
In the Matter of the Compensation of
JAMA A. JARRELL, Claimant
WCB Case No. 01-05137, 01-00675
ORDER ON REVIEW
Kryger Et Al, Claimant Attorneys
Johnson Nyburg & Andersen, Defense Attorneys
Vavrosky MacColl Olson Et Al, Defense Attorneys

Reviewing Panel: Members Langer, Bock, and Phillips Polich. Member Langer concurs in part and dissents in part. Member Phillips Polich concurs in part and dissents in part.

Liberty Northwest Insurance Corporation requests review of those portions of Administrative Law Judge (ALJ) Spangler's order that: (1) set aside its denial of claimant's bilateral wrist conditions; (2) upheld Gallagher Bassett Insurance Service's denial of claimant's occupational disease/new injury claim for the same condition; and (3) assessed a penalty for Liberty's allegedly unreasonable compensability denial. On review, the issues are compensability, responsibility, and penalties. We affirm in part and reverse in part.

FINDINGS OF FACT

We adopt the ALJ's Findings of Fact, with the exception of the third Ultimate Finding of Fact.

CONCLUSIONS OF LAW AND OPINION

Compensability/Responsibility

We adopt and affirm the ALJ's order on these issues.

Penalty

The ALJ assessed a penalty for Liberty's allegedly unreasonable compensability denial. For the following reasons, we reverse the ALJ's penalty assessment.

Under ORS 656.262(11)(a), if an insurer or self-insured employer unreasonably delays or unreasonably refuses to pay compensation, the insurer or self-insured employer shall be liable for an additional amount up to 25 percent

of the amount then due. 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. *International Paper Co. v. Huntley*, 106 Or App 107 (1991). If so, the refusal to pay is not unreasonable. "Unreasonableness" and "legitimate doubt" are to be considered in the light of all the evidence available to the insurer. *Brown v. Argonaut Insurance*, 93 Or App 588, 591 (1988).

Here, Liberty originally accepted claimant's claim for bilateral tendinitis in 1991. (Ex. 12A). On July 5, 2001, after claimant had changed employers, Liberty issued a denial of responsibility and compensability. (Ex. 58). Liberty's denial specifically denied a "bilateral carpal tunnel syndrome" condition. (*Id.*)

At least as of the date of Liberty's July 5, 2001 denial, the medical evidence had failed to objectively verify a diagnosis of bilateral carpal tunnel syndrome (CTS). Nerve conduction studies were repeatedly "normal." (*See, e.g.*, Ex. 55). In addition, at the time of its denial, Liberty reasonably relied on the March 31, 2001 insurer-arranged medical examination (IME) report of Drs. Coletti and Eckman, who found no objective findings of any condition and could not make a diagnosis of claimant's subjective complaints. (Ex. 51-8). Finally, the IME report of Drs. Radecki and Sacamano on April 26, 2001 also stated that claimant had no documented "objective abnormalities." (Ex. 53-7). These physicians felt that it was "obvious" that "physical factors" were not causing claimant's "plethora of complaints." (Ex. 53-9).

Based on this medical evidence, we find that Liberty had a legitimate doubt as to its liability for claimant's bilateral CTS condition. It follows that Liberty's denial was not unreasonable. Accordingly, we reverse the ALJ's penalty assessment.

Claimant's attorney is entitled to an assessed fee for services on review. 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 is \$1,500, payable by Liberty. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by claimant's respondent's brief), the complexity of the issues, and the value of the interest involved.¹

¹ Claimant is not entitled to an assessed fee for services regarding the penalty issue.

ORDER

The ALJ's order dated October 30, 2001 is affirmed in part and reversed in part. That portion of the ALJ's order that awarded a penalty is reversed. The order is otherwise affirmed. For services on review, claimant's attorney is awarded \$1,500, payable by Liberty.

Entered at Salem, Oregon on September 11, 2002

Board Member Langer concurring in part and dissenting in part.

Although I agree with the majority's decision to reverse the ALJ's order on the penalty issue, I disagree with the ALJ's evaluation of the medical evidence and would have upheld both carriers' denials of compensability.

To begin, I note that Liberty accepted only bilateral tendinitis. (Ex. 12A). The ALJ implicitly found that Liberty also accepted a bilateral carpal tunnel syndrome (CTS) condition because that condition had also been diagnosed at the time of its acceptance. (*O&O* at 6). However, we generally will not look behind the express language of a carrier's acceptance. *See Jerry W. Gabbard*, 54 Van Natta 1022 (July 25, 2002) (where there has been a written acceptance, the scope of acceptance encompasses only those conditions specifically or officially accepted in writing); *Johnson v. Spectra Physics*, 303 Or 49, 56 (1987); *Quinna J. Nolan*, 53 Van Natta 226, 228 (2001). In my view, there is no basis to find that Liberty accepted a CTS condition back in 1991.

In addition, I would find that claimant did not meet her burden of establishing the compensability of her condition(s). ORS 656.266. The ALJ relied on the opinions of (claimant's treating physicians) Drs. Barish and Warren. These doctors never explained the inconsistency of their later opinions with their concurrence with Dr. Porter's IME, which had concluded that there was no convincing evidence claimant ever suffered from either tendinitis or CTS. (Exs. 28, 29, 30). I would find the opinions of Drs. Barish and Warren unpersuasive.

In fact, all of the physicians in the record who have diagnosed CTS have done so without objective verification. Dr. Gordin asserted that claimant's CTS condition could not be confirmed due to her "needle phobia." However, in a letter to counsel for claimant, Dr. Gordin actually confirmed that claimant *had*

undergone an injection on the right. (Ex. 61). We never learn the results of that study, and Dr. Gordin notably did not cite the study as confirming the presence of CTS.

I would rely on the opinions of the various IME examiners, which have been consistent in their findings of no diagnosable condition, and which did not relate claimant's condition to either employment exposure. (Exs. 28, 51, 53).

I would uphold both carriers' denials. Accordingly, I respectfully dissent in part.

Board Member Phillips Polich concurring in part and dissenting in part.

I agree with the majority's decision to uphold the ALJ's compensability and responsibility determinations. I would have affirmed the ALJ's penalty assessment as well, and I therefore write separately.

I agree with the ALJ that a penalty is appropriate here. Liberty accepted a bilateral tendinitis condition in 1991. (Ex. 12A). Although its July 5, 2001 denial referenced a bilateral CTS condition, as the ALJ correctly observed, Liberty did not limit its defense of the claim to the CTS condition, but instead denied claimant's entire current bilateral wrist condition. The medical evidence in the record has consistently linked the two diagnoses (CTS and tendinitis). Especially given its earlier acceptance of the tendinitis condition, I do not believe Liberty's denial was reasonable.

Finally, I believe that the majority on the penalty issue has reached a conclusion inconsistent with our decision to find this claim compensable and the responsibility of Liberty. Specifically, if the Board agrees with the ALJ that "claimant is currently experiencing the same condition, with reonset of symptoms, that she was experiencing in 1990," then we should also find that Liberty's denial (of essentially the same condition that it accepted in 1990) was unreasonable and yields entitlement to a penalty.

For these reasons, I respectfully dissent in part.