

In the Matter of the Compensation of
SANOMA PAPADOPOLI, Claimant

WCB Case No. 15-01762

ORDER ON REVIEW

Welch Bruun & Green, Claimant Attorneys
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Reviewing Panel: Members Johnson, Weddell, and Somers.

The insurer requests review of that portion of Administrative Law Judge (ALJ) Otto's order that set aside its *de facto* denial of claimant's injury claim for a left forearm anterior interosseous neuropathy (AIN). On review, the issues are claim preclusion and (potentially) compensability.

We adopt and affirm the ALJ's order with the following supplementation concerning claim preclusion.¹

The ALJ found that claim preclusion did not bar claimant from litigating the compensability of her left forearm AIN condition, despite the insurer's prior unappealed denial of her left hand and thumb condition.

On review, the insurer contends that the claim is barred because its denial was not limited to a specific condition, but rather included a denial of "legal and medical causation." For the following reasons, we disagree with the insurer's contention.

We begin by addressing the scope of the insurer's denial, which is a question of fact.² See *Mills v. Boeing Co.*, 212 Or App 678, 685 (2007); *SAIF v. Allen*, 193 Or App 742, 749 (2004) (the scope of a carrier's denial is a question of fact).

¹ Claim preclusion bars litigation of a claim based on the same factual transaction that was or could have been litigated between the parties in a prior proceeding that has reached a final determination. See *Drews v. EBI Cos.*, 310 Or 134, 149 (1990). Claim preclusion does not require actual litigation of an issue, but does require the opportunity to litigate, whether or not the opportunity is used. *Id.* at 140.

² Carriers are bound by the express wording of their denials. *Tattoo v. Barrett Bus. Serv.*, 118 Or App 348, 351 (1991). Although evidence that a carrier intended something other than what it expressly said may not be considered in construing a denial, whether a denial is directed at a particular claim "does not depend solely on the words [the denial] uses." *Mills*, 212 Or App at 682; *Allen*, 193 Or App at 749. It depends also on "the context in which [the denial] is made * * * including what the insurer did or did not know" and the date the denial was sent. *Id.*; see *Altamirano v. Woodburn Nursery, Inc.*, 133 Or App 16, 19 (1995) (considering the date of the denial letter as context for the phrase "then current condition"). "If, in context, the language of the denial has only one possible meaning, it must be read consistently with that contextual meaning." *Mills*, 212 Or App at 683.

Based on our reading of the denial letter as a whole, we conclude that it specifically denied compensability of claimant's "left hand and thumb" condition. We base our interpretation on the express wording of the insurer's denial, which states:

"You filed a claim for *an injury to your left hand and thumb* allegedly sustained on or about February 2, 2014 while employed at [the insured].

"Information obtained during our investigation fails to establish *your injury/disease* is compensably related to your work activities with [the insured].

"Therefore, without waiving any other potential defenses, we deny your claim for benefits as *your condition* is not legally and medically attributable to your work activities with [the insured]." (Ex. 12-1) (Emphasis supplied).

Because of the express wording of the denial, we conclude that it is not an "all-inclusive" denial. *C.f. Longview Inspection v. Snyder*, 182 Or App 530, 536 (2002) (a general denial will put at issue all relevant medical conditions of which the carrier was aware). Rather, the denial specifically mentioned "a claim for an injury to [claimant's] left hand and thumb," and continued to refer to "your injury/disease" and "your condition," without suggesting that any other condition could be at issue. (Ex. 12-1). Thus, when the denial is read as a whole, we are persuaded that the insurer's intent was to deny a "left hand and thumb" condition.

The insurer stresses that its denial, denied claimant's "claim for benefits as your condition is not legally and medically attributable to your work activities." Relying on *Deborah V. Hernandez*, 59 Van Natta 2096 (2007), the insurer contends that its denial includes the defenses of both legal and medical causation and, therefore, it is not limited to a specific condition. Based on the following reasoning, *Hernandez* is distinguishable.

In *Hernandez*, the carrier had issued a denial because it was "unable to obtain sufficient evidence that [the claimant] sustained a compensable injury arising out of and in the course and scope of employment * * *." 59 Van Natta at 2097. Based on that statement, we reasoned that the carrier had "unequivocally denied [the] claimant's *entire claim* on the basis that she did not establish legal and medical causation, regardless of any diagnosed condition." *Id.* (emphasis in

original). Thus, because the unappealed claim denial was based on a specific work-related incident, we concluded that the claimant was precluded from pursuing a claim for additional conditions based on the same work-related injurious event. *Id.*

Like the denial at issue in *Hernandez*, the insurer's denial in this case disputed legal and medical causation of the denied condition. However, the denial at issue in *Hernandez* generally denied "a compensable injury," whereas the denial at issue here specifically addressed claimant's hand and thumb condition, and claimant's claim for that condition.

Because the insurer's denial was specifically limited to a "left hand and thumb" condition, the situation is more akin to the facts at issue in *Jimmie C. Hudson*, 57 Van Natta 243 (2005) and *Jeremy J. Hawkins*, 53 Van Natta 566 (2001). In *Hudson* and *Hawkins*, we interpreted the carriers' denials to be limited to specific conditions (*i.e.* a lumbar strain and a circulatory system condition, respectively). Given such an analysis, we concluded that claim preclusion did not bar the claimants' subsequent claims for conditions that were not the subject of the earlier denials.

Here, for the reasons expressed above, we interpret the insurer's denial to have been limited to a "left hand and thumb" condition. Accordingly, consistent with the *Hudson/Hawkins* rationale, we conclude that claimant's current left forearm AIN condition claim is not precluded. Thus, based on the aforementioned reasoning, as well as the reasons expressed in the ALJ's order, we affirm.

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 \$6,000, 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 and her counsel's uncontested submission), the complexity of the issue, the value of the interest involved, the risk that counsel may go uncompensated, and the contingent nature of the practice of workers' compensation law.

Finally, claimant is awarded reasonable costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the *de facto* denial, to be paid by the insurer. See ORS 656.386(2); OAR 438-015-0019; *Gary E. Gettman*, 60 Van Natta 2862 (2008).

ORDER

The ALJ's order dated April 8, 2016 is affirmed. For services on review, claimant's attorney is awarded \$6,000, payable by the insurer. Claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the denial, to be paid by the insurer.

Entered at Salem, Oregon on November 2, 2016