
In the Matter of the Compensation of
BRIAN SNYDER, Claimant
WCB Case No. 13-04318
ORDER ON REVIEW
Dale C Johnson, Claimant Attorneys
SAIF Legal, Defense Attorneys

Reviewing Panel: Members Lanning, Curey and Somers.

The SAIF Corporation requests review of that portion of Administrative Law Judge (ALJ) Fisher's order that awarded a penalty and attorney fee under ORS 656.262(11)(a) for an allegedly unreasonable claim processing. On review, the issues are penalties and attorney fees. We reverse.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact," with the exception of the second paragraph on page two of the order, which we rephrase to state that Dr. O'Neill performed a C5-6, C7 anterior cervical discectomy, a C6-7 arthrodesis and an anterior cervical fusion.

CONCLUSIONS OF LAW AND OPINION

Claimant sustained a compensable injury in July 2010, initially accepted for a right knee sprain. In August 2010, claimant underwent right knee surgery that included reconstruction of the anterior cruciate ligament.

That same month, Dr. Brenneke performed cervical surgery that included an anterior cervical fusion. The diagnoses listed on the operative report referred to cervical spondylosis and cervical disc conditions. (Ex. 4). The relationship of the operative procedure, if any, to the right knee injury is unclear from the operative report, but SAIF later accepted central cord syndrome after an ALJ determined that anesthetic complications from claimant's right knee surgery were the major contributing cause of that condition. (Exs. 20A-10, 21).

In October 2012, a panel of SAIF-arranged medical examiners, Drs. Dordevich and Bald, noted that claimant's cervical fusion resulted in "slightly" decreased cervical range of motion, but ultimately concluded that claimant's central cord syndrome was medically stationary without impairment. (Ex. 22-3, -14). Dr. Earl, the attending physician, agreed that claimant had no impairment related to the central cord syndrome. (Ex. 23).

SAIF then closed the claim by a December 19, 2012 Notice of Closure that awarded temporary, but no permanent, disability for the central cord syndrome. Claimant requested reconsideration, contending that there was insufficient information to close the claim.

Before issuance of the reconsideration order, claimant obtained a report from Dr. Earl explaining that he would not have concurred with the impairment opinion of the examining physicians had he known about the Director's rules about impairment values for spinal surgery and range of motion. (Ex. 26).

A March 2013 reconsideration order rescinded the Notice of Closure on the ground that there was insufficient information to close the claim. (Ex. 27-2). Claimant requested a hearing seeking penalties and attorney fees for allegedly unreasonable claim processing, but later withdrew that request. (Exs. 28, 31).

SAIF closed the claim again in July 2013, awarding both temporary and permanent disability, including impairment for the cervical fusion and for reduced cervical range of motion. (Ex. 35). Claimant requested a hearing.

After addressing a number of issues not currently contested on review, the ALJ determined that claimant was entitled to a 25 percent penalty and an attorney under ORS 656.262(11), finding that SAIF should have awarded permanent impairment for cervical fusion surgery and lost range of cervical motion in its December 2012 Notice of Closure. The ALJ, therefore, concluded that SAIF had unreasonably delayed awarding permanent disability compensation.

On review, SAIF argues that claimant was not statutorily authorized to assert a claim for penalties and attorney fees for actions taken in a final Notice of Closure and further that ORS 656.262(11)(a) does not apply to an allegedly unreasonable claim closure. Because we find SAIF's claim processing was not unreasonable, we do not decide these issues.

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 amount "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 (1991); *Katrina Miller*, 60 Van Natta 1307, 1309 (2008). 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 carrier. *Brown v. Argonaut Ins.*, 93 Or App 588, 591 (1988).

Here, SAIF issued its December 2012 Notice of Closure based on the medical examiners' opinion that claimant's central cord compression was medically stationary without impairment and the concurrence of claimant's attending physician. (Exs. 22, 23). In contrast to the ALJ's reasoning, we are not persuaded that the examining panel's report (which was initially ratified by claimant's attending physician) attributed claimant's fusion surgery to the central cord syndrome. (Ex. 22). In reaching this conclusion, we note that the August 2010 operative report did not mention central cord syndrome, but rather listed the pre- and post-operative diagnoses as cervical spondylosis and cervical disc conditions. (Ex. 4).

Consequently, based on the record available to SAIF when it closed the claim in December 2012, we find that it had a legitimate doubt regarding its liability for permanent impairment for the cervical cord syndrome.¹ Thus, even assuming that claimant's penalty and attorney fee request under ORS 656.262(11)(a) was not precluded, such an award would not be warranted. Therefore, we reverse.

ORDER

The ALJ's order dated March 14, 2014, as reconsidered on May 2, 2014, is reversed in part and affirmed in part. Those portions of the ALJ's order that awarded a penalty and a \$3,000 penalty-related attorney fee under ORS 656.262(11)(a) are reversed. The remainder of the ALJ's order is affirmed.

Entered at Salem, Oregon on November 25, 2014

¹ In reaching this conclusion, we recognize that SAIF ultimately awarded permanent impairment for the August 2010 cervical surgery and reduced range of cervical motion. (Ex. 35-2). Nevertheless, the present issue is whether SAIF had legitimate doubt as to its liability for a permanent impairment award for central cord syndrome when it closed the claim in December 2012. Based on the opinion of its medical examiners and the concurrence of claimant's attending physician (as well as the ambiguity in the record as to whether the 2010 cervical surgery was related to the compensable central cord syndrome), we are persuaded that SAIF had a legitimate doubt when it issued its December 2012 Notice of Closure.