

In the Matter of the Compensation of
BRADLEY R. MADRID, Claimant

WCB Case No. 13-06383

ORDER ON REVIEW

Hooton Wold & Okrent LLP, Claimant Attorneys
Sather Byerly & Holloway, Defense Attorneys

Reviewing Panel: Members Weddell and Curey.

Claimant requests review of those portions of Administrative Law Judge (ALJ) Spangler's order that: (1) found that a final, unappealed Notice of Closure had awarded temporary partial disability benefits at a rate of zero for a specified period; (2) declined to award additional temporary disability benefits; and (3) declined to award penalties and attorney fees for allegedly unreasonable claim processing. The self-insured employer cross-requests review of that portion of the ALJ's order that set aside its "ceases" denial of claimant's combined low back condition. On review, the issues are compensability, claim processing, temporary disability, penalties, and attorney fees. We affirm.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact," as summarized below.

Claimant sustained a compensable low back injury in November 2012, initially accepted for a lumbar strain. (Ex. 10).

In January 2013, claimant had a lumbar spine MRI, which showed a mild L5-S1 broad based disc bulge with a broad based central disc protrusion, which flattened the ventral thecal sac, but did not result in central canal stenosis. (Ex. 14). There were findings of mild articular facet degeneration at L4-5 and L5-S1. (*Id.*)

In February 2013, claimant began treating with Dr. Schmitt, physiatrist. (Exs. 18, 19). Dr. Schmitt documented claimant's work injury and reviewed his MRI report. (Ex. 18). Dr. Schmitt noted that claimant had left dorsiflexor weakness, toe extensor weakness, and left foot numbness consistent with L5 lumbar radiculopathy, likely attributable to claimant's L5-S1 disc injury. (Ex. 18-2).

In March 2013, Dr. Roe, orthopedic surgeon, evaluated claimant at the employer's request. (Ex. 25). He concluded that claimant's preexisting facet arthritis and L5-S1 disc condition combined with claimant's November 2012 work injury, but that the work injury remained the major contributing cause of claimant's need for treatment/disability. (Ex. 25-12).

Dr. Schmitt concurred with Dr. Roe's evaluation findings. (Ex. 28).

Subsequently, the employer issued a Modified Notice of Acceptance to include "combined condition preexisting facet degeneration arthritis at L4-5 and L5-S1 as well as preexisting disc degeneration with mild protrusion at L5-S1." (Ex. 30).

In June 2013, claimant had a second lumbar MRI which, when compared with the previous January 2013 MRI, reflected improvement in the L5-S1 disc. (Ex. 49).

On November 8, 2013, Dr. Schmitt took claimant off work, stating that claimant could "[r]eturn to work on 11/13/13." (Ex. 64).

Dr. Rosenbaum, neurosurgeon, evaluated claimant at the employer's request. (Ex. 68). Dr. Rosenbaum opined that claimant's lumbar strain combined with preexisting facet degenerative arthritis at L4-5 and L5-S1. (Ex. 68-8-9). He concluded that the lumbar strain ceased to be the major contributing cause of the need for treatment/disability for the combined low back condition by May 2013 when it had resolved. (*Id.*)

The employer denied claimant's "otherwise compensable combined condition preexisting facet deg arthritis L4-5 and L5-S1 as well as preexisting disc deg with mild protrusion L5-S1 and lumbar strain." (Ex. 71). Claimant timely appealed that denial.

Dr. Schmitt did not agree with Dr. Rosenbaum's report. (Ex. 73). Specifically, she determined that claimant had discogenic pain regardless of whether he had focal neurological deficits on examination. (Ex. 73-1). She further explained that claimant's L5-S1 disc improvement, as seen on the June 2013 MRI suggested that the disc was larger at one point, which corresponded with the work injury timeframe. (Ex. 73-2).

On February 27, 2014, Dr. Schmitt performed a closing examination, and subsequently clarified that claimant's examination limitations on full forward flexion and lumbar extension correlated to his underlying degenerative disc disease and discogenic pain. (Exs. 75, 77).

Dr. Rosenbaum reviewed the June 2013 MRI, and noted that the MRI “demonstrates spondylosis changes in the lumbar spine, which is degenerative arthritis,” and the findings were similar to the January 2013 MRI. (Ex. 76). He concluded that claimant’s lumbar strain had resolved and that ongoing symptoms were consistent with preexisting lumbar spondylosis. (*Id.*)

On March 20, 2014, the employer issued a Notice of Closure, which was corrected on March 27, 2014. (Exs. 79, 80). The Corrected Notice of Closure awarded the following periods of temporary disability: (1) temporary partial disability from November 19, 2012 through December 13, 2013;¹ (2) temporary partial disability from January 15, 2013 through May 30, 2013; (3) temporary total disability from May 31, 2013 through June 7, 2013; (4) temporary partial disability from June 8, 2013 through November 7, 2013; (5) temporary total disability from November 8, 2013 through November 12, 2013; and (6) temporary partial disability from November 13, 2013 through February 27, 2014. (Ex. 80-1). Claimant did not request reconsideration of the Notice of Closure.

In July 2014, Dr. Schmitt considered claimant’s forward flexion limitations to be to be caused in major part by his compensable injury. (Ex. 82-3). She concluded that claimant’s work injury pathologically worsened his preexisting condition. (*Id.*)

CONCLUSIONS OF LAW AND OPINION

Relying on the final, unappealed Notice of Closure (NOC), the ALJ found that claimant was not entitled to additional temporary disability benefits. In setting aside the employer’s “ceases” denial, the ALJ reasoned that Dr. Schmitt, claimant’s attending physician, persuasively addressed the rationale expressed in *Brown v. SAIF*, 262 Or App 640 (2014). Based on Dr. Schmitt’s opinion, the ALJ determined that claimant’s work injury-incident remained the major contributing cause of the need for treatment/disability for his combined low back condition.

On review, claimant contends that he is entitled to additional temporary disability benefits, and the employer argues that its “ceases” denial of claimant’s combined low back condition should be reinstated. For the following reasons, we affirm the ALJ’s order.

¹ It is likely that these dates include a typographical error. Specifically, the worksheet described claimant’s temporary partial disability during this time to be authorized from November 19, 2012 through December 13, 2012. (Ex. 80-2).

Temporary Disability

Claimant contends that he is entitled to additional temporary total disability (procedural) benefits, arguing that the employer was not authorized to convert these benefits to temporary partial disability (TPD) without first seeking his attending physician's approval of a modified job offer. Claimant asserts that he is merely seeking "enforcement" of the NOC, because the employer did not pay the TPD benefits at the appropriate rate. Based on the following reasoning, we disagree with claimant's contentions.

Claimant filed a hearing request, seeking additional temporary disability (procedural) benefits. While his hearing request was pending, the employer issued a NOC that awarded TPD benefits for the disputed period of November 13, 2013 through February 27, 2014. (Ex. 80-1). Claimant did not request Director reconsideration of the NOC, and that closure has become final. Thus, there is a final order awarding TPD benefits for the same period for which he is seeking additional benefits.

Because this issue is a "matter concerning a claim," we have jurisdiction over requests for procedural temporary disability benefits even though the claim has subsequently been closed and a claimant's substantive entitlement to temporary disability benefits has been determined. *See Alfredo Martinez*, 49 Van Natta 67 (1997). However, we are not authorized to award temporary disability for periods that have been substantively determined by final closure orders.² *See Lebanon Plywood v. Seiber*, 113 Or App 651, 654 (1992); *Gerald F. Jaensch*, 50 Van Natta 66, 68 (1998); *Martinez*, 49 Van Natta at 68.

Here, as noted above, the NOC awarded TPD benefits from November 13, 2013 through February 27, 2014. While claimant argues that he is merely seeking enforcement of the TPD benefits for this period at a temporary total disability rate other than zero, he is essentially requesting a modification of the NOC's temporary disability awards. Specifically, he asserts that the employer was not authorized to terminate temporary total disability benefits under ORS 656.268(4).³

² Although authorized to "enforce" the NOC's temporary disability award, neither the ALJ nor we may "modify" that award because the NOC was not appealed within 60 days of its issuance and, as such, has become final. ORS 656.268(5)(c). *See Seiber*, 113 Or App at 654; *Jaensch*, 50 Van Natta at 68; *Martinez*, 49 Van Natta at 68.

³ ORS 656.268(4) provides, in relevant part:

Yet, claimant did not appeal the NOC to contest either the duration of temporary partial or temporary total disability benefits or the amounts paid to him in temporary partial or temporary total disability benefits.⁴ Because claimant's entitlement to temporary disability benefits for the disputed time period has been substantively determined by the final NOC, we are without authority to award additional procedural temporary disability benefits for the same period. *See Jaensch*, 50 Van Natta at 68.

Finally, we address claimant's contention that he is entitled to seek "enforcement" of the substantive temporary disability found in the final NOC. Our review of this record establishes that claimant was paid the amounts noted in the NOC for temporary partial or temporary total disability benefits. In fact, claimant concedes that he was paid TPD benefits at a "zero" rate during November 13, 2013 through February 27, 2014, the period in dispute, but did not contest the NOC. (Tr. 28).

Accordingly, based on the aforementioned reasoning, we conclude that claimant is not entitled to additional temporary disability benefits beyond that granted by the final, unappealed NOC. Based on this decision, we likewise affirm the ALJ's conclusion that the employer's claim processing was not unreasonable and, as such, does not support an award of penalties and related attorney fees. Consequently, we affirm that portion of the ALJ's order.

"Temporary total disability benefits shall continue until whichever of the following events first occurs:

"(a) The worker returns to regular or modified employment; or

"* * * * *

"(c) The attending physician or nurse practitioner who has authorized temporary disability benefits for the worker under ORS 656.245 advises the worker and documents in writing that the worker is released to return to modified employment, such employment is offered in writing to the worker and the worker fails to begin such employment."

⁴ A Notice of Closure has several requirements, including a listing of the duration of temporary total or temporary partial disability compensation, and any amount of further compensation. ORS 656.268(5)(a)(B). A claimant may disagree with the elements within the notice, including the duration of temporary total or temporary partial disability, or amount of compensation, by filing a request for reconsideration within 60 days of the Notice of Closure. ORS 656.268(5)(c).

Compensability

A carrier may deny an accepted combined condition if the otherwise compensable injury ceases to be the major contributing cause of the combined condition. *See* ORS 656.262(6)(c). The “otherwise compensable injury” is the “work-related injury incident,” and is not limited to the lumbar strain identified in the employer’s acceptance. *Brown*, 262 Or App at 652. In evaluating the “ceases” denial, we consider only the components of the combined condition, which are the “otherwise compensable injury” and the statutory preexisting condition. *Vigor Indus., LLC v. Ayres*, 257 Or App 795, 803 (2013), *rev den*, 355 Or 142 (2014).

The word “ceases” presumes a change in the claimant’s condition or circumstances since the acceptance of the combined condition, such that the “work-related injury incident” is no longer the major contributing cause of disability or need for treatment of the combined condition. *Brown*, 262 Or App at 656; *Wal-Mart Stores, Inc. v. Young*, 219 Or App 410, 419 (2008). The “effective date” of the combined condition acceptance provides the “baseline” for determining whether there has been a “change” in claimant’s condition or circumstances. *Oregon Drywall Sys. v. Bacon*, 208 Or App 205, 210 (2006).

Because of the disagreement among physicians regarding the cause of claimant’s need for treatment, resolution of this matter presents a complex medical question and requires expert medical opinion. *Barnett v. SAIF*, 122 Or App 279, 283 (1993). We give more weight to those opinions that are well reasoned and based on complete information. *Somers v. SAIF*, 77 Or App 259, 263 (1986).

Here, Dr. Rosenbaum’s opinion supported the employer’s “ceases” denial. He concluded that the “lumbar strain” had resolved by May 31, 2013, when Dr. Schmitt recommended imaging studies due to claimant’s neurological findings. (Ex. 68-9).

We do not consider Dr. Rosenbaum’s opinion sufficient to satisfy the employer’s statutory burden of proof. Specifically, Dr. Rosenbaum’s discussion of the combined condition focused primarily on the resolution of the lumbar strain, rather than the “work-related injury incident,” as required by *Brown*. *See Brown*, 262 Or App at 655; *Sandy Anderson*, 67 Van Natta 1019, 1020 (2015). Moreover, his opinion did not discuss the entire “combined condition” in that the work injury-incident and the preexisting mild L5-S1 protrusion were not addressed.

Thus, Dr. Rosenbaum's opinion does not persuasively establish that the work-related injury incident ceased to be the major contributing cause of claimant's disability/need for treatment of the combined low back condition. Consequently, the employer did not establish the requisite change in condition or circumstances pursuant to ORS 656.262(6)(c). Accordingly, we affirm the ALJ's decision setting aside the employer's "ceases" denial.

Claimant's attorney is entitled to an assessed fee for services on review regarding the employer's "ceases" denial. ORS 656.382(2). After considering the factors set forth in OAR 438-015-0010(4) and applying them to this case, we find that a reasonable fee for claimant's attorney's services on review concerning that issue is \$6,000, payable by the employer. In reaching this conclusion, we have particularly considered the time devoted to the issue (as represented by claimant's cross-respondent's brief), the complexity of the issue, the value of the interest involved, and the risk that claimant's counsel might go uncompensated.

Finally, claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the "ceases" denial, to be paid by the employer. *See* ORS 656.386(2); OAR 438-015-0019; *Gary Gettman*, 60 Van Natta 2862 (2008). The procedure for recovering this award, if any, is prescribed in OAR 438-015-0019(3).

ORDER

The ALJ's order dated March 26, 2015 is affirmed. For services on review pertaining to the employer's "ceases" denial, claimant's attorney is awarded an assessed fee of \$6,000, payable by the employer. Claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the "ceases" denial, to be paid by the employer.

Entered at Salem, Oregon on December 30, 2015