

In the Matter of the Compensation of
RANDY G. SIMI, Claimant
WCB Case Nos. 16-03709, 16-03107
ORDER ON REVIEW
Ronald A Fontana, Claimant Attorneys
Sather Byerly & Holloway, Defense Attorneys

Reviewing Panel: Members Curey and Lanning.

Claimant requests review of those portions of Administrative Law Judge (ALJ) Ogawa's order that: (1) upheld the self-insured employer's denials of claimant's aggravation claim; (2) awarded a \$3,000 employer-paid attorney fee under ORS 656.386(1) for prevailing over the employer's denial of claimant's new/omitted medical condition claim for right shoulder supraspinatus and infraspinatus tears; and (3) did not award penalties and attorney fees for an allegedly unreasonable denial. The employer cross-requests review of that portion of the ALJ's order that set aside its denial of the aforementioned new/omitted medical condition claim. On review, the issues are aggravation, compensability, claim processing, penalties, and attorney fees. We affirm in part and reverse in part.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact" and provide the following summary.

Claimant slipped and fell at work on April 6, 2010. (Ex. 29). A June 1, 2010 right shoulder MRI showed infraspinatus tearing and a full thickness supraspinatus tear. (Ex. 36-1). On July 7, 2010, Dr. Stanley performed a surgical repair of the supraspinatus tear. (Ex. 39-1).

The employer accepted a right rotator cuff tear, among other conditions. (Ex. 42).

An August 12, 2011 Notice of Closure awarded 5 percent whole person permanent impairment for the right shoulder. (Ex. 45).

On December 9, 2013, claimant again slipped and fell at work. (Ex. 47). He developed immediate pain in both shoulders, but did not seek treatment or report a new injury until April 2, 2014. (Exs. 47, 48-1). On April 23, 2014, the employer issued a denial, asserting that the December 9, 2013 injury claim was not timely reported. (Ex. 51). Claimant did not request a hearing, and the denial became final. (Ex. 70-2).

A May 5, 2014 right shoulder arthrogram showed an infraspinatus tear and a recurrent supraspinatus tear. (Ex. 53-1). On June 23, 2015, Dr. Butters performed a right subacromial decompression, rotator cuff debridement, distal clavicle resection, biceps tenodesis, and rotator cuff repair. (Ex. 66).

On October 5, 2015, Dr. Swanson, an orthopedic surgeon who performed an examination at the employer's request, opined that the 2010 rotator cuff repair did not remain intact. (Ex. 74-27). He stated that, because there were no MRIs between 2010 and 2014, the timing of the failure of the rotator cuff repair was unknown. (*Id.*) He concluded that all of the right shoulder conditions identified by Dr. Butters at the time of the June 23, 2015 surgery were degenerative and due to the failure of the 2010 rotator cuff repair, possible psoriatic arthritis, and prior right shoulder surgery.¹ (Ex. 74-30).

On June 16, 2016, claimant initiated a new/omitted medical condition claim for right shoulder "full thickness tear of the supraspinatus tendon, tearing of the infraspinatus tendon, failed repair of full thickness rotator cuff tear, [and] recurrent full thickness rotator cuff tear." (Ex. 93). On July 1, 2016, the employer denied the claim, asserting that the April 6, 2010 injury was not a material contributing cause of the claimed conditions. (Ex. 94). Claimant requested a hearing.

On July 27, 2016, Dr. Butters submitted an 827 form, reporting an aggravation claim, which was not signed by claimant. (Ex. 95A).

On August 4, 2016, claimant's attorney mailed the employer a copy of the 827 form. This copy included claimant's signature, which was dated July 18, 2016. (Ex. 96A-1, -2).

On August 9, 2016, the employer issued an aggravation denial, asserting that the aggravation claim was not perfected.² (Ex. 97). Claimant requested a hearing.

Subsequently, the employer obtained Drs. Stanley's, Butters's, and Swanson's opinions that any worsened right rotator cuff conditions were due to the denied December 9, 2013 injury, not the compensable April 6, 2010 injury. (Exs. 99-4, 100-4, 101-4, -5).

¹ In 2004, Dr. Stanley performed a right shoulder debridement, partial bursectomy, and acromioplasty. (Ex. 23-1). In 2010, he performed an open right rotator cuff repair. (Ex. 39-1).

² Although the employer's August 9, 2016 denial did not indicate that it was directed at the July 27, 2016 827 form, its October 7, 2016 denial clarified that was the case. (Ex. 102-1).

On October 7, 2016, the employer issued a denial of claimant's August 4, 2016 aggravation claim, contending that any worsening of claimant's compensable right shoulder condition was the result of an intervening injury, not the April 6, 2010 injury.³ (Ex. 102). Claimant requested a hearing.

At the hearing, the employer argued that the claimed supraspinatus and infraspinatus tears were encompassed within its acceptance of the right rotator cuff tear. (Tr. 5).

CONCLUSIONS OF LAW AND OPINION

Reasoning that the employer's denial of compensability was diametrically opposed to its position that the supraspinatus and infraspinatus tears were encompassed within the accepted right rotator cuff tear, the ALJ set aside the July 1, 2016 denial of supraspinatus and infraspinatus tears and awarded claimant's counsel a \$3,000 attorney fee under ORS 656.386(1).⁴ The ALJ did not award penalties and attorney fees under ORS 656.262(11)(a) for an unreasonable denial. Regarding claimant's aggravation claim, the ALJ upheld the employer's August 9, 2016 and October 7, 2016 denials. In doing so, the ALJ concluded that the employer met its statutory burden to prove that the major contributing cause of the worsened condition was an injury not occurring within the course and scope of employment. *See* ORS 656.273(1).

On review, claimant contends that the October 7, 2016 aggravation denial should be set aside. In doing so, he asserts that, notwithstanding the unappealed denial, the December 2013 injury occurred within the course and scope of employment for purposes of the affirmative defense under ORS 656.273(1). He also argues that the August 9, 2016 denial should be set aside because the employer received his perfected aggravation claim before issuing its denial. Next, claimant seeks penalties and attorney fees for an allegedly unreasonable compensability denial of the claimed supraspinatus and infraspinatus tears. Finally, claimant seeks an increased "ORS 656.386(1)" attorney fee for his counsel's services in prevailing against the employer's compensability denial of the supraspinatus and infraspinatus tears at the hearing level.

³ The employer's October 7, 2016 denial clarified that it received the 827 form signed by claimant on August 8, 2016. (Ex. 102-1). In other words, the aggravation claim was perfected and timely denied.

⁴ The ALJ's order upheld the July 1, 2016 denial of claimant's recurrent right rotator cuff tear and failed repair. The parties do not dispute that portion of the ALJ's order.

In support of its aggravation denials, the employer responds that claimant initially submitted an unsigned 827 form (*i.e.*, an unperfected claim), and that he did not establish a compensable worsening. The employer further contends that it had a legitimate doubt as to its liability when it denied the infraspinatus and supraspinatus tears. In its cross-request, the employer argues that the claimed infraspinatus and supraspinatus tears were neither new nor omitted (because they were encompassed within the accepted right rotator cuff tear) and, therefore, were properly denied.

Based on the following reasoning, we set aside, as a nullity, the employer's August 9, 2016 denial for an unperfected aggravation claim and affirm the ALJ's decisions regarding the employer's October 7, 2016 aggravation denial and July 1, 2016 new/omitted medical condition denial.

October 7, 2016 Aggravation Denial

To establish a compensable aggravation claim, claimant must prove an actual worsening of his compensable condition since the last award or arrangement of compensation. ORS 656.266(1); ORS 656.273(1). Claimant must further establish that his compensable injury materially contributed to his worsened condition. *Id.*; *Grable v. Weyerhaeuser Co.*, 291 Or 387, 631 (1981); *Jocelyn v. Wampler Werth Farms*, 132 Or App 165, 173 (1994); *Fernandez v. M & M Reforestation*, 124 Or App 38, 42 (1993). If claimant meets his burden, he is entitled to additional compensation, unless the employer proves that the major contributing cause of the worsened condition is an injury not occurring in the course and scope of employment. ORS 656.273(1); *Fernandez*, 124 Or App at 42-43; *Roger D. Hart*, 44 Van Natta 2189, 2191 (1992), *aff'd Asplundh Tree Expert Co. v. Hart*, 132 Or App 494 (1995).

The determination of whether claimant's accepted condition actually worsened is a complex medical question that must be resolved by expert medical opinion. *Barnett v. SAIF*, 122 Or App 279, 283 (1993); *Randy S. Gehrs*, 64 Van Natta 2094 (2012). We rely on medical opinions that are well reasoned and based on complete information. *Somers v. SAIF*, 77 Or App 259, 263 (1986).

Claimant relies on the opinion of Dr. Butters. For the following reasons, we do not find Dr. Butters's opinion sufficient to satisfy claimant's initial burden of proof.

In his November 14, 2016 deposition, Dr. Butters opined that “although * * * the 2013 injury event was a likely cause of the worsening, * * * the 2010 injury was a material contributing cause as well[.]” (Ex. 103-30). Yet, two months earlier, Dr. Butters signed a concurrence opinion letter stating that any worsened right rotator cuff conditions were not materially contributed to by the 2010 work injury; rather, they were caused by the intervening December 9, 2013 injury incident. (Ex. 100-4). At that time, Dr. Butters explained that a rotator cuff repair would not normally fail after less than four years, without an intervening cause or injury. (*Id.*)

When asked about his earlier opinion during the deposition, Dr. Butters stated only that “the original tear in 2010 has to be considered the material contributing cause of the current tear[.]” (Ex. 103-30). He also stated that “[i]t’s hard to deny that the original tear wasn’t a material contributing cause[.]” (Ex. 103-38). He did not explain the basis for these conclusory statements, clarify the inconsistency, or, if he had changed his opinion, explain the reasons for that change. Under these circumstances, we do not find Dr. Butters’s opinion persuasive. *See Moe v. Ceiling Sys., Inc.*, 44 Or App 429, 433 (1980) (rejecting unexplained and conclusory opinion as unpersuasive); *Kenneth L. Edwards*, 58 Van Natta 487, 488 (2006) (unexplained change of opinion renders physician’s opinion unpersuasive).

The concurrence opinions signed by Drs. Stanley and Swanson also do not support the compensability of claimant’s aggravation claim.⁵ (Exs. 99-4, 101-4). Therefore, because the record is insufficient to meet claimant’s burden to prove that the compensable injury was a material contributing cause of his worsened condition, the record does not demonstrate a compensable aggravation claim. *See Michael Clark*, 65 Van Natta 2334, 2336 (2013). Accordingly, we affirm that part of the ALJ’s order that upheld the October 7, 2016 denial.⁶

⁵ Dr. Swanson denied that his opinion had changed, explaining that claimant’s right shoulder pathology was the result of an intervening cause. (Ex. 101-4).

⁶ Because we have determined that claimant has not met his initial burden to prove that the worsened condition was attributable to the original compensable injury, we need not consider whether the employer proved an affirmative defense under ORS 656.273(1). *See Marcum v. City of Hermiston*, 149 Or App 392, 397 (1997) (where the claimant had not met her initial burden to prove that the worsened condition was attributable to the original compensable injury, the carrier did not have to prove the affirmative defense under ORS 656.273(1)).

August 9, 2016 Aggravation Denial

A claim for aggravation must be in writing and signed by the worker (or the worker's representative) and the worker's attending physician. ORS 656.273(3). A carrier is not obligated to process an aggravation claim until it is perfected under ORS 656.273(3). *See Ted B. Minton*, 50 Van Natta 2423 (1998) (carrier not obligated to process aggravation claim until it is perfected under ORS 656.273(3)).

Here, on July 27, 2016, Dr. Butters submitted an 827 form, making a claim for aggravation, which was not signed by claimant. (Ex. 95A). The claim was unperfected, and the employer was not obligated to process it until it was perfected. *See Minton*, 50 Van Natta at 2425. Under such circumstances, the employer's August 9, 2016 denial is a nullity and without legal effect. *Id.* Consequently, we reverse that portion of the ALJ's order that upheld the August 9, 2016 denial.

Because we have set aside the employer's August 9, 2016 denial as a nullity, claimant is not entitled to an attorney fee award or cost reimbursement under ORS 656.386(1) and (2). *See Charles L. Chittim, Jr.*, 51 Van Natta 764, 765 n 4 (1999) (the legal predicate for an attorney fee award did not exist where the carrier's denial was set aside as a nullity, citing *Stephenson v. Meyer*, 150 Or App 300, 304 (1997)).

New/Omitted Medical Condition Denial

We adopt and affirm that portion of the ALJ's order that set aside the employer's denial of claimant's new/omitted medical condition claim for infraspinatus and supraspinatus tears.⁷ *See Sandy K. Koehn*, 69 Van Natta 421,

⁷ At hearing, the employer argued that the claimed conditions were "encompassed" within the accepted right rotator cuff tear condition (*i.e.*, it conceded that the supraspinatus and infraspinatus tears were compensable), but it did not rescind, or amend, its denial of compensability. (Tr. 5-7). On review, the employer contends that its denial was appropriate and should be upheld, rather than set aside, because the accepted rotator cuff tear encompassed the claimed supraspinatus and infraspinatus tears. We disagree, based on the following reasoning.

A carrier is bound by the express language of its denial. *Tattoo v. Barrett Bus. Serv.*, 118 Or App 348, 351 (1993). Here, the employer denied that the injury was a material contributing cause of the claimed supraspinatus and infraspinatus tears. (Ex. 94). Because the employer concedes that those conditions are compensable, its denial must be set aside. *Koehn*, 69 Van Natta at 424.

The employer also argues that the ALJ's order "could create the illusion that [the] employer must process the supraspinatus and infraspinatus tears." We note, however, that in setting aside the employer's denial, the ALJ's order did not remand the claim to the employer for further processing according to law; rather, the order provided that, "[t]hose conditions remain encompassed with[in] the accepted rotator cuff tear claim."

424 (2017) (setting aside the carrier's compensability denial where the carrier conceded that the claimed new/omitted medical condition was compensable, notwithstanding its amendment to its denial for an "encompassed" condition).

Attorney Fees/ Penalties/ Costs

The ALJ's order did not determine whether penalties and attorney fees were warranted for the employer's allegedly unreasonable compensability denial of the new/omitted medical condition claim for infraspinatus and supraspinatus tears. On review, claimant renews his request for penalties and attorney fees. The employer contends that its denial was reasonable based on the medical record at the time of the denial. For the following reasons, we conclude that penalties and attorney fees are justified.

Under ORS 656.262(11)(a), if a carrier unreasonably delays or refuses to pay compensation, 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 constitutes 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).

The employer contends that it had a legitimate doubt regarding its liability for the claimed tears because the medical record supported its acceptance of a right rotator cuff tear. Yet, the employer did not deny the new/omitted medical condition claim on the ground that the claimed conditions had been accepted as part of the rotator cuff tear. (Ex. 94); *Michael L. Long*, 63 Van Natta 2134, 2135, *recons*, 63 Van Natta 2300, 2301 (2011) (new/omitted medical condition claims may be denied if the claimed conditions are not "new" or "omitted" because they have already been accepted). Instead, as noted above, it denied that the claimed conditions were compensable.

Considering the employer's contention that its doubt regarding its liability for the infraspinatus and supraspinatus tears was based on its acceptance of the rotator cuff tear, we find no reasonable basis for its denial of compensability.⁸

⁸ At hearing, the employer argued that the claimed conditions were "encompassed" (*i.e.*; it conceded that the supraspinatus and infraspinatus tears were compensable), but it did not rescind, or amend, its initial denial of compensability. (Tr. 5-7). In other words, the employer continued to deny the compensability of the claimed new/omitted medical conditions while simultaneously conceding that the conditions were compensable because they were encompassed within the employer's prior claim acceptance.

See Koehn, 69 Van Natta at 425 (finding no reasonable basis for the carrier's denial of compensability, where the carrier's doubt regarding its liability was based on its position that the claimed new/omitted condition was already accepted). Accordingly, we award a penalty in the amount of 25 percent of any amounts due as of the date of the February 22, 2017 hearing, resulting from the ALJ's compensability decision (which we have affirmed).

Claimant's counsel is entitled to a penalty-based attorney fee for services at hearing and on review regarding the employer's unreasonable denial. ORS 656.262(11)(a); *SAIF v. Traner*, 273 Or App 310, 320-21 (2015); *Stanley T. Castle*, 67 Van Natta 2055, 2057 (2015). That attorney fee shall be in a reasonable amount that is proportionate to the benefit to claimant and takes into consideration the factors set forth in OAR 438-015-0010(4), giving primary consideration to the results achieved and the time devoted to the case. *See* OAR 438-015-0110(1), (2). Based on our review of the record, and considering these factors, we award \$1,000 as a reasonable penalty-related attorney fee regarding the employer's unreasonable denial.

Finally, we adopt and affirm the ALJ's award of a \$3,000 attorney fee for services related to the new/omitted medical condition denial. *See Robert L. Lininger*, 67 Van Natta 1712, 1718 (2015) (although the time devoted to the case is a "rule-based" factor, an hourly rate is not; application of the "rule-based" factors does not involve a strict mathematical formulation).

Claimant's attorney is entitled to an assessed fee for services on review regarding the employer's new/omitted medical condition claim 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 is \$3,500, payable by the employer. In reaching this conclusion, we have particularly considered the time devoted to the issue (as represented by claimant's respondent's brief, his counsel's fee representation, and the employer's objection), 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.

Claimant is also awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the denial of the new/omitted medical condition claim for infraspinatus and supraspinatus tears, to be paid by the employer. ORS 656.386(2); OAR 438-015-0019; *Gary E. 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 24, 2017 is affirmed in part and reversed in part. That portion of the ALJ's order that upheld the employer's August 9, 2016 aggravation denial is reversed. The August 9, 2016 denial is set aside as a nullity. For services on review regarding the infraspinatus and supraspinatus tears, claimant is awarded an assessed fee of \$3,500, payable by the employer. Claimant is also awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the denial of infraspinatus and supraspinatus tears, to be paid by the employer. Claimant is awarded a 25 percent penalty of the amounts then due as of the February 22, 2017 hearing and a \$1,000 attorney fee, payable by the employer, for its unreasonable compensability denial of infraspinatus and supraspinatus tears. The remainder of the ALJ's order is affirmed.

Entered at Salem, Oregon on October 3, 2017