

In the Matter of the Compensation of
BRYAN V. DECHAND, Claimant
WCB Case No. 15-00643, 14-05984
ORDER ON REVIEW

Ransom Gilbertson Martin et al, Claimant Attorneys
Maher & Tolleson LLC, Defense Attorneys

Reviewing Panel: Members Curey and Lanning.

The self-insured employer requests review of Administrative Law Judge (ALJ) Pardington's order that: (1) set aside its denial of an injury claim for a left shoulder condition; and (2) assessed a penalty and attorney fee for its allegedly unreasonable claim processing. In his respondent's brief, claimant seeks an additional attorney fee award under ORS 656.262(11)(a) for the employer's unreasonable denial. On review, the issues are compensability, penalties, and attorney fees. We affirm in part, reverse in part, and modify in part.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact" and summarize as follows.

On May 1, 2013, claimant sustained a prior compensable left shoulder injury while working for the employer. (Ex. 1). The employer accepted a left shoulder strain and left partial tear supraspinatus tendon. (Ex. 24).

In March 2014, claimant was released to work without restrictions. (Ex. 48). He returned to his regular work, which included heavy lifting. (Ex. 54; Tr. 8).

On July 16, 2014, claimant was lifting a heavy fluid-filled pipe overhead, which became unbalanced and "kicked" to his left side, causing his left shoulder to audibly pop, resulting in a burning sensation. (Tr. 10; Ex. 56). Claimant informed his supervisor of the incident on the same day. (Tr. 10).

On August 12, 2014, claimant was evaluated by Dr. Henderson, who recommended an MR arthrogram to determine if he had sustained a significant new shoulder injury. (Ex. 56). He noted that claimant continued to work, but "had difficulty performing the more strenuous activities with his left upper extremity." (Ex. 56-1). Dr. Henderson stated that, based on claimant's history, he "sustained a new injury to his left shoulder, which is separate from his previous injury." (Ex. 56-2).

On September 2, 2014, Dr. Henderson reported that an MR arthrogram showed a near complete full-thickness tear of the supraspinatus tendon. (Ex. 59). He concluded that claimant had sustained a new injury. (*Id.*) Dr. Henderson recommended waiting for one month before considering surgery, and noted that claimant would “continue with his regular work activities, but avoid heavy overhead use of the left upper extremity.” (*Id.*)

On September 8, 2014, Dr. Henderson wrote to the employer explaining that claimant had sustained a new left shoulder injury on July 15, 2014. (Ex. 60).

On November 5, 2014, the employer denied the July 16, 2014 injury claim, explaining that claimant had a claim that was “currently open * * * and appears to be for the same body part/injury, as this newest claim filed for a date of injury of [July 16, 2014].” (Ex. 63). Claimant requested a hearing.

At the hearing, claimant sought a penalty, based on the alleged untimely denial of his claim, and a separate penalty for the issuance of an alleged unreasonable denial. (Tr. 2, 13).

Claimant testified that he told his supervisor about the July 2014 injury incident on the day that it happened. (Tr. 10). He sought treatment for the July 16, 2014 shoulder injury on August 12, 2014. (Ex. 56). The insurer first received notice of treatment for the new injury on September 17, 2014. (Ex. 60).

CONCLUSIONS OF LAW AND OPINION

The ALJ determined that claimant’s July 2014 injury claim was compensable. The ALJ further reasoned that ORS 656.262(6)(a) required the employer to accept or deny the claim within 60 days of claimant’s report of his injury to his supervisor on July 16, 2014. Because the claim was not denied until November 5, 2014, the ALJ awarded a penalty and attorney fee under ORS 656.262(11)(a).

On review, the employer contends that the July 2014 injury claim is not compensable and that its November 5, 2014 denial was not untimely because neither it nor its claim processor had notice of a potentially compensable injury until the insurer received Dr. Henderson’s September 8, 2014 letter. Stated differently, the employer contends that claimant’s report of the July 2014 incident to his supervisor was not sufficient to constitute a “claim” under ORS 656.005(6) until Dr. Henderson’s September 8, 2014 letter provided notice that the injury required medical services.

Claimant contends that in addition to the penalty and attorney fee awards related to the allegedly untimely denial, he should be awarded another fee under ORS 656.262(11)(a) because the November 5, 2014 denial was, itself, unreasonable.

We adopt the ALJ's reasoning regarding the compensability issue.¹ However, as explained below, we award a penalty and attorney fee for an unreasonable denial, but reverse the ALJ's penalty and attorney fee awards for an untimely denial.

Under ORS 656.262(11)(a), if a carrier unreasonably delays acceptance or denial of a claim, the carrier shall be liable for an additional amount up to 25 percent of the amount "then due." A carrier must accept or deny a claim within 60 days after it has notice or knowledge of the claim. ORS 656.262(6)(a). Regardless of whether the carrier has a legitimate reason to doubt its liability for the claimed condition, it is required to accept or deny the condition within 60 days of receipt of the claim. *See* ORS 656.262(6)(a); *Richard D. Wiseman*, 66 Van Natta 1699, 1703 (2014).

ORS 656.005(6) provides that a claim is a "written request for compensation from a subject worker or someone on the worker's behalf, or any compensable injury of which a subject employer has notice or knowledge." "Knowledge" of the injury should include enough facts to lead a reasonable employer to conclude that workers' compensation liability is a possibility and that further investigation is appropriate. *Argonaut Ins. v. Mock*, 95 Or App 1, 5, *rev den*, 308 Or 79 (1989).

In *Praxedis Alvarez-Barrera*, 65 Van Natta 183 (2013), we held that a carrier's acceptance was not untimely, although it was issued nearly four months after the employer had notice of the claimant's work *incident*. 65 Van Natta at 185 (emphasis added). In that case, while the claimant and the employer completed an incident report form at the time of the initial work incident, that form provided that an 801 must be completed if the injury required medical treatment. *Id.* at 183. Then, some three months later, the claimant had another work incident and informed the employer that she was seeking medical treatment. *Id.* At that time, an 801 form was completed, and the carrier accepted the earlier injury claim. *Id.* Under such circumstances we did not consider the carrier's acceptance to be

¹ The employer contends that the ALJ's order neglected to consider Dr. Farris's opinion. However, our review confirms that the ALJ's order considered Dr. Farris's opinion in determining that the July 2014 left shoulder injury was compensable. We adopt the ALJ's reasoning in this regard.

untimely, because we concluded that the earlier work incident report did not constitute a “claim” under ORS 656.005(6) until the employer also had knowledge that the claimant was seeking medical treatment. *Id.* at 185.

Here, we agree with the ALJ’s finding that claimant promptly reported the occurrence of his work incident to his employer. However, claimant’s report of the incident (without a “written request for compensation”) is not sufficient, by itself, to constitute a “claim” under the statutory definition. ORS 656.005(6); *Alvarez-Barrera*, 65 Van Natta at 185.

Our review establishes that August 12, 2014 was the first treatment record to reference the separate and new injury occurring on July 16, 2014. It is unclear when the employer or its claim processor received that treatment record. (Ex. 59). Consequently, the earliest *notice* to the employer (or its claim processor) that claimant had sought medical treatment for his July 2014 injury was a September 8, 2014 letter from Dr. Henderson. (Ex. 60). Based on the date stamp at the bottom of that letter, the claim processor received the letter on September 17, 2014.² (*Id.*) Sixty days from September 17, 2014 was November 16, 2014. The denial issued on November 5, 2014, within this 60-day period. Therefore, it was timely. *See* ORS 656.262(6)(a). Accordingly, no penalty or attorney fee is warranted for an untimely denial.

Claimant also seeks a penalty and attorney fee, on the basis that the November 5, 2014 denial was unreasonable. Based on the following reasoning, we grant claimant’s request.

Under ORS 656.262(11)(a), if a carrier unreasonably refuses to pay compensation, the carrier is liable for penalties on “amounts then due” and penalty-related attorney fees. The standard for determining an unreasonable resistance to the payment of compensation is 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, 110 (1991). “Unreasonableness” and “legitimate doubt” are to be considered in the light of all the evidence available to the insurer. *Brown v. Argonaut Ins.*, 93 Or App 588, 591 (1988).

² Moreover, claimant’s testimony does not establish that he missed work or had disability until November 2014. (Tr. 11).

Here, at the time of the November 2014 denial, the employer's claim processor was in possession of Dr. Henderson's September 8, 2014 letter explaining that claimant had suffered a new left shoulder injury that resulted in a need for medical treatment. (Ex. 60). There was no medical evidence contrary to Dr. Henderson's opinion that claimant had suffered a new injury. Therefore, we find that the employer did not have a legitimate doubt as to its liability. *See, e.g., James S. Hurlocker*, 66 Van Natta 1930, 1937 (2014) (where medical opinions were based on accurate history and supported compensability of the claim, the carrier lacked legitimate doubt of its liability when it denied the claim).

Accordingly, we award claimant a penalty equal to 25 percent of the amounts then due (as of the date of the September 10, 2015 hearing) resulting from the ALJ's compensability decision.³

Claimant's counsel is entitled to a penalty-based attorney fee for services at hearing and on review regarding the employer's unreasonable denial. ORS 656.262(11)(a); *SAIF v. Traner*, 273 Or App 310 (2015); *Stanley T. Castle*, 67 Van Natta 2055, 2057 (2015). That attorney fee shall 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. *See* OAR 438-015-0110(1), (2). Based on our review of the record, and considering these factors (in addition to claimant's counsel's uncontested fee submission), we award \$1,000 as a reasonable penalty-related attorney fee regarding the employer's unreasonable denial.

Claimant's attorney is also entitled to an assessed fee for services on review regarding the compensability issue. ORS 656.382(2). After considering the factors set forth in OAR 438-015-0010(4) and OAR 438-015-0110 and applying them to this case, we find that a reasonable fee for claimant's attorney's services on review concerning the compensability issue is \$2,750, payable by the employer. In reaching this conclusion, we have particularly considered the time devoted to

³ The employer contends that no penalty is warranted because there were "no amounts then due." We need not resolve this question. If there were no "amounts then due" as of September 10, 2015 (as a result of the ALJ's compensability decision), the penalty assessment would be zero. Furthermore, should a dispute arise regarding the computation of the penalty assessment, claimant may request a hearing at that time. Finally, even if it is determined that there were no "amounts then due," an attorney fee award is warranted. *See SAIF v. Traner*, 270 Or App 67, 65 (2015); *Nancy Ochs* 59 Van Natta 1785, 1794 (2007) (a penalty-related attorney fee was warranted where the carrier unreasonably delayed compensation, even though there were no "amounts then due").

the issue (as represented by claimant's respondent's brief and his counsel's fee submission), the complexity of the issue, the value of the interest involved, and the risk that claimant's counsel might go uncompensated.⁴

Finally, 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 the employer. *Gary E. Gettman*, 60 Van Natta 2862 (2008). The procedure for recovering this award, if any, is prescribed in OAR 438-015-0019(3).

ORDER

The ALJ's September 29, 2015 order is reversed in part, modified in part, and affirmed in part. The ALJ's penalty and \$1,000 penalty-related attorney fee awards for an untimely denial are reversed. Concerning the unreasonable denial issue, claimant is awarded a penalty equal to 25 percent of the "amounts then due" resulting from the ALJ's compensability decision (as of the date of the hearing, September 10, 2015), payable by the employer. Claimant's counsel is awarded a \$1,000 penalty-related attorney fee for services at hearing and on review regarding the unreasonable denial issue, payable by the employer. For services on review regarding the compensability issue, claimant's counsel is awarded an assessed fee of \$2,750, payable by the employer. The remainder of the ALJ's order is affirmed.

Entered at Salem, Oregon on May 10, 2016

⁴ Because claimant did not successfully defend the ALJ's finding that the employer's denial was untimely, claimant's counsel is not entitled to an attorney fee for services on review regarding this issue. ORS 656.382(3).