
In the Matter of the Compensation of
DAVID J. LAMPA, Claimant
WCB Case No. 13-02172
ORDER ON REVIEW
Moore Jensen, Claimant Attorneys
Gress & Clark LLC, Defense Attorneys

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

Claimant requests review of those portions of Administrative Law Judge (ALJ) Donnelly's order that: (1) declined claimant's motion to reopen the record for the admission of his claim closure request (which included the insurer's date stamp of receipt); and (2) declined to award penalties and attorney fees for the insurer's allegedly unreasonable refusal to close his claim. On review, the issues are the ALJ's procedural ruling, claim processing, penalties, and attorney fees. We reverse.

FINDINGS OF FACT

In January 2012, claimant compensably injured his left shoulder and elbow. (*See* Exs. 2, 4-1). The insurer accepted a left shoulder tendinitis/strain and a Type 2 SLAP tear plus partial thickness rotator cuff tear. (Exs. 7A, 18A).

In March 2013, claimant's treating physician, Dr. Lamoreaux, concluded that claimant's conditions were medically stationary and recommended a work capacity evaluation (WCE). (Ex. 27-2). On March 18, 2013, claimant had a WCE, which recommended medium work. (Ex. 28, -9). No job analyses were provided. (Ex. 28-9).

In a May 23, 2013 letter addressed to the insurer's claim examiner, claimant's attorney requested that the insurer close the claim. (Exs. 32, 32A-1). The request included Dr. Lamoreaux's "full" agreement with the WCE findings and conclusion that claimant's accepted left shoulder injury prevented him from returning to his "at-injury" job. (Ex. 32A-2). The request further noted that Dr. Lamoreaux had been provided a job description. (*Id.*)

The insurer did not respond to claimant's claim closure request. On June 10, 2013, claimant requested a hearing. He sought penalties under ORS 656.268(5)(d) and attorney fees pursuant to ORS 656.382(1).

At the hearing, a copy of the May 23, 2013 letter was admitted into evidence. (Ex. 32). This copy of the letter, however, did not include the insurer's date stamp, documenting its receipt of the letter. There is no certificate of mailing or certified mail return receipt in the record. However, claimant offered the following testimony from his counsel's legal assistant regarding her handling of the letter and its enclosures:

“When our office went paperless, we had to figure out a way, when we put information into the correspondence file, indicating that particular correspondence went together, because there [were] problems in the file room with people thinking that stuff was out of order. And so, when this was attached into the correspondence file, *I numbered the pieces of paper, showing that all of this was sent at once to [the claim examiner], at [the insurer], on May 23rd.*” (Tr. 5) (emphasis added).

The insurer's attorney did not cross-examine the legal assistant.

In closing arguments, the insurer challenged the sufficiency of claimant's evidence to prove that the claim closure request was mailed to the insurer. (Tr. 10-12). According to the insurer, without documentary evidence that the letter was mailed, claimant could not rely on the statutory presumption of receipt in ORS 40.135(1)(q).¹ Thus, the insurer contended that claimant had not proven when it received the claim closure request.

CONCLUSIONS OF LAW AND OPINION

In declining to issue a penalty, the ALJ concluded that claimant had not established that the insurer *received* his request for closure. The ALJ reasoned that the evidence was insufficient to establish that claimant's letter requesting claim closure was actually mailed and/or that it was ever received by the insurer.

Thereafter, claimant sought to reopen the record for admission of a copy of the claim closure request with the insurer's date stamp showing it had been received on May 28, 2013. The ALJ declined to reopen the record, reasoning that claimant offered no explanation for why the submitted document could not have been offered at the hearing. *See* OAR 438-007-0025.

¹ That statutory provision provides that it is a presumption that a “letter duly directed and mailed was received in the regular course of the mail.” ORS 40.165(1)(q).

On review, claimant contends that evidence in the record establishes that the claim closure request was mailed to the insurer, triggering the presumption under ORS 40.135(1)(q) that the insurer received it in regular course and refused to timely close the claim.² In response, the insurer maintains that claimant's evidence did not establish that the letter was mailed and, therefore, the statutory presumption was never triggered. Based on the following reasoning, we agree with claimant's contention.

Claimant offered testimony from his counsel's legal assistant that the letter requesting claim closure, which was addressed to the claim examiner at the insurer's Portland office, was "sent" to the insurer on May 23, 2013. (Tr. 5). When considered in the context of this particular record, we find that such testimony is sufficient to establish that claimant's counsel's legal assistant's reference to "sent" establishes that claimant's claim closure request was "mailed" to the insurer on May 23, 2013. *See Rickey A. Stevens*, 49 Van Natta 1444, 1445 (1997) (recognizing that testimonial evidence may be sufficient to prove the date on which a letter was mailed).³

Moreover, the insurer presented no evidence to challenge claimant's counsel's legal assistant's testimony, nor did it argue that it did not receive claimant's claim closure request. In the absence of any evidence suggesting otherwise, (*e.g.*, evidence that the letter was not properly addressed, returned as undeliverable or never received by the insurer or its claim examiner), we find claimant's counsel's legal assistant's testimony that the claim closure request was sent to the insurer's claim examiner on May 23, 2013 sufficient to establish that the request was mailed to the insurer on May 23, 2013, thereby evoking the presumption that the request was received in the regular course of the mail. ORS 40.135(1)(q); *Debra R. Cawrse*, 53 Van Natta 763, 767 (2001).

The insurer's reliance on *Wilmer T. Parker*, 57 Van Natta 3218 (2005), is misplaced. In that case, we concluded that the claimant had failed to prove when the carrier had received his faxed claim closure request. In doing so, we reasoned

² Claimant also contends that the ALJ's refusal to reopen the record was an abuse of discretion. We need not address that contention, however, because we find claimant's evidence sufficient to establish that claimant's claim closure request was mailed and, thus, presumed received under ORS 40.165(1)(q).

³ While acknowledging that testimonial evidence may be sufficient to establish when a letter was mailed, the insurer maintains that, in this case, the legal assistant's testimony that the letter was "sent" to the insurer was insufficient to prove that the claim closure request was in fact mailed. We disagree. For the reasons expressed above, when viewed in context, we conclude that the legal assistant's testimony was sufficient to establish that the claim closure request was mailed to the insurer on May 23, 2013.

that, from the evidence submitted, we were unable to determine which of the three potential recipients, if any, was sent the fax document at the time noted in the “banner.” Thus, we could not determine when or if the insurer received the faxed claim closure request. 57 Van Natta at 3220. *Parker* is factually distinguishable because it involved a document that was purportedly faxed to the carrier. There is no statutory presumption of receipt of a faxed document.

Contrary to the insurer’s contention, we find the legal assistant’s testimony that the claim closure request was sent to the insurer on May 23, 2013 sufficient to establish that it was mailed to the insurer on that date. Under ORS 40.135(1)(q), we presume, therefore, that the insurer received claimant’s claim closure request in the regular course of the mail. Because the insurer did not respond to that request within the statutorily required 10-day period, we conclude that the insurer refused to timely close the claim. See ORS 656.268(5)(b);⁴ *Joy M. Walker*, 66 Van Natta 325, 329 (2014).

Next, we analyze whether the insurer’s conduct was unreasonable and subject to a penalty pursuant to ORS 656.268(5)(d). *Red Robin Int’l v. Dombrosky*, 207 Or App 476, 481 (2006); *Walker*, 66 Van Natta at 330.

ORS 656.268(5)(d) provides:

“If an insurer or self-insured employer has closed a claim or refused to close a claim pursuant to this section, if the correctness of that notice of closure or refusal is at issue in a hearing on the claim and if a finding is made at the hearing that the notice of closure or refusal to close was not reasonable, a penalty shall be assessed against the insurer or self-insured employer and paid to the worker in an amount equal to 25 percent of all compensation determined to be then due the claimant.”

⁴ ORS 656.268(5)(b) provides, in pertinent part, that:

“If the insurer or self-insured employer has not issued a notice of closure, the worker may request closure. Within 10 days of receipt of a written request from the worker, the insurer or self-insured employer shall issue a notice of closure if the requirements of this section have been met or a notice of refusal to close if the requirements of this section have not been met.”

The insurer contends that any refusal to close the claim was not unreasonable. In doing so, it maintains that, at the time claimant requested closure, the available information was insufficient to close the claim. In particular, the insurer asserts that the March 2013 WCE was not complete because no job analyses were provided. (Tr.12); *see* OAR 436-030-0020 (Requirements for Claim Closure). Furthermore, according to the insurer, because the evaluator did not have claimant's job description, no opinion was offered about whether or not claimant could return to his regular work. (Tr. 12). Finally, the insurer contends that the WCE did not adequately address whether claimant's accepted conditions significantly limited his ability to repetitively use his left shoulder. (Tr. 13). Thus, the insurer asserts that more information was required before the claim could be closed. (*Id.*)

Yet, the insurer had received the WCE report and Dr. Lamoreaux's concurrence by the time it received claimant's May 23, 2013 claim closure request. Assuming, *arguendo*, that, after receiving either the WCE report or Dr. Lamoreaux's concurrence, the insurer required additional information to close claimant's claim, the record does not reveal any attempt by the insurer to gather such information. Furthermore, the insurer did not provide any explanation for this inaction.

Under the circumstances, we conclude that the insurer unreasonably refused to close the claim.⁵ Consequently, under ORS 656.268(5)(d), claimant is entitled to a penalty of 25 percent of the compensation determined to be due resulting from the eventual claim closure. *See Shelley R. Wallace*, 60 Van Natta 1614, 1616 (2008) (finding the carrier's *de facto* refusal to close the claimant's claim unreasonable where the record did not indicate that the carrier attempted to obtain necessary information for claim closure); *see also Oath Boun*, 60 Van Natta 411, 415-16 (2008) (the carrier's need to obtain information from a physician did not explain the delay between its receipt of the claimant's request for claim closure and its compliance with that request).

Under ORS 656.382(1), claimant is also entitled to an award of attorney fees for his attorney's services at the hearing level related to the insurer's unreasonable resistance to the payment of compensation.⁶ After considering the

⁵ By the July 31, 2013 hearing, there was still no indication that the insurer had sought any additional information to close the claim.

⁶ Claimant's attorney is not entitled to an attorney fee for services on review related to the penalty and attorney fee issues. *Cayton v. Safelite Glass Corp.*, 257 Or App 188, 195 (2013); *Anthony Lopez*, 65 Van Natta 1912, 1913 n 5 (2013).

factors set forth in OAR 438-015-0010(4) and applying them to this case, we find a reasonable fee for claimant's attorney's services at the hearing level is \$2,500, payable by the insurer. In reaching this conclusion, we have particularly considered the time devoted to the penalty issue (as represented by the hearing record), the complexity of the issue, the value of the interest involved, and the risk that claimant's counsel might go uncompensated.

ORDER

The ALJ's order dated August 26, 2013, as reconsidered October 3, 2013, is reversed. Claimant is awarded a penalty of 25 percent of all compensation determined to be then due resulting from the eventual claim closure. Claimant's counsel is also awarded a \$2,500 attorney fee, payable by the insurer.

Entered at Salem, Oregon and copies mailed to:

Member Lowell dissenting.

Applying the presumption in ORS 40.135(1)(q) that a "letter duly directed and mailed was received in the regular course of the mail," the majority concludes that claimant's evidence was sufficient to prove that the insurer received his claim closure request. Because, under the circumstances of this case, I disagree with the majority's application of the presumption under ORS 40.135(1)(q), I respectfully dissent.

First, I have concerns about invoking the presumption under ORS 40.135(1)(q) to trigger the 10-day statutory deadline for an employer's response to a claim closure request. I acknowledge that we have approved application of the presumption under ORS 40.135(1)(q) in other circumstances. *See Roger D. Houser*, 56 Van Natta 1805 (2004) (applying ORS 40.135(1)(q) presumption to conclude that the claimant had received documents mailed by the Board to his address on record). However, there are other ways in which a claimant can prove when a claim closure request was received by the carrier. For example, claimant may use certified mail, seek discovery of the date-stamped copy of the claim closure request, or provide the testimony of the claim examiner at hearing. I believe that those alternative means available to claimant to prove the receipt of a claim closure request avoid the uncertainty inherent in the use of a presumption under ORS 40.135(1)(q).

Second, on this record, I disagree with the majority's application of the presumption of receipt because I find claimant's evidence insufficient to establish when, or if, his claim closure request was actually mailed. In *William T. Parker, II*, 58 Van Natta 786 (2006), we summarized the elements of proof required under ORS 656.268(5)(b) as follows:

“Under ORS 656.268(5)(b), it is the ‘receipt’ of such requests that triggers a carrier's attendant obligations to begin claim closure procedures. The statute establishes that a carrier has 10 days from the date of ‘receipt’ to meet its obligations. Thus, absent proof of ‘receipt’ of the request, the timeline for measuring a carrier's obligations cannot be measured.” *Id.* at 791.

While acknowledging claimant's burden of proving the insurer's receipt of his claim closure request, the majority uses the statutory presumption of receipt in ORS 40.135(1)(q) to satisfy that burden. However, because I find no evidence of when, or if, the claim closure request was actually mailed, I do not find the presumption to have been triggered, and claimant is left with no evidence of the insurer's receipt.

Contrary to the majority's view of the record, I do not find the testimony of claimant's counsel's legal assistant sufficient to establish when, or if, the claim closure request was mailed. The legal assistant never testified that she mailed the claim closure request or that she observed any other person mail it. Rather, she merely testified about the meaning of certain numbers on pieces of paper in a correspondence file.

“[CLAIMANT'S COUNSEL]: Okay. And if you wouldn't mind just looking through the rest of the pages, and let me know if there are numbers on the additional pages as well.

“[PAMELA ALLEN]: There are numbers, two, three, four, five and six.

“Q. Okay. And what are those numbers?

“A. When our office went paperless, we had to figure out a way, when we put information into the correspondence file, indicating that particular

correspondence went together, because there was problems in the file room with people thinking that stuff was out of order. And so, when this was attached into the correspondence file, I numbered the pieces of paper, showing that all of this was sent at once to [the claim examiner], at Liberty Mutual, on May 23rd.” (Tr. 5).

Significantly, the legal assistant was not asked whether she or anyone else to her knowledge had mailed the claim closure request. I am not saying that the legal assistant could not have provided such testimony. I am simply pointing out that she was never asked the relevant and dispositive question for application of ORS 40.135(1)(q)—when was the “letter duly directed and mailed?”

In my view, this case is substantially similar to *Thomas L. Cannon III*, 56 Van Natta 2404 (2004), where the Board concluded that the evidence was insufficient to establish that a letter claiming an omitted condition had been mailed to the carrier. In that case, the parties had stipulated that the claimant’s legal assistant:

“would testify as to our office procedure for mailing documents to [the carrier]. That those procedures were likely followed in this case and that Exhibit 29A was likely mailed to [the carrier] on July 15, 2003. However she does not have *an independent recollection of mailing Exhibit 29A.*” *Id.* at 2405 (emphasis added).

As in *Cannon III*, here, the legal assistant did not testify that she had “mailed” the claim closure request. Thus, we have no direct evidence of mailing. Under those circumstances, I find the majority’s application of the presumption of receipt in ORS 40.135(1)(q) erroneous. On this record, we simply have no evidence from which we can infer when, or if, the claim closure request was mailed. *See Norton v. Comp. Dep’t*, 252 Or 75, 78 (1968) (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 is written).

For the above reasons, under the circumstances of this case, I disagree with the majority’s application of the presumption under ORS 40.135(1)(q) to prove the carrier’s receipt of claimant’s claim closure request. Accordingly, I dissent.