

In the Matter of the Compensation of
DALE D. CLARK, Claimant
WCB Case No. 15-00658
ORDER ON REVIEW
Moore Jensen, Claimant Attorneys
SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Lanning, Curey, and Somers. Member Lanning concurs in part and dissents in part.

Claimant requests review of Administrative Law Judge (ALJ) Riechers's order that: (1) upheld the SAIF Corporation's denial of claimant's aggravation claim for a low back strain condition; and (2) declined to award penalties and attorney fees for allegedly unreasonable claim processing. On review, the issues are aggravation, claim processing, penalties, and attorney fees.

We adopt and affirm the ALJ's order with the following supplementation regarding the aggravation issue.

In upholding SAIF's denial of claimant's aggravation claim, the ALJ concluded that the medical evidence did not provide sufficient proof of an "actual worsening" of the accepted lumbar strain condition. In so doing, the ALJ rejected claimant's argument that *Brown v. SAIF*, 262 Or App 640, *rev allowed*, 356 Or 397 (2014), applies to an aggravation claim. The ALJ also declined to award penalties and attorney fees for allegedly unreasonable claim processing. On review, claimant disputes these rationales.

We agree with the ALJ's conclusions and analysis. In addition, we offer the following supplementation to address *Nacoste v. Halton Co.*, 275 Or App 600 (2015), which issued after the ALJ's order.

In *Nacoste*, analyzing ORS 656.267 and ORS 656.273(1), the court affirmed our order that upheld an aggravation denial because the record did not establish that the claimant's accepted medial meniscus tear condition had worsened. 275 Or App at 608. The court noted that, by its text, ORS 656.273 applied to an "actual worsening of the compensable condition." *Id.* at 607. Moreover, citing *SAIF v. Walker*, 330 Or 102, 109 (2000), the court observed that the term "compensable condition" under ORS 656.273(1) had been defined as "the medical condition for which a worker already has been compensated." *Id.* Consequently, the court considered the definition of "compensable condition" in ORS 656.273(1) to be

consistent with its conclusion that an aggravation may only occur upon a condition identified in a Notice of Acceptance. *Id.* The court also distinguished the *Brown* holding, reasoning that *Brown* did not address whether an aggravation claim must be based on an accepted condition. *Id.*

Therefore, in accordance with the court's rationale in *Nacoste*, we decline to apply *Brown* in the context of an aggravation claim. Accordingly, we affirm.

ORDER

The ALJ's order dated July 31, 2015 is affirmed.

Entered at Salem, Oregon on February 24, 2016

Member Lanning concurring in part and dissenting in part.

First, inasmuch as *Nacoste v. Halton Co.*, 275 Or App 600 (2015), is controlling case precedent, I am constrained to follow it under the doctrine of *stare decisis*. Therefore, I must concur with that portion of the majority's opinion. However, because I disagree with the majority's conclusion that SAIF's claim processing was not unreasonable, I respectfully dissent.

ORS 656.262(6)(b)(F) explicitly provides that a carrier is obligated to modify its acceptance "from time to time as medical or other information changes a previously issued notice of acceptance." As I previously stated in my dissenting opinion in *Gerald W. Mogensen*, 66 Van Natta 1074, 1078-79 (2014), *aff'd*, 275 Or App 491 (2015), I share the interpretation of the statutory scheme and a carrier's claim processing obligations as discussed by Member Weddell in her concurring opinion in *Mai K. Moua*, 66 Van Natta 848, 852 (2014). In *Moua*, Member Weddell addressed this statute, reasoning that, although a claimant has a right to pursue a new/omitted medical condition claim under ORS 656.262(6)(d) and (7)(a), such a right does not relieve a carrier of its independent duty to initially determine what conditions are compensable and, pursuant to ORS 656.262(6)(b)(F), to modify its acceptance based on changes in its knowledge of a compensable condition.

Applying that statutory analysis to the present case, I conclude that SAIF did not have a legitimate doubt regarding whether to modify its Notice of Acceptance after it received Dr. Dromsky's April 24 and May 24, 2014 reports, wherein Dr. Dromsky concluded that the L5-S1 disc herniation was related to the work injury. (Exs. 18-8, 20-2). Dr. Gerry also stated on December 4, 2014, that claimant had a large disc herniation from his work injury. (Ex. 25).

Under such circumstances, I would conclude that SAIF's claim processing was unreasonable and, as such, an assessment of penalties and attorney fees under ORS 656.262(11)(a) was justified. Because the majority reaches a contrary conclusion, I respectfully dissent from that portion of the opinion.