoulder MRI was interpreted as showing mild chronic thickening of the inferior glenohumeral ligament and small humerus head bone islands. (Ex. 45).

On April 9, 2009, Dr. Duncan, a consulting physician, diagnosed right shoulder pain with impingement and bursitis and acromioclavicular joint degenerative joint disease. (Ex. 46-2). Claimant decided to proceed with surgery in June 2009, to coordinate with the school year. (1 Tr. 30).

On June 16, 2009, Dr. Duncan operated on claimant's right shoulder. (Ex. 51-1). His preoperative diagnoses was right shoulder pain with impingement and bursitis and partial thickness rotator cuff tear. (*Id.*) His postoperative

diagnoses included those conditions and grade 4 chondromalacia of the glenohumeral joint. (*Id.*) Claimant's shoulder symptoms improved after the surgery. (1 Tr. 65-19).

Several denials were issued in relation to claimant's right shoulder condition. SDAO denied compensability of a right shoulder injury claim. (Ex. 55-1). SDAO also denied responsibility for the right shoulder injury claim. (Ex. 63-1). SAIF denied compensability of a new/omitted medical condition claim for right shoulder conditions under the accepted 2003 claim. (Ex. 68-1). Liberty denied responsibility for claimant's right shoulder condition as either an injury or occupational disease. (Ex. 73-1). SAIF denied responsibility for claimant's right shoulder condition. (Ex. 75-1). SDAO denied responsibility for a right shoulder occupational disease claim. (Ex. 77-1). Claimant requested a hearing regarding each of these denials.

CONCLUSIONS OF LAW AND OPINION

Despite SDAO's objections, the ALJ admitted into the record Exhibits 81, 82, and 84, which were reports from Dr. Bald, who examined claimant at SAIF's request. Finding Dr. Bald's opinion that claimant's work activities after July 1, 2008 contributed to the worsening of his right shoulder condition persuasive, the ALJ found SDAO responsible. Finally, reasoning that there were not extraordinary circumstances justifying a fee higher than the maximum allowed by ORS 656.308(2)(d) for services regarding the responsibility denial, the ALJ awarded claimant's attorney an assessed fee of \$2,630.91, to be paid by SDAO.

On review, claimant contends that his counsel should be awarded an attorney fee of \$23,800. Also, SDAO contends that SAIF is responsible for claimant's right shoulder condition because Dr. Bald's opinion is less persuasive than the contrary opinion of Dr. Strum.

As explained below, we would agree with SDAO's responsibility argument even if we considered the disputed exhibits.³ Further, we agree with the ALJ's reasoning regarding the attorney fee issue.

³ In light of this conclusion (based on the record developed at hearing), it is unnecessary to resolve SDAO's challenge to the ALJ's evidentiary rulings, which admitted the aforementioned reports from Dr. Bald.

Responsibility

Under the last injurious exposure rule (LIER), initial or presumptive responsibility for an occupational disease is assigned to the carrier during the last period of employment when conditions could have contributed to the claimant's disability. *AIG Claim Servs. v. Rios*, 215 Or App 615, 629 (2007). The "onset of disability" is the triggering date for determining the last potentially causal employment. *Agricom Ins. v. Tapp*, 169 Or App 208, 211, *rev den*, 331 Or 244 (2000). If the claimant receives medical treatment before experiencing temporary disability due to the condition, the triggering date for assignment of liability is the time when the worker first seeks medical treatment. *Id.* at 212.

The last carrier may transfer liability to a previous carrier by establishing that it was impossible for its employer to have caused the condition, or that a prior period of employment was the sole cause of the condition. *Reynolds Metals v. Rogers*, 157 Or App 147, 153 (1998), *rev den*, 328 Or 365 (1999). Alternatively, the initially responsible carrier may transfer liability to a subsequent carrier by establishing that the subsequent employment actually contributed to a worsening of the condition. *Id.*

The parties agree that SAIF is the initially responsible carrier because the "onset of disability" of claimant's right shoulder condition was when he sought treatment for right shoulder pain in 2005. Therefore, SDAO is only responsible if employment conditions beginning July 1, 2008 actually contributed to a worsening of the condition. The worsening must relate to the condition; a mere increase in symptoms is not sufficient. *Id.*

Resolution of this matter presents a complex medical question that must be resolved by expert medical evidence. *Uris v. State Comp. Dep't*, 247 Or 420, 426 (1967); *Barnett v. SAIF*, 122 Or App 279, 283 (1993); *Jason L. Dugan*, 63 Van Natta 755, 758 (2011). In evaluating the medical evidence, we rely on those opinions that are both well reasoned and based on accurate and complete information. *Somers v. SAIF*, 77 Or App 259, 263 (1986).

SAIF relies on Dr. Bald's opinion to establish that claimant's employment conditions beginning July 1, 2008 worsened his right shoulder condition. Dr. Bald reasoned that because claimant's work activities as a PE teacher and coach caused his right shoulder condition, and claimant continued to perform such work activities after July 1, 2008, it was more likely than not that work activities continued to contribute to an actual worsening of the condition after July 1, 2008.

(Ex. 81-2). He further opined that it would not be possible to state, to a reasonable medical probability, that claimant's work activities stopped contributing to the worsening of the condition at any point in time. (Ex. 81-3).

SDAO cites the contrary opinion of Dr. Strum, who compared the 2005 and 2009 MRI images and concluded that they showed the same condition, with no objective evidence of a pathological worsening in that period. (Ex. 62-1-2). Dr. Strum also reviewed Dr. Duncan's intraoperative photographs. (Ex. 83-2). Dr. Strum opined that the 2009 operative report did not provide evidence of a pathological worsening and that the intraoperative photographs were consistent with the 2005 and 2009 MRIs. (Exs. 70-2, 83-3). He acknowledged that claimant had experienced a symptomatic worsening, but explained that changes in symptoms do not correlate with pathologic changes. (Ex. 79-2).

Dr. Strum further stated that claimant's right shoulder condition was a progressive condition that would be expected to naturally worsen over time without any specific activity. (Ex. 83-4). Therefore, he opined that even if claimant's right shoulder condition had worsened, such worsening would not necessarily be attributable to work activities. (*Id.*) In the absence of specific evidence of work-related worsening, he described Dr. Bald's conclusion as "entirely theoretical." (Ex. 83-3). Given the relative brevity of claimant's period of work activity from July 1, 2008 through the date of his June 2009 surgery, compared to the length of his career as a PE teacher and coach, Dr. Strum opined that it was not probable that employment conditions beginning July 1, 2008 caused a worsening of the condition. (*Id.*)

In response to Dr. Strum's opinion, Dr. Bald stated that "what is theoretical or speculative is trying to assert that there was some arbitrary date when the work activities would have ceased to make any contribution to [claimant's] right shoulder condition." (Ex. 84-2). Dr. Bald reasoned that there was no dispute that claimant's work activities were the major contributing cause of the condition, and that claimant continued to perform some of those activities after July 1, 2008. (*Id.*) Therefore, Dr. Bald opined, it was "logical" to conclude that claimant's work activities continued to cause the condition to worsen. (*Id.*)

Dr. Bald also explained that a comparison of the 2005 and 2009 MRIs would not show whether claimant's right shoulder condition had worsened. (*Id.*) Dr. Bald reasoned that, based on Dr. Duncan's operative report, claimant's right shoulder condition was much worse than had been revealed by the 2009 MRI. (*Id.*) Therefore, Dr. Bald concluded that the MRIs showed an inaccurate picture

of claimant's condition and comparison of the MRIs would not be expected to accurately show whether there had been a worsening of claimant's right shoulder condition. (*Id.*)

Nevertheless, Dr. Bald acknowledged that review of the intraoperative photographs would be "invaluable in documenting what was identified, seen and treated." (Ex. 81A-12). He explained that "as surgeons * * * we all have our ways of describing what we are seeing and putting into words," but "a picture is worth a thousand words." (Ex. 81A-11). Nevertheless, whereas Dr. Strum based his opinion on a review of the intraoperative photographs, which he described as consistent with the MRIs, Dr. Bald relied on Dr. Duncan's operative report to conclude that the MRIs provided an inaccurate picture of claimant's shoulder condition. (Ex. 84-2). Further, Dr. Bald also acknowledged that he would have expected to see worsening between the 2005 and 2009 MRIs. (Ex. 81A-28). Under such circumstances, we conclude that Dr. Strum's opinion is based on more complete information, and is therefore more persuasive.

Further, Dr. Bald concurred with the opinion of Dr. Butters, a consulting physician, who examined claimant in 2005, "that from July 1, 2008 forward, there is no objective evidence of an actual worsening of [claimant's right shoulder condition] and that claimant's employment from July 1, 2008 forward did not independently contribute to an actual worsening of these conditions." (Exs. 72-2, 81A-56). Dr. Bald's concurrence is not reconcilable with his ultimate opinion that such employment contributed to an actual worsening, and the record does not provide a reasonable explanation for the change in opinion. Therefore, we find his opinion less persuasive. *See John C. McCullough*, 63 Van Natta 2157 (2011) (changed opinion found unpersuasive where there was no reasonable explanation for the change); *cf. Kelso v. City of Salem*, 87 Or App 630, 633 (1987) (opinion found persuasive where there was a reasonable explanation for a change of opinion).

Finally, Dr. Bald acknowledged that claimant's right shoulder condition was progressive, and would have worsened even if claimant had ceased work activities in June 2008. (Ex. 81A-49). Although he believed that claimant's work activities beginning July 1, 2008 worsened his right shoulder condition, Dr. Bald was only able to state that claimant might "possibly not" have required surgery in the absence of such work activities. He also acknowledged that he was unable to identify any changes in claimant's right shoulder that he could attribute to employment conditions. (Ex. 81A-60).

To shift responsibility to SDAO, SAIF must prove that claimant's right shoulder condition, and not just its symptoms, had worsened as a result of his employment conditions beginning July 1, 2008. Dr. Strum's opinion was based on comparing objective evidence of claimant's condition over time, including the 2005 MRI image and the 2009 intraoperative photographs. He also considered both the natural progression of the condition once it had been instigated and the relative brevity of claimant's work activities beginning July 1, 2008.

Dr. Bald's contrary opinion was not formed with the benefit of the "invaluable" intraoperative photographs or the 2005 MRI image and was inconsistent with his own opinion that work activities beginning July 1, 2008 did not independently worsen the condition. Further, Dr. Bald was unable to identify changes to which such employment conditions contributed and was unable to state, to a degree of probability, that such conditions caused claimant to require surgery.

Under such circumstances, we find Dr. Strum's opinion more persuasive. Therefore, we are not persuaded that employment conditions beginning July 1, 2008 worsened claimant's right shoulder condition. Accordingly, we find that SAIF remains responsible.

Attorney Fee

Because SAIF is responsible for claimant's right shoulder condition, it is also responsible for the attorney fee award for claimant's attorney's services in relation to its denial of responsibility for that condition. At the hearing level, claimant's attorney submitted a statement of services requesting a \$23,800 fee.

ORS 656.308(2)(d) provides that absent a showing of extraordinary circumstances, a fee awarded for an attorney's appearance and active and meaningful participation in finally prevailing against a responsibility denial shall not exceed \$2,500, as adjusted by the same percentage increases as made to the average weekly wage. For assessed fees awarded from July 1, 2011 through June 30, 2012, the maximum fee award under ORS 656.308(2)(d) was \$2,630.91. WCB Bulletin No. 1-2011, eff. July 1, 2011. Thus, the ALJ's attorney fee award was the maximum permissible award for claimant's counsel's services in overcoming the responsibility denial, absent extraordinary circumstances.

Claimant contends the attorney fee should have been awarded under ORS 656.386(1), and not limited by ORS 656.308(2)(d), because SDAO's denial was not limited to the responsibility issue.⁴ Specifically, he contends that SDAO's denial expressly stated that it was "not to be considered as a waiver of any other reasons for denial," did not expressly concede compensability, and did not comply with the statutory requirements for a "responsibility only" denial. (Ex. 77-1).

A carrier is bound by the express language of its denial. *Tattoo v. Barrett Bus. Serv.*, 118 Or App 348, 351-52 (1993). SDAO's denial stated, "It is the position of SDAO that there are other insurers or employers responsible for the claimed conditions. SDAO therefore denies responsibility for your right shoulder condition(s)." (*Id.*) The denial identified no other basis for the denial. (*Id.*)

In any event, at the hearing level, claimant did not contend that SDAO's denial raised any issues other than responsibility. Claimant's hearing request identified responsibility as the only issue raised by SDAO's denial. At the outset of the hearing, the ALJ described SDAO's denial as "a responsibility denial for an occupational disease in the right shoulder," and claimant's attorney and SDAO's attorney agreed with the ALJ. (1 Tr. 2-3). When the hearing reconvened for closing arguments, claimant's attorney and SDAO's attorney agreed with the ALJ's statement that the remaining issues were "responsibility denials for a right shoulder condition." (2 Tr. 2).

Thus, even if SDAO's denial could have been construed as raising compensability as an issue, claimant did not raise that argument at hearing. To the contrary, claimant's counsel specifically agreed that responsibility was the only issue raised by SDAO's denial. Under such circumstances, it was proper for the ALJ to treat SDAO's denial as a "responsibility only" denial.

Claimant next contends that because his counsel's statement of services was uncontested, the ALJ should have granted a \$23,800 fee without requiring that it be justified by "extraordinary circumstances." However, our authority to award attorney fees is specifically limited by statute. *See Brown v. EBI Cos.*, 289 Or 905,

⁴ Although we have found SAIF responsible for claimant's right shoulder condition, and claimant does not contend that SAIF's May 17, 2010 denial raised issues other than responsibility, we address the scope of SDAO's August 19, 2010 denial because it has long been our policy to require a carrier not found to be responsible for a claim to pay an attorney fee under ORS 656.386(1) where it has issued a compensability denial, but the carrier ultimately found responsible only denied responsibility. *See Daniel E. Jagers*, 60 Van Natta 2799, 2803 (2008); *Antonio J. Lopez*, 47 Van Natta 1304, 1306 (1995).

908 (1980). We must determine a reasonable attorney fee award, even in the absence of an objection. *See Delmar E. Lawson*, 57 Van Natta 2900 (2005); *Georgia C. Lamb*, 55 Van Natta 805 (2003); *Randall E. Kelley*, 54 Van Natta 1860 (2002). Therefore, “extraordinary circumstances” must be shown to justify a fee exceeding the statutory limit.

Claimant contends that extraordinary circumstances existed justifying an extraordinary fee. After considering claimant’s contentions and the record, we do not find that extraordinary circumstances exist to warrant an attorney fee award in excess of the statutory limit.

Claimant’s counsel’s statement of services indicates that he and co-counsel devoted over 57 hours to the case. However, as noted above, this case also involved denials of injury and new/omitted medical condition claims for claimant’s right shoulder condition. Claimant’s counsel’s statement of services did not specify how much time was devoted to the issue of responsibility for claimant’s right shoulder condition as an occupational disease. Moreover, time devoted to an issue is but one factor that we consider in determining a reasonable attorney fee award. *Brenda J. Dillard*, 62 Van Natta 3052 (2010); *Cheryl Mohrbacher*, 50 Van Natta 1826 (1998).

Claimant contends that the case was complex because of the number of denials issued and carriers involved. Again, as noted above, only two denials remained at issue at the time of closing arguments. Claimant also contends that the case was factually complex because of the length of the record. The record includes 84 exhibits, including one deposition and two investigative statements by claimant.⁵ The hearing was 71 minutes long, and recorded closing arguments were 53 minutes long. Such circumstances are comparable to responsibility disputes generally litigated in this forum. *See Kevin D. Cierniak*, 58 Van Natta 2991 (2006) (no extraordinary circumstances found where, although the case involved two depositions and the reconvening of the hearing for oral closing argument, the medical, legal, and factual issues were of a complexity level comparable to responsibility cases generally litigated before this forum); *Daniel S. Kaleta*, 51 Van Natta 309 (1999) (no extraordinary circumstances found where 142 exhibits were submitted at hearing, including a 40-page deposition, and the claimant’s attorney submitted an extensive appellate brief on Board review).

⁵ Claimant’s statement of services asserts that a third investigative statement was made to Liberty on May 12, 2010. Nevertheless, because it was not admitted into the record, it did not affect the complexity of the record.

Further, compared to responsibility disputes generally litigated in this forum, the value of the interest involved, the benefits secured for the represented party, and the nature of the proceedings, were typical. Under such circumstances, we do not find “extraordinary circumstances” justifying a fee higher than the statutory limit. Consequently, we affirm the ALJ’s attorney fee award under ORS 656.308(2)(d).⁶

ORDER

The ALJ’s order dated November 29, 2011 is reversed in part and affirmed in part. SAIF’s denial is set aside and the claim is remanded to SAIF for processing according to law. SDAO’s denial is reinstated and upheld. SAIF is responsible for payment of the ALJ’s \$2,630.91 attorney fee award under ORS 656.308(2)(d), and reasonable expenses and costs. The remainder of the ALJ’s order is affirmed.

Entered at Salem, Oregon on July 25, 2012

⁶ Claimant’s counsel is not entitled to an attorney fee award for services on review. *See Liberty Northwest Ins. Corp. v. Gordineer*, 150 Or App 136 (1997) (attorney fee award under ORS 656.308(2)(d) for prevailing over a responsibility denial is limited to statutory maximum, which applies to all levels of review, absent a showing of extraordinary circumstances).