

In the Matter of the Compensation of  
**RICHARD A. STALEY, Claimant**

WCB Case No. 13-01812

ORDER ON REVIEW

Ransom Gilbertson Martin et al, Claimant Attorneys  
Law Offices of Kathryn R Morton, Defense Attorneys

Reviewing Panel: Members Lanning and Johnson.

Claimant requests review of Administrative Law Judge (ALJ) Otto's order that did not award an assessed attorney fee concerning the insurer's "pre-hearing" rescission of its denial. On review, the issue is attorney fees. We reverse.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact" as summarized and supplemented below.<sup>1</sup>

Claimant had an accepted claim for a comminuted and displaced supracondylar distal right femur. (Ex. 2). On February 12, 2004, the parties entered into a Claim Disposition Agreement (CDA), in which claimant released his rights to all "non-medical service-related" benefits. (Ex. 5).

In June 2009, the insurer modified its Notice of Acceptance to include post-traumatic osteoarthritis of the right knee. (Ex. 10). Claimant underwent various surgeries related to his right knee. (Exs. 13, 21).

On January 30, 2013, claimant, *pro se*, asked the insurer to accept, as new/omitted conditions, a right hip condition, cellulitis, and ring worm. (Ex. 39). On April 3, 2013, the insurer denied the new/omitted medical conditions claim. (Ex. 42). On April 30, 2013, claimant, *pro se*, requested a hearing.

On June 3, 2013, claimant retained an attorney to represent him. On June 4, 2013, claimant's attorney asked the insurer to amend its Notice of Acceptance to include claimant's right knee replacement, post-operative right knee cellulitis and right knee arthrofibrosis as new/omitted medical conditions. (Ex. 44).

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<sup>1</sup> The ALJ's references to "SAIF" are changed to "the insurer."

On June 17, 2013, the insurer obtained a report from Dr. Bald, an orthopedic surgeon, who opined that the “claimed condition of post-[operative] right knee cellulitis [was] related to the original work injury consequentially but has resolved without residuals.” (Ex. 45).

On July 15, 2013, the insurer modified its acceptance to include right knee arthrofibrosis and right knee resolved cellulitis. (Ex. 46). On August 1, 2013, the insurer denied the claimed right knee replacement on the ground that it was treatment rather than a “diagnosable condition.” (Ex. 47). Claimant requested a hearing on the denial.

### CONCLUSIONS OF LAW AND OPINIONS

The parties submitted their case to be decided on the written record. Claimant withdrew his challenge to the insurer’s denial of a right hip condition, ring worm, and right knee replacement. The only remaining issue concerned entitlement to an assessed attorney fee for the insurer’s alleged “post-denial” acceptance of right knee cellulitis.

The ALJ declined to award an assessed attorney fee, reasoning that the insurer had accepted claimant’s right knee cellulitis within 60 days of his attorney’s June 4, 2013 request to accept that condition. On review, claimant contends that his attorney was instrumental in obtaining a rescission of the April 3, 2013 denial of right knee cellulitis prior to hearing and, therefore, is entitled to an assessed attorney fee award pursuant to ORS 656.386(1). We agree.

Entitlement to attorney fees in workers’ compensation cases is governed by statute. Unless specifically authorized by statute, no attorney fee may be awarded. *Forney v. Western States Plywood*, 297 Or 628, 634 (1984). ORS 656.386(1) provides:

“(1)(a) \* \* \* in such cases involving denied claims where the claimant prevails finally in a hearing before an Administrative Law Judge or in a review by the Workers’ Compensation Board, then the Administrative Law Judge or board shall allow a reasonable attorney fee. In such cases involving denied claims where an attorney is instrumental in obtaining rescission of the denial prior to a decision by the Administrative Law Judge, a reasonable attorney fee shall be allowed.

“(b) For purposes of this section, a ‘denied claim’ is:

“(A) A claim for compensation which an insurer or self-insured employer refuses to pay on the express ground that the injury or condition for which compensation is claimed is not compensable or otherwise does not give rise to an entitlement to any compensation[.]”

Here, on April 3, 2013, the insurer denied claimant’s claim for benefits for cellulitis on the ground that the condition was not legally or medically attributable to his work activity. (Ex. 42). Thus, the insurer refused to pay a claim for compensation on the express ground that the injury or condition for which compensation was claimed was not compensable or otherwise did not give rise to an entitlement to any compensation. *See* ORS 656.386(1)(b)(A).

Claimant requested a hearing and retained an attorney. While the hearing regarding the April 2013 denial was pending, claimant’s attorney sought acceptance of various new/omitted medical conditions, including the right knee cellulitis condition. (Ex. 44). On July 15, 2013, after obtaining a medical report, the insurer accepted the claimed new/omitted right knee cellulitis condition, and, thereby, rescinded its earlier denial. (Ex. 46). Subsequently, claimant requested an assessed attorney fee award under ORS 656.386(1), contending that his attorney was instrumental in obtaining a rescission of the insurer’s April 3, 2013 denial prior to a decision by the ALJ.

The question on review is whether claimant’s attorney was instrumental in obtaining the “pre-hearing” rescission of the insurer’s denial. *See* ORS 656.386(1)(a). For the following reasons, we answer that question affirmatively.

It is undisputed that the insurer denied claimant’s initial new/omitted medical condition claim for cellulitis. It is also undisputed that claimant’s attorney re-initiated that claim. (Ex. 44). Moreover, claimant’s counsel did not withdraw the request for hearing, but continued to prepare claimant’s case to prove compensability. Thereafter, the insurer sought a medical opinion and then accepted cellulitis as a new/omitted medical condition, which in effect vacated its earlier denial of that claim. Based on our review of this record, we conclude that claimant’s attorney contributed to the eventual withdrawal of the denial of claimant’s cellulitis condition.

Under such circumstances, we conclude that claimant's attorney was instrumental in obtaining a rescission of the insurer's April 3, 2013 denial of cellulitis "prior to a decision by the [ALJ]" warranting an attorney fee award pursuant to ORS 656.386(1)(a).<sup>2</sup> See, e.g., *Peggy L. Segur*, 62 Van Natta 1406, 1407 (2010) (an award shall be granted pursuant to ORS 656.386(1)(a) where an attorney is instrumental in obtaining rescission of a denial prior to an ALJ's decision); see also *Ronald V. Packer*, 66 Van Natta 1715 (2014) (an assessed attorney fee awarded under ORS 656.386(1)(a) where the carrier had paid a previously disputed medical services claim as a result of its acceptance of a new/omitted medical condition claim initiated by the claimant's attorney).

After considering the factors in OAR 438-015-0010(4), we award an assessed attorney fee of \$1,500, payable by the insurer. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by the record and claimant's attorney's representation), the complexity of the issue, the value of the interest involved, and the risk that counsel may go uncompensated. See *Daniel M. McCartney*, 56 Van Natta 460 (2004) (a reasonable attorney fee is determined irrespective of an objection to a claimant's counsel's request).

### ORDER

The ALJ's order dated June 20, 2014 is reversed. For services in obtaining a "pre-hearing" rescission of the insurer's denial, claimant's attorney is awarded \$1,500, payable by the insurer.

Entered at Salem, Oregon on December 5, 2014

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<sup>2</sup> Claimant's attorney is not entitled to a fee on review regarding the attorney fee issue. See *Amador Mendez*, 44 Van Natta 736 (1992).