

In the Matter of the Compensation of
MURRY NACOSTE, JR., Claimant

WCB Case No. 11-03172

ORDER ON REVIEW

Jodie Phillips Polich, Claimant Attorneys
Wallace Klor & Mann PC, Defense Attorneys

Reviewing Panel: Members Weddell, Langer, and Herman.

Claimant requests review of that portion of Administrative Law Judge (ALJ) Ogawa's order that upheld the self-insured employer's denial of his aggravation claim for a right knee medial meniscus tear. With his reply brief, claimant submits a document that was not submitted at hearing. The employer cross-requests review of those portions of the ALJ's order that: (1) awarded a \$1,500 penalty-related attorney fee for its unreasonable delay in denying the aggravation claim; and (2) awarded a \$3,000 penalty-related attorney fee for its unreasonable claim processing regarding temporary disability benefits. On review, the issues are evidence/administrative notice, aggravation, and attorney fees. We affirm in part and modify in part.

FINDINGS OF FACT

We adopt the ALJ's findings of fact.

CONCLUSIONS OF LAW AND OPINION

We adopt the ALJ's order with the following supplementation, except we modify the ALJ's \$1,500 penalty-related fee for the employer's unreasonable delay in denying the aggravation claim.

Evidence/Administrative Notice

On review, in support of the penalty-related attorney fee for the employer's unreasonable claim processing regarding temporary disability benefits, claimant submits a copy of a September 1, 2012 Notice of Closure. The employer objects to claimant's submission, arguing that consideration of that document would not change the outcome of the case.

We have no authority to consider evidence not in the record. However, we may take administrative notice of facts “capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned,” including agency orders. *See* ORS 40.065(2); ORS 656.295(5); *Groshong v. Montgomery Ward Co.*, 73 Or App 403 (1985); *Gary L. Goodeagle*, 47 Van Natta 628 (1995).

Here, we need not determine the “notice” issue because, even if we considered claimant’s submission, we would reach the same conclusions regarding the disputed issues.

Untimely Aggravation Denial

At hearing, claimant sought a penalty and attorney fee for the employer’s allegedly unreasonable delay in denying the aggravation claim. Dr. Yoshinaga signed an aggravation claim form on April 4, 2011, which was received by the employer on April 7, 2011. (Ex. 77). The employer had 60 days, or until June 6, 2011, within which to accept or deny the claim. ORS 656.262(6)(a). The employer denied the claim on June 21, 2011, and offered no explanation for the late denial either at hearing or on review. (Ex. 82).

Under ORS 656.262(11)(a), if a carrier unreasonably delays or unreasonably refuses to pay compensation, the carrier shall be liable for an additional amount up to 25 percent of the amounts “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. *Int’l Paper Co. v. Huntley*, 106 Or App 107, 110 (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 Ins.*, 93 Or App 588, 591 (1988).

Because the employer offered no explanation for its untimely aggravation denial, we agree with the ALJ’s conclusion that the employer’s untimely aggravation denial was unreasonable. *See* ORS 656.262(11)(a); *Nicholas Otzoy-Mejia*, 61 Van Natta 2555, 2556 (2009). However, because the employer’s aggravation denial is upheld, there are no “amounts then due” on which to base a penalty for that claim.

Nevertheless, an attorney fee under ORS 656.262(11)(a) is not contingent on the assessment of a penalty, and such a fee may be awarded in the absence of “amounts then due.” *Nancy Ochs*, 59 Van Natta 1785, 1793 (2007). The ALJ

awarded a \$1,500 penalty-related attorney fee for the employer's unreasonable delay in denying the aggravation claim. Based on the following reasoning, we modify the ALJ's award.

An attorney fee under ORS 656.262(11)(a) shall be awarded in a reasonable amount that is proportionate to the benefit to claimant and that takes into consideration the factors set forth in OAR 438-015-0010(4), giving primary consideration to the results achieved and to the time devoted to the case. OAR 438-015-0110(1) and (2).

Here, the ALJ's order indicates that claimant's counsel's services regarding multiple depositions and closing arguments were considered in determining the "time devoted" element. Yet, our review of the record confirms that the depositions did not concern the employer's untimely aggravation denial and that the closing arguments were essentially entirely directed at the disputed aggravation claim. Thus, the ALJ's attorney fee award included the consideration of components that did not pertain to the untimely aggravation denial issue.

After considering the factors set forth in OAR 438-015-0110 and OAR 438-015-0010(4) and applying them to this case, we find that a reasonable attorney fee under ORS 656.262(11)(a) is \$1,000, payable by the employer. Consequently, the ALJ's attorney fee award is modified. In reaching this conclusion, we have given primary consideration to the benefit to claimant, the results achieved, and the time devoted to the case (*i.e.*, the untimely aggravation denial, as represented by the record).

ORDER

The ALJ's order dated July 2, 2012 is affirmed in part and modified in part. In lieu of the ALJ's \$1,500 attorney fee award, claimant's counsel is awarded \$1,000, to be paid by the employer. The remainder of the ALJ's order is affirmed.

Entered at Salem, Oregon on March 14, 2013