

In the Matter of the Compensation of
HOBBY L. BROOKS, Claimant
WCB Case No. 15-00886
ORDER ON REVIEW
Alvey Law Group, Claimant Attorneys
Kenneth R Searce, Defense Attorneys

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

The insurer requests review of those portions of Administrative Law Judge (ALJ) Sencer's order that: (1) found that claimant's counsel was instrumental in obtaining a "pre-hearing" rescission of its denial of claimant's injury claim; and (2) awarded a \$3,000 insurer-paid attorney fee under ORS 656.386(1)(a). Claimant cross-requests review of that portion of the ALJ's order that declined to award penalties/attorney fees for an allegedly unreasonable denial. On review, the issues are penalties and attorney fees. We reverse in part and affirm in part.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact," with the following summary.

On December 23, 2014, claimant injured his right knee at work. (Ex. 4).

On January 16, 2015, claimant was evaluated by Dr. Dales, who recorded a history of several weeks of right knee pain. (Ex. 1-2). Dr. Dales did not report a mechanism of injury or disease, work-related or otherwise. (*Id.*) However, Dr. Dales recorded a history that claimant "*developed* a clicking and pain to the medial aspect of the knee with bending and twisting of the knee." *Id.* (emphasis added). Dr. Dales diagnosed bilateral knee conditions, including right knee osteoarthritis and end state arthritis of the left knee. (Ex. 1-3).

On January 27, 2015, after an MRI, Dr. Dales also diagnosed a right knee medial meniscal tear. (Ex. 1-4). He made no notation whether the conditions were degenerative, acute, work-related or otherwise. (*Id.*)

On January 29, 2015, claimant and the employer completed an 801 form for a December 23, 2014 injury. (Ex. 4). The employer indicated that it first knew of the claim on January 29, 2015. (*Id.*)

On February 3, 2015, the insurer denied claimant's injury claim, stating that "[t]here is insufficient evidence to establish that [claimant] sustained a compensable injury arising out of and in the course of employment." (Ex. 5).

On February 11, 2015, Dr. Dale performed arthroscopic right knee surgery. (Ex. 7).

On February 13, 2015, claimant, *pro se*, requested a hearing challenging the insurer's denial. (Ex. 8a-2).

Claimant was released by his attending physician to regular duty without restrictions as of February 20, 2015. (Ex. 8).

On March 6, 2015, the ALJ sent the insurer a copy of claimant's *pro se* request for hearing. (Ex. 8a). On March 27, 2015, the insurer advised claimant that it had scheduled an examination with Dr. Fellars on April 10, 2015 "to assist in compensability." (Ex. 8b-1).

On March 30, 2015, the insurer's counsel wrote claimant and requested "initial and ongoing" discovery and notified claimant that all correspondence should be directed to him. (Ex. 8c).

On April 2, 2015, claimant signed a retainer agreement with his attorney. (Ex. 8d-4). His attorney signed the agreement on April 5, 2015. (*Id.*)

On April 6, 2015, claimant's attorney advised the insurer of his representation and requested discovery from the insurer. (Ex. 8d-1).

On April 10, 2015, Dr. Fellars opined that claimant had a work-related medial meniscus tear, right knee, combined with preexisting osteoarthritis. (Ex. 9-8). Because of claimant's preexisting osteoarthritis, Dr. Fellars concluded that claimant's work injury ceased to be the major contributing cause of his ongoing disability or need for treatment. (Ex. 9-11). The insurer received Dr. Fellars's report on April 14, 2015. (Tr. 12).

On April 23, 2015, the insurer accepted "right knee complex tear of the posterior horn of the medial meniscus combined with preexisting non-compensable right knee osteoarthritis." (Ex. 10-1).¹

¹ That same day, the insurer sent claimant's counsel the previously requested discovery. (Ex. 12).

CONCLUSIONS OF LAW AND OPINION

Attorney Fees

Reasoning that the insurer's actions required claimant's counsel to prepare for hearing, the ALJ concluded that counsel was instrumental in obtaining rescission of the denial before the hearing. Accordingly, the ALJ held that claimant's counsel was entitled to an attorney fee award under ORS 656.386(1)(a).

On review, the insurer argues that the record does not establish that claimant's counsel was instrumental in obtaining the rescission of its denial. Based on the following reasoning, we agree.

ORS 656.386(1) provides:

“(1)(a) * * * in such cases involving denied claims where the claimant prevails finally in a hearing before an Administrative Law Judge or in a review by the Workers' Compensation Board, then the Administrative Law Judge or board shall allow a reasonable attorney fee. In such cases involving denied claims *where an attorney is instrumental in obtaining rescission of the denial* prior to a decision by the Administrative Law Judge, a reasonable attorney fee shall be allowed.” (Emphasis added).

It is claimant's burden to prove that his attorney was “instrumental” in obtaining rescission of the denial. *See* ORS 656.386(1); *Harris v. SAIF*, 292 Or 683, 690 (1982) (burden of proof is on the proponent of a fact or position). “Instrumental” is not defined by statute, but is otherwise defined as “being an instrument that functions in the promotion of some end or purpose.” *Webster's Third New Int'l Dictionary* 1172 (unabridged ed 1993).²

² In *Bowman v. SAIF*, 278 Or App 417 (2016), the court held that “post-rescission” services by a claimant's counsel may be considered in the determination of a reasonable attorney fee award under ORS 656.386(1)(a) for the counsel's efforts in obtaining a “pre-hearing” rescission of a carrier's denial. Here, the pivotal issue is whether claimant's counsel's was “instrumental” in obtaining rescission of a denial (thereby entitling him to a fee). In contrast, the determinative issue in *Bowman* was the considerations in a determination of a reasonable attorney fee.

Nonetheless, consistent with the *Bowman* interpretation of the policy reasons behind ORS 656.386(1)(a), we have considered the record in its entirety, including evidence developed/generated before and after the employer's April 23, 2015 Notice of Acceptance, to determine whether claimant's counsel was instrumental in obtaining the “pre-hearing” rescission of the employer's denial.

Claimant asserts that his counsel's representation influenced the insurer's decision to accept his claim following its receipt of Dr. Fellars's report, and, as such, was "instrumental" in obtaining the "pre-hearing" rescission of the insurer's denial. However, the record does not support claimant's assertion.

The record is devoid of any action taken by claimant's counsel that could have influenced the insurer, save the submission of a retainer agreement and notice of representation. Such limited action may be sufficient in some cases, depending on their specific facts. In this particular case, however, an insurer-arranged medical examination had been ordered prior to the insurer's receipt of the retainer, and the issuance of the acceptance coincided with the insurer's receipt of that medical examiner's report establishing the compensability of the claim. Therefore, this particular record does not persuasively support a conclusion that claimant's counsel was "instrumental" in obtaining the "pre-hearing" rescission of the insurer's denial.

Consequently, we conclude that an attorney fee award under ORS 656.386(1)(a) is not warranted. In reaching this conclusion, we distinguish our decision from cases where a claimant's attorney was considered instrumental in obtaining the rescission of a denial.

In *Richard A. Staley*, 66 Van Natta 1993 (2014), the carrier denied an unrepresented claimant's new/omitted medical condition request, and the claimant requested a hearing. Subsequently, the claimant obtained representation. *Id.* The claimant's attorney "re-initiated" the new/omitted medical condition request and, after subsequently seeking and obtaining a report from a carrier-requested medical examination, the carrier accepted the condition. *Id.* Finding that the claimant's attorney submitted the new/omitted medical condition request and continued to prepare for the scheduled hearing to prove compensability of the disputed claim, we found that the claimant's counsel was instrumental in obtaining the rescinded denial before the hearing. *Id.* at 1996.

Additionally, in *Peggy L. Segur*, 62 Van Natta 1406 (2010), the claimant retained a second attorney after her first attorney filed a hearing request. *Id.* at 1406. After the claimant retained the second attorney, the carrier then sought a

In conducting such an analysis, we note that, if a claimant's counsel's services extend to clarifying/supplementing the "pre-hearing" Notice of Acceptance, such "scope of acceptance" services may be relevant to any "entitlement/instrumental" analysis under the statute and the *Bowman* rationale. Here, there is no evidence of a challenge to the Notice of Acceptance.

carrier-requested medical examination. That carrier-requested medical report definitively established compensability of the denied claim. *Id.* When the carrier subsequently rescinded its denial, we found that the attorney’s representation of the claimant was instrumental to rescission of the denial, and awarded a carrier-paid fee. *Id.* at 1407-08.

Here, in contrast to those cases, claimant’s attorney’s “pre-hearing rescission” actions consisted of announcing his representation and requesting discovery. Unlike the claimant’s counsel in *Staley*, counsel in this case had not submitted additional claims on his client’s behalf. 66 Van Natta at 1996. Also, unlike the carrier in *Segur*, the insurer had arranged for a medical examination before claimant was represented by counsel. 62 Van Natta at 1407. Finally, other than claimant’s counsel’s asserted presumption that his “appearance” affected a rescission of the denial (an inference that the insurer has disputed),³ the record does not establish that he was instrumental in obtaining the “pre-hearing” rescission of the insurer’s denial.⁴

Accordingly, based on the aforementioned reasoning, an attorney fee award under ORS 656.386(1)(a) is not justified. Therefore, the ALJ’s attorney fee award is reversed.

Penalty/Attorney Fee

Noting claimant’s three-week delay in seeking treatment and five-week delay in filing his claim, in conjunction with the absence of a work-related injury reference in Dr. Dale’s chart notes, the ALJ concluded that the insurer had a legitimate doubt concerning its liability for the claim. Consequently, the ALJ found that the insurer’s denial was not unreasonable. *See* ORS 656.262(11)(a).

³ Such an inference would be more persuasive had the insurer rescinded its denial after receipt of the notice of representation, but before it received Dr. Fellars’s report.

⁴ Relying on the rationale expressed in *Heriberto Valencia*, 44 Van Natta 1709 (1992), and *Kimberly Wayne*, 44 Van Natta 328, 329 (1992), the dissent reasons that claimant’s counsel’s announcement of his representation in response to the insurer’s discovery request was sufficient to satisfy the “instrumental” requirement for entitlement to an attorney fee award under ORS 656.386(1)(a). Yet, as acknowledged by the dissent, unlike the claimants in *Valencia* and *Wayne*, claimant in the present case filed his hearing request without benefit of counsel. Moreover, although the dissent describes claimant’s counsel’s “notice of representation/discovery request” letter as a “response” to the insurer’s discovery

request, there is no indication that any claim-related documents were disclosed. The submission of claimant’s counsel’s letter does not persuasively lead to a conclusion that counsel was instrumental in obtaining the “pre-hearing” rescission of the insurer’s denial.

On review, claimant contends that the insurer's denial was unreasonable, asserting that it based its denial solely on the 801 claim form, which was received, at most, a few days before the issuance of the denial. Based on the following reasoning, we affirm.

Under ORS 656.262(11)(a), if a carrier unreasonably delays or refuses to pay compensation, or unreasonably delays acceptance or denial of a claim, it shall be liable for a penalty of up to 25 percent of any amounts then due, plus an assessed attorney fee. Whether a denial was an unreasonable resistance to the payment of compensation depends on 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). "Unreasonableness" and "legitimate doubt" are to be considered in light of all the evidence available at the time of the denial. *Brown v. Argonaut Ins. Co.*, 93 Or App 588, 591 (1988). A "legitimate doubt" does not exist when the carrier denies a claim without conducting a reasonable investigation. See OAR 436-060-0140(1); *James Hurlocker*, 66 Van Natta 1930, 1937 (2014); *Kenneth A. Foster*, 44 Van Natta 148 (1992), *aff'd without opinion*, 117 Or App 543 (1993).

Here, when the insurer issued its denial on February 3, 2015, it had received Dr. Dale's chart notes from January 16, 2015 and January 27, 2015. Those chart notes did not refer to a specific knee injury (work-related or otherwise), but rather reported that claimant's knee clicking and pain had "developed" with bending or twisting of the knee over a "several-week history." (Ex. 1-2). Moreover, these chart notes began with a diagnosis of bilateral knee osteoarthritis, and later added a specific right knee diagnosis. (Ex. 1-3). Further, on the January 29, 2015 801 form, the employer noted that January 29, 2015 was its first notice of the December 23, 2014 injury.

Considering claimant's approximately three-week delay in seeking medical treatment (and approximately five-week delay in filing the claim), in conjunction with initial treatment records that did not mention a work-related cause for claimant's right knee symptoms (but rather referred to bilateral knee osteoarthritis), we are persuaded that the insurer had a legitimate doubt of its liability for the claim when it issued its denial. See, e.g., *Deborah A. Synkelma*, 67 Van Natta 1141, 1145 (2015) (carrier had a legitimate doubt for its denial when chart notes documented a preexisting condition and did not mention a work-related injury). Accordingly, we affirm the ALJ's decision that the insurer's denial was not unreasonable.

ORDER

The ALJ's order dated June 12, 2015 is affirmed in part and reversed in part. The ALJ's \$3,000 attorney fee award is reversed. The remainder of the ALJ's order is affirmed.

Entered at Salem, Oregon on June 16, 2016

Member Weddell dissenting.

The majority concludes that the insurer had a legitimate doubt regarding the compensability of claimant's work injury, and that claimant's counsel was not instrumental in obtaining the rescission of the insurer's denial. Accordingly, the majority concludes that neither a penalty nor attorney fees are due. Because I disagree with the majority's interpretation of the record, I respectfully dissent.

Penalty/Attorney Fee

When the insurer denied the claim on February 3, 2015 (Monday), it was in possession of the January 29, 2015 801 form (signed by claimant on the previous Thursday), stating that claimant twisted his right knee at work on December 23, 2014. The insurer was also in possession of Dr. Dale's chart notes from January 16 and January 27, 2015. (Ex. 1-1).

A "legitimate doubt" does not exist when the carrier denies a claim without conducting a reasonable investigation. *See James Hurlocker*, 66 Van Natta 1930, 1937 (2014); *Kenneth A. Foster*, 44 Van Natta 148 (1992), *aff'd without opinion*, 117 Or App 543 (1993).

OAR 436-060-0140(1) provides that:

"The insurer is required to conduct a 'reasonable' investigation based on all available information in ascertaining whether to deny a claim. A reasonable investigation is whatever steps a reasonably prudent person with knowledge of the legal standards for determining compensability would take in a good faith effort to ascertain the facts underlying a claim, giving due consideration to the cost of the investigation and the likely value of the claim."

While the insurer's denial states that there was "insufficient evidence" to establish that claimant sustained a compensable injury, there is no evidence in this record that directly addresses the insurer's basis for doubting compensability of the claim. (Ex. 5). Moreover, there is no evidence that the insurer conducted a "reasonable investigation * * * in a good faith effort to ascertain the facts underlying [the] claim." OAR 436-060-0140(1).

The majority cites claimant's "delay" in seeking medical treatment and filing his claim, as well as a lack of a work-related diagnosis and mechanism of injury in the initial treatment records that were in the possession of the insurer. However, claimant filed his injury claim well within the statutory 90-day period. ORS 656.265(1). Additionally, given the relatively mundane nature of the mechanism of injury (striking a table with his foot and twisting his knee), I would not consider claimant's decision to wait several weeks before seeking treatment to be out of the ordinary or to provide a basis for the insurer to doubt the validity of the claim before conducting a reasonable investigation.

In summary, the reasons cited by the majority for the insurer's "legitimate doubt" should have been the starting points for the insurer's "good faith effort to ascertain the facts of the claim." OAR 436-060-0140(1). While the majority identifies potential questions raised by the initial chart notes and 801 form, they do not cite any good faith effort on the part of the insurer to ascertain the facts underlying the claim and shed light on those questions.⁵

Such reasoning conflicts with multiple policy objectives contained in ORS 656.012, as well as the statutory incentives for carriers to adequately investigate and process claims. First, the insurer's conduct resulted in a substantial delay in the provision of benefits under the compensable claim. *See* ORS 656.012(2)(a) (objective of workers' compensation law is to provide prompt medical and income benefits). Second, the insurer's lack of investigation resulted in litigation that was wholly unnecessary. *See* ORS 656.012(2)(b) (objective to reduce litigation and adversary nature of proceedings).

The insurer has 60 days in which to investigate a claim before issuing an acceptance or denial. ORS 656.262(6)(a). Here, inexplicably, that 60 day period was waived by the issuance of a denial within a few days of the insurer receiving the claim. ORS 656.262(11)(a) provides incentive for carriers to perform an

⁵ The insurer did not present any direct evidence such as the testimony of the claim representative in support of the legitimate doubt upon which the denial is based.

adequate investigation before issuing a denial. *See Hurlocker*, 66 Van Natta at 1937. However, the majority's reasoning appears to disregard the requirement of an investigation and the availability of penalties where there is any delay in claim filing or questions presented by initial treatment records, regardless of whether those issues would be clarified by an investigation or not.

Because the requirement of an adequate investigation is supported by Board rules and case law, and is consistent with the policy objectives of providing prompt compensation and reducing litigation, I disagree with the majority's opinion that such an investigation was not necessary. Accordingly, because the investigation was not performed, I would find that a penalty for an unreasonable denial is warranted. ORS 656.262(11)(a).

Attorney Fees

The other statutory incentive for reasonable claim processing relevant to this dispute is the availability of attorney fees where an attorney is instrumental in obtaining the rescission of a denial. ORS 656.386(1). Based on the evidence, case law, and policy considerations, I disagree with the majority's interpretation of the "instrumental" requirement of ORS 656.386(1). I reason as follows.

"Instrumental" is not defined by statute, but is otherwise defined as "being an instrument that functions in the promotion of some end or purpose." *Webster's Third New Int'l Dictionary*, 1172 (unabridged ed 1993). While the record must support a conclusion that claimant's counsel was instrumental in obtaining a rescission, ORS 656.386(1) does not require a certain quantum of instrumentality. *See David K. Krueger*, 45 Van Natta 1131 (1993) (finding that the claimant's counsel was instrumental in obtaining the rescission of a denial, but noting that a certain quantum of instrumentality is not required by ORS 656.386(1)).

In *Kimberly Wayne*, 44 Van Natta 328, 329 (1992), we found that the carrier's decision to rescind its denial was "not the result of any direct efforts" on the part of the claimant's attorney. Instead, the record established that the carrier rescinded its denial based on medical records belatedly received from the claimant's treating physician. *Id.* at 330. Nonetheless, we determined that the claimant's counsel was instrumental because of the filing of a hearing request that preserved the claimant's right to challenge the denial. *Id.*

Also, in *Heriberto Valencia*, 44 Van Natta 1709 (1992), we found that the carrier's "pre-hearing" rescission of its denial was prompted by legislation resulting in statutory changes, rather than any actions on the part of claimant's

counsel, including the filing of a hearing request. However, reasoning that the hearing request preserved the claimant's right to challenge the carrier's denial, we deemed the claimant's counsel to be instrumental and awarded an attorney fee. *Id.*

Here, claimant requested a hearing before he sought legal representation. The hearing was set for May 18, 2015. On March 30, 2015, the insurer's counsel requested discovery from claimant "pursuant to OAR 438-007-0015."⁶ (Ex. 8c). Then, on April 2, 2015, claimant retained legal counsel. (Ex. 8d-5). On April 6, 2015, claimant's counsel gave notice of his representation, requested discovery, and responded to the insurer's discovery request. (Ex. 8d-1).

While the majority does not consider claimant's counsel's representation to have been instrumental, I disagree. As previously noted, the insurer made a formal request for discovery from the *pro se* claimant citing OAR 438-007-0015. In accordance with that rule, claimant had 15 days to comply with that discovery request. Moreover, a claimant's noncompliance with such a request could have resulted in penalties, attorney fees, exclusion of evidence, continuance of a hearing, or dismissal of a hearing request. OAR 438-007-0015(8). Considering the potential consequences of noncompliance with the Board's disclosure rule, claimant's counsel's timely response to the insurer's discovery request (some seven days from the insurer's request and four days after counsel was retained) was a step in maintaining claimant's hearing request and ensuring that the case could be convened for a hearing on the scheduled date.

⁶ OAR 438-007-0015 provides:

“* * * * *

“(3) Upon written demand by the insurer, the claimant shall within 15 days of the mailing or delivering of the demand, furnish to the insurer, without cost, originals or legible copies of all medical and vocational reports and other documents pertaining to the claim(s) as specified below, which the claimant did not receive from the insurer (or self-insured employer) making the demand. In cases involving multiple insurers, an insurer shall seek discovery in accordance with section (9) of this rule.

“* * * * *

“(8) It is the express policy of the Board to promote the full and complete discovery of all relevant facts and expert opinion bearing on a claim being litigated before the Hearings Division, consistent with the right of each party to due process of law. Failure to comply with this rule, if found to be unreasonable or unjustified, may result in the imposition of penalties and attorney fees, exclusion of evidence, continuance of a hearing (subject to OAR 438-006-0091), and/or dismissal of a request for hearing.”

Consistent with the *Wayne* and *Valencia* rationale, a claimant's attorney who initiates a hearing request is instrumental in the carrier's "pre-hearing" rescission of its denial, even when the carrier's decision to rescind is based on factors unrelated to the claimant's counsel's involvement. See *Wayne*, 44 Van Natta 328; *Valencia*, 44 Van Natta 1709. Here, the only difference between those decisions and the present case is that claimant filed the hearing request *pro se*. However, I believe that the maintenance of claimant's hearing request through his counsel's subsequent response to the insurer's request for discovery was the functional equivalent of the filing of the hearing request (for statutorily required "instrumental" purposes) because counsel's action effectively preserved claimant's right to continue the prosecution of the insurer's denial at the scheduled hearing. Because counsel's action maintained and continued the prosecution of the claim toward a hearing, I would consider his representation to be instrumental.

Furthermore, regardless of whether claimant's attorney filed a request for hearing, or a request for discovery, or announced his undertaking claimant's representation, any reasonable insurer would infer that because claimant was represented by competent counsel, the evidence regarding legal and medical causation would be competently developed and presented.

I acknowledge that the insurer-requested medical examination with Dr. Fellars was arranged before claimant's counsel's representation, and that Dr. Fellars's report provided a significant basis for the rescission of the insurer's denial. Nonetheless, I would not conclude that the report was the sole reason for the rescission of the insurer's denial, nor that claimant's counsel was not instrumental in obtaining that rescission.

Although Dr. Fellars's report supported the compensability of the claim, his support was far from unequivocal. For example, Dr. Fellars diagnosed preexisting right knee osteoarthritis and a combined condition of complex tear of the posterior horn of the medial meniscus, which he considered to be work-related. (Ex. 9-8). However, following these diagnoses, he explained that "the delay in reporting the incident makes it difficult to say truly whether this happened at work or at some other time. It can only be stated that his reported mechanism of injury could plausibly tear the medial meniscus." (*Id.*) Dr. Fellars went on to state that claimant could have actually injured his knee while taking care of the acreage at his home. (Ex. 9-9). He further explained that "it is also possible that he became symptomatic from his arthritis at some point. He has a degenerative tear of his medial meniscus and preexisting arthritis. It is possible the meniscal tear

could be a red herring as it was likely preexisting. If you look at an MRI of any degenerative knee, it is likely to include a meniscal tear that is very similar in appearance to what was evident on the claimant's MRI * * *." (*Id.*)

While the majority apparently finds the insurer's rescission of the denial to have been a foregone conclusion on the basis of this report, I would consider Dr. Fellars's statements to have given the insurer a plausible basis on which to continue the defense of its denial at the hearing. Thus, my review of this record supports a conclusion that the presence of claimant's counsel in this litigation (as well as the potential that this attorney may choose to amend the issues at hearing to include a penalty for an unreasonable denial based on Dr. Fellars's report) contributed to the insurer's "pre-hearing" rescission.

Under these circumstances, I would find that claimant's counsel was instrumental in obtaining rescission of the insurer's denial (the purpose for which claimant hired him). Consequently, I would award an attorney fee under ORS 656.386(1).

Finally, I believe that the majority's interpretation of the "instrumental" requirement of ORS 656.386(1) discourages representation of claimants with denied claims that are undergoing the insurer's initial investigation during the litigation process. "[P]roviding for access to adequate representation for injured workers" is a stated policy objective of recent legislation concerning attorney fees. *See* HB 2764 §1 (2015).

Had the claimant approached the attorney for representation during the 60-day period provided before an acceptance or denial is required, the attorney might in good conscience decline to represent the claimant until such time as the insurer issues a decision based on its investigation, sparing the attorney the effort of representation until such time as his services might be needed. In this case, however, the attorney would have had no reason to believe that the insurer had begun investigating the claim only weeks before the hearing, and that they were on the brink of rescinding the denial.

In summary, claimant's attorney was saddled with representation for which he could not be compensated (according to the majority's reasoning) because the insurer chose to conflate the investigation and litigation processes. The workers' compensation statutes provide timeframes for separate investigation and litigation processes, and our case law provides for penalties and attorney fees when an insurer fails to investigate a claim and is subsequently obliged to rescind its

denial. Here, the insurer has avoided its statutory responsibility to perform an investigation until the last possible moment before being required to explain its denial to an ALJ in the face of claimant's challenge. Claimant and his counsel have borne the cost of this benefit to the insurer in the form of delayed benefits and uncompensated representation in which claimant and his attorney have prevailed. Such a result is inconsistent with policy, statute, and rule. Accordingly, I respectfully dissent.