
In the Matter of the Compensation of
JASON T. HACHMUTH, Claimant
WCB Case Nos. 14-01902, 12-05592
ORDER ON REVIEW
Julene M Quinn LLC, Claimant Attorneys
SAIF Legal, Salem, Defense Attorneys

Reviewing Panel: Members Curey and Weddell.

Claimant requests review of Administrative Law Judge (ALJ) Poland's order that: (1) found that claimant's medical services claim for an L4-5 surgery was not causally related to his compensable low back injury; and (2) declined to award penalties and attorney fees for an allegedly unreasonable denial. On review, the issues are compensability, penalties, and attorney fees.¹ We reverse.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact," subject to the following summary.

In March 2010, claimant, a paramedic, sustained a low back injury while lifting a patient and stretcher into an emergency vehicle. (Ex. 1). SAIF accepted a lumbar sprain. (Ex. 4).

In May 2010, a lumbar MRI showed discogenic degenerative changes and annular bulges at L4-5 and L5-S1. (Ex. 6).

In June 2010, claimant was evaluated by Dr. Rosenbaum. He noted claimant's symptoms of low back pain and bilateral radiating pelvic and leg pain, as well as numbness of the low back, legs and feet. (Ex. 7). Dr. Rosenbaum

¹ The SAIF Corporation has filed a "rebuttal argument" to claimant's reply. Noting that SAIF did not seek permission to supplement the previously established briefing schedule before filing its additional brief, claimant objects to consideration of SAIF's "rebuttal" brief. SAIF responds that, in submitting its supplemental argument, it sought the Board's acceptance of the brief and, further, raises no objection to the Board's consideration of claimant's supplemental reply. After reviewing SAIF's request and claimant's objection, we decline to allow supplemental briefing based on the following reasoning.

Arguments submitted outside the briefing schedule will not be considered. *See* OAR 438-011-0020(2); *Betty L. Juneau*, 38 Van Natta 553, 556 (1986). In requesting permission to allow supplemental briefing, SAIF contends that the "central theme" of claimant's reply brief mischaracterizes SAIF's arguments. Such a contention could be advanced by any respondent objecting to an appellant's reply arguments. Because claimant is opposed to the consideration of further arguments beyond his reply, we grant his motion to strike.

diagnosed a lumbar strain and spondylosis without “a classic radiculopathy.” (Ex. 7-2). He concluded that the only viable surgical treatment would be a “several level fusion” and recommended further conservative treatment. (*Id.*)

In July 2010, Dr. Schweigart became claimant’s attending physician. (Ex. 8). He diagnosed musculoskeletal low back pain and annular bulges at L4-5 and L5-S1. (*Id.*) Dr. Schweigart recommended a physiatrist evaluation. (Ex. 8-2).

In August 2010, Dr. Brumbaugh, a physiatrist, evaluated claimant and recommended EMG/NCS testing to further evaluate his lower extremity symptoms. (Ex. 10).

In October 2010, Dr. Brumbaugh performed EMG/NCS testing and concluded that claimant had an abnormal study with minimal findings most consistent with an L4 or L5 radiculopathy. (Ex. 11).

In November 2010, Dr. Craven performed a record review on behalf of SAIF. Dr. Craven opined that the significance of the EMG study was “that it confirms he has active lumbar radiculopathy.” (Ex. 12A-2).

In December 2010, Dr. Schweigert diagnosed an L4 and “possibly” L5 radiculopathy, and requested that SAIF accept L4-5 radiculopathy. (Exs. 13, 14).

In February 2011, Dr. Schweigert requested SAIF to accept a “broad-based annular bulge and tear at L4-5,” a “broad-based annular bulge at L5-S1,” L4-5 radiculopathy, and “lumbo-sacral neuritis.” (Ex. 14).

In March 2011, Dr. Rosenbaum opined that claimant’s annular bulges were consistent with degenerative change. (Ex. 15-3). He did not believe the EMG/NCS testing established the existence of an L4-5 radiculopathy and considered the testing to be “nonspecific.” (*Id.*)

In April 2011, claimant reiterated Dr. Schweigert’s February 2011 request for acceptance of additional conditions. (Ex. 18).

In May 2011, SAIF denied claimant’s new/omitted condition requests. (Ex. 22). Claimant requested a hearing. (Ex. 24).

In June 2011, Dr. Schweigert noted that claimant had received injections and experienced about 50 percent improvement in his symptoms. (Ex. 25).

In July 2011, Dr. Puziss examined claimant and concluded that he had “radiculopathic symptomatology without true sciatica.” (Ex. 26-9). He explained that claimant did not have nerve compression from a herniated disc, but likely suffered radiating pain caused by chemical irritation from the annular tear. (*Id.*) Dr. Puziss disagreed with Dr. Rosenbaum and stated that claimant had a “well-documented radiculopathy” which was substantiated by the EMG/NCS testing which he believed correlated well with claimant’s reported symptoms and the location of the annular tear. (Ex. 26-12).

In August 2011, Dr. Schweigert concurred with Dr. Puziss’s opinion. (Ex. 28).

On August 2, 2011, SAIF denied “L5-S1 herniated lumbar disc, L4-5 central disc herniation and degenerative disc disease and/or spondylosis at L4-5 and L5-S1.” (Ex. 27).

In October 2011, Dr. Rosenbaum considered claimant’s symptoms to be most consistent with referred pain from a musculoligamentous strain or degenerative arthritic changes. (Ex. 32).

On October 12, 2011, SAIF issued a Notice of Closure without an award of permanent impairment. (Ex. 34).

In December 2011, another MRI showed no significant change in comparison to the May 2010 MRI. (Ex. 35).

On December 16, 2011, an earlier ALJ approved the parties’ stipulation that SAIF would accept an L4-5 annular tear, L4-5 disc bulge, L4-5 disc herniation, and L4-5 radiculopathy. (Ex. 36-3, -5). SAIF agreed to withdraw its denials of L5-S1 annular bulge, disc protrusion and disc herniation.² (Ex. 36-3). The stipulation also provided that SAIF’s denials of degenerative disc disease and/or spondylosis at L4-5 and L5-S1, and lumbosacral neuritis were final. (Ex. 36-3, -5).

In January 2013, Dr. Rosenbaum evaluated claimant at SAIF’s request. (Ex. 60). He diagnosed preexisting lumbar spondylosis and noted the accepted conditions of lumbar sprain, L4-5 annular bulge, L4-5 annular tear, L4-5

² Claimant also agreed to withdraw his request for acceptance of the claimed L5-S1 disc conditions, and to withdraw his request for hearing regarding SAIF’s denial of those conditions. (Ex. 36-3).

radiculopathy and L4-5 disc herniation. (Ex. 60-7). He concluded that claimant did not have nerve root compression and was not a candidate for decompression surgery. (*Id.*)

In February 2013, Dr. Schweigert noted that claimant's leg pain had improved after receiving further epidural steroid injections and a medial branch block. (Ex. 65).

In December 2013, claimant sought treatment with Dr. Tatsumi, who diagnosed lumbar radiculopathy and recommended an L4-5 decompression procedure. (Ex. 97).

In February 2014, SAIF's managed care organization (MCO) declined to review Dr. Tatsumi's request for authorization for L4-5 decompression surgery, contending that the procedure was directed toward the denied condition of degenerative disc disease and/or spondylosis at L4-5 and L5-S1. (Ex. 103).

In March 2014, claimant requested that the Workers' Compensation Division (WCD) review the MCO's decision. (Ex. 105).

In April 2014, SAIF responded to claimant's WCD request, contending that the disputed medical service was disapproved because the underlying condition had been formally denied, and that it was not causally related to an accepted condition. (Ex. 106). WCD transferred the dispute to the Board's Hearings Division.

In May 2014, Dr. Sabahi, radiologist, reviewed the medical records and diagnostic imaging at SAIF's request. (Ex. 108). He considered claimant's radiculopathy symptoms to be unexplained by the diagnostic imaging. (Ex. 108-15). He noted that claimant had foraminal stenosis at L4-5 and L5-S1, but that the stenosis was greater on the right than the left, which was inconsistent with the majority of claimant's symptoms being in the left leg. (*Id.*) Dr. Sabahi considered claimant's persistent low back pain to be consistent with severe degenerative discogenic changes at L5-S1. (*Id.*) He stated that Dr. Tatsumi's recommendation for an L4-5 decompression surgery was directed toward treatment of preexisting and chronic degenerative disease, rather than any effects from the work injury. (Ex. 108-20). Dr. Sabahi explained that claimant's bilateral recess narrowing was a degenerative phenomenon, unrelated to the work injury. (*Id.*)

In June 2014, Dr. Tatsumi explained that the recommended L4-5 decompression procedure was addressing claimant's L4-5 radicular symptoms. He further explained that EMG/NCS findings, MRI findings of lateral recess stenosis, and claimant's positive response to injections indicated nerve compression that could be alleviated by the procedure. (Exs. 110, 110B).

In August 2014, Dr. Rosenbaum disagreed with Dr. Tatsumi's opinion and explained that EMG testing and epidural steroid injections were not diagnostic regarding the presence of radiculopathy. He reiterated his conclusion that claimant did not have sufficient objective findings on examination to establish a diagnosis of L4-5 radiculopathy. (Ex. 113-6). Regarding the proposed L4-5 decompression surgery, Dr. Rosenbaum explained that it would be directed at the L4-5 radiculopathy "if [claimant] was felt to have a true L4-5 radiculopathy still existing." (*Id.*) Dr. Rosenbaum further explained that a nerve root compression could not be identified based on imaging or on examination. (*Id.*)

In December 2014, Dr. Tatsumi participated in a video recorded interview with claimant and his counsel. Dr. Tatsumi reiterated that claimant had L4-5 radiculopathy shown by EMG/NCS testing, MRI imaging, claimant's subjective symptoms and his response to injections. (Exs. 118, 119-3). He further explained that claimant's symptoms were in a normal dermatomal distribution from L4-5. Dr. Tatsumi presented claimant's lumbar MRI imaging and demonstrated the areas of nerve root compression and compared those areas of compression to "fairly normal" levels of claimant's lumbar spine where compression was absent. (Exs. 118, 119-3). Dr. Tatsumi considered claimant's 2010 work injury to be a material cause of his need for treatment based on his lack of symptoms before the work injury. (Exs. 118, 119-4).

On January 2015, Dr. Sabahi reiterated that claimant did not have an L4-5 radiculopathy. He stated that lateral recess narrowing or arthritis of the facet joints could be causing claimant's symptoms, which were preexisting and unrelated to the 2010 work injury. (Ex. 120-2).

On January 28, 2015, Dr. Rosenbaum reiterated his opinion and agreed with Dr. Sabahi's assessment. (Ex. 121).

In March 2015, Dr. Tatsumi disagreed with Dr. Sabahi's opinion. (Ex. 122). Dr. Tatsumi explained that there was sufficient evidence to diagnose claimant with an L4-5 radiculopathy, and that it was caused by the 2010 work injury. (*Id.*)

CONCLUSIONS OF LAW AND OPINION

Compensability

The ALJ found that the L4-5 decompression surgery was not causally related to claimant's 2010 compensable injury. In doing so, the ALJ concluded that Dr. Tatsumi's opinion did not persuasively establish that the L4-5 radiculopathy (for which the surgery was recommended) was the same condition that had been previously accepted by the parties' stipulation. The ALJ reasoned that the medical evidence at the time of the stipulation suggested that claimant did not have nerve root compression, but only had "radiculopathic symptomatology" caused by irritation from the L4-5 annular tear.

The ALJ next addressed whether the disputed medical service was directed toward the accepted L4-5 annular tear, L4-5 disc bulge, L4-5 disc herniation or any other condition caused in material part by the 2010 work injury. In light of the contrary opinions of Drs. Rosenbaum and Sabahi, the ALJ did not consider Dr. Tatsumi's opinion sufficient to persuasively establish that the L4-5 decompression was directed at any of the accepted conditions or other conditions caused in material part by the work injury. In particular, the ALJ reasoned that Dr. Tatsumi's opinion did not persuasively establish whether claimant's radiculopathy symptoms were caused by mechanical compression of the nerve root (which could be addressed by the decompression procedure) or by irritation from the L4-5 annular tear (which could not be addressed by the decompression procedure).

On review, claimant contends that the disputed surgery is causally related to his compensable injury or his accepted L4-5 radiculopathy. Based on the following reasoning, we agree with claimant's contention.

ORS 656.245(1)(a) provides:

“For every compensable injury, the insurer or self-insured employer shall cause to be provided medical services for conditions caused in material part by the injury for such period as the nature of the injury or the process of the recovery requires, subject to the limitations in ORS 656.225, including such medical services as may be required after a determination of permanent disability. In addition, for consequential and combined conditions

described in ORS 656.005(7), the insurer or self-insured employer shall cause to be provided only those medical services directed to medical conditions caused in major part by the injury.”

The relevant inquiry is whether claimant has established a casual relationship between the disputed medical services and the injury incident (compensable injury), rather than the accepted condition. *SAIF v. Carlos-Macias*, 262 Or App 629 (2014). However, an accepted condition is deemed to be a condition caused in material part by the compensable injury/injury incident. *See, e.g., SAIF v. Sprague*, 346 Or 661, 674 (2009) (carrier acknowledged that the compensable injury was the major contributing cause of a consequential condition by reason of its acceptance of that condition).

Because the medical experts disagree whether the L4-5 decompression procedure is directed toward a condition caused in material part by the work injury, the issue is a complex medical question that must be established by expert medical opinion. *See Uris v. Comp. Dep't*, 247 Or 420 (1967). When there is a dispute between medical experts, more weight is given to those medical opinions which are well reasoned and based on complete information. *See Somers v. SAIF*, 77 Or App 259, 263 (1986).

SAIF contends that Dr. Tatsumi’s diagnosis of “current” L4-5 radiculopathy is unpersuasive in light of the lack of findings from other examiners. SAIF further asserts that Dr. Tatsumi’s opinion does not establish the existence of mechanical nerve compression which would need to be present in order to establish claimant’s need for an L4-5 decompression procedure.

SAIF’s contention that claimant’s “current” radiculopathy is distinct from the accepted L4-5 radiculopathy raises the issue of the scope of its acceptance, which is a question of fact. *E.g., SAIF v. Dobbs*, 172 Or App 446, 451, *recons*, 173 Or App 599 (2001); *SAIF v. Tull*, 113 Or App 449, 454 (1992). Based on the following reasoning, we are not persuaded that such a distinction exists.

Before the stipulation, claimant reported to Dr. Rosenbaum that he had bilateral leg pain radiating through his pelvis, to the posterior legs to his toes. (Ex. 7). Dr. Rosenbaum concluded that claimant did not have a “classic radiculopathy, despite bilateral radiating leg symptoms.” (*Id.*). Following an EMG/NCS, Dr. Brumbaugh described evidence of a “left L4, or possibly L5, active radiculopathy.” (Ex. 11). Dr. Craven opined that the EMG study

“confirm[ed] he has active lumbar radiculopathy.” (Ex. 12A-2). Diagnosing an L4 and “possibly” L5 radiculopathy, Dr. Schweigert requested that SAIF accept L4-5 radiculopathy. (Exs. 13, 14).

Following the approved December 2011 stipulation (in which SAIF agreed to accept a L4-5 radiculopathy as well as an L4-5 annular tear, disc bulge, and herniation), SAIF modified its acceptance to include L4-5 radiculopathy, along with the other L4-5 disc-related conditions. (Exs. 36-5, 37).

In December 2013, two years after the stipulation, claimant reported to Dr. Tatsumi that his pain was predominately in his legs and worse on the left than the right leg. (Ex. 97). He described pain radiating down the outside of his thigh and then wrapping around the front of his shin and continuing into the foot. (Exs. 118, 119-3).

Dr. Rosenbaum commented on the EMG/NCS findings and considered them to be “extremely nonspecific,” and concluded that an L4-5 radiculopathy “did not exist.” (Ex. 15-3, -4).

Disagreeing with Dr. Rosenbaum, Dr. Puziss stated that claimant had a “well-documented radiculopathy,” which was substantiated by the EMG/NCS testing. Dr. Puziss believed that the test results correlated well with claimant’s reported symptoms and the location of the annular tear. (Ex. 26-12). Dr. Schweigert concurred with Dr. Puziss’s opinion. (Ex. 28). Dr. Rosenbaum continued to consider claimant’s symptoms to be most consistent with referred pain from a musculoligamentous strain or degenerative arthritic changes. (Ex. 32).

Following the acceptance of claimant’s L4-5 radiculopathy, Dr. Rosenbaum continued to explain that he did not consider claimant to have an L4-5 radiculopathy or nerve root compression, and on that basis did not consider the L4-5 decompression procedure to be related to claimant’s work injury. (Ex.113-6).

Likewise, Dr. Sabahi, who performed a “post-stipulation” record review, did not consider the L4-5 decompression procedure to be related to claimant’s “accepted condition or the effects of the work incident.” (Ex. 120-2). He explained that there were insufficient findings to corroborate a radiculopathy, and there was “no disc herniation” at L4-5. (*Id.*)

As previously explained, SAIF accepted claimant’s L4-5 radiculopathy as a result of the parties’ stipulation. Yet, Drs. Rosenbaum and Sabahi never considered the L4-5 radiculopathy to exist. Nonetheless, the stipulation resolved

that question and established that the L4-5 radiculopathy is compensably related to the work injury. Furthermore, neither Dr. Rosenbaum nor Dr. Sabahi offered an explanation for why the current “L4-5 radiculopathy” would be different from the “stipulated/accepted” “L4-5 radiculopathy.” Therefore, those medical opinions are inconsistent with the “law of the case” and are unpersuasive. *See Kuhn v. SAIF*, 73 Or App 768, 772 (1985); *Lyle E. Sherburn*, 59 Van Natta 632, 635 (2007).

In contrast, we find Dr. Tatsumi’s opinion to be well-reasoned, complete and consistent with the legal posture of the case. Additionally, Dr. Tatsumi’s opinion that claimant suffered a single radiculopathy caused by the work-related injury is supported by the opinion of Dr. Schweigert who examined claimant both before and after the stipulation. Following the stipulation, he noted that claimant had a “continuous complaint of lateral thigh pain and numbness of his lateral thigh and leg.” (Ex. 47). *See Kienow’s Food Stores v. Lyster*, 79 Or App 416, 421 (1986) (greater probative weight accorded to the physician’s opinion who had observed the claimant’s condition before and after the pivotal event); *Steven J. Rogers*, 67 Van Natta 232, 233 (2015). Under such circumstances, we find Dr. Tatsumi’s opinion, as supported by Dr. Schweigert, to be more persuasive than the contrary opinions.

We acknowledge SAIF’s argument that the record does not establish that claimant’s L4-5 radiculopathy is caused by mechanical nerve root compression versus a “chemical” radiculopathy from claimant’s L4-5 disc pathology. Dr. Tatsumi acknowledged that both types of pathology are potential causes of the L4-5 radiculopathy. (Ex. 110B). However, it is claimant’s burden to establish that the disputed medical treatment is directed toward a condition caused in material part by the work-related injury incident. ORS 656.245(1); *SAIF v. Carlos-Macias*, 262 Or App 629, 636-37 (2014). Based on Dr. Tatsumi’s persuasive opinion, claimant has satisfied that statutory requirement.

SAIF also contends that Dr. Tatsumi did not address why the surgery would be needed for any accepted or compensable condition if the problem was actually due to “chemical radiculitis.” Yet, Dr. Tatsumi persuasively opined that claimant had L4-5 radiculopathy caused by the work-related injury incident, and that the recommended decompression procedure was intended to treat that condition.

Moreover, while Dr. Tatsumi identified both “chemical radiculitis” and mechanical nerve compression as possible causes of claimant’s L4-5 radiculopathy, he persuasively explained that claimant had L4-5 foraminal stenosis and that the decompression procedure would relieve pressure on the nerve roots at that level. (Exs. 118, 119-3, -4).

While both Drs. Rosenbaum and Sabahi disputed Dr. Tatsumi's assessment of nerve compression causing claimant's L4-5 radiculopathy, as previously explained, we have found their opinions to be unpersuasive because they are inconsistent with the "law of the case." See *Sherburn*, 59 Van Natta at 635 (medical opinion that is contrary to the legal posture of the claim is not persuasive). Indeed, a central premise of both examiners' opinions was that claimant did not have, and never did have, an actual lumbar radiculopathy, despite SAIF's acceptance of that condition. (Exs. 113-6, 120-2). As already addressed above, because that thesis is inconsistent with the "law of the case," their opinions are unpersuasive. Finally, while SAIF contends that the opinions of Drs. Rosenbaum and Sabahi did not support the existence of a "current radiculopathy," neither examiner offered a persuasive explanation differentiating claimant's "accepted" L4-5 radiculopathy from his "current" L4-5 radiculopathy.

In sum, based on Dr. Tatsumi's demonstration and explanation that the purpose of the decompression procedure is "for" claimant's accepted L4-5 radiculopathy (which is consistent with the "law of the case"), we conclude that his opinion persuasively establishes the compensability of the disputed procedure. See, e.g., *Fernando Javier-Flores*, 67 Van Natta 2245, 2250 (2015). Consequently, we reverse the ALJ's compensability decision.

Penalty/Attorney Fee

While claimant listed penalties/attorney fees as an issue in his hearing request, and raised it as an issue at the outset of the hearing, the ALJ concluded that claimant had waived the issue of penalties and penalty-related attorney fees because he did not address the issues in his written closing arguments. (Tr. 9). On review, claimant contends that the issue was not waived. Based on the following reasoning, we agree.

Issues raised in a hearing request are generally ripe for resolution, even if they are not raised or argued at hearing. See *Liberty Northwest v. Alonzo*, 105 Or App 458, 460 (1991). However, an issue may be waived even if it is raised by a hearing request if it is not included in a subsequent statement of the issues agreed to by the parties. See *Clifford D. Cornett*, 51 Van Natta 1430, 1432 (1999).

Here, claimant raised the penalty/attorney fee issue in his hearing request, and raised it again in the statement of issues at the outset of the hearing. (Tr. 9). Claimant's written closing argument did not mention the penalty/attorney fee issues. Nevertheless, claimant's written argument did not expressly waive the

issue or state that the medical service issue was the only remaining disputed issue for resolution. Under such circumstances, we do not consider claimant to have intentionally relinquished his known right to pursue the previously raised penalty/attorney fee issue. See *Drews v. EBI Companies*, 310 Or 134, 150 (1990); *Wright Schuchart Harbor v. Johnson*, 133 Or App 680, 685 (1995); *Rex M. Butler*, 67 Van Natta 216, 217 (2015).

Under ORS 656.262(11)(a), if a carrier unreasonably delays or refuses to pay compensation, it shall be liable for a penalty of up to 25 percent of any amounts then due, plus an assessed attorney fee. Whether a denial constitutes an unreasonable resistance to the payment of compensation depends on whether, from a legal standpoint, the carrier had a legitimate doubt as to its liability. *Int'l Paper Co. v. Huntley*, 106 Or App 107 (1991). “Unreasonableness” and “legitimate doubt” are to be considered in light of all the evidence available at the time of the denial. *Brown v. Argonaut Ins. Co.*, 93 Or App 588, 591 (1988).

Claimant contends that SAIF’s denial of his medical services claim, based on its reliance on the opinions of Drs. Rosenbaum and Sabahi, was unreasonable because those opinions were contrary to the “law of the case.” In response, SAIF argues that it reasonably relied on the opinions of Dr. Rosenbaum and Sabahi in determining that the proposed L4-5 decompression procedure was not directed to claimant’s accepted L4-5 radiculopathy. It asserts that because the accepted L4-5 radiculopathy “was not necessarily a permanent condition” and the condition was not necessarily due to nerve root compression, the compensability of the L4-5 decompression procedure was unclear. Based on the following reasoning, we disagree with SAIF’s contention.

First, SAIF does not refer to any specific medical opinion in support of its position; *i.e.* an opinion that acknowledges the existence of the radiculopathy, but concluded that such a condition resolved such that it no longer required treatment. Rather, as explained above, Drs. Rosenbaum and Sabahi disputed the existence of the radiculopathy at all times following claimant’s 2010 work injury. Such opinions are contrary to the law of the case, and reliance on them to dispute compensability of the current medical services does not substantiate the existence of a legitimate doubt regarding SAIF’s liability for the claim. See *Gwendolyn Perkins*, 60 Van Natta 1187, 1194 (2008) (medical opinions that did not discuss a change in the initial compensability of accepted condition were insufficient to support a legitimate doubt regarding the carrier’s combined condition denial); *Stephen B. Briggs*, 56 Van Natta 472, 475 (2004) (the carrier did not have a legitimate doubt where it relied on medical opinion that the claim was not initially compensable as support for a current condition denial).

Accordingly, based on the aforementioned reasoning, we conclude that SAIF's medical services denial was unreasonable. Consequently, a penalty and a penalty-related attorney fee is warranted. ORS 656.262(11)(a); Or Laws 2015, ch 521, § 2 (eff. January 1, 2016). In assessing penalty-related attorney fees under ORS 656.262(11)(a), we consider the proportionate benefit to claimant, giving primary consideration to the results achieved and to the time devoted to the case. *See Id.*

An attorney fee for an unreasonable denial must be in a reasonable amount that is proportionate to the benefit to claimant and takes into consideration the factors set forth in OAR 438-015-0010(4), giving primary consideration to the results achieved and the time devoted to the case. ORS 656.262(11)(a); OAR 438-015-0110(1), (2). After considering the benefit to claimant and the factors set forth in OAR 438-015-0010(4), particularly the result achieved and the time devoted to the unreasonable denial issue (as represented by the record, claimant's appellate briefs, and her counsel's uncontested submission), we find that a reasonable attorney fee regarding SAIF's unreasonable denial, that is proportionate to the benefit to claimant, is \$3,500, payable by SAIF.³

Claimant's attorney is also entitled to an assessed fee for services at hearing and on review concerning the medical services denial. ORS 656.386(1). After considering the factors set forth in OAR 438-015-0010(4) and applying them to this case, we find that a reasonable fee for claimant's attorney's services at hearing and on review regarding that denial is \$18,000 payable by SAIF. In reaching this conclusion, we have particularly considered the time devoted to this issue (as represented by the record, claimant's appellate briefs, his successful motion to strike, his counsel's request, and SAIF's objections), the complexity of the issue, the value of the interest involved, and the risk that counsel may go uncompensated.

Claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the medical services denial, to be paid by SAIF. *See* ORS 656.386(2); OAR 438-015-0019; *Nina Schmidt*, 60 Van Natta 169 (2008); *Barbara Lee*, 60 Van Natta 1, *recons*, 60 Van Natta 139 (2008). The procedure for recovering this award, if any, is described in OAR 438-015-0019(3).

³ In considering the amount of the penalty-related attorney fee, we include consideration of claimant's counsel's services on review. *See Traner v. SAIF*, 273 Or App 310, 317 (2015); *Stanley T. Castle*, 67 Van Natta 2055, 2057 (2015).

ORDER

The ALJ's order dated July 13, 2015 is reversed. SAIF's denial of the medical services is set aside and the claim is remanded to SAIF for further processing. For services at hearing and on review, claimant's counsel is awarded \$18,000 payable by SAIF. Claimant is awarded reasonable expenses for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the medical services denial, to be paid by SAIF. Claimant is awarded a penalty equal to 25 percent of the amounts then due at the time of the hearing record closure on June 11, 2015 (as a result of this order), payable by SAIF. For services at hearing and on review regarding the unreasonable denial issue, claimant's counsel is awarded a penalty-related attorney fee in the amount of \$3,500, payable by SAIF.

Entered at Salem, Oregon on April 12, 2016