
In the Matter of the Compensation of
NATALIYA VAUGHAN, Claimant
WCB Case No. 15-02099
ORDER ON REVIEW
Philip H Garrow, Claimant Attorneys
SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Curey and Weddell.

The SAIF Corporation requests review of those portions of Administrative Law Judge (ALJ) Ogawa's order that awarded a 10 percent penalty and a \$1,000 insurer-paid attorney fee for its unreasonable delay in accepting claimant's new/omitted medical condition claim for a left hip labral tear. On review, the issues are penalties and attorney fees. We affirm.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact."

CONCLUSIONS OF LAW AND OPINION

After claimant's compensable injury, SAIF initially accepted a left hip strain and a left hip contusion. (Ex. 7). On February 24, 2015, she filed a new/omitted medical condition claim for a left hip labral tear, which SAIF received on February 27, 2015. (Ex. 43). SAIF also received a request for surgery shortly thereafter. (Tr. 6). SAIF approved the surgery, but did not accept or deny the new/omitted medical condition claim.

On May 12, 2015, claimant requested a hearing, raising the issues of a *de facto* denial, penalties, and attorney fees. On September 30, 2015, SAIF accepted the left hip labral tear. (Ex. 54).

At the hearing, the parties specified that, as a result of SAIF's acceptance, only the penalty and attorney fee issues remained. (Tr. 2-3). SAIF agreed that ORS 656.262(7)(a) required it to accept or deny the new/omitted medical condition claim within 60 days of its receipt of the claim, and that it had not done so. (Tr. 3, 20). However, it asserted that the delay in its acceptance was reasonable under the circumstances. (Tr. 3).

The ALJ reasoned that SAIF was required to accept or deny the new/omitted medical condition claim within 60 days of its receipt of the claim, regardless of whether it had a legitimate doubt of its liability for the claimed condition. Based on the testimony of SAIF's claim adjuster (which stated that the acceptance of the new/omitted medical condition claim was delayed because she doubted the existence of the condition), the ALJ concluded that SAIF's claim processing was unreasonable. Accordingly, the ALJ awarded a penalty and attorney fee under ORS 656.262(11)(a).

On review, SAIF contends that the delay in its acceptance of the new/omitted medical condition claim was reasonable because it had a legitimate doubt as to the existence of the claimed conditions. We disagree with SAIF's contention.

A carrier is required to accept or deny a new/omitted medical condition claim within 60 days after its receipt of written notice of the claim. ORS 656.262(7)(a). If a carrier unreasonably refuses to pay compensation or unreasonably delays acceptance or denial of a claim, a penalty of up to 25 percent of compensation then due, plus an attorney fee, shall be awarded. ORS 656.262(11)(a). The reasonableness of a carrier's actions depends on whether it had a legitimate doubt as to its liability, based on all evidence available to the carrier at the time of the allegedly unreasonable conduct. *Brown v. Argonaut Ins. Co.*, 93 Or App 588, 591 (1988).

After reviewing the documentary record, we are not persuaded that SAIF's delay in issuing an acceptance or denial resulted from a legitimate doubt as to the existence of the claimed labral tear condition.¹ Thus, even if we accepted the premise of SAIF's argument (*i.e.*, that a delay in acceptance or denial of a claim would be reasonable if the carrier has a legitimate doubt as to the compensability of the claim), we would still find SAIF's delay unreasonable.

¹ In particular, before the expiration of the 60-day period following SAIF's receipt of claimant's new/omitted medical condition claim, attending and examining physicians supported the presence of a left hip labral tear. (Exs. 24-3, 25, 29, 30-1, 32-2, 34-1, 38-4, 42-2, 44-1-2). Moreover, Dr. Hiratzka, a physician who examined claimant at SAIF's request, reported that it would be reasonable to add an anterior superior labral tear diagnosis to the list of claimant's accepted conditions. (Ex. 38-4). Finally, an April 21, 2015 adjuster's note in SAIF's file recorded that the labral tear was "present on the MRI," and an April 21, 2015 e-mail from SAIF's claim examiner stated, "I don't really have concerns with the probable compensability of the condition[.]" (Exs. 44a, 44b).

Under these circumstances, the evidence available to SAIF when it was required to issue an acceptance or denial of the new/omitted medical condition claim supported the existence of the labral tear, as well as its relationship to claimant's work injury.

In any event, ORS 656.262(7)(a) unambiguously mandates that a carrier must timely issue a notice of either acceptance or denial of a new/omitted medical condition claim. *Rose v. SAIF*, 200 Or App 654, 664 (2005). SAIF acknowledges that in failing to comply with this statutory claim processing responsibility, it delayed the acceptance or denial of the claim beyond the 60-day period permitted by ORS 656.262(7)(a). Moreover, SAIF concedes that it fully understood its statutory obligation to timely accept or deny the claim. Yet, asserting that it had a legitimate doubt concerning the existence of the claimed condition, SAIF argues that its delay of a timely response was justified until such time as it confirmed the condition's existence.

We reject the proposition advanced in SAIF's argument. A delay in the issuance of an acceptance or denial as required by ORS 656.262(7)(a) may be reasonable if the law is in a confused state regarding the carrier's statutory obligation to respond. *See SAIF v. Stephens*, 247 Or App 107, 113 (2011). Nevertheless, where a carrier understands its obligation to timely accept or deny a new/omitted medical condition claim, its failure to comply with the terms of the statute is considered unreasonable, regardless of its view of the merits of the claim. *See SAIF v. Traner*, 270 Or App 67, 76 (2015) (a penalty for unreasonable delay in acceptance or denial was justified where, at the time of the delay, the case law had clarified the carrier's duties under ORS 656.262(7)(a)).

SAIF cites *Red Robin Int'l v. Dombrosky*, 207 Or App 476 (2006), as support for its contention that failing to issue a required notice within a statutorily mandated timeframe is not *per se* unreasonable. Based on the following reasoning, we consider *Dombrosky* distinguishable.

In *Dombrosky*, the court addressed *former* ORS 656.268(5)(d) (2003), *renumbered as* ORS 656.268(5)(f) (2015), which provided for a penalty if a carrier "closed a claim or refused to close a claim pursuant to [ORS 656.268], if the correctness of that notice of closure or refusal to close is at issue in a hearing on the claim and if a finding is made at the hearing that the notice of closure or refusal to close was not reasonable." Whereas the Board had assessed a penalty based on the carrier's failure to timely issue a Notice of Closure or a notice of refusal to close the claim,² the court explained that *former* ORS 656.268(5)(d) only

² *Former* ORS 656.268(5)(b), *renumbered as* ORS 656.268(5)(d) (2015), required a carrier to issue a Notice of Closure, if the requirements of ORS 656.268 were met, or a notice of refusal to close, if the requirements of ORS 656.268 were not met, within 10 days of receipt of a written request for closure from the worker.

allowed for a penalty if either a Notice of Closure or a notice of refusal to close the claim had been issued. 207 Or App at 480. Thus, the court concluded that a carrier's failure to properly respond to a request for closure could only support a penalty under *former* ORS 656.268(5)(d) if that failure constituted an unreasonable refusal to close the claim. *Id.* at 481; *cf. Maria T. Arguello*, 68 Van Natta 157 (2016) (the carrier's failure to close the claim within 10 days of receipt of the claimant's request was a refusal to close, but was not unreasonable); *Shelley R. Wallace*, 60 Van Natta 1614 (2008) (an ORS 656.268(5)(d) penalty was awarded because the carrier's failure to respond to the claimant's closure request was a *de facto* refusal to close, and was unreasonable).

The present case does not concern ORS 656.268(5)(d). Instead, ORS 656.262(11)(a) (the applicable statute in this case) provides for a penalty for an unreasonable delay in issuing either an acceptance or denial. The statute does not qualify that penalty assessment by stating that the aforementioned delay is only unreasonable where the *de facto* denial created by the delay would be unreasonable.³ Thus, we disagree with SAIF's interpretation concerning the standard for assessing a penalty under ORS 656.262(11)(a).

In conclusion, for the reasons expressed above, SAIF's delay was unreasonable. Accordingly, we affirm the ALJ's penalty and attorney fee awards.

Claimant's attorney is entitled to an assessed fee for services on review. ORS 656.382(3). 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 \$2,500, payable by SAIF. In reaching this conclusion, we have particularly considered the time devoted to the case

³ A denial may constitute an unreasonable refusal to pay compensation, and thus support a penalty and attorney fee under ORS 656.262(11)(a), if the carrier lacks a legitimate doubt as to the compensability of the claim at the time of the denial. *E.g., James S. Hurlocker*, 66 Van Natta 1930, 1937 (2014). However, even if a denial would be reasonable, the claimant is entitled to the timely issuance of that denial, and ORS 656.262(11)(a) provides for the award of a penalty and attorney fee if the denial is unreasonably delayed. *Traner*, 270 Or App at 74.

Thus, if a carrier questions the existence of a claimed condition (or any other aspect of the compensability of the claim) at the end of the statutory 60-day period for acceptance or denial, the carrier must decide whether to accept or deny the claim before the expiration of the statutory period. If the information available to the carrier at the time of the denial gave it a legitimate doubt as to the compensability of the claim, it would have a defense against a claimant's subsequent contention that the denial was unreasonable even if the claim were ultimately determined to be compensable. Nevertheless, for the reasons expressed above, such a legitimate doubt regarding the merits of the claim would not affect the unequivocal statutory deadline for issuance of an acceptance or denial.

(as represented by claimant's respondent's brief, his counsel's attorney fee representations, and SAIF's response),⁴ the complexity of the issue, the value of the interest involved, and the risk of claimant's counsel going uncompensated.

ORDER

The ALJ's order dated April 1, 2016 is affirmed. For services on review, claimant's attorney is awarded an assessed fee of \$2,500, to be paid by SAIF.

Entered at Salem, Oregon on October 21, 2016

⁴ Because claimant's counsel's contentions regarding the ORS 656.382(3) attorney fee did not comply with OAR 438-015-0029(2), they have not been considered a "request" under OAR 438-015-0029. OAR 438-015-0029(4). Nonetheless, claimant's counsel's representations, along with SAIF's objection, have been considered in reaching our determination of a reasonable attorney fee award. *See Randal D. Plummer*, 63 Van Natta 594, 599 (2011).