In the Matter of the Compensation
MICHAEL DEROEST, Claimant
WCB Case No. 12-01220
ORDER ON REVIEW
Doblie & Associates, Claimant Attorneys
Sather Byerly & Holloway, Defense Attorneys

Reviewing Panel: Members Weddell, Lowell, and Somers. Member Weddell dissents.

The self-insured employer requests review of that portion of Administrative Law Judge (ALJ) Mills's order that set aside its *de facto* denial of claimant's aggravation claim for a left cuboid fracture. Claimant cross-requests review of that portion of the ALJ's order that declined to award penalties and attorney fees for an alleged discovery violation concerning an employer-arranged medical examiner's addendum report. On review, the issues are aggravation, penalties, and attorney fees. We reverse in part and affirm in part.

FINDINGS OF FACT

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

CONCLUSIONS OF LAW AND OPINION

Claimant sustained a compensable left foot injury in May 2007, which the employer accepted as a left cuboid fracture. The claim was closed in August 2007 by a Notice of Closure that did not award any permanent disability.

In early 2011, claimant sought treatment from Dr. Rushton for left foot pain. On March 2, 2011, Dr. Rushton surgically removed a bone fragment in the cuboid area. The employer paid for the surgery. (Ex. 29-3).

Claimant subsequently filed an aggravation claim. No temporary disability was authorized by Dr. Rushton, even though he signed the physician's portion of the form 827 reporting an aggravation. (Exs. 15, 20-2). The employer neither accepted nor denied the claim. Claimant requested a hearing on a *de facto* denial, also seeking penalties and attorney fees.

The ALJ set aside the denial, finding that claimant had established a compensable aggravation claim based on the medical opinion of an examining physician, Dr. Courogen. The ALJ further assessed penalties and attorney fees for the employer's failure to accept or deny the aggravation claim. The ALJ declined, however, to award penalties and attorney fees for an alleged discovery violation involving an addendum report from Dr. Courogen.

On review, the employer contends that the medical evidence is insufficient to establish an actual worsening of the compensable injury. For the following reasons, we agree.

To establish a compensable aggravation claim, claimant must prove an "actual worsening" of his compensable condition since the last award or arrangement of compensation. ORS 656.273(1); *Evelyn R. Crossman*, 56 Van Natta 1076, 1079 (2004). An aggravation claim must be for a compensable condition that has been accepted and processed in accordance with ORS 656.262 and ORS 656.268. *Crossman*, 56 Van Natta at 1078-79.

An "actual worsening" may be established either by direct proof of a pathological worsening or through inference of such a worsening based on increased symptoms. In the latter instance, a physician must make the inference. *SAIF v. Walker*, 330 Or 102, 118-19 (2000); *SAIF v. January*, 166 Or App 620, 624 (2000); *Anna L. Johnson*, 57 Van Natta 1396 (2005). In either instance, the finding of an "actual worsening" must be established by medical evidence supported by objective findings. ORS 656.273(1); *James E. Penland*, 58 Van Natta 138, 139 (2006).

Determining whether claimant's compensable injury actually worsened is a complex medical question that must be resolved by expert medical opinion. *Barnett v. SAIF*, 122 Or App 279, 282 (1993); *Randy M. Manning*, 59 Van Natta 694, 695 (2007). We give more weight to those medical opinions that are well reasoned and based on complete information. *Somers v. SAIF*, 77 Or App 259, 263 (1986); *Danny L. Skelton*, 58 Van Natta 2083 (2006).

Here, the ALJ found that Dr. Courogen's opinion established a compensable aggravation claim consisting of an actual/pathological worsening of his accepted left foot cuboid fracture. Having reviewed Dr. Courogen's reports and deposition testimony, we disagree with the ALJ's conclusion.

Dr. Courogen addressed the "worsening" issue in his May 29, 2012 report. He explicitly stated that there was *no* objective evidence of a pathologic worsening in the accepted left foot cuboid fracture. (Ex. 20A-9). It is well settled that an "actual worsening" must be of the accepted condition. *See Crossman*, 56 Van Natta at 1078-79 (an aggravation claim must be for a compensable condition that has been accepted and processed in accordance with ORS 656.262 and ORS 656.268). Given Dr. Courogen's express statement regarding the absence of any worsening of the accepted condition, we conclude that claimant has not established a compensable aggravation claim, regardless of whether there is a causal relationship between the current accepted condition and the compensable injury.[1]

In conclusion, claimant has not established an "actual worsening" of the accepted condition.[2] *See* ORS 656.273(1).[3] Accordingly, we reverse.

ORDER

The ALJ's order dated December 26, 2012 is reversed in part and affirmed in part. The employer's *de facto* aggravation denial is reinstated and upheld. The ALJ's $7,000 assessed attorney fee award is also reversed. The remainder of the ALJ's order is affirmed.

Entered at Salem, Oregon on December 26, 2013

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[1] Dr. Rushton, claimant's treating podiatrist, signed the form 827 that was submitted as an aggravation claim. (Ex. 15). However, he subsequently indicated that he could not provide an opinion on whether claimant's compensable injury had pathologically worsened. (Ex. 20-1). Therefore, Dr. Rushton's opinion does not establish a compensable aggravation claim.

[2] In response to the dissent, we take no position regarding whether claimant should have requested acceptance of a bone fragment, instead of filing an aggravation claim. However, if claimant asserts an aggravation claim, there must be medical evidence establishing an actual worsening of the accepted condition. Here, two doctors (Courogen and Rushton) were deposed, but neither was asked whether claimant's accepted condition had worsened. The focus of the litigation appeared to concern medical causation, even though the initial claim was accepted, medical bills were paid and no unpaid temporary disability apparently exists.

[3] With regard to the penalty and attorney fee issues for a discovery violation, there would be no entitlement to penalties and attorney fees under ORS 656.262(11)(a) because there would be no compensation flowing to claimant on the aggravation claim. Therefore, there would be no unreasonable refusal to pay compensation under the aforementioned statute supporting an award of penalties and attorney fees.

Member Weddell dissenting.

The majority finds that claimant did not establish a compensable aggravation claim, concluding that Dr. Courogen's opinion did not establish an "actual worsening" of the accepted left cuboid fracture. Because I would affirm the ALJ's decision setting aside the employer's aggravation denial, I respectfully dissent.

Claimant sustained a compensable left foot injury in May 2007, when a very heavy "jig" fell on his foot. A CT scan of his left foot was initially interpreted as showing a fractured left cuboid. (Ex. 3-1). The employer accepted the claim for "fractured cuboid left foot." (Ex. 5).

Dr. Weeks, claimant's initial attending physician, declared claimant's foot condition medically stationary without impairment in August 2007. (Ex. 7). Previously observed swelling was no longer mentioned in Dr. Weeks's August 2007 report.

In February 2011, claimant sought treatment from a podiatrist, Dr. Rushton, complaining that his fractured cuboid had "healed wrong." Claimant also reported that he could feel a "bump" in his foot. Swelling and bruising were noted to be present. Dr. Rushton ordered x-rays that apparently showed a bone fragment at the left cuboid. Dr. Rushton excised the bone fragment. (Exs. 11, 12).

In July 2011, claimant sought treatment from Dr. Rushton for symptoms consistent with a stress facture. (Ex. 16). Claimant signed a form 827, reporting an aggravation of the original injury. Dr. Rushton signed his portion of the form, noting that the first date of treatment in February 20011 and last day in March 2011. (Ex. 15).

The employer did not accept or deny the aggravation claim. Claimant requested a hearing.

The ALJ set aside the *de facto* denial, finding that the opinion of Dr. Courogen, who examined claimant on behalf the employer, was sufficient to establish a pathological worsening of the compensable condition. Unlike the majority, I would affirm the ALJ's determination.

I acknowledge that neither Dr. Rushton nor Dr. Courogen explicitly stated that the accepted cuboid fracture worsened. However, as I interpret this record, I would find that the accepted cuboid fracture and the bone fragment that Dr. Rushton excised are so closely related that they should be considered to be the same condition.

The record indicates that a bone fragment was present at the time of claimant's May 2007 injury. X-rays taken that day showed a small bone fragment between the third cuneiform and the cuboid. (Ex. 21A-38). Over three years later the bone fragment became a problem evidenced by increased pain and swelling. At that time, the bone fragment was removed. Dr. Rushton testified that the bone fragment was connected to the cuboid bone. (Ex. 21A-22).

Given the close relationship between the fracture and the bone fragment, I would find that the accepted cuboid facture included the bone fragment. Clearly the surgical procedure, if not the swelling and increased discomfort, constituted an actual worsening of the compensable injury.

The implication of the majority's decision is that claimant should have requested acceptance of the bone fragment. However, claimant chose to assert an aggravation claim. The fact that there could have been a basis for an expansion request does not foreclose the possibility of a compensable aggravation. Under the circumstances of this claim, I do not believe that it is reasonable to split claimant's foot condition into a fracture and a bone fragment. This, in my view, represents a hyper-technical reading of this record. Since we are dealing with only one condition, I believe that this record establishes a compensable aggravation claim.[4] Because the majority concludes otherwise, I must dissent.

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[4] I would further award penalties and attorney fees based on the employer's failure to timely provide a copy of Dr. Courogen's addendum report. (Ex. 21). In *Madewell v. Salvation Army*, 49 Or App 713, 717 (1980), the court explained: "While there is a presumption that a writing is truly dated, and that a letter directed and mailed was received in the regular course of the mail, there is no presumption that a letter is mailed on the day it is dated or on the day it was written." Here, there is proof that Dr. Courogen's report was e-mailed to the employer on June 11, 2012. (Ex. 26-3). Therefore, there is a presumption that the e-mail was received in the regular course. While I acknowledge this matter concerns an "e-mail," rather than a letter, I see no reason to not apply the aforementioned presumption to an e-mail. Therefore, absent any proof of lack of receipt (such as testimony that an attachment was too large for a receiving system to handle, or that the e-mail went to a "spam" file), I would find that the employer promptly received Dr. Courogen's addendum report on the date it was "mailed." Because Dr. Courogen's report was not provided to claimant's counsel until July17, 2012, I would find that a discovery violation occurred and award penalties and attorney fees.