
In the Matter of the Compensation of
HARRY R. BATES, Claimant
WCB Case No. 14-01864, 13-06289, 13-05540, 13-05152, 13-05151, 13-01203
ORDER ON REVIEW
Douglas J Rock PC, Claimant Attorneys
SAIF Legal Salem, Defense Attorneys
Holmes Weddle & Barcott PC, Defense Attorneys
Kent W Day, Defense Attorneys

Reviewing Panel: Members Weddell and Johnson.

Zurich Insurance Co.¹ requests review of those portions of Administrative Law Judge (ALJ) Pardington's order that: (1) set aside its denials of claimant's new/omitted medical condition claims for L5-S1 fusion, L4-5 foraminal stenosis, L4-5 degenerative changes, L4-5 disc degeneration, and L4-5 synovial cyst conditions; and (2) awarded penalties and attorney fees for an allegedly unreasonable denial. On review, the issues are compensability, penalties, and attorney fees. We reverse in part and affirm in part.²

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact" with the following summary and supplementation.

On September 9, 1988, claimant compensably injured his low back while working for Liberty Northwest's insured. (Ex. 3). In October 1988, Dr. Franks performed an L5-S1 discectomy. (Ex. 5).

¹ Claimant's 1988 claim has been processed by several claim administrators on behalf of Zurich. (Tr. 5). For the sake of clarity, we substitute "Zurich" for the ALJ's references to Sulzer Papertec and Zurich/Sedgwick CMS.

² Zurich requests that claimant's hearing request in WCB Case No. 13-05151 be dismissed as abandoned and, additionally, contends that it did not *de facto* deny a claim regarding a May 16, 1994 date of injury as alleged by that hearing request. Yet, at the hearing, claimant preserved the issue, and, rather than requesting dismissal, Zurich responded to the merits of the allegation. (I Tr. 3-4, II Tr. 18). In any event, the record does not support the existence of this alleged *de facto* denial. Accordingly, claimant's request for relief regarding this matter is denied. See *Tamara R. Bain*, 66 Van Natta 577, 580 (2014) (where a hearing request alleges a *de facto* denial, but there was no *de facto* denial, the Board has jurisdiction, but relief is denied).

In May 1994, claimant injured his right ankle while working for another employer, insured by Zurich. (Ex. 22-2). In September 1994, claimant began to develop radiating right leg and hip pain and filed a claim regarding those symptoms. (Exs. 18, 22-2). Zurich accepted a recurrent L5-S1 disc herniation with a date of injury of September 20, 1994. (Ex. 25).

In January 1995, claimant underwent an L5-S1 “re-exploration with excision of extruded disc fragment and neurolysis.” (Ex. 27).

In October 1998, claimant sought treatment for another onset of right leg radiculopathy symptoms. (Ex. 43). He filed an aggravation claim concerning his September 1994 injury with Zurich. (Ex. 45).

In November 1998, claimant was examined by Dr. Brett, who diagnosed a recurrent L5-S1 disc herniation and S1 nerve root impingement. (Ex. 48-3). He recommended an L5-S1 fusion surgery, which was performed on November 9, 1998. (Ex. 49).

In March 1999, Zurich accepted claimant’s aggravation claim, describing the accepted condition as “L5-S1 disc herniation, right.” (Ex. 59)

In December 2012, claimant sought treatment with Dr. Burnett. He reported slipping on a steep bank while cutting brush working for a different employer and developing increased right leg pain. (Ex. 102).

In January 2013, claimant was evaluated by Dr. Tien regarding right lower extremity pain, which had been worsening over the last year. (Ex. 110). Dr. Tien diagnosed lumbar radiculopathy and spondylosis. (Ex. 110-3). He recommended an EMG study to evaluate claimant’s radiculopathy. (*Id.*)

On February 12, 2013, claimant filed a claim for a low back injury with a different employer, which was insured by the SAIF Corporation. (Ex. 114). He stated that he hurt his back lifting cut tree limbs on February 11, 2013. (*Id.*)

On March 6, 2013, SAIF denied claimant’s February 11, 2013 injury claim. (Ex. 122). The same day, Dr. Tien performed an L4-5 nerve root decompression (among other procedures at the L4-5 level). (Ex. 123).

In May 2013, Dr. Tien opined that claimant’s need for treatment and disability, since April 2012, was due to L4-5 pathology caused in major part by the L5-S1 fusion. (Ex. 127). Dr. Tien explained that the work incidents in

December 2012 and February 2013 likely contributed to claimant's symptoms, but were not material or major causes of his disability or need for treatment. (Ex. 127-2).

Between June and October 2013, claimant initiated multiple claims against several former employers for "L5-S1 fusion," "L4-5 foraminal stenosis," and "L4-5 degenerative changes." (Exs. 129 through 136). On October 25, 2013, SAIF denied each of the claimed conditions. (Ex. 137). On December 17, 2013, Zurich denied the claim for "L4-5 foraminal stenosis and L4-5 degenerative changes." (Ex. 138).

In December 2013, Dr. Tien explained that claimant's need for treatment was due to L4-5 foraminal stenosis and L4-5 degenerative changes. (Ex. 139-2). He explained that claimant's L5-S1 fusion created a "lever effect," which increased stress on the L4-5 level. Dr. Tien opined that the L5-S1 fusion was the major contributing cause of claimant's need for surgery at the L4-5 level. (Ex. 139-3).

In January 2014, claimant was evaluated by Dr. Rosenbaum at Zurich's request. (Ex. 143). He diagnosed lumbar spondylosis, "status post-herniated disk L5-S1 right, and discectomy October 13, 1988," "status post-recurring herniated disk and discectomy, January 9, 1995," "status post-L5 fusion, interbody BAK, November 9, 1998," and "status post-right L4-5 laminectomy, March 6, 2013, spondylosis and L5 radiculopathy." (Ex. 143-11). Dr. Rosenbaum reasoned that the rate of progression of claimant's L4-5 spondylosis was consistent with a diagnosis of preexisting spondylosis, rather than accelerated degeneration from adjacent segment disease. (Ex. 143-12). Dr. Rosenbaum explained that claimant's L4-5 spondylosis was an arthritic condition. (Ex. 143-14). He did not consider the injury events in December 2012 or February 2013 to be significant because claimant's low back pain and right leg symptoms had been present before those incidents. (Ex. 143-16).

Zurich asked Dr. Rosenbaum, "Is L5-S1 fusion a condition? Please explain your answer. If so, does [claimant] have 'L5-S1 fusion'?" (Ex. 143-12). Dr. Rosenbaum responded that "[claimant] does have an L5-S1 fusion. This occurred on the basis of a surgical intervention by Dr. Brett on November 9, 1998." (*Id.*)

In February 2014, claimant fell from his employer's truck, landing on his back. (Ex. 143A). He filed a claim for a back and left leg injury. (Ex. 143D).

In March 2014, Dr. Rosenbaum stated that none of the claimed L4-5 conditions were caused by claimant's 1994 injury and subsequent L5-S1 fusion. (Ex. 144). He reiterated that claimant's L4-5 condition was caused by preexisting degenerative disease. (Ex. 144-2). Dr. Rosenbaum indicated that Dr. Tien's contrary opinion did not alter his assessment. (*Id.*)

On March 20, 2014, claimant was re-evaluated by Dr. Tien. (Ex. 145). Claimant reported left buttock and leg pain following the February 2014 fall. (*Id.*) Dr. Tien diagnosed lumbar radiculopathy, commenting that claimant's leg pain was caused by a combined condition composed of the degenerative changes and the February 2014 injury, which resulted in his need for treatment. (Ex. 145-4).

In April 2014, claimant was again evaluated by Dr. Rosenbaum, at SAIF's request. (Ex. 148). Dr. Rosenbaum opined that the onset of claimant's left leg radiculopathy related to the February 2014 work incident, but that the major contributing cause of claimant's L4-5 disc pathology was claimant's preexisting L4-5 disc pathology and recent L4-5 laminectomy. (Ex. 148-10). He considered the February 2014 work incident to be a material cause of the left lower extremity radiculopathy. (Ex. 148-12). However, he concluded that the existence of preexisting L4-5 pathology resulted in a combined condition that was caused in major part by the preexisting condition. (Ex. 148-13).

On April 17, 2014, SAIF denied the February 2014 injury claim, asserting that claimant's low back and left leg symptoms resulted from L4-5 degeneration, which was the responsibility of another carrier. (Ex. 149). Thereafter, claimant initiated claims against multiple prior employers for "L4-5 disc degeneration." (Exs. 149B, 149C, 149D).

Also on April 17, 2014, Dr. Tien opined that claimant's need for treatment for left lower extremity radiculopathy was a combined condition consisting of the February 2014 work incident, natural progression of claimant's L4-5 spondylosis, and increased degenerative change due to the L5-S1 fusion. (Ex. 150-2). He considered the degenerative change due to the L5-S1 fusion to be the major contributing cause of claimant's L4-5 disc degeneration. (*Id.*)

In May 2014, Dr. Tien performed another surgical procedure at the L4-5 level. The post-operative diagnosis was "left L5 radiculopathy secondary to synovial cyst." (Ex. 150A).

In June 2014, Dr. Rosenbaum opined that the 1994 work injury did not materially contribute to claimant's L4-5 disc degeneration. (Ex. 151-3). He did not consider the L4-5 disc degeneration to be a combined condition because there was no contribution from the work injury. (*Id.*)

On June 23, 2014, Zurich denied the claim for L4-5 degeneration. (Ex. 152).

In August 2014, Dr. Rosenbaum reiterated that claimant's L4-5 disc condition was not related to the L5-S1 fusion because the rate of degeneration did not appear to accelerate markedly after the fusion procedure. (Ex. 154-2). Comparing x-ray and MRI imaging between 2005 and 2014, Dr. Rosenbaum concluded that the rate of degeneration was consistent with natural aging and the degenerative process. (*Id.*)

On August 21, 2014, Dr. Brett reviewed a report of a 1994 MRI and films of x-ray and MRI imaging from 2005 to 2012. (Ex. 155). Based on his review, he concluded that the L5-S1 fusion contributed as little as five percent to the claimed L4-5 disc pathology. (Ex. 155-2). He explained that there was very little disc space narrowing, which would have been associated with such a contribution from the fusion. (*Id.*) He also reasoned that an L5-S1 fusion does not result in a loss of movement sufficient to significantly affect the L4-5 level. (*Id.*)

In December 2014, Dr. Tien testified in a "post-hearing" deposition. (Ex. 156). He maintained his opinion regarding the contribution of the L5-S1 fusion to claimant's L4-5 disc pathology, including an L4-5 synovial cyst. (Ex. 156-17). He attributed 51 percent of the cause of the L4-5 pathology to the L5-S1 fusion. (*Id.*) Dr. Tien disagreed with Dr. Rosenbaum because the L5-S1 fusion would not necessarily have caused a sudden change in the L4-5 disc, but biomechanically caused increased stress over a long period. (Ex. 156-26, -27). He noted that the 1998 MRI report indicated minimal degenerative change at L4-5, which he considered to be consistent with his opinion that the L5-S1 fusion was the major contributing cause of claimant's L4-5 pathology. (Ex. 156-31, -32).

On December 12, 2014, claimant filed a new/omitted medical condition claim for "L4-5 synovial cyst" concerning the Zurich claim. (Ex. 156A).

Dr. Brett testified in a "post-hearing" deposition on January 22, 2015. (Ex. 157). He initially stated that he would defer to the opinion of Dr. Tien because Dr. Tien had more recently examined claimant and taken a history.

(Ex. 157-5, -6). However, after reviewing his previous opinion, Dr. Brett stated that he did not defer to Dr. Tien. (Ex. 156-7). Dr. Brett concluded that the L5-S1 fusion was not the major contributing cause of claimant's L4-5 disc pathology. (*Id.*) Because he did not appreciate significant disc space narrowing, he considered the L4-5 condition to be a result of natural aging, rather than the L5-S1 fusion. (Ex. 157-10). Dr. Brett then stated that he would defer to Dr. Tien regarding the cause of claimant's need for treatment. (Ex. 157-12). He then indicated that he concurred with the opinion of Dr. Rosenbaum, and that he "differed with [Dr. Tien's] opinion at least in terms of the major cause of the degenerative conditions[.]" (Ex. 157-12, -13).

In February 2015, Zurich denied the compensability of, and responsibility for, the claimed L4-5 synovial cyst condition.

In March 2015, Dr. Rosenbaum reviewed Dr. Tien's deposition and opined that the L4-5 synovial cyst would not have been caused by the L5-S1 fusion, but by the natural progression of claimant's L4-5 degeneration, consistent with his previously stated opinion. (Ex. 159).

CONCLUSIONS OF LAW AND OPINION

Relying on the opinions of Dr. Tien and Dr. Rosenbaum, the ALJ concluded that the claimed L5-S1 fusion, L4-5 foraminal stenosis, L4-5 degenerative changes, L4-5 disc degeneration, and L4-5 synovial cyst conditions were compensable new/omitted medical conditions related to the 1994 injury. Accordingly, the ALJ set aside Zurich's denials of claimant's new/omitted condition claims. Further reasoning that Zurich lacked evidence on which to base its December 17, 2013 responsibility denial, the ALJ found its denial unreasonable and awarded a penalty and attorney fee under ORS 656.262(11)(a).

Compensability

On review, Zurich contends that the claimed "L5-S1 fusion" is a procedure and not a condition. Alternatively, Zurich argues that claimant "abandoned" his claim for "L5-S1 fusion" as a new/omitted medical condition. Zurich further asserts that its denials of L4-5 foraminal stenosis, L4-5 degenerative changes, L4-5 disc degeneration, and L4-5 synovial cyst should be upheld because Dr. Tien's opinion attributing them to the 1994 work injury, as consequential conditions, is not persuasive. Based on the following reasoning, we disagree with Zurich's contentions.

To initiate a new/omitted medical condition claim, ORS 656.267(1) requires a claimant to “clearly request formal written acceptance of a new medical condition or an omitted medical condition from the insurer or self-insured employer.” A “medical condition” in ORS 656.267(1) is “the physical status of the body as a whole * * * or one of its parts.” *Young v. Hermiston Good Samaritan*, 233 Or App 99, 104 (2008). Whether a claim is for a medical “condition” is a question of fact to be decided based on the medical evidence in individual cases. *Id.* at 107 (finding that “radiculopathy,” defined by the medical evidence as “pain that radiates along the course of a nerve root that exists from the spine,” was a “symptom and not a condition”).

Here, Zurich accepted a “recurrent disc herniation, L5-S1, affecting right S1 nerve root.” (Ex. 25). Dr. Brett then performed an L5-S1 fusion procedure. (Ex. 49).

Based on the medical record, we conclude that claimant’s “L5-S1 fusion” represents a “physical status of the body as a whole * * * or one of its parts.” *Benz v. SAIF*, 170 Or App 22, 25 (2000) (the Board may make reasonable inferences based on the medical record). Dr. Brett’s L5-S1 fusion operative report describes the procedure as including “BAK instrumentation” and placement of “15 x 24 mm implants x 2.” Also, x-ray reports after the L5-S1 fusion note that “cages remain in good position,” as well as visualization of “L5-S1 fusion screws” and an “intervertebral fusion cage at the L5-S1 disc level.” (Exs. 63, 74, 79).

Moreover, Dr. Tien explained that claimant’s L5-S1 fusion created a “lever effect,” which placed increased stress on the L4-5 level, resulting in symptoms and increased degeneration over time. (Exs. 125-16, 139-3). Accordingly, because claimant’s L5-S1 fusion changed the biomechanics of the body and had an impact on adjacent levels over time, we infer, under these circumstances, that claimant’s L5-S1 fusion is more than simply a “procedure,” but also represents a physical status of the body.

Zurich cites to numerous portions of the medical record that describe “L5-S1 fusion” as a procedure, and urges us to, therefore, conclude that it is not a condition. However, based on Dr. Tien’s description, in addition to other descriptions in the medical record, we conclude that “L5-S1 fusion” is a condition.³

³ Dr. Rosenbaum was asked to comment on whether claimant had “L5-S1 fusion,” if he concluded that it was, indeed, a condition. (Ex. 143-12). Dr. Rosenbaum responded that claimant “does have an L5-S1 fusion.” (*Id.*) Accordingly, Dr. Rosenbaum’s response could reasonably be interpreted to support that the “L5-S1 fusion” was a condition, and that claimant had it. Furthermore, there is no medical evidence that contradicts such an interpretation.

See Fernando Felipe-Cumplido, 67 Van Natta 1746, 1751 (2015) (medical opinion established that the claimant’s “adjacent segment disease” was a condition and not merely a “process”); *Milton D. Restoule*, 66 Van Natta 1731, 1734, *recons*, 66 Van Natta 1838 (2014) (persuasive medical evidence established that a claim for a “fusion with retained hardware” qualified as a medical “condition”).

Zurich argues, in the alternative, that claimant “abandoned” his new/omitted medical condition claim for “L5-S1 fusion” because he identified the issue as an “aggravation” of an L5-S1 fusion, and did not submit argument regarding the compensability of the condition. We disagree with this interpretation of claimant’s position.

Waiver is the “intentional relinquishment of a known right.” *Drews v. EBI Cos.*, 310 Or 134, 150 (1990). A waiver need not be explicit; it can be implied by a party’s conduct, but it must be “plainly and unequivocally manifested.” *Wright Schuchart Harbor v. Johnson*, 133 Or App 680, 685-86 (1995); *Connie M. Johnson*, 48 Van Natta 239 (1996) (on remand) (whether a “waiver” has occurred must be ascertained from the “totality of the circumstances” of each case).

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, responding to the ALJ’s request to state the issues, claimant’s counsel stated that he was pursuing “an aggravation of an L5-S1 fusion.” (I Tr. 3). Then he stated they were also pursuing “*de facto* denials from all of the insurance companies * * * for any denials that they should have issued but did not.” (*Id.*) He explained that the claims were contained in the record. (*Id.*) Zurich was given an opportunity to respond to claimant’s statement of the issues, but made no objection. (I Tr. 4-5).

The record contains claimant’s new/omitted medical condition claims against Zurich for “L5-S1 fusion.” (Ex. 136). The record does not contain an acceptance or denial of the claimed “L5-S1 fusion” by Zurich.

While we acknowledge that claimant’s counsel inaccurately identified an “aggravation,” rather than a *de facto* denial, of the L5-S1 fusion as one of the issues, his broader statement of the issues was inclusive of Zurich’s *de facto* denial.

Under such circumstances, we do not consider claimant to have intentionally relinquished his right to contest the *de facto* denial. *See Drews*, 310 Or at 150; *Johnson*, 133 Or App at 685; *Rex M. Butler*, 67 Van Natta 216, 217 (2015).

Apart from the abovementioned procedural arguments, Zurich does not otherwise contest the compensability of “L5-S1 fusion” as a new/omitted medical condition. Accordingly, we affirm.

Zurich additionally argues that its denials of L4-5 foraminal stenosis, L4-5 degenerative changes, L4-5 disc degeneration and L4-5 synovial cyst should be upheld because Dr. Tien’s opinion attributing them to the 1994 work injury, as consequential conditions, is not persuasive. Based on the following reasoning, as well as that expressed in the ALJ’s order, we disagree with Zurich’s contention.

To establish the compensability of his L4-5 disc conditions as consequential conditions, claimant must prove that his compensable injury was the major contributing cause of the claimed conditions. ORS 656.005(7)(a)(A); ORS 656.266(1); *Fred Meyer, Inc. v. Crompton*, 150 Or App 531, 536 (1997); *Butler*, 67 Van Natta at 217. “Compensable injury,” under ORS 656.005(7)(a)(A), means the “work-related injury incident.” *English v. Liberty Northwest Ins. Corp.*, 271 Or App 211, 215 (2015); *Denise Petersen*, 67 Van Natta 1023, 1025 (2015) (same).

The determination of major contributing cause involves the evaluation of the relative contribution of the different causes of claimant’s condition and a decision as to which is the primary cause. *Dietz v. Ramuda*, 130 Or App 397, 401 (1994), *rev dismissed*, 321 Or 416 (1995); *Linda E. Patton*, 60 Van Natta 579, 581 (2008).

Because of the disagreement between medical experts regarding the cause of claimant’s condition, this claim presents a complex medical question that must be resolved by expert medical opinion. *Barnett v. SAIF*, 122 Or App 279, 282 (1993); *Matthew C. Aufmuth*, 62 Van Natta 1823, 1825 (2010). More weight is given to those medical opinions that are well reasoned and based on complete information. *Somers v. SAIF*, 77 Or App 259, 263 (1986); *Patton*, 60 Van Natta at 581. We properly may or may not give greater weight to the opinion of the treating physician, depending on the record in each case. *See Dillon v. Whirlpool Corp.*, 172 Or App 484, 489 (2001); *Darwin B. Lederer*, 53 Van Natta 974, 974 n 2 (2001) (absent persuasive reasons to the contrary, the Board generally gives greater weight to the opinion of the claimant’s attending physician).

Dr. Tien was claimant's most recent treating physician and performed low back surgeries on March 6, 2013 and May 21, 2014. (Exs. 123, 150A). Dr. Tien consistently explained that the "lever effect" of claimant's L5-S1 fusion was the major cause of the L4-5 pathology. (Exs. 127, 139, 150, 156). We consider Dr. Tien's opinion to be based on complete information, to be well explained, and, therefore, to be persuasive. *See Somers*, 77 Or App at 263; *Jason T. Hachmuth*, 68 Van Natta 505, 513 (2016). Moreover, we find no persuasive reasons not to grant his opinion persuasive weight as the attending physician and surgeon. *See Lederer*, 53 Van Natta at 974 n 2 (2001).

Zurich asserts that Dr. Tien's opinion was based on an irrelevant 1988 MRI. Zurich also contends that he did not address L4-5 findings that were present before the fusion, and, further, that he did not review a 2005 x-ray.

Yet, neither Dr. Rosenbaum nor Dr. Brett criticized Dr. Tien's opinion for the reasons argued by Zurich. In the absence of such reasoning, we do not discount Dr. Tien's opinion on these bases. *See, e.g., Dorothy S. Calliham*, 59 Van Natta 137, 138 (2007) (where other medical opinions attached no significance to certain facts, a physician's failure to evaluate those facts did not undermine the persuasiveness of the physician's medical opinion). Moreover, Dr. Rosenbaum commented on the L4-5 pathology present before the 1998 fusion and concluded that claimant "did not have significant pathology at L4-5 other than the originations of his degenerative disease." (Ex. 151-2).

While Dr. Tien did not specifically comment on the 2005 x-ray, his causation theory was not predicated on the appearance of increased degenerative changes within a specific number of years after the L5-S1 fusion. Rather, Dr. Tien explained that the increased mechanical pressure on the L4-5 level due to the L5-S1 fusion would cause an increased rate of gradual degeneration. (Ex. 156-26). Dr. Tien acknowledged that claimant's L4-5 degeneration preexisted the 1998 fusion procedure and continued to progress over time, in part, due to the natural progression of the disease. (Ex. 156-17). However, he considered the contribution from the natural progression of the L4-5 degeneration to be less than the contribution of the L5-S1 fusion. (Ex. 156-31, -32).

Zurich additionally contends that Dr. Tien based his causation opinion on "generalizations" and that it was conclusory based on his comments that he encounters "very few patients that have good long term outcomes from fusions." (Ex. 156-24). However, rather than being conclusory, Dr. Tien evaluated

claimant's particular circumstances and explained that his fusion created a "lever effect," where the fused level of the spine compensates for lost motion by exerting greater force on the next spinal level. (Ex. 156-27, -28).

Finally, Zurich contends that Dr. Tien "misread" Dr. Rosenbaum's opinion and failed to adequately respond to it. To the contrary, we are persuaded that Dr. Tien fully understood Dr. Rosenbaum's contention that increased degeneration from the L5-S1 fusion would be an "exuberant or unexpected evolution" of the degenerative condition. (Ex. 143-11). Dr. Tien disagreed with Dr. Rosenbaum's opinion because the L5-S1 fusion could contribute gradually over a long period, until claimant's body finally became unable to sufficiently adapt. (Ex. 156-27). Based on our review, we find that Dr. Tien understood and persuasively rebutted Dr. Rosenbaum's opinion.

Accordingly, based on the abovementioned reasoning, as well as that expressed in the ALJ's order, we conclude that Dr. Tien's persuasive opinion establishes that the claimed L4-5 disc conditions were caused, in major part, by the compensable injury. Therefore, we affirm.

Penalties/Attorney Fees

The ALJ concluded that Zurich lacked a legitimate doubt regarding its responsibility for the claimed L4-5 disc conditions. Accordingly, the ALJ awarded a penalty and attorney fee. *See* ORS 656.262(11)(a). On review, Zurich contends that its claim processing was not unreasonable.⁴ Based on the following reasoning, we agree.

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,

⁴ On review, claimant requests that we affirm the ALJ's penalty and penalty-related attorney fee award based on Zurich's *de facto* denial of "L5-S1 fusion." However, this specific basis for a penalty and attorney fee was not raised at the hearing. Under such circumstances, we limit the scope of our review to the ALJ's reasoning concerning the issues presented by claimant at the hearing level. *See Fister v. South Hills Health Care*, 149 Or App 214 (1997) (absent adequate reason, Board should not deviate from its well-established practice of considering only those issues raised by the parties at hearing); *Stevenson v. Blue Cross*, 108 Or App 247 (1991) (Board can refuse to consider issues on review that are not raised at hearing); *Donelle Applegate*, 67 Van Natta 1538, 1540 (2015).

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).

Here, at the time of Zurich’s December 17, 2013 responsibility denial, it was aware that claimant was working for a new employer where he had filed a claim for low back pain, and that claimant had also sustained another unclaimed incident that worsened his low back symptoms. (Exs. 127, 131). While Dr. Tien had concluded that these incidents were not the major contributing cause of claimant’s need for treatment/disability for his low back, we conclude that the occurrence of these incidents in the context of claimant’s new employment was sufficient to raise a legitimate doubt sufficient to support Zurich’s denial. *See Theodore F. Babuka*, 61 Van Natta 2757, 2764 (2009) (the carrier had a legitimate doubt regarding its responsibility for an occupational disease based on claimant’s new employment with another employer); *Joseph A. Clark*, 65 Van Natta 1112, 1119 (2013). Accordingly, the ALJ’s penalty and penalty-related attorney fee awards are reversed.

Claimant’s attorney is entitled to an assessed fee for services on review regarding the compensability issues. ORS 656.382(2). 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 these issues is \$4,500, payable by Zurich. 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 value of the interest involved, and the risk 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 of the L5-S1 fusion and the denial of the new/omitted medical condition claims for the L4-5 conditions, to be paid by Zurich. *See* ORS 656.386(2); OAR 438-015-0019; *Gary E. Gettman*, 60 Van Natta 2862 (2008). The procedure for recovering this award, if any, is described in OAR 438-015-0019(3).

ORDER

The ALJ's order dated September 25, 2015 is affirmed in part and reversed in part. Those portions of the ALJ's order that assessed a penalty and \$1,000 attorney fee under ORS 656.262(11)(a), payable by Zurich, are reversed. The remainder of the ALJ's order is affirmed.⁵ For services on review regarding the compensability issues, claimant's attorney is awarded an assessed fee of \$4,500, payable by Zurich. Claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the aforementioned denials (*de facto* and expressed), to be paid by Zurich.

Entered at Salem, Oregon on June 15, 2016

⁵ The ALJ's order describes an "April 23, 2014" partial denial. However, the correct date of the partial denial is June 23, 2014. (Ex. 152).