
In the Matter of the Compensation of
WCB Case No. 13-02929
MICHAEL L. OAKLEY, Claimant
ORDER ON REVIEW
Julene M Quinn LLC, Claimant Attorneys
SAIF Legal, Defense Attorneys

Reviewing Panel: Members Johnson, Weddell and Somers. Member Johnson dissents.

The SAIF Corporation requests review of that portion of Administrative Law Judge (ALJ) Crummé's order that awarded penalties and attorney fees for its allegedly unreasonable contention that claimant's medical services claim for several prescribed medications was not causally related to his accepted conditions. On review, the issues are penalties and attorney fees. We modify.

FINDINGS OF FACT

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

In the 1990s, before his June 2, 2007 work injury, claimant had several myocardial infarctions and a balloon angioplasty. (Exs. 21-1, 23-1). He had also been diagnosed with coronary artery disease with atherosclerosis. (Ex. 10).

On June 2, 2007, claimant suffered a work-related electrical shock injury. (Ex. 7). After undergoing an emergency angioplasty and stent placement, he was diagnosed with a total occlusion of the circumflex artery. (Exs. 4, 5).

In August 2007, SAIF accepted "4 mm occlusion left circumflex vessel, 3-4 mm acute occlusion left obtuse marginal coronary vessel, small left inferior posterior cardiac infarct and electrical shock to area of left pectoralis muscle." (Ex. 11).

In May 2013, claimant requested Workers' Compensation Division (WCD) review regarding reimbursement for various medications. (Ex. 42). SAIF disputed the causal relationship of the prescribed medications, in addition to contending that they were otherwise not appropriate under WCD rules. (Exs. 44, 45). WCD issued a "Defer and Transfer Order," transferring the dispute regarding the causal relationship to the Hearings Division. (Ex. 45).

CONCLUSIONS OF LAW AND OPINION

The ALJ found that the disputed medications were causally related to claimant's accepted work injury. Furthermore, concluding that SAIF's medical services denial was not based on a legitimate doubt as to the causal relationship, the ALJ assessed a 25 percent penalty based on any compensation that becomes due after WCD completes its review of the remaining disputed medical services issues. Finally, the ALJ awarded a ORS 656.262(11)(a) penalty-based attorney fee, reasoning that the fee was not contingent on whether there were "amounts then due."

We adopt the ALJ's reasoning that SAIF's denial was not based on a legitimate doubt regarding causation.¹ However, as explained below, we conclude that the ORS 656.262(11)(a) attorney fee is contingent on claimant finally prevailing concerning the disputed medical services claim before WCD.

In addition to disputing causation, SAIF argues that it had other "non-causal relationship" reasons for disputing its responsibility for the claimed medical services (*i.e.* the prescriptions). Among other contentions, SAIF asserts that the request for medical services and request for WCD review did not satisfy Managed Care Organization (MCO) requirements. *See* ORS 656.245(4). Those disputes implicate WCD rules and MCO requirements, which are not matters "concerning a claim." ORS 656.704(3)(b)(B); *AIG Claim Services, Inc. v. Cole*, 205 Or App 170, 173-74 *rev den*, 341 Or 244 (2006).

When a dispute involves a challenge regarding the causal relationship of medical services to the compensable claim and a question of appropriateness of reimbursement of the medical services, both issues must be resolved favorably to the claimant for the medical services to be compensable. *Cole*, 205 Or App at 178; *Hazel M. Hand*, 59 Van Natta 1028, 1037 (2007).

Here, because the "propriety" aspect of the medical services denial remains pending before WCD, it is our practice to award a "contingent" attorney fee under ORS 656.386(1) for prevailing over the portion of the medical services issue that is before the Board. Such an award is payable if the claimant finally prevails in

¹ The ALJ concluded that Dr. Samoil's opinion did not establish that the disputed medications were solely directed to claimant's preexisting coronary artery disease. The ALJ reasoned that Dr. Samoil was responding to SAIF's question about whether the compensable injury was the major cause of the need for treatment and did not address whether the disputed medications were also partly directed to the compensable injury.

the medical services dispute before WCD. *Brian S. Crowder*, 65 Van Natta 1435, 1441, *recons den*, 65 Van Natta 1691 (2013); *Antonio L. Martinez*, 58 Van Natta 1814 (2006), *aff'd*, *SAIF v. Martinez*, 219 Or App 182 (2008) (awarding “contingent” attorney fee where the claimant prevailed over the “causation” portion of a medical services denial, pending resolution of “propriety” portions of the denial before WCD).

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).

Here, while the ALJ determined that SAIF’s denial of a causal relationship between the work injury and the disputed prescriptions was unreasonable, given the remaining issues pending resolution before WCD, it cannot finally be determined whether SAIF’s denial (*i.e.*, its refusal to pay compensation) was, itself unreasonable. Accordingly, claimant, at this time, has not “finally prevailed” on the issue of whether SAIF’s denial was unreasonable.

Under such circumstances, consistent with the “contingent attorney fee” rationale of *Martinez*, we likewise award the attorney fee under ORS 656.262(11)(a) contingent on the resolution of the remaining issues pending before WCD. *See Martinez*, 58 Van Natta at 1823 (2006).

Accordingly, we modify the ALJ’s attorney fee award. Specifically, the award is contingent on claimant finally prevailing over all aspects of SAIF’s medical services denial. Should SAIF withdraw its propriety challenge prior to a determination from WCD, the penalty and penalty-related attorney fee would then be due. *See Steven C. Johnson*, 67 Van Natta 1289, 1292 (2015).

In addition, in the event that claimant finally prevails over all aspects of SAIF’s medical services denial, he is entitled to an attorney fee for his counsel’s services on review regarding the penalty and related attorney fee award. *See* ORS 656.262(11)(a); ORS 656.382(3); Or Laws 2015, Ch. 521, § 11 (the

statutory amendments to ORS 656.382 apply to orders issued and fees incurred after January 1, 2016); OAR 438-015-0070(2); *SAIF v. Traner*, 273 Or App 310, 322 (2015).

After considering the factors set forth in OAR 438-015-0010(4) and applying them to this case, we award a reasonable “contingent” attorney fee for claimant's counsel's services on review regarding these issues of \$3,000, 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, and the value of the interest involved.

ORDER

The ALJ's order dated June 16, 2015 is modified in part and affirmed in part. The ALJ's \$2,250 penalty-related attorney fee award is contingent on claimant finally prevailing over all aspects of the medical services denial as described in this order. The remainder of the ALJ's order is affirmed. For services on review, claimant is awarded an assessed fee of \$3,000, payable by SAIF, contingent on claimant finally prevailing over all aspects of the medical services denial as described in this order.

Entered at Salem, Oregon on March 11, 2016

Member Johnson dissenting.

The majority adopts the ALJ's conclusion that SAIF's denial of the disputed medical services was unreasonable, and finds that a contingent penalty and penalty-based attorney fee is due pending resolution of the remaining issues before WCD. Based on the following reasoning, I respectfully dissent.

The ALJ concluded that SAIF did not have a legitimate doubt as to its liability for the disputed medications because it relied on Dr. Samoil's answer to a question about the major contributing cause of claimant's need for treatment (as opposed to whether the disputed medication was for a condition caused in material part by the compensable injury under ORS 656.245(1)(a)). While I agree that SAIF's *question* addressed the incorrect standard for compensability of medical services, the correct focus of the inquiry should be whether Dr. Samoil's *answer* and medical opinion supports a legitimate doubt.

In responding to SAIF's inquiry about whether the work injury remained the major contributing cause of claimant's need for treatment, Dr. Samoil stated that claimant's "need for medication stems from his coronary artery disease which is pre-existent and pre-dating the [work injury]." (Ex. 36-3). Dr. Samoil explained that claimant's use of beta blockers, lipid lowering drugs and blood pressure medication was related to claimant's preexisting coronary artery disease and hypertension. (Ex.36-3). She commented that claimant's use of Plavix would be indicated as a result of the work-related stent placement for 18 months after the procedure, however the purpose of claimant's use of the medication after 2010 was unclear. (Ex. 36-4). The disputed medications were prescribed between June 2011 and December 2012. I would find such an opinion to be a sufficient basis for legitimate doubt as to whether the disputed medications were directed toward conditions caused in material part by the compensable injury, as opposed to claimant's significant preexisting conditions.

Indeed, the Board has found a legitimate doubt under closer facts than presented here. In *Richard F. Tyska*, 63 Van Natta 2293, 2296 (2011), although the medical record indicated the possible work-relatedness of claimant's MRSA infection, we concluded that the record established a legitimate doubt for the carrier's denial because the record did not meet the compensability standard of medical probability. *See also Shannon Dahlquist*, 51 Van Natta 1406, 1407 (1999) (ambiguous medical records sufficient to create a legitimate doubt as to the carrier's liability for the claim). Here, SAIF relied on the opinion of a cardiologist who definitively attributed use of the disputed medications to claimant's preexisting coronary artery disease and hypertension, and questioned the ongoing use of another medication after one and a half years following the compensable stent placement procedure. (Ex. 36). Under such circumstances, I submit that SAIF's denial was based on a legitimate doubt regarding its liability for the medical services. Consequently, I would reverse the ALJ's penalty determination.

Finally, I would note that the majority opinion's award of a contingent penalty in this medical services case raises unresolved issues regarding the findings WCD must make in order to satisfy the contingent element of the award. Because penalties under ORS 656.262(11)(a) are due based on a carrier's unreasonable conduct (*i.e.* denial of medical services), I would conclude that in order for the contingent penalty award to be due, the medical services defenses reserved for WCD's jurisdiction must also be determined to be unreasonable. *See Cayton v. Safelite Glass Corp.*, 232 Or App 454, 462-63 (2009) (penalties are based on each instance of a carrier's unreasonable conduct). In the absence of such a finding,

claimant would not satisfy his burden to show that the medical services denial was unreasonable. *See Noel G. Brown*, 62 Van Natta 2303, 2311 (2010)(the claimant bears the burden to establish entitlement to a penalty award).

Because the majority concludes that a penalty is due despite SAIF's reliance on medical opinion attributing claimant's need for the disputed medical services to his preexisting conditions, I respectfully dissent.