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In the Matter of the Compensation of  
**RYAN MARCHAND, Claimant**  
WCB Case No. 15-04823  
ORDER ON REVIEW  
Edward J Hill, Claimant Attorneys  
Gilroy Law Firm, Defense Attorneys

Reviewing Panel: Members Lanning and Curey.

Claimant requests review of those portions of Administrative Law Judge (ALJ) Bethlahmy's order that: (1) declined to award penalties and attorney fees for the self-insured employer's allegedly unreasonable claim processing concerning a medical service claim for a CT scan; (2) found that the employer did not deny claimant's medical service claim for physical therapy; (3) declined to assess penalties and attorney fees for allegedly unreasonable claim processing of claimant's physical therapy claim; and (4) declined to award penalties and attorney fees for an alleged discovery violation. The employer cross-requests review of those portions of the ALJ's order that: (1) found that the employer rescinded a denial of claimant's medical services claim for the CT scan before the scheduled hearing; and (2) awarded a \$3,000 employer-paid attorney fee. On review, the issues are claim processing, discovery, penalties, and attorney fees. We affirm in part and reverse in part.

#### FINDINGS OF FACT

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

Claimant was compensably injured on November 7, 2014. (Ex. 1). On January 5, 2015, the employer accepted a left rotator cuff tear, inferior labral tear, biceps instability, and tendinopathy. (Ex. 8).

Following a December 2014 left shoulder surgical procedure, claimant eventually began treatment with Ms. Bowden, a nurse practitioner. (Exs. 7, 13).

In July 2015, claimant continued to have "post-surgery" shoulder symptoms, and Ms. Bowden reported that he required additional physical therapy, as well as a cervical MRI, for further evaluation. (Ex. 16A). Ms. Bowden later replaced her MRI recommendation with a CT scan recommendation. (Ex. 18-3).

On July 2, 2015, following a medical examination requested by the employer, Dr. Staver opined that claimant was not yet medically stationary, but that physical therapy should be limited to two weekly appointments for four additional weeks. (Ex. 15-2).

On July 22, 2015, Ms. Bowden disagreed with Dr. Staver's recommendation to limit physical therapy to four weeks, explaining that such a limitation might not allow adequate therapy. (Ex. 16A).

In September 2015, claimant requested review from the Workers' Compensation Division's (WCD's) Medical Resolution Team (MRT) regarding the employer's non-authorization of a cervical CT scan and further physical therapy.

On September 23, 2015, the employer's adjuster wrote to the diagnostic imaging facility, stating that "[a]t this time, we do not have a claim for a cervical condition. As such, we are **NOT** approving the diagnostics." (Ex. 19) (emphasis in original). Later, claimant submitted the employer's letter and additional argument concerning the disputed medical services to MRT. (Ex. 19a). The employer completed a "Specification of Disputed Medical Issues" form at the request of MRT, indicating that the requested physical therapy and cervical CT scan were disapproved because "the service[s] [are] not causally related to the accepted condition." (Ex. 19C).

Claimant treated with Dr. Puziss on September 25 and October 5, 2015. (Exs. 19B, 19E).

On October 13, 2015, MRT transferred the dispute to the Hearings Division for a determination of whether a sufficient causal relationship existed between the disputed medical services and the accepted claim. (Ex. 19G).

Dr. Puziss treated claimant again on October 26 and December 1, 2015. (Exs. 19H, 19I).

### CONCLUSIONS OF LAW AND OPINION

At the hearing, the employer contended that it had not denied the medical services, but had simply declined to preauthorize them, noting that the corresponding bills for the disputed medical services had been received and timely paid by the employer. The ALJ concluded that the employer's letter stating that it

would not authorize the CT scan was a denial, and its subsequent payment for that medical service was a rescission of its denial. The ALJ determined that claimant's counsel was instrumental in obtaining the rescission based on his request for WCD review and arguments submitted to MRT, and awarded a \$3,000 attorney fee. Concerning the penalty issue, the ALJ concluded that the denial was not unreasonable because the CT scan was recommended to assess claimant's preexisting cervical spine condition.

Turning to the physical therapy dispute, the ALJ concluded that there was no written request for preauthorization of the therapy. Consequently, the ALJ determined that there was no denial of those services.

Finally, the ALJ did not find a discovery violation because the record did not establish when the employer's claim processor received Dr. Puziss's chart notes.

On review, claimant contends that: (1) the employer denied his physical therapy claim; (2) both of the employer's denials were unreasonable; and (3) the employer did not provide discovery of Dr. Puziss's chart notes. In response, the employer asserts that: (1) it did not deny the compensability of the disputed medical services; and (2) the requested penalties and attorney fees for unreasonable claim processing and an alleged discovery violation are not warranted.

#### Medical Services - Cervical CT Scan

We adopt and affirm the ALJ's conclusions that: (1) the employer denied, and, before the hearing, rescinded its denial of claimant's medical services claim for a cervical CT scan; and (2) a penalty and attorney fee were not justified for an allegedly unreasonable denial of that claim. However, we supplement the ALJ's reasoning as follows.

A claim is denied when a carrier refuses to pay for requested medical services on the ground that the condition for which compensation is claimed is not compensable or otherwise does not give rise to an entitlement to any compensation. *SAIF v. Bales*, 274 Or App 700, 704-05 (2015). Such a denial occurs when a carrier disputes the compensability of a medical service in its response to MRT's "Specification of Disputed Issues" form. *See Audrey Castillo*, 62 Van Natta 2058, 2063 (2010). A carrier's payment of a medical service after such a denial constitutes a rescission of the denial. *Bales*, 274 Or App at 709.

Here, in its response to MRT's "Specification of Disputed Medical Issues" form, the employer indicated that it disapproved the medical service because it was not causally related to the accepted condition. (Ex. 19C). In asserting that the medical service was not causally related to the accepted condition, the employer denied the compensability of claimant's cervical CT scan. *See Castillo*, 62 Van Natta at 2063. When the employer then paid for the CT scan, it rescinded that denial. *See Bales*, 274 Or App at 709. Accordingly, the ALJ's attorney fee award under ORS 656.386(1) was appropriate.<sup>1</sup>

### Medical Services - Physical Therapy

Claimant contends that the employer denied the requested physical therapy. Based on the following reasoning, we agree.

In submitting its response to the abovementioned "Specification of Disputed Medical Issues" form to WCD, the employer included claimant's requested physical therapy within the heading "Subject of Dispute." Furthermore, the employer indicated that it disapproved of the medical service because it was not causally related to the accepted condition. (Ex. 19C).

Under such circumstances, we conclude that the proposed medical service (the physical therapy) was denied. *See Castillo*, 62 Van Natta at 2063. Furthermore, the record establishes that the denial was later rescinded, and at the hearing, the employer abandoned its position that physical therapy was

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<sup>1</sup> ORS 656.386(1)(a) provides in part:

"(1)(a) \* \* \* 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."

Claimant's counsel initiated the request for WCD review and submitted argument regarding the disputed CT scan before the employer ultimately rescinded the denial by reimbursing the bills for the disputed medical service. (Exs. 19a, 21). Additionally, the record does not include any other document or action that preceded the employer's payment of the CT scan bill that would rebut the proposition that claimant's attorney was instrumental in prompting the "pre-hearing" rescission of the employer's medical services denial. *See Amalia Garcia-Cortes*, 68 Van Natta 1585, 1588 (2016) (record supported the claimant's contention that his counsel was instrumental in obtaining a "pre-hearing rescission" of a denial). Based on such circumstances, we conclude that claimant's counsel was instrumental in obtaining the rescission of the employer's denial and is entitled to an assessed attorney fee for obtaining that rescission. *See, e.g., Peggy L. Segur*, 62 Van Natta 1406, 1407 (2010) (the claimant's counsel was instrumental by requesting a hearing and preparing for the hearing before the carrier's rescission of its denial).

not compensable, and instead asserted that there was “nothing denied.” (Tr. 11). *See Bales*, 274 Or App at 708-09; *Lorna D. Huston*, 66 Van Natta 802, 804 (2014) (awarding attorney fee when carrier rescinded its denial during closing argument).

Finally, claimant’s counsel initiated the request for WCD review and submitted argument regarding the disputed physical therapy services before the employer ultimately rescinded its denial of the medical services before the hearing by reimbursing the bills for the disputed services. (Exs. 19a, 21). Accordingly, we conclude that claimant’s counsel was instrumental in obtaining the rescission and is entitled to an assessed attorney fee for obtaining rescission of the employer’s denial. ORS 656.386(1)(a); *Amalia Garcia-Cortes*, 68 Van Natta 1585, 1588 (October 3, 2016); *Peggy L. Segur*, 62 Van Natta 1406, 1407 (2010).

Claimant’s counsel is entitled to an attorney fee for his services regarding both the denied CT scan and the physical therapy services. ORS 656.382(3); ORS 656.386(1)(a). 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 concerning the aforementioned issues is \$4,000, payable by the employer. In reaching this conclusion, we have particularly considered the time devoted to the issues, the complexity of the issues, the value of the interests involved, and the risk of going uncompensated.

Claimant also seeks a penalty and penalty-related attorney fee regarding the employer’s denial of his medical services claim for physical therapy services. Based on the following reasoning, we grant claimant’s request.

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, WCD’s September 28, 2015 “Specification of Disputed Medical Issues” form stated that the disputed physical therapy was the therapy proposed by Ms. Bowden. (Ex. 19C). The employer contended that such medical services were not causally related to claimant’s accepted condition. (*Id.*)

However, on July 2, 2015, prior to the employer's specification of issues, Dr. Staver had opined that physical therapy should be limited to twice weekly for four additional weeks. (Ex. 15-2). Ms. Bowden disagreed with Dr. Staver's recommendation to limit physical therapy to four weeks, reasoning that such a set limitation might not be adequate. (Ex. 16A).

As explained above, the employer's response to the specification of issues form denied claimant's request for physical therapy services. *See Castillo*, 62 Van Natta at 2063. Based on the following reasoning, we conclude that the employer's denial was unreasonable.

ORS 656.245(1)(a) provides, "[f]or every compensable injury, the insurer or the self-insured employer shall cause to be provided medical services for conditions caused in material part by the injury for such period as the nature of the injury or the process of the recovery requires \* \* \*."

There is a sufficient causal relationship if the disputed medical services are for a condition caused in material part by the compensable injury. The phrase, "in material part," refers to a "fact of consequence." *Mize v. Comcast Corp.- AT & T Broadband*, 208 Or App 563, 569-71 (2006). The "compensable injury" is not limited to the accepted condition, but is defined by the work-related injury incident. *SAIF v. Carlos-Macias*, 262 Or App 629, 637 (2014); *see also Brown v. SAIF*, 262 Or App 640, 652 (2014) (the "compensable injury" is the "work-related injury incident"); *Roberta S. Curley-Richmond*, 66 Van Natta 1670, 1670 (2014) (medical services under ORS 656.245(1) must be related to the work-related injury incident, rather than to an accepted condition).

Here, both Dr. Staver and Ms. Bowden recommended physical therapy for claimant's compensable shoulder injury, supporting a causal relationship between the compensable injury and the disputed physical therapy. (Exs. 15-2, 16A). The employer's response to the "Specification of Disputed Medical Issues" form was an unqualified denial of physical therapy, asserting that there was no causal relationship between the physical therapy and claimant's compensable shoulder injury. Because that contention is not supported by any medical opinion, we conclude that the employer's denial was not based on a legitimate doubt.

However, the record does not support a conclusion that there were "amounts then due" at the time of the employer's rescission of its physical therapy denial. Thus, a penalty is not warranted. *See Juanita Murillo*, 62 Van Natta 1746, 1752 (2010). Nevertheless, a penalty-related attorney fee award is justified. ORS

656.262(11)(a). *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, even though there were no “amounts then due”).

An attorney fee award under ORS 656.262(11)(a) for an unreasonable denial must 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. ORS 656.262(11)(a); OAR 438-015-0110(1), (2). After considering the benefit to claimant and the factors set forth in OAR 438-015-0010(4), particularly the result achieved and the time devoted to the unreasonable denial issue (as represented by the record, claimant’s appellant’s brief, and her counsel’s uncontested submission), we find that a reasonable attorney fee regarding the employer’s unreasonable denial, that is proportionate to the benefit to claimant, is \$1,000, payable by the employer.

### Discovery

Relying on OAR 438-007-0015, claimant contends that the employer’s claim processing agent improperly withheld documents pertaining to the claim. For the following reasons, the record does not support such a conclusion.

A carrier must disclose documents pertaining to a claim within 15 days of the mailing or delivery of a written demand, or of a request for hearing. OAR 438-007-0015(2). Documents acquired after the initial exchange must be provided within seven days after the disclosing party’s receipt of the documents. OAR 438-007-0015(4). Failure to comply with discovery responsibilities may result in the imposition of penalties and attorney fees. OAR 438-007-0015(8); *Micah Blotter*, 65 Van Natta 1578, 1580 (2013).

Here, claimant asserts that the employer withheld chart notes from Dr. Puziss for dates of service between September and December 2015. (Exs. 19B, 19E, 19H, 19I). Claimant received the chart notes directly from Dr. Puziss on or about December 21, 2015. (Ex. 21A). As of the date of hearing (January 11, 2016), the employer had not provided claimant with Dr. Puziss’s records.

This record does not establish when Dr. Puziss’s chart notes were either sent to, or received by, the employer (or its claim processing agent), if at all. While the chart notes document the day on which they were written, that is not sufficient to establish the date that they were received by the employer. *See Madewell v.*

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*Salvation Army*, 49 Or App 713, 716 (1980) (there is no presumption that a letter is mailed on the day that it is written); *Bonnie L. Garber*, 61 Van Natta 2305, 2306 (2009). Under such circumstances, the record does not establish the existence of a discovery violation. See *Brett E. Hawtin*, 55 Van Natta 3677, 3686 (2003) (claimant has the burden to establish that a discovery violation has occurred, which includes proving when the applicable disclosure period for discovery commenced).

In reaching this conclusion, we decline to infer that the employer's reimbursement of Dr. Puziss's treatment establishes that it received his chart notes. Instead, the employer's payment only establishes that it received his bill for medical services. In the absence of documentary or testimonial evidence demonstrating the employer's receipt of Dr. Puziss's chart notes, this particular record does not establish a discovery violation pursuant to OAR 438-007-0015.

#### ORDER

The ALJ's order dated March 14, 2016 is reversed in part and affirmed in part. For services regarding the denied CT scan and physical therapy services, claimant's counsel is awarded \$4,000, payable by the employer. For services at hearing and on review regarding the unreasonable therapy denial issue, claimant's counsel is awarded a penalty-related attorney fee in the amount of \$1,000, payable by the employer. The remainder of the ALJ's order is affirmed.

Entered at Salem, Oregon on October 21, 2016