

In the Matter of the Compensation of
ELENA B. CASTANEDA, Claimant

WCB Case No. 14-01196

ORDER ON REVIEW

Ransom Gilbertson Martin et al, Claimant Attorneys
Maher & Tolleson LLC, Defense Attorneys

Reviewing Panel: Members Johnson and Lanning.

The insurer requests review of Administrative Law Judge (ALJ) Kekauoha's order that: (1) directed the insurer to accept claimant's injury claim for "sudden aggravation of grade 1 to 2 L5-S1 spondylolisthesis with bilateral L5 and S1 nerve root compression and cauda equina compression and grade II spondylolisthesis L5 on S1" and process the claim according to law; (2) assessed a penalty and attorney fee under ORS 656.262(11)(a) for the insurer's allegedly unreasonable failure to pay compensation; (3) assessed an attorney fee under ORS 656.262(11)(a) for the insurer's allegedly unreasonable failure to timely submit exhibits; and (4) awarded an assessed attorney fee under ORS 656.386(1). On review, the issues are jurisdiction, claim processing, penalties, and attorney fees.

We adopt and affirm the ALJ's order with the following supplementation regarding the jurisdiction and claim processing issues.

On December 3, 2008, claimant was injured in a motor vehicle accident and was treated for several conditions, including low back pain. On November 12, 2009, Dr. Ordonez performed back surgery. His postoperative diagnoses were "posttraumatic low back and lower extremity pain caused by [a] "sudden aggravation of grade 1 to 2 L5-S1 spondylolisthesis with bilateral L5 and S1 nerve root compression and cauda equina compression[.]" (Ex. 24). On December 10, 2009, he performed a second surgery. (Ex. 27).

On June 11, 2010, the insurer denied the December 2008 claim, explaining that an investigation failed to establish that claimant's condition of "sudden aggravation of grade 1 to 2 L5-S1 spondylolisthesis with bilateral L5 and S1 nerve root compression and cauda equine [sic] compression" and "grade II spondylolisthesis L5 on L1" was related to claimant's work activity. The insurer asserted that the claimed condition did not arise out of and in the course of her employment. (Ex. 38). Claimant requested a hearing.

In a January 25, 2011 order, a prior ALJ upheld the insurer's denial. The order identified the issues raised at hearing as including the claim for sudden aggravation of grade 1 to 2 L5-S1 spondylolisthesis with bilateral L5 and S1 nerve root compression and cauda equina compression and grade II spondylolisthesis L5 on L1. (Ex. 41-1). We affirmed the prior ALJ's order. *Elena Mendoza*, 63 Van Natta 1599 (2011).¹ However, the Court of Appeals reversed, reasoning that the injuries occurred in the course of employment. *Mendoza v. Liberty Northwest Ins. Corp.*, 257 Or App 74 (2013). On November 8, 2013, we issued an Order on Remand that reversed the prior ALJ's January 25, 2011 order, set aside the insurer's denial, and remanded the claim to the insurer for processing in accordance with law. *Elena Mendoza*, 65 Van Natta 2140 (2013) (on remand).

In November 2013, Dr. Treible requested authorization for a repeat decompression and hardware removal at L5-S1. (Ex. 51).

In March 2014, claimant's former attorney filed a request for hearing, which included an issue regarding the failure to comply with our November 8, 2013 order.

On August 13, 2014, the day before the hearing, the insurer accepted a nondisabling lumbar strain. (Ex. 66).

At hearing, the insurer conceded that it had paid no benefits on the claim. But the insurer argued that it had complied with our November 8, 2013 order by accepting a lumbar strain. The insurer contended that claimant must request acceptance of any other conditions under ORS 656.267(1). The insurer also argued that the Director had jurisdiction over the dispute because the only issues to be litigated were penalties and related attorney fees.

The ALJ rejected the insurer's jurisdiction argument, reasoning that claimant had also raised an issue regarding enforcement of the Board's November 8, 2013 order. The ALJ concluded that the enforcement issue was not moot and that the Hearings Division had jurisdiction.

On review, the insurer argues that the issue of penalties and fees, absent the enforcement action, lies exclusively with the Director. For the following reasons, we hold that the Hearings Division has jurisdiction.

¹ Claimant's March 2014 request for hearing indicates that her name was formerly "Mendoza."

The Board has authority to review “matters concerning a claim.” ORS 656.704(1). “Matters concerning a claim” are “those matters in which a worker’s right to receive compensation, or the amount thereof, are directly in issue.” ORS 656.704(3)(a).

Here, claimant requested a hearing, seeking enforcement of our November 8, 2013 order. Because claimant’s request constituted a “matter concerning a claim,” the Hearings Division had jurisdiction. *See Leonard W. Kirklin*, 48 Van Natta 1571 (1996) (Hearings Division had jurisdiction over the claimant’s enforcement request regarding a prior ALJ’s order concerning a penalty assessment).

The ALJ determined that our November 8, 2013 final order required the insurer to accept the specific condition identified in its June 11, 2010 denial. The ALJ reasoned that the insurer was bound by the final order setting aside the denial and may not relitigate compensability of the claimed condition based on a new defense that could have been raised in the prior proceeding.

The insurer argues that the enforcement action is moot because it complied with our November 13, 2013 order when it accepted a lumbar strain. The insurer contends that if claimant disagrees with the accepted condition, she is authorized under ORS 656.262(6)(d) and ORS 656.267(1) to file a new/omitted medical condition claim. For the following reasons, we reject the insurer’s contention.

Where a prior, final litigation order finds a particular condition compensable, that finding controls over a subsequent Notice of Acceptance. *E.g., George B. Furst*, 65 Van Natta 1664, 1666-67 (2013) (because a final litigation order found an L4-5 disc herniation compensable, that order controlled over a subsequent Notice of Acceptance and the carrier was obligated to accept that specific condition); *Joy M. Walker*, 61 Van Natta 739, 741-42 (2009)² (where the ALJ’s prior order determined compensability of the claimant’s mental disorder claim as major depression and panic disorder, the fact that the employer accepted “anxiety with depression” did not change what was actually litigated and found compensable as a result of the prior litigation).

Here, we must determine the nature of the claim that was found compensable as a result of the insurer’s June 2010 denial and the subsequent litigation.

² The employer did not seek judicial review of this particular *Walker* case. *See Providence Health Sys. Oregon v. Walker*, 252 Or App 489, 491 (2012) (summarizing the claimant’s cases).

Based on the insurer's denial of "sudden aggravation of grade 1 to 2 L5-S1 spondylolisthesis with bilateral L5 and S1 nerve root compression and cauda equine [sic] compression" and "grade II spondylolisthesis L5 on L1" and the prior ALJ's January 25, 2011 order, which identified those as the conditions litigated at hearing, we conclude that the ALJ's prior order litigated compensability of those conditions. *Tattoo v. Barrett Bus. Serv.*, 118 Or App 348, 351 (1993) (an employer is bound by the express language of its denial). On remand, we reversed the prior ALJ's January 25, 2011 order, set aside the insurer's denial, and remanded the claim to the insurer for processing in accordance with law. *Mendoza*, 65 Van Natta at 2140.

The fact that the insurer subsequently accepted a "lumbar strain" does not change what was actually litigated and found compensable as a result of the prior litigation. *See Furst*, 65 Van Natta at 1666-67 (where a final litigation order found an L4-5 disc herniation compensable, that order controlled over a subsequent acceptance and the carrier was obligated to accept that specific condition); *Walker*, 61 Van Natta at 741-42. Therefore, because the parties have already litigated the compensability of "sudden aggravation of grade 1 to 2 L5-S1 spondylolisthesis with bilateral L5 and S1 nerve root compression and cauda equine [sic] compression" and "grade II spondylolisthesis L5 on L1," the insurer is directed to correct the Notice of Acceptance and accept the conditions litigated in the prior ALJ's order and in a manner consistent with this order.

The insurer argues, however, that medical causation was not actually litigated in the prior proceeding. The insurer contends that the only issue litigated was "course and scope of employment."

As discussed above, the insurer's June 11, 2010 denial denied the claim on the grounds that it did not arise out of and in the course and scope of employment. (Ex. 38). The insurer's denial did not specifically include a medical causation defense. Nevertheless, on remand, we concluded that claimant's injuries arose out of and in the course of employment, and, therefore, "her claim is compensable." *Mendoza*, 65 Van Natta at 2140. There is no indication that the insurer appealed our November 8, 2013 Order on Remand. Thus, pursuant to a final litigation order, compensability of claimant's "sudden aggravation of grade 1 to 2 L5-S1 spondylolisthesis with bilateral L5 and S1 nerve root compression and cauda equine [sic] compression" and "grade II spondylolisthesis L5 on L1" has been determined to be compensable, as a matter of law.

Consequently, because the parties have already litigated the compensability of the aforementioned conditions, we agree with the ALJ's conclusion that the insurer may not relitigate those conditions.

Claimant's attorney is entitled to an assessed fee for services on review. 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 is \$3,000, payable by the insurer. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by claimant's respondent's brief), the complexity of the issues, and the value of the interest involved. Claimant's counsel is not entitled to a fee for services on review concerning the penalty and attorney fee issues. *Saxton v. SAIF*, 80 Or App 631, *rev den*, 320 Or 159 (1986); *Dotson v. Bohemia, Inc.*, 80 Or App 233, *rev den*, 302 Or 35 (1986).

ORDER

The ALJ's order dated September 15, 2014 is affirmed. For services on review, claimant's attorney is awarded an assessed fee of \$3,000, payable by the insurer.

Entered at Salem, Oregon on February 12, 2015