
In the Matter of the Compensation of
GARY DESPOIS, Claimant
WCB Case No. 02-02165
ORDER ON RECONSIDERATION
Mustafa T Kasubhai PC, Claimant Attorneys
Terrall & Terrall, Defense Attorneys

Reviewing Panel: Members Biehl and Lowell.

The self-insured employer requests reconsideration of our February 26, 2003 order that reversed the portion of an Administrative Law Judge's (ALJ's) order that declined to award an assessed attorney fee under ORS 656.386(1) based on the employer's rescission of its denial of claimant's "new medical condition" claims for Grade IV chondral changes in the left patella and a left medial femoral chondral defect. The employer contends that we erred in awarding a fee under ORS 656.386(1)(b)(A), because the only issue at hearing was entitlement to a fee under ORS 656.386(1)(b)(B).¹

The employer is correct that the ALJ's order stated that the sole issue was claimant's entitlement to an assessed fee pursuant to ORS 656.386(1)(b)(B). (Opinion and Order, p.1). However, the ALJ's statement in this regard was incorrect: Claimant's request for hearing raised compensability, penalties, and attorney fees generally – without mentioning a particularly statute or subsection, or otherwise limiting the fee issue. The employer's initial response to the issues raised by claimant denied that claimant sustained a work-related accidental injury or occupational disease and that claimant was entitled to penalties or attorney fees. Later, the employer amended its response to claimant's specification of issues, and denied that there was a *de facto* denial.

The parties' written arguments to the ALJ addressed the attorney fee issue with *and without* reference to ORS 656.386(1)(b)(B).² And claimant asserted that

¹ The employer apparently agrees with our finding that ORS 656.386(1)(b)(B) would not apply, because the claims in question were for "new medical conditions," not "omitted conditions." See ORS 656.386(1)(b)(C); see *Johansen v. SAIF*, 158 Or App 672, 679, on recon 160 Or App 579, rev den 329 Or 527 (1999) (claims for conditions first diagnosed after acceptance were "new medical condition" claims, not claims for "omitted conditions").

² No hearing convened; the parties presented this case to the ALJ based on the written record and their written arguments.

the carrier's initial "response" to his hearing request established a denied claim. Thus, claimant's position would not be consistent with an attorney fee under ORS 656.386(1)(b)(B).³ Under these circumstances, particularly considering the *general* attorney fee issue raised by claimant's request for hearing, we disagree that the issue before the ALJ was limited to entitlement to a fee under ORS 656.386(1)(b)(B), or any specific statutory provision. *See Liberty Northwest Ins. Corp. v. Alonso*, 105 Or App 458, 460 (offset issue raised in the carrier's response to issues in request for hearing was properly before the Board notwithstanding that the carrier did not "raise" offset issue at hearing).

Finally, on Board review, claimant did not refer to ORS 656.386(1)(b)(B) in support of his request for an attorney fee award. Moreover, on review, claimant again referred to the employer's initial response to his hearing request as a claim denial that supports an attorney fee award. Thus, in effect, claimant's entitlement to an attorney fee under ORS 656.386(1)(a) and (b)(A) was raised at the hearing level and on review.

Accordingly, on reconsideration, we continue to find that the employer's response to claimant's request for hearing regarding the claims for Grade IV chondral changes in the left patella and a left medial femoral chondral defect was a denial under ORS 656.386(1)(b)(A), because it was a refusal to pay compensation "on the express ground that the injury or condition for which compensation is claimed is not compensable." Moreover, because claimant's counsel was instrumental in obtaining a rescission of that denial prior to a decision by the ALJ, we continue to conclude that claimant was entitled to an attorney fee under ORS 656.386(1)(a).

Finally, we acknowledge the employer's contention that claimant's request for hearing was "premature" because it was filed before the employer "denied" the claims. We do not address this argument, because it was not raised at hearing. *See Fister v. South Hills Health Care*, 149 Or App 214 (1997) (absent adequate reason, Board should not deviate from its well-established practice of considering only issues raised at hearing); *Stevenson v. Blue Cross of Oregon*, 108 Or App 247 (1991); *see also Thomas v. SAIF*, 64 Or App 193 (proceeding to litigate the merits is a waiver of the procedural defect of a premature denial); *Brian M. Eggman*,

³ *See e.g., Daniel S. Field*, 47 Van Natta 1457 (1995) (our first task is to determine which provisions of the Workers' Compensation Law apply).

49 Van Natta 1835 (1997) (“It is well-established that failure to raise a procedural defect is a waiver of any procedural error.”).

Accordingly, we withdraw our February 26, 2003 order. On reconsideration, we republish our February 26, 2003 order, as supplemented herein. The parties’ rights of appeal shall begin to run from the date of this order.

IT IS SO ORDERED.

Entered at Salem, Oregon on March 26, 2003