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In the Matter of the Compensation of  
**AMALIA C. GARCIA-CORTES, Claimant**  
WCB Case No. 15-04398  
ORDER ON REVIEW  
Dunn & Roy PC, Claimant Attorneys  
Scott H Terrall & Associates, Defense Attorneys

Reviewing Panel: Members Weddell and Curey.

The self-insured employer requests review of Administrative Law Judge (ALJ) Pardington's order that: (1) found that the employer had *de facto* denied claimant's injury claim for a right shoulder claim; (2) awarded a \$3,000 employer-paid attorney fee under ORS 656.386(1); and (3) awarded an \$1,000 employer-paid attorney fee under ORS 656.262(11)(a) for allegedly unreasonable claim processing.<sup>1</sup> In her respondent's brief, claimant seeks an increased attorney fee award under ORS 656.386(1). On review, the issues are claim processing, penalties, and attorney fees.

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

Claimant compensably injured her right shoulder on July 3, 2015. (Exs. 1, 2, 23).

An 801 form was filed with the employer on July 6, 2015. (Ex. 1). The employer signature line stated "Reported By Internet." (*Id.*) The employer listed the date that it knew of the claim as July 6, 2015. (*Id.*) The "worker portion" of the form was dated but not signed. (*Id.*)

Claimant received treatment for her shoulder from Dr. Yu beginning on August 7, 2015. (Exs. 2).

On August 27, 2015, claimant was evaluated by Dr. Heitsch. (Ex. 16). Dr. Heitsch recommended an MRI for further evaluation of the shoulder. (*Id.*)

In September 2015, a right shoulder MRI was interpreted as showing rotator cuff pathology. (Ex. 20).

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<sup>1</sup> We adopt and affirm the ALJ's determination that a penalty-related attorney fee were warranted based on the employer's failure to timely process her July 6, 2015 injury claim.

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On September 18, 2015, claimant filed a request for hearing, alleging a *de facto* denial. (Hearing File).

On September 24, 2015, Dr. Heitsch wrote a letter responding to a September 14 letter from the employer's claim processor. (Ex. 21Ff-1). He attributed the MRI findings to claimant's July 3, 2015, work injury. (*Id.*)

On October 5, 2015, the employer completed a second 801 form. (Ex. 22). The employer's counsel received the form the same day. Also on the same day, the employer's claim processor accepted a right shoulder sprain. (Ex. 23).

Determining that the claim filed on July 6, 2015, was *de facto* denied, the ALJ awarded an attorney fee under ORS 656.386(1), as well as a penalty-related attorney fee under ORS 656.262(11)(a) for untimely claim processing.

### De Facto Denial

On review, the employer contends that the July 6, 2015, 801 form was not a "claim" under ORS 656.005(6) because it was not signed by claimant and, because she had not sought medical treatment or suffered disability, there was no "written request for compensation." Based on the following reasoning, we disagree.

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."

To begin, we note that the initial 801 form includes the statement that the "Date employer knew of [the] claim" was on July 6, 2015. (Ex. 1). The completion of that portion of the form weighs against the employer's contention that the 801 form did not constitute a "claim."

In any event, we disagree with the employer's contention that the 801 form could not be a request for "compensation" because the employer was not aware of any medical treatment or disability. A written request for compensation need not be additionally supported by evidence of disability/need for treatment in order to constitute a "claim."<sup>2</sup> *See, e.g., Rosenboom*, 43 Van Natta at 955 (the

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<sup>2</sup> Such considerations are relevant to whether a claim should be accepted or denied. However, such matters are not essential components for initiating a claim through a written request for compensation. *See* ORS 656.005(7)(a); ORS 656.266(1).

carrier received notice of the claim when it received claimant's 801 claim form). However, in the absence of a written request for compensation, a claim can consist of the employer's notice of a work-related injury combined with notice of resulting disability or need for medical treatment. *See e.g. Bryan V. Dechand*, 68 Van Natta 703, 706 (2016) (no penalty was due when the employer received notice of a work-related injury, but did not respond for more than 60 days until it received notice of resulting medical treatment); *Praxedis Alvarez-Barrera*, 65 Van Natta 183, 185 (2013) (the employer's knowledge of a work-related injury incident, followed by medical treatment constituted a "claim").

Here, a written claim was filed with the employer. Therefore, the employer was obligated to process the claim in accordance with its statutory responsibility.

The employer further contends that in the light of the form's instruction that "[i]f you do not intend to file a workers' compensation claim with the insurance company, do not sign the signature line," the lack of claimant's signature establishes that she did not intend to file a claim. (Ex. 1). However, further information included on the 801 form contradicts the employer's interpretation.

Specifically, the "employer's portion" of the form is also not signed, and instead includes the printed words "Reported By Internet," followed by a printed name. (*Id.*) Based on the lack of both claimant's and the employer's signatures, and the indication that the form was submitted electronically, the record supports a conclusion that the form was not submitted in a format that would have allowed claimant to sign it. Given that the employer processed the 801 form in a manner that did not allow for a signature, we decline to find that the lack of claimant's signature is evidence that she did not intend to file a claim. Consequently, based on the aforementioned circumstances, we conclude that the 801 form constituted a claim for the injury described therein. Accordingly, claimant's July 6, 2015, claim was *de facto* denied after it had not been accepted or denied within 60 days. *See* ORS 656.262(6)(a); *Jonathan J. Lee*, 63 Van Natta 1913, 1919 (2011).

### Attorney Fee

The employer contends that the ALJ's \$3,000 attorney fee under ORS 656.386(1) was not warranted because the record does not establish that claimant's attorney's hearing request resulted in the acceptance of the claim. Instead, the employer asserts that it accepted the claim on October 5, 2015, after its August 10 receipt of information from Dr. Yu regarding his treatment plan. (Exs. 3, 23). Based on the following reasoning, we conclude that an attorney fee was warranted.

ORS 656.386(1) provides:

“(1)(a) \* \* \* In such cases involving denied claims where the claimant prevails finally in a hearing before an Administrative Law Judge or in a review by the Workers’ Compensation Board, then the Administrative Law Judge or board shall allow a reasonable attorney fee. In such cases involving denied claims where an attorney is instrumental in obtaining rescission of the denial prior to a decision by the Administrative Law Judge, a reasonable attorney fee shall be allowed.”

Here, claimant filed an 801 form initiating her claim on July 6, 2015. (Ex. 1). On September 18, 2015, more than 60 days after the claim, claimant’s counsel filed a hearing request alleging a *de facto* denial. (Hearing File). On October 5, 2015, the employer accepted a right shoulder sprain. (Ex. 23).

The employer contends that its acceptance was in response to information it received from Dr. Yu regarding his treatment plan on August 10, 2015. In other words, the employer suggests that its October 5, 2015 acceptance (which issued nearly two months after its August 10 receipt of Dr. Yu’s report, but only some two weeks following the filing of claimant’s counsel’s September 18 request for hearing alleging a *de facto* denial) was not influenced by claimant’s counsel’s action in filing the hearing request.

Under these particular circumstances, we conclude that claimant’s attorney was instrumental in obtaining the rescission of the employer’s *de facto* denial by the filing of a hearing request. *See, e.g., Peggy L. Segur*, 62 Van Natta 1406, 1407 (2010) (the claimant’s counsel was instrumental in obtaining the “pre-hearing” rescission of a denial by requesting a hearing and preparing for the hearing before the carrier’s rescission). In reaching this conclusion, we distinguish *Hobby Brooks*, 68 Van Natta 923, 927 (2016) for the following reasons.

In *Brooks*, we determined that a claimant’s counsel was not instrumental in obtaining a “pre-hearing” rescission of a carrier’s denial when the hearing request was submitted by claimant *pro se*, before his representation by counsel, and the carrier rescinded its claim denial following its receipt of a medical report, which supported the compensability of the claim and had been solicited by the carrier before the claimant’s counsel’s representation. Here, as in *Brooks*, the employer received a physician’s report before accepting the claim. However, unlike in

*Brooks*, the employer had received the report some two months before its acceptance. Moreover, that acceptance issued just two weeks after claimant's counsel filed claimant's hearing request alleging a *de facto* denial, and seeking penalties and attorney fees.<sup>3</sup>

Under these particular circumstances, in contrast to *Brooks*, this record supports a conclusion that claimant's counsel was instrumental in obtaining a "pre-hearing" rescission of the *de facto* denial. On this record, we conclude that the request for hearing filed by claimant's attorney brought the employer's attention to the previously submitted 801 form and the *de facto* denied status of the claim. Consequently, an attorney fee award under ORS 656.386(1) was warranted in this specific situation.<sup>4</sup>

Claimant's attorney is entitled to an assessed fee for services on review. ORS 656.382(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 is \$4,000, payable by the employer. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by claimant's respondent's brief and her counsel's uncontested submission), the complexity of the issues, the values of the interest involved, and the risk of going uncompensated.

### ORDER

The ALJ's order dated March 3, 2016 is affirmed. For services on review, claimant's attorney is awarded an assessed fee of \$4,000, to be paid by the employer.

Entered at Salem, Oregon and on October 3, 2016

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<sup>3</sup> We also note that the employer completed a second 801 form on October 5, 2015. (Ex. 22). That form was received by the employer's counsel on the same day. (*Id.*) Also on the same day, the employer accepted the claim for a right shoulder strain. (Ex. 23).

<sup>4</sup> We adopt the ALJ's determination of a reasonable attorney fee.