
In the Matter of the Compensation of
KEITH J. WIGGINS, Claimant
WCB Case No. 16-03000
ORDER ON REVIEW
Thomas Coon Newton & Frost, Claimant Attorneys
SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Ousey and Curey.

Claimant requests review of Administrative Law Judge (ALJ) Brown's order that: (1) found that a Notice of Closure, which did not include a "chronic condition award for claimant's right knee condition, was not unreasonable; and (2) did not award penalties and attorney fees for the SAIF Corporation's allegedly unreasonable claim processing. On review, the issues are penalties and attorney fees.

We adopt and affirm the ALJ's order with the following supplementation.

In February 2015, SAIF re-opened claimant's right knee injury claim to process a new/omitted medical condition (patellofemoral chondromalacia). (Ex. 28).

In November 2015, claimant was examined by Dr. Baldwin at SAIF's request. (Ex. 30). Dr. Baldwin commented that due to the accepted conditions, claimant should not operate a vehicle with a heavy clutch, lift over 40 pounds (and should only occasionally lift that amount), or kneel for more than five minutes in one hour. (Ex. 30-13, -15). Further, Dr. Baldwin noted that claimant was "somewhat" limited in his ability to repetitively use his right leg. (Ex. 30-14).

In December 2015, SAIF wrote to claimant's attending physician and surgeon, Dr. Greenleaf, requesting information regarding claimant's permanent impairment. (Ex. 31). SAIF asked Dr. Greenleaf, "Which of the following best describes the patient's ability to repetitively use the injured knee due to the accepted conditions of right knee sprain and right knee patellofemoral chondromalacia?" (Ex. 31-1). SAIF offered Dr. Greenleaf the following three "check the box" options: "No limitation," "Some limitation," and "Significant limitation (more than 2/3 of the time)." (*Id.*) Dr. Greenleaf checked the box indicating "Some limitation." (*Id.*)

In January 2016, SAIF closed the claim without a permanent impairment award for a "chronic condition." (Ex. 32).

In March 2016, claimant requested reconsideration of the Notice of Closure. (Ex. 36).

On March 22, 2016, claimant's attorney sent Dr. Greenleaf a letter of inquiry that provided a definition of "significantly limited."¹ (Ex. 38-1). Dr. Greenleaf indicated that claimant was "significantly limited in the repetitive use of his right knee." (*Id.*) Dr. Greenleaf noted that claimant would not be able to repetitively walk on uneven ground, twist, turn, or rotate the knee, use stairs, squat, kneel, run, or jog for more than two-thirds of an eight-hour day. (Ex. 38-2).

In May 2016, an Order on Reconsideration found that claimant was entitled to a permanent impairment award for a "chronic condition" under OAR 436-035-0019(1) because he was significantly limited in the repetitive use of his right knee. (Ex. 39-4).

In June 2016, claimant requested a hearing, seeking penalties and attorney fees. (Hearing File).

The ALJ found that the Notice of Closure was not unreasonable because it was based on Dr. Greenleaf's initial opinion, available at the time of closure, that claimant did not have a significant limitation in the repetitive use of the right leg.

On review, claimant contends that the Notice of Closure was unreasonable because it was based on SAIF's use of a "gradation scale" that does not accurately reflect the standard for entitlement to a "chronic condition" award. Based on the following reasoning, in addition to that expressed in the ALJ's order, we disagree.

ORS 656.268(5)(f) provides that if a carrier has closed a claim, the "correctness" of that closure is at issue in a hearing, and a finding is made at the hearing that the Notice of Closure was not reasonable, then a penalty of 25 percent of "all compensation determined to be then due the claimant" shall be assessed against the carrier. *Cayton v. Safelite Glass Corp.*, 232 Or App 454, 460 (2009); *Clarinda S. Keys*, 53 Van Natta 1592, 1595 (2001). An "ORS 656.268(5)(f)" penalty depends on whether the Notice of Closure, including the permanent and temporary disability awards that are required to be included in such a notice, was reasonable. *See Kerry K. Hagen*, 64 Van Natta 316, 321 (2012).

¹ The definition was consistent with the Workers' Compensation Division's (WCD's) December 22, 2014 "Industry Notice," which describes its interpretation of when a worker is "significantly limited in the repetitive use" of a body part under OAR 436-035-0019(1).

The reasonableness of the Notice of Closure must be evaluated based on the information available to the carrier at the time of the closure. *David J. Morley*, 66 Van Natta 2052, 2056 (2014). If a carrier had a legitimate doubt as to its liability, its actions were not unreasonable. See *Snyder v. SAIF*, 287 Or App 361, 371 (August 23, 2017) (though the claimant was ultimately entitled to a permanent impairment award, the carrier had a legitimate doubt, at the time of claim closure, regarding its liability for permanent impairment); *Int'l Paper Co. v. Huntley*, 106 Or App 107, 110 (1991); *Robert E. Charbonneau*, 57 Van Natta 591, 602 (2005) (although the claim was prematurely closed, no penalty was awarded because the carrier had a legitimate doubt regarding its liability).

Here, claimant argues that SAIF's use of a gradation scale in determining whether to award a "chronic condition" award was *per se* unreasonable. We disagree.

In *Spurger v. SAIF*, 266 Or App 183 (2014), the court determined that the claimant's entitlement to a "chronic condition" award did not depend on whether a physician described the claimant's limitations as "significant," but whether the limitations described in the medical record established a significant limitation. 266 Or App at 193-94. Reasoning that our order lacked an adequate interpretation of what constitutes a "significant limitation," the court remanded for further interpretation of the "significant limitation standard." *Id.* at 195. In *Angelica M. Spurger*, 67 Van Natta 1798, 1804 (2015) (on remand), we concluded that "the plain and ordinary meaning of 'significantly limited' denotes a limitation that is meaningful or important."

In its December 22, 2014 "Industry Notice," the WCD defined "significant" as "having or expressing a meaning; meaningful" or "important; notable; valuable," and defined "limited" as "confined or restricted." In that notice, the WCD stated that it "interprets the relevant inquiry under OAR 436-035-0019(1) as follows: Because of a permanent and chronic condition caused by the compensable injury, is the worker unable to repetitively use the body part for more than two-thirds of a period of time?"²

² The Board has previously questioned the utility of SAIF's practice of providing a "three-part" "significant limitation" question which implies a gradation scale, rather than the "either/or" analysis that is required for a determination of a claimant's entitlement to a "chronic condition" impairment award. See, e.g., *Ryan D. Grassman*, 62 Van Natta 270, 271 n 2 (2010). However, despite SAIF's use of a gradation scale in this particular case, we conclude that, for the reasons expressed above, it was not unreasonable for its impairment rating to exclude a "chronic condition" impairment value based on the medical record that was available at the time of claim closure.

Here, SAIF's inquiry to the attending physician, Dr. Greenleaf, both addressed the standard set forth in OAR 436-035-0019(1) (whether claimant had a "significant limitation" in the repetitive use of his right knee) and referred to the WCD's interpretation of that standard ("more than 2/3 of the time"). Moreover, the attending physician was aware of the restrictions that he had placed on claimant due to the accepted conditions, as well as Dr. Baldwin's examination findings, at the time SAIF presented the "chronic condition" inquiry letter to him. SAIF closed the claim based on the record at closure, including Dr. Greenleaf's opinion (as the attending physician) regarding claimant's lack of a significant limitation.

After considering these particular circumstances, we do not consider the Notice of Closure (which did not award a "chronic condition" permanent impairment value) to be unreasonable.

Furthermore, after claim closure, claimant's attorney provided Dr. Greenleaf a description of limitations suggested by Dr. Baldwin in his November 2015 report. (Ex. 38). Those limitations included not driving vehicles with a heavy clutch and not kneeling more than five minutes in an hour. (Exs. 30-13-15, 38-1). Claimant's attorney also provided a description of additional difficulties that claimant reported to Dr. Baldwin in his November 2015 report. (Ex. 38). Those difficulties pertained to twisting, turning, and rotating the knee, squatting, jogging, running climbing stairs, and walking on uneven surfaces.³ (Exs. 30-3-4, 38-1-2).

Given that claimant's entitlement to the "chronic condition" award was established by a "post-closure" report obtained from Dr. Greenleaf, we conclude that the Notice of Closure was not unreasonable. *See Scot T. Campbell*, 61 Van Natta 1818, 1832 (2009) (declining to award an ORS 656.268 penalty where the increased compensation resulted from findings in a "post-closure" medical report that the carrier could not reasonably have known at the time of claim closure); *Tyrel Albert*, 66 Van Natta 1212, 1219 (2014). Therefore, we conclude that claimant is not entitled to a penalty under ORS 656.268(5)(f). Accordingly, we affirm.

ORDER

The ALJ's order dated January 19, 2017 is affirmed.

Entered at Salem, Oregon on September 7, 2017

³ Although Dr. Baldwin recorded claimant's difficulties in performing these particular activities, neither he nor Dr. Greenleaf imposed work restrictions regarding them.