
In the Matter of the Compensation of
RONALD V. PACKER, Claimant
WCB Case No. 13-03691
CORRECTED ORDER ON REVIEW
Moore Jensen, Claimant Attorneys
SAIF Legal, Defense Attorneys

Reviewing Panel: Members Johnson and Weddell. Member Johnson concurs.

On October 7, 2014, we affirmed an Administrative Law Judge's (ALJ's) order that awarded an assessed attorney fee under ORS 656.386(1). It has come to our attention that our order contains a clerical error. Specifically, our order included an inaccurate case citation. To correct this oversight, we withdraw our October 7 order and replace it with the following order. The parties' statutory 30-day rights of appeal shall begin to run from the date of this order.

The SAIF Corporation requests review of Administrative Law Judge (ALJ) Naugle's order that awarded an assessed attorney fee under ORS 656.386(1) for its alleged rescission of a medical services denial. On review, the issue is attorney fees.

We adopt and affirm the ALJ's order with the following supplementation.

In April 2011, claimant sustained a compensable cervical spine injury. In June 2013, Dr. Dunn requested authorization to perform a C7-T1 epidural steroid injection. SAIF denied the requested medical service as not causally related to the accepted C5-6 disc extrusion. In July 2013, the causation dispute was transferred to the Hearings Division by the Medical Resolution Section of the Workers' Compensation Division (WCD).¹

After the medical services dispute was transferred to the Hearings Division, claimant formally requested that SAIF accept a C6-7 disk protrusion. SAIF accepted that condition in October 2013. Claimant underwent the disputed injection in November and December 2013. SAIF paid for the injections as compensably related to the accepted C6-7 disc protrusion.

¹ WCD's transfer order was not admitted into evidence. An ALJ, as well as this Board, however, are authorized to take administrative notice of facts "capable of accurate and ready determination by resort to sources whose accuracy cannot be readily questioned." *Rodney J. Thurman*, 44 Van Natta 1572 (1992). This authority includes agency orders. *See Groshong v. Montgomery Ward Co.*, 73 Or App 403 (1985); *Carmen Mendoza*, 51 Van Natta 1986 (1999) (taking administrative notice of an Order on Reconsideration). Accordingly, we have taken administrative notice of the transfer order.

The ALJ reasoned that SAIF's payment of the requested medical services rendered the issue regarding the propriety of SAIF's denial "moot." Finding that claimant's attorney was instrumental in obtaining the "pre-hearing" rescission of SAIF's medical services denial, the ALJ awarded a \$5,000 assessed fee under ORS 656.386(1). Among the decisions cited by the ALJ was *Guy E. Bales*, 65 Van Natta 1376 (2013).

In *Bales*, an attending physician proposed synvisc injections for the claimant's left knee condition. The carrier declined to authorize the procedure, asserting that the medical service was unrelated to the claimant's accepted left knee medial meniscus tear. While the matter was pending before the Hearings Division, the claimant filed a new/omitted medical condition claim for additional left knee conditions. The carrier accepted that claim and paid for the previously disputed medical services.

Thereafter, the carrier sought dismissal of the hearing request, asserting that its payment of the procedure rendered the dispute moot. Alternatively, the carrier opposed the 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 and awarded an assessed attorney fee.

On review, we noted the carrier's hearing concession that the causal relationship issue was resolved. Consequently, based on the record, we found that the carrier had rescinded its denial of the claimant's medical services claim before the hearing. Turning to the question of whether the claimant's counsel was instrumental in obtaining the "pre-hearing" rescission of the carrier's denial under ORS 656.386(1)(a), we noted that the carrier paid for the previously disputed medical services based on its acceptance of the claimant's new/omitted medical condition claim. We further observed that the record established that the claimant's attorney initiated the new/omitted medical condition claim, which eventually led to the carrier's claim acceptance, as well as its payment of the previously disputed medical services claim.

Under such circumstances, we determined that the claimant's attorney was instrumental in obtaining the rescission of the carrier's medical services denial "prior to a decision by the [ALJ]." Thus, we concluded that the ALJ properly awarded an insurer-paid attorney fee. *Id.* at 1378.

The facts of this claim are similar to those in *Bales*. Here, as in *Bales*, the disputed medical services have been paid based on acceptance of a new/omitted medical condition claim. Moreover, as was true in *Bales*, the record establishes that claimant's attorney initiated the claim that led to the acceptance and payment of the previously disputed medical services claim. Therefore, as we concluded in *Bales*, claimant's attorney was instrumental in obtaining the rescission of a medical services denial "prior to a decision by the [ALJ]."

SAIF argues, however, that no statute authorizes an attorney fee award. In doing so, it cites ORS 656.385(1), which provides that in all cases involving a dispute over compensation benefits under certain specified statutes, including ORS 656.245, the attorney fee must be based on all work the claimant's attorney has done relative to the proceeding at all levels "before the department." SAIF contends that, because the hearing was not before the "Department" (*i.e.*, the WCD on behalf of the Director of the Department of Consumer and Business Services), but rather before the Hearings Division of the Board, no assessed fee is statutorily authorized. We disagree.

We have previously held that we have no jurisdiction to award an attorney fee under ORS 656.385(1). *Antonio L. Martinez*, 58 Van Natta 1814, 1822 (2006), *aff'd*, *SAIF v. Martinez*, 219 Or App 182 (2008). However, we are authorized to award an attorney fee under ORS 656.386(1) in a medical services dispute. *Stephen H. Moore*, 66 Van Natta 1003, 1006 (2014).

SAIF argues that an attorney fee award is not authorized under ORS 656.386(1) because it did not expressly deny any claim for a condition or expressly allege that the injury or a condition was not compensable.² That argument is not persuasive.

SAIF denied the requested medical services on the express ground that they were not causally related to the accepted C5-6 condition. In doing so, SAIF was asserting that the condition (C6-7 disc protrusion) for which compensation (*i.e.* medical services) was claimed did not give rise to an entitlement to

² ORS 656.386(1) provides:

"(b) For purposes of this section, a 'denied claim' is:

"(A) 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."

compensation. Although SAIF ultimately accepted the condition at C6-7 and paid for the denied medical services, at the time the medical services were disputed, its position was that the condition producing the need for medical treatment did not give rise to an entitlement to compensation. Accordingly, claimant's attorney was entitled to an assessed fee under ORS 656.386(1) for his services in obtaining rescission of the denial before the issuance of a decision by the ALJ.³ Thus, we affirm.⁴

ORDER

The ALJ's order dated March 19, 2014 is affirmed.

Entered at Salem, Oregon on October 15, 2014

Member Johnson concurring.

Although I agree with the lead opinion's conclusion that claimant's counsel is entitled to an insurer-paid attorney fee under ORS 656.386(1) for services in obtaining rescission of the medical services denial, I write separately to express my agreement with Member Langer's dissenting opinion in *Guy E. Bales*, 65 Van Natta 1376 (2013). I further note that a petition for judicial review of the *Bales* decision remains pending before the court. Nevertheless, consistent with the principles of *stare decisis*, I will adhere to the Board's *Bale* holding.

³ 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).

⁴ SAIF argues that the ALJ's attorney fee award was excessive. We adopt the ALJ's reasoning in support of the award.