
In the Matter of the Compensation of
PENNY I. COOPER, Claimant
WCB Case No. 11-01305
ORDER ON REVIEW
Philip H Garrow, Claimant Attorneys
Scott H Terrall & Associates, Defense Attorneys

Reviewing Panel: Members Lowell and Biehl.

The self-insured employer requests review of Administrative Law Judge (ALJ) Mills's order that: (1) did not reduce claimant's temporary disability award, as granted by an Order on Reconsideration; (2) affirmed an Order on Reconsideration that awarded three percent permanent impairment for claimant's left ankle injury; and (3) awarded a \$3,500 attorney fee under ORS 656.382(2). On review, the issues are temporary disability, extent of permanent disability (impairment) and attorney fees. We modify in part and affirm in part.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact."

CONCLUSIONS OF LAW AND OPINION

Temporary Disability

The October 27, 2010 Notice of Closure awarded temporary disability, including temporary partial disability (TPD) for the period from July 1, 2008 through August 8, 2008. (Ex. 96-1). The February 14, 2011 Order on Reconsideration, however, modified that period of temporary disability to July 1, 2008 to August 21, 2008. (Ex. 11-3)

On review, the employer contends that the August 8, 2008 ending date for the temporary disability award, as granted by the Notice of Closure, was correct.¹ We agree.

¹ Although the ALJ's order did not address this temporary disability issue, it is undisputed that the employer raised this issue at the hearing level.

Dr. Digiulio, attending physician, released claimant to her regular work on August 8, 2008. (Ex. 18). Claimant does not dispute, and we find, that her eligibility for temporary disability ended on that date. *See Debbie J. Brawand*, 56 Van Natta 1319, 1321 (2004) (terminating TPD on the claimant's release to regular work). Accordingly, we modify claimant's temporary disability award.

Permanent Disability

The ALJ affirmed the reconsideration order's award of three percent permanent impairment, finding that the employer did not satisfy its burden of proving error in the reconsideration proceedings. In doing so, the ALJ relied on the impairment findings of the medical arbiter, Dr. Ballard.

On review, the employer contends that the ALJ's decision was incorrect in light of its denial of claimant's current left ankle condition. Specifically, it argues that the medical arbiter incorrectly expressed an opinion on the cause of claimant's lost range of motion in light of its current condition denial.

Yet, the prohibition against the consideration of denied conditions during the reconsideration proceeding pertains to combined conditions denied pursuant to ORS 656.262(7)(b). OAR 436-035-0014(1)(c). Here, the employer's denial pertained to a "current condition." Consequently, there is no prohibition against evaluating claimant's permanent disability related to her accepted left ankle condition at claim closure.²

Turning to the present case, we agree with the ALJ's reasoning regarding the medical arbiter's opinion. Consequently, we affirm the ALJ's permanent disability award.

Attorney Fees

We adopt the ALJ's award of \$3,500 for defending against the employer's request for hearing of the Order on Reconsideration regarding the permanent disability issue. ORS 656.382(2); OAR 438-015-0010(4).

² We further note that the issuance of "current condition" denials is permissible only under limited circumstances. *See Barbara J. Ferguson*, 63 Van Natta 2253 (2011). Moreover, we note that the employer's denial has been set aside by another ALJ's order.

Finally, 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 regarding the permanent disability issue is \$2,500, payable by the employer. In reaching this conclusion, we have particularly considered the time devoted to the issue (as represented by claimant's respondent's brief), the complexity of the issue, and the value of the interest involved.

ORDER

The ALJ's order dated July 13, 2011 is modified in part and affirmed in part. The Order on Reconsideration's award of temporary disability is modified to award TPD from July 1, 2008 to August 8, 2008. The remainder of the ALJ's order is affirmed. For services on review, claimant's counsel is awarded an assessed fee of \$2,500, to be paid by the employer.

Entered at Salem, Oregon on February 28, 2012