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In the Matter of the Compensation of  
**DAN M. MORGAN, Claimant**  
WCB Case No. 15-01336  
ORDER ON REVIEW  
Dale C Johnson, Claimant Attorneys  
SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Lanning and Johnson

The SAIF Corporation requests review of Administrative Law Judge (ALJ) Donnelly's order that: (1) set aside its *de facto* denial of an occupational disease claim for a bilateral wrist condition; (2) awarded interim compensation; and (3) awarded a penalty and attorney fee for allegedly unreasonable claim processing. In his respondent's brief, claimant seeks an increase in the ALJ's attorney fee awards regarding the compensability, interim compensation, and penalty issues. On review, the issues are the scope of the denial, penalties, and attorney fees.

We adopt and affirm the ALJ's order with the following supplementation and modification.

Claimant worked for SAIF's insured since 1975, primarily as a saw operator cutting structural steel. (Ex. 26-2).

In June 2003, claimant sought treatment for symptoms of bilateral hand numbness. (Ex. 1). EMG testing was consistent with moderate bilateral carpal tunnel syndrome (CTS). (Ex. 2).

In December 2004, claimant filed a claim for his condition. (Ex. 6).

In January 2005, Dr. Movassaghi performed a left carpal tunnel release. (Ex. 8).

In March 2005, SAIF accepted bilateral CTS as an occupational disease. (Ex.14).

In July 2005, Dr. Movassaghi released claimant to regular work. (Ex. 19).

In September 2014, claimant filed an incident report concerning worsening right hand symptoms. (Ex. 20).

On October 3, 2014, Dr. Garfinkel evaluated claimant, diagnosing tendinitis and “cumulative trauma from repetitive motion.” (Ex. 21). He prescribed physical therapy and time off work. (Ex. 21-2). Claimant and Dr. Garfinkel completed and filed an 827 form listing diagnoses of tendinitis and “repetitive use injury.” (Ex. 22).

On October 8, 2014, claimant and the employer completed an 801 form, noting that “[b]oth hands have tingling in fingers.” (Ex. 23).

Also on October 8, 2014, claimant was evaluated by Dr. Abraham, an occupational medicine physician, who diagnosed bilateral wrist tendinitis. (Ex. 24). Claimant filed an additional 827 form, signed by Dr. Abraham. (Ex. 25).

In November 2014, claimant was evaluated by Dr. Denekas at SAIF’s request. (Ex. 30). Dr. Denekas diagnosed bilateral CTS and bilateral hand/wrist tendinitis. (Ex. 30-7). Dr. Denekas opined that claimant’s work activities were the major contributing cause of the CTS and “recent diagnosis” of hand and wrist tendinitis. (Ex. 30-8, -9).

On December 3, 2014, SAIF issued a denial stating, “You filed a claim for an occupational disease described as right carpal tunnel syndrome and le[f]t carpal tunnel syndrome, which occurred on or about September 19, 2014, while you were employed [by the employer]. Unfortunately, we are unable to accept your claim for the following reasons: Your condition(s) of right carpal tunnel syndrome and le[f]t carpal tunnel syndrome is/are the responsibility of another SAIF claim \* \* \*.” (Ex. 32).

On March 17, 2015, claimant retained counsel, who filed a hearing request on March 20, 2015, challenging the December 3, 2014 denial.

The ALJ determined that the hearing request regarding the denial was untimely filed, and that good cause for the untimely filing had not been established. *See* ORS 656.319(1)(b). Nevertheless, reasoning that the denial specifically pertained to claimant’s bilateral CTS condition, the ALJ concluded that claimant’s bilateral wrist tendonitis claim had been *de facto* denied. Addressing the merits of the claim, the ALJ set aside the *de facto* denial. The ALJ also awarded a penalty and penalty-related attorney fee for SAIF’s failure to timely accept or deny the bilateral wrist tendinitis condition. Additionally, the ALJ awarded interim compensation and found SAIF’s failure to pay interim compensation unreasonable, for which the ALJ assessed an additional penalty-related attorney fee.

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### Scope of Denial/Preclusion

On review, SAIF contends that its December 3, 2015 denial was a “complete claim denial” encompassing the bilateral wrist tendonitis condition, as well as bilateral CTS. Because claimant’s request for hearing from that denial was untimely, and there was not good cause for the untimely filed hearing request, SAIF asserts that claimant is precluded from litigating his bilateral wrist tendonitis claim. For the following reasons, we disagree.

The ALJ relied on *Longview v. Snyder*, 182 Or App 530 (2002), for the proposition that a limited and specific denial does not encompass all possible conditions. Reasoning that SAIF’s denial was specific to bilateral CTS, the ALJ concluded that the denial did not encompass the claimed bilateral wrist tendonitis.

SAIF argues that *SAIF v. Allen*, 193 Or App 742 (2004), limited the *Snyder* holding, based on the rationale that where a carrier is aware of certain conditions at the time of its denial, the denial is properly construed as including all symptoms and conditions that had arisen or would arise from the work exposure. Based on the following reasoning, we do not consider either the *Snyder* or the *Allen* rationales dispositive.

Both *Snyder* and *Allen* concerned disputes regarding the scope of “combined condition” denials and consider the context of the medical evidence to determine the extent of the denials. We summarize the decisions below.

In *Snyder*, the carrier accepted a right shoulder and cervical strain before issuing a combined condition denial that stated that the accepted conditions had combined with preexisting degenerative arthritis and degenerative disc disease, and that the accepted conditions were no longer the major contributing cause of the combined condition. 182 Or App at 533. Subsequently, the claimant was diagnosed and treated for a facet joint injury, which his physician attributed to the work-related injury. *Id.* The *Snyder* court rejected the claimant’s argument that the subsequent diagnosis of the facet joint injury contradicted the carrier’s earlier denial of the combined condition, reasoning that the denial specifically denied right shoulder and cervical strains combined with preexisting conditions, and that the denial did not address the claimant’s facet joint injury. *Id.* In its reasoning upholding the carrier’s denial, the court emphasized that the carrier was not aware of the facet joint injury when it issued the denial and that the denial listed specific causes, rather than generally denying all of claimant’s underlying conditions. *Id.* at 536.

In *Allen*, the claimant submitted a new/omitted medical condition claim for L5-S1 spondylosis. The carrier denied the claim, asserting that the claim was for a preexisting condition and was not caused or pathologically worsened by the work injury. *Id.* at 744. On appeal, the carrier argued that a “combined condition” analysis was not applicable because its denial did not include a denial of L5-S1 spondylosis as a combined condition. *Id.* at 745. The court disagreed and, citing *Snyder*, reasoned that the scope of a denial did not depend solely on the words used in the denial, but also depended on the context in which the denial was made. *Id.* at 749. Determining that the carrier was aware of medical evidence describing the claimed condition as a combined condition, the court concluded that, in that context, the carrier’s denial included a denial of the claimed condition as a “combined condition.” *Id.*

Here, in conducting our analysis of this particular record, we first consider the scope of claimant’s claim. For initial claims, a signed 827 form and a physician’s chart notes can be considered a “claim” when received by the carrier. *See Jonathan J. Lee*, 63 Van Natta 1913, 1916 (2011).

SAIF received an October 3, 2014, 827 form and chart note from Dr. Garfinkel diagnosing wrist tendinitis and an overuse condition. (Exs. 21, 22). Additionally, SAIF received an October 8, 2014, 827 form and chart note from Dr. Abraham diagnosing bilateral wrist tendinitis. (Exs. 24, 25). Accordingly, based on these submissions, we conclude that claimant filed an initial claim for the condition of bilateral wrist tendonitis. *See Lee*, 63 Van Natta at 1918 (“pre-acceptance” filing of an 827 form and chart notes concerning a head injury diagnosis received as part of initial claim concerning a right shoulder injury).<sup>1</sup>

About one month later, claimant was examined by Dr. Denekas at SAIF’s request. (Ex. 30). He diagnosed bilateral CTS and hand and wrist tendinitis. (Ex. 30-7). Claimant was re-examined by Dr. Abraham, who diagnosed possible CTS of the right upper extremity. (Ex. 31).

Following its receipt of these documents, SAIF issued the following denial:

“You filed a claim for an occupational disease described as right carpal tunnel syndrome and le[f]t carpal tunnel syndrome, which occurred on or about September 19, 2014, while you were employed at [the employer]. Unfortunately, we are unable to accept your claim for the following reasons:

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<sup>1</sup> Moreover, we construe SAIF’s contention that its denial encompassed the compensability of the bilateral wrist tendonitis condition to acknowledge that claimant filed an initial claim for that condition.

Your condition(s) of right carpal tunnel syndrome and le[f]t carpal tunnel syndrome is/are the responsibility of another SAIF claim [number].” (Ex. 32)

SAIF is bound by the express language of its denial. *See Tattoo v. Barrett Bus. Serv.*, 118 Or App 348, 351-52 (1993). While we have frequently cited *Snyder* for the proposition that “a limited and specific denial does not encompass all relevant medical conditions that existed at the time it was rendered if the carrier did not know of them,” that holding does not stand for the proposition that a carrier may deny a condition it has knowledge of by issuing a specific denial for a different condition. *Snyder*, 182 Or App at 536; *see, e.g., Manetta R. Carter*, 60 Van Natta 1986, 1989 (2008); *Dorothy H. Latta*, 58 Van Natta 1645, 1648 (2006). Furthermore, as previously explained, the *Snyder* court addressed the scope of a combined condition denial relative to a new diagnosis that arose after the combined condition denial. *Id.* The *Snyder* court’s reasoning does not extend to an initial claim denial of a specific condition when the carrier is aware of additional diagnosed conditions when it issued its denial.

Here, as previously explained, claimant had already been diagnosed with bilateral wrist tendinitis when SAIF’s denial issued. Nevertheless, SAIF’s denial specifically denied responsibility of bilateral CTS, indicating that the claimed condition would be covered under a previously accepted claim. (Ex. 32). Under such circumstances, the record does not support a conclusion that SAIF’s denial encompassed bilateral wrist tendinitis.<sup>2</sup>

Therefore, claimant’s occupational disease claim for bilateral wrist tendonitis is not precluded by his failure to timely appeal SAIF’s bilateral CTS claim denial. Accordingly, we set aside SAIF’s *de facto* denial of claimant’s occupational disease claim for bilateral wrist tendonitis.<sup>3</sup>

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<sup>2</sup> A more general denial of claimant’s bilateral hand and wrist condition may well have been interpreted to encompass both CTS and wrist tendinitis conditions such that the absence of a timely hearing request may have had a preclusive effect on a subsequent wrist tendinitis claim. However, here, as previously discussed, SAIF specifically limited its claim denial to a CTS condition, which does not extend to claimant’s wrist tendinitis claim.

<sup>3</sup> The parties do not otherwise dispute the compensability of the bilateral wrist tendonitis. In addition, as acknowledged by SAIF, our determination regarding the *de facto* denial also resolves its challenge to claimant’s interim compensation award. (App. Br. at 6).

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## Attorney Fees

On review, claimant requests an increase in the ALJ's attorney fee awards. Further noting that the ALJ's order neglected to include an attorney fee award for his counsel's services regarding the interim compensation award, claimant seeks an assessed fee for obtaining increased temporary disability (interim compensation). *See* ORS 656.383(2).

We adopt and affirm the ALJ's attorney fee awards, with the following modification.<sup>4</sup> Specifically, based on the following reasoning we award an assessed fee under ORS 656.383(2), which provides for such an attorney fee when claimant "finally prevails" in a dispute over temporary disability benefits. Or Laws 2015, ch 521, §10.

HB 2764 provides that the statutory changes apply to "orders issued and attorney fees incurred on or after the effective date of this 2015 Act [January 1, 2016], regardless of the date on which the claim was filed." Or Laws 2015, ch. 521, §11; *see Rodolfo Arevalo*, 68 Van Natta 1142 (July 27, 2016).

Here, although it awarded interim compensation, the ALJ's order neglected to include an attorney fee award regarding such benefits. At that time, an "out-of-compensation" attorney fee would have been appropriate. *See former* OAR 438-015-0045.

However, in his respondent's brief, claimant expressly challenged that portion of the ALJ's order that did not award an attorney fee concerning the interim compensation award. Relying on ORS 656.383(2), claimant seeks an insurer-paid attorney fee for his counsel's services in securing the temporary disability benefits.

After conducting our review of this particular record, because the attorney fee is "incurred" at the time of this order, we conclude that claimant's counsel is entitled to an assessed attorney fee award for obtaining claimant's interim compensation award. We base our attorney fee determination on the law applicable at the time of this order; *i.e.*, ORS 656.383(2); *See Arevalo*, 68 Van Natta at 1149.

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<sup>4</sup> SAIF contends that claimant was required to challenge the *de facto* denial, or "the wording" of its denial within the appeal period of the December 3, 2014 denial. However, in asserting the existence of a *de facto* denial, claimant raised a matter concerning a claim, for which he is entitled to a hearing. ORS 656.283(1). For the reasons expressed above, we find that the claim for bilateral wrist tendonitis was *de facto* denied and that the denied condition is compensable as an occupational disease.

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 the hearing level concerning the temporary disability (interim compensation) issue is \$2,500, payable by SAIF.

Claimant's attorney is also entitled to an assessed fee for services on review regarding the compensability, temporary disability, penalty, and penalty-related attorney fee issues. ORS 656.382(2), (3). 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 on review concerning the aforementioned issues is \$6,000, payable by SAIF. In reaching this conclusion, we have particularly considered the time devoted to the issues (as represented by claimant's respondent's brief), the complexity of the issues, the values of the interests involved, and the risks that counsel may go uncompensated.

Finally, claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the *de facto* denial, to be paid by SAIF. *See* ORS 656.386(2); OAR 438-015-0019; *Gary E. Gettman*, 60 Van Natta 2862 (2008).

### ORDER

The ALJ's order dated October 27, 2015 is affirmed in part and modified in part. For services at the hearing level regarding the temporary disability (interim compensation) issue, claimant's counsel is awarded an assessed fee of \$2,500, to be paid by SAIF. For services on review regarding the compensability, temporary disability (interim compensation), penalty, and penalty-related attorney fee issues, claimant's attorney is awarded an assessed fee of \$6,000, payable by SAIF. Claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the denial, to be paid by SAIF.

Entered at Salem, Oregon on August 3, 2016