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In the Matter of the Compensation of  
**GUY E. BALES, Claimant**  
WCB Case No. 11-06366  
ORDER ON REVIEW  
Ronald A Fontana, Claimant Attorneys  
Heidi M Havercroft, SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Langer, Weddell, and Herman. Member Langer dissents.

The SAIF Corporation requests review of that portion of Administrative Law Judge (ALJ) Lipton's order that awarded a \$3,000 assessed fee concerning its denial of a medical services claim for synvisc injections. On review, the issue is attorney fees. We affirm.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact," with the exception of the last two sentences of the first full paragraph on page 3.

CONCLUSIONS OF LAW AND OPINION

Claimant's attending physician proposed synvisc injections for claimant's left knee condition. (Ex. 87). SAIF declined to authorize the procedure, asserting that the medical service was unrelated to claimant's accepted left knee medial meniscus tear. (Exs. 90, 92). The Workers' Compensation Division (WCD) referred the causation dispute to the Hearings Division. (Ex. 93).

While the matter was pending before the Hearings Division, claimant filed a new/omitted medical condition claim for the following left knee conditions: second, extended or recurrent tear of the posterior horn of the medial meniscus; posttraumatic arthritis, with loss of articular cartilage; medial compartment arthritis; and medial compartment osteoarthritis. (Ex. 97A). SAIF accepted that claim and paid for the previously disputed medical services.

In lieu of a hearing, the parties presented their case on the written record. SAIF sought dismissal of the hearing request, asserting that its payment of the procedure rendered the dispute moot. Alternatively, SAIF opposed claimant's counsel's entitlement to an attorney fee award, contending that the procedure was unrelated to the accepted left knee medial meniscus tear, which was the accepted condition when the medical service claim was initially denied.

The ALJ found a causal relationship between the disputed procedure and the accepted claim. Consequently, the ALJ awarded an insurer-paid attorney fee.

On review, SAIF argues that claimant neither prevailed against the medical services denial, nor was instrumental in obtaining a rescission of the denial. Thus, it contends that an attorney fee under ORS 656.386(1)(a) is not warranted. For the following reasons, we disagree with SAIF's contentions.

ORS 656.386(1)(a) provides, in pertinent part:

“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 a rescission of the denial prior to a decision by the Administrative Law Judge, a reasonable attorney fee shall be allowed.”

Here, the parties do not dispute that SAIF's medical services denial constitutes a “denied claim.” That is, the denial constitutes “[a] claim for compensation which an insurer or self-insured employer refuses to pay on the express ground that the injury or condition for which compensation claimed is not compensable or otherwise does not give rise to an entitlement to any compensation[.]” *See* ORS 656.386(1)(b)(A).

SAIF initially denied the compensability of the disputed medical services, which claimant appealed. (Exs. 90, 92). While a hearing was pending, claimant requested acceptance of various new/omitted medical conditions, including the left knee medial compartment arthritis condition. (Ex. 97A). Before the commencement of the hearing process, SAIF accepted the claimed new/omitted medical conditions. (Ex. 98). Subsequently, SAIF paid for the disputed medical services.

At hearing, SAIF moved to dismiss the hearing as moot. In doing so, it asserted that it had accepted the new/omitted medical condition claim and paid for the previously disputed medical services claim as it related to the accepted

left knee injury claim. According to SAIF, no issue remained for resolution before the ALJ. Implicit in such an argument is that the medical services denial was rescinded.<sup>1</sup>

Nevertheless, on review, SAIF asserts that it did not rescind its denial. Instead, it maintains that the medical services were not causally related to the accepted medial meniscus tear. However, as noted above, SAIF conceded at hearing that the causal relationship issue was no longer at issue before the ALJ. Consequently, based on this record, we are persuaded that SAIF rescinded its denial of claimant's medical services before the hearing.

We turn to the question of whether claimant's counsel was instrumental in obtaining the "pre-hearing" rescission of SAIF's denial. *See* ORS 656.386(1)(a). SAIF concedes that it paid for the previously disputed medical services based on its acceptance of claimant's new/omitted medical condition claim. The record establishes that claimant's attorney initiated the new/omitted medical condition claim. (Ex. 97A). That claim eventually led to SAIF's claim acceptance, as well as its payment of the previously disputed medical services claim. Under such circumstances, we conclude that claimant's attorney was instrumental in obtaining the rescission of SAIF's medical services denial "prior to a decision by the [ALJ.]" ORS 656.386(1)(a).

The dissent argues that our conclusion conflicts with ORS 656.386(1)(b)(A). Specifically, the dissent contends that SAIF has not rescinded the "express ground" for its denial of claimant's medical services claim; *i.e.*, that the knee injections were not due, in material part, to the accepted left knee medial meniscus tear. As such, the dissent asserts that claimant's counsel has not been instrumental in obtaining a rescission of a denial prior to an ALJ decision and, therefore, there is no entitlement to a carrier-paid attorney fee award under ORS 656.386(1)(a).

Yet, this record establishes the existence of one, and only one, disputed medical service claim; *i.e.*, left knee synvisc injections. This record further demonstrates that, before the hearing, SAIF paid for this medical service and, based on its "pre-hearing" action, moved for dismissal of the pending hearing. Such actions persuasively establish that SAIF believed that its "pre-hearing" actions had mooted the "compensability/causation" dispute concerning the

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<sup>1</sup> "Rescission" is defined as the act of doing away with, taking away, or removing something. *See SAIF v. Batey*, 153 Or App 634, 641, *recons*, 155 Or App 21 (1998), *rev den*, 328 Or 330 (1999); *see also Robyn E. Stein*, 62 Van Natta 290, 296 (2010).

previously denied medical service claim. In other words, SAIF was no longer contending that the medical services “[did] not give rise to an entitlement to any compensation.” *See* ORS 656.386(1)(b)(A). Thus, SAIF rescinded its previous denial of the medical service claim prior to the scheduled hearing, thereby satisfying the statutory prerequisites for a carrier-paid attorney fee under ORS 656.386(1).

The dissent essentially contends that the basis for SAIF’s change of position regarding its obligation to pay for the medical service claim is determinative regarding claimant’s counsel’s entitlement to an attorney fee award. We disagree. Upon accepting the new/omitted medical condition claim, SAIF became obligated to process the claim, which necessarily included an evaluation of any benefits to which claimant was entitled. As a matter of course, such an assessment is not confined to benefits due prospectively from the date of acceptance, but also encompasses benefits that were claimed or requested before the filing and acceptance of the new/omitted medical condition claim.

In this particular instance, SAIF’s acceptance of claimant’s new/omitted medical condition claim resulted in a re-appraisal of his medical service claim and a decision that the previously disputed medical service was its responsibility. In other words, in effect, SAIF reconsidered and retracted its prior position that the medical service claim “[did] not give rise to an entitlement to any compensation.” *See* ORS 656.386(1)(b)(A). Such an analysis is consistent with the rationale followed in several previous decisions where a medical service claim has been found compensable based on a compensability determination of a new/omitted medical condition claim that was initiated after the filing of the medical service claim. *See Marshall A. Beachell*, 64 Van Natta 1602 (2012); *Kenneth A. Herdina*, 62 Van Natta 2189, 2194, n1 (2010); *Lisa M. Guerrero*, 62 Van Natta 1805, 1814 (2010). We can conceive of no logical basis to award a carrier-paid attorney fee for services at hearing regarding a medical service claim under such circumstances, but to prohibit such an award when the compensability of the medical service claim is conceded before a hearing.

Thus, regardless of the basis for SAIF’s ultimate claim processing action, the indisputable fact remains that the medical service claim in question is no longer denied.<sup>2</sup> Consequently, SAIF’s denial has been rescinded prior to a hearing.

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<sup>2</sup> Citing ORS 656.262(10) and *Rodney Danielson*, 60 Van Natta 1978 (2008), the dissent further asserts that SAIF’s payment of the disputed medical bill does not represent an acceptance of the claim. Yet, our decision is not premised on such an analysis. Rather, as explained above, our reasoning is based on SAIF’s position at the hearing level that its decision to no longer oppose the medical service claim

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Because the record further establishes that claimant's counsel was instrumental in obtaining that "pre-hearing" rescission of the medical service denial, the statutory requirements for a carrier-paid attorney fee award under ORS 656.386(1) have been met.

In conclusion, the ALJ properly awarded an insurer-paid attorney fee. Accordingly, we affirm.<sup>3</sup>

### ORDER

The ALJ's order dated November 19, 2012 is affirmed.

Entered at Salem, Oregon on July 25, 2013

Member Langer dissenting.

The majority finds that an attorney fee under ORS 656.386(1)(a) is warranted because claimant's attorney was instrumental in obtaining a rescission of SAIF's medical services claim denial for left knee synvisc injections.<sup>4</sup> Because I disagree with the majority's determination that SAIF rescinded its denial, I respectfully dissent.

The following facts are undisputed. SAIF denied the compensability of claimant's medical services claim on the basis that the proposed synvisc injections were not causally related to the accepted condition (*i.e.*, left knee medial meniscus tear).<sup>5</sup> The injections were "directed to" claimant's left knee medial compartment

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mooted the pending "causation" dispute arising from WCD's "transfer" order. For the reasons we have previously discussed, we consider such a position to constitute a retraction of SAIF's previous position that claimant was not otherwise entitled to compensation arising from the medical service claim and, as such, constituted a rescission of a denied claim prior to a hearing.

<sup>3</sup> Claimant's attorney is not entitled to an attorney fee for services on review related to the attorney fee issue. *Dotson v. Bohemia, Inc.*, 80 Or App 233 (1986).

<sup>4</sup> "Rescission" is defined as the act of doing away with, taking away, or removing something. *See SAIF v. Batey*, 153 Or App 634, 641, *recons*, 155 Or App 21 (1998), *rev den*, 328 Or 330 (1999); *see also Robyn E. Stein*, 62 Van Natta 290, 296 (2010).

<sup>5</sup> There is also no dispute that SAIF's medical services denial constitutes a "denied claim." Further, there is no assertion that the proposed medical services were diagnostic in nature.

arthritis, which was not an accepted condition at the time the medical services claim was made and denied. While a hearing was pending, claimant filed a new/omitted medical condition claim for various left knee conditions, including medial compartment arthritis. Before the commencement of the hearing, SAIF accepted the new/omitted condition claim and paid for the disputed medical services.

At hearing, SAIF moved to dismiss the hearing as moot because it had paid for the disputed medical services as a result of its acceptance of the new/omitted medical conditions. I disagree with the majority's interpretation that SAIF's conduct was an effective "rescission" of the medical services denial.

Both at hearing and on review, SAIF has continued to deny the compensability of the medical services claim as it relates to the then-accepted medial meniscus tear. SAIF has also consistently conceded that the medical services claim is compensable in relation to the later-accepted new/omitted medical conditions.

A "denied claim" is defined, in pertinent part, as "[a]claim for compensation which an insurer or self-insured employer refuses to pay on the express ground that the injury or condition for which compensation is claimed is not compensable or otherwise does not give rise to an entitlement to any compensation[.]" ORS 656.386(1)(b)(A). As the majority notes, "rescission" is defined as the act of doing away with, taking away, or removing something. *See SAIF v. Batey*, 153 Or App 634, 641, *recons*, 155 Or App 21 (1998), *rev den*, 328 Or 330 (1999); *see also Robyn E. Stein*, 62 Van Natta 290, 296 (2010).

SAIF's concession regarding the compensability of the disputed medical services as related to the *later-accepted* new/omitted medical conditions (*i.e.*, left knee medial compartment arthritis) does not equal to a rescission of its denial as related to a different, *initially-accepted* condition (*i.e.*, left knee medial meniscus tear). I reason as follows.

A single medical services claim, as any other claim, may be disputed on multiple grounds. Here, SAIF refused to pay for the disputed medical services on the "express ground" that the medical services claim was "not directed towards the accepted condition of: LEFT KNEE MEDIAL MENISCUS TEAR." (Exs. 88, 92). That is, SAIF denied that a sufficient causal relationship existed between the disputed left knee injections and the accepted condition, *i.e.*, the accepted medial meniscus tear. (*See* Ex. 93). Although SAIF ultimately approved

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the requested medical services on a different ground, at no time did SAIF do away with, take away, or remove its prior refusal to pay for the disputed medical services on the particular and “express ground” that the services were not causally related to the accepted medial meniscus tear.

Therefore, SAIF did not rescind its express denial and claimant’s attorney was not instrumental in obtaining any alleged rescission. To the contrary, SAIF conceded compensability of the medical services claim only insofar as it relates to the later-accepted conditions. To the extent that SAIF ultimately paid for the disputed medical services, the record supports SAIF’s assertions that it did so as a result of the newly accepted medical conditions.<sup>6</sup> Claimant’s attorney was “instrumental” in obtaining acceptance of those conditions; however, no statute authorizes an attorney fee for those services.

Finally, it is well established that merely paying or providing compensation shall not be considered acceptance of a claim or an admission of liability. ORS 656.262(10). Absent evidence to the contrary, SAIF’s payment of the disputed medical bills neither explicitly nor implicitly rescinded its denial of liability for claimant’s treatment for the conditions that were not accepted at the time of the medical services denial. *Rodney Danielson*, 60 Van Natta 1978, 1983 n 4 (2008).

Under these circumstances, I am not persuaded that SAIF has rescinded its medical services denial; therefore, an attorney fee under ORS 656.386(1) is not warranted. Because the majority concludes otherwise, I respectfully dissent.

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<sup>6</sup> The cases cited by the majority, involving denied new/omitted medical condition claims along with medical services claims, do not address a rescission and related attorney fee issues and, therefore, are inapposite.