

In the Matter of the Compensation of
MICHAEL D. DEVRIES, JR., Claimant
WCB Case No. 02-05028
ORDER ON REVIEW
Daniel M Spencer, Claimant Attorneys
Hoffman Hart & Wagner, Defense Attorneys

Reviewing Panel: Members Biehl and Lowell.

The self-insured employer requests review of those portions of Administrative Law Judge (ALJ) Tenenbaum's order that: (1) set aside its denial of claimant's "new medical condition" claims for mechanical lumbar instability and bilateral lumbar radiculopathy conditions; and (2) set aside the employer's "current condition" denial. Claimant cross-requests review of that portion of the ALJ's order that awarded an attorney fee of \$5,500, requesting an increased attorney fee. On review, the issues are hearing procedure, compensability, and attorney fees. We affirm in part and reverse in part.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact," but change the date that claimant first came under Dr. Belza's care to October 30, 2001.

CONCLUSIONS OF LAW AND OPINION

Claimant, a network technician, compensably injured his low back when a 28-foot extension ladder he was loading onto his work truck caught in a tree and pulled him backward. Claimant twisted and felt a pop and low back pain. (Tr. 23). Claimant sought treatment from Dr. Jones, chiropractor. (Ex. 1A). An MRI revealed a small central protrusion at L4-5 and minor degenerative changes at L5-S1. Dr. Brett, consulting neurosurgeon, assessed an annular injury at L4-5 and/or L5-S1, with discogenic low back pain with muscle spasm, and opined that claimant's work injury was superimposed on preexisting degenerative changes in the low back. (Ex. 2). The employer accepted a "disabling" lumbar strain. (Exs. 6, 20). Although Dr. Brett released him to regular work, claimant's symptoms persisted and he continued to treat with Dr. Jones until September 2001. (Tr. 26).

On October 30, 2001, claimant sought treatment from Dr. Belza, neurosurgeon, who diagnosed mechanical instability of the lumbar spine, a central

disc protrusion and a large annular fissure at L4-5, spondylosis¹ at L4-5 and L5-S1 with bilateral lumbar radiculopathy, and grade I spondylolisthesis². (Exs. 13, 22, 24A, 25.)

On April 16, 2002, claimant requested that the employer amend its Notice of Acceptance to include “lumbar disc disease L4 to S1” and “bilateral lumbar radiculopathy” as “new medical conditions.” On June 16, 2002, the employer denied compensability of the “new” conditions, asserting that claimant’s compensable lumbar strain was superimposed on preexisting lumbar disc disease, which caused symptoms of lumbar radiculopathy, and refusing to expand the scope of acceptance to include the preexisting degenerative condition. The employer also stated that, if there is a combined condition of strain/disc disease, the current need for treatment is not now compensably related to the accepted condition. (Ex. 31). Claimant subsequently requested acceptance of mechanical instability as a “new” medical condition, which the employer also denied. Claimant requested a hearing. The ALJ upheld the employer’s denial of claimant’s lumbar disc disease³ and set aside the employer’s remaining denials.

Applying the major contributing cause standard, the ALJ concluded that Dr. Belza’s opinion was more persuasive than those of the employer’s examining physicians. After our *de novo* review of the record, we adopt the ALJ’s opinion on this issue, with the following supplementation.

The employer contends that all the medical evidence at the time it issued its denial indicated that the major contributing cause of claimant’s need for treatment was the preexisting degenerative condition in his low back, including Dr. Belza’s February 6, 2002 chart note and April 3, 2002 report, Dr. Schilperoort’s review of the MRI scan, and Dr. Belza’s operative report. (Exs. 22, 23, 25, 29). Subsequent to the denial, however, Dr. Belza explained during his conference with claimant’s attorney and at deposition that, although claimant had evidence of a very mild preexisting degenerative condition at L4-5 and L5-S1, the force and circumstances of claimant’s injurious event caused the lumbar strain and mechanical instability, including the pars defect, and that claimant’s continuing work for the employer continued to cause the worsening of the low back strain and the mechanical

¹ “Spondylosis is defined as “ankylosis of the vertebra; often applied nonspecifically to any lesion of the spine of a degenerative nature.” *Stedman's Electronic Medical Dictionary*, v. 4.0 (1998).

² “Spondylolisthesis” is defined as “forward movement of the body of one of the lower lumbar vertebrae on the vertebra below it, or upon the sacrum.” (*Id.*)

³ Claimant does not challenge this decision on review.

instability of the lumbosacral area, which resulted in impingement of the spinal nerves thereby producing periodic radiculopathy. Finally, after weighing all the contributing factors, including claimant's degenerative arthritis and the annular tear, Dr. Belza opined that the major contributing cause of the need for treatment was the November 6, 2000 work injury. (Exs. 33, 35).

We conclude that Dr. Belza's explanation regarding causation is well reasoned and based on a complete and accurate history. *See Somers v. SAIF*, 77 Or App 259, 263 (1986). Moreover, his opinion is based in part on his observations at surgery, and is therefore entitled to great weight. *See Argonaut Insurance Co. v. Mageske*, 93 Or App 698 (1988). Accordingly, we find his opinion persuasive.

The employer does not assert on review that the record is factually insufficient to support the ALJ's conclusion that claimant's current condition is compensable. Rather, the employer contends that the ALJ erred in concluding that the parties agreed to proceed on a "current condition denial" theory. The employer asserts that the parties agreed to limit the issue at hearing to the "scope of acceptance issue," *i.e.*, the denial of claimant's "new" medical conditions. Claimant argues that the remarks of both attorneys at hearing show that they were prepared to litigate the compensability of claimant's disc problems and instability, regardless of the theory of compensability. Claimant also relies on the express terms of the denial, asserting that it made the employer's position clear that claimant's current condition was not compensable.

The employer's June 16, 2003 denial stated in pertinent part:

"Your compensable lumbar strain is superimposed on a pre-existing degenerative lumbar disc disease (L4-S1). The pre-existing condition appears to have caused symptoms of lumbar radiculopathy and a recommendation by Dr. Belza for surgery. While we have accepted the strain, we are not going to expand the scope of acceptance to include the pre-existing degenerative condition which appears to be the sole cause of your need for treatment.

"In the alternative, if is [sic] is determined that there is now a combined condition of strain/disc disease, the current need for treatment [and] any resulting disability is not now (and never has been) caused in major part by your accepted strain or your employment at [the employer]."

At hearing, claimant's attorney identified the issue as a current condition denial that arose out of the request for acceptance of the new medical conditions, which included lumbar degenerative disc disease, bilateral radiculopathy, and mechanical instability. (Tr. 1, 2). The employer's attorney asserted that the issue was a scope of acceptance issue, not a current condition denial. (Tr. 3). After further discussion, he stated: "What [the ALJ] need[s] to determine in this case is whether degenerative disc disease, radiculopathy, and mechanical instability are compensable. If * * * they are, the claimant gets benefits, and [his attorney] gets a fee. If * * * they aren't, the claimant still has a compensable open lumbar strain claim. We're not here to take him out totally." (Tr. 5). After a recess, the parties and the ALJ continued to discuss the matter. (Tr. 5 through 11). The employer's attorney continued to assert that the only issue before the ALJ was whether the "scope of acceptance" should be expanded. Claimant's attorney finally stated: "Let's go. That's fine."

Based on the denial and parties' positions as expressed at the hearing, we interpret the employer's denial to deny claimant's L4-5 degenerative disc disease, either separately or as a condition that combined with the accepted lumbar strain. As such, rather than representing a denial of claimant's "current condition," the denial indicates that claimant's current need for treatment is due to his noncompensable degenerative disc disease, either solely or as the major cause of a combined condition. Consequently, we reverse the ALJ's order insofar as the order set aside a "current condition" denial.

As noted previously, the ALJ upheld the employer's denial of claimant's lumbar disc disease as a "new" medical condition. In light of such circumstances, and based on our interpretation of the employer's purported "current condition" denial, it necessarily follows that the denial of degenerative disc disease is upheld.

Claimant's counsel submitted a request for attorney fees for his services at hearing. Based on the time devoted to the case, he requested a \$10,560 attorney fee award. The insurer objected to that amount and requested that the fee be based on the customary factors in line with awards in similar cases.

The ALJ found claimant entitled to an assessed attorney fee under ORS 656.386(1) for prevailing over the employer's denials of the "mechanical instability and lumbar radiculopathy" and "current condition" and awarded a fee of \$5,500. In awarding that fee, the ALJ considered the factors set forth in OAR 438-015-0010(4). On review, claimant renews his request for a fee of \$10,560, based on 52.8 hours of time devoted to the compensability issues.

Claimant contends that the ALJ failed to identify any factor that would justify a fee of less than the amount requested.

On *de novo* review, we proceed to consider the factors in OAR 438-015-0010(4) in determining a reasonable attorney fee for claimant's counsel's services at hearing. *Daryl L. Underwood*, 50 Van Natta 2330, 2332 (1998).

In determining a reasonable attorney fee, we consider the following factors: (a) the time devoted to the case; (b) the complexity of the issue(s) involved; (c) the value of the interest involved; (d) the skill of the attorneys; (e) the nature of the proceedings; (f) the benefits secured for the represented party; (g) the risk in a particular case that an attorney's efforts may go uncompensated; and (h) the assertion of frivolous issues or defenses. OAR 438-015-0010(4).

The issue at hearing was whether claimant had established compensability of his "new medical conditions."⁴ The hearing lasted approximately one hour and 45 minutes. Claimant was the only witness to testify. There was one deposition prior to hearing. The record consists of 58 exhibits, 22 of which were submitted by claimant's counsel. The exhibits submitted by claimant's counsel included a well-reasoned explanation as to why Dr. Belza, claimant's treating surgeon, concluded that the work injury was the major contributing cause of the disability and need for treatment of the "new" conditions.

Based on compensability disputes generally litigated before this forum, we find the issue presented in this case to be of average complexity regarding the legal and factual issues involved.⁵ The value of the interest involved and the benefit secured for claimant are significant because the employer's denial of the mechanical lumbar instability and bilateral lumbar radiculopathy conditions has been set aside, rendering claimant's treatment (including the May 20, 2002 surgery) and any temporary and/or permanent disability related to those conditions recoverable. The attorneys involved in this matter are skilled litigators with substantial experience in worker's compensation law.

⁴ Based on our decision regarding the "current condition" denial issue, claimant's attorney is not finally prevailing over that denial; thus, we do not consider that issue in our determination of a reasonable attorney fee at hearing.

⁵ Claimant's attorney submitted a statement of services, representing that 52.8 hours of time was expended at the hearings level. The statement of services indicates a figure of \$10,560 as the total "amount of fee sought."

No frivolous issues or defenses were presented at hearing. Furthermore, there was a risk that claimant's counsel might go uncompensated, given the contrary medical opinions provided by Dr. Rosenbaum and Drs. Schilperoort and Eckman.

After considering the record (including claimant's counsel's statement of services and the employer's objections) and the factors set forth in OAR 438-015-0010(4), we conclude that a \$5,500 fee is reasonable for claimant's attorney's services at hearing regarding the lumbar instability and bilateral lumbar radiculopathy compensability issues. In reaching this conclusion, we have particularly considered the time devoted to the issues (as represented by the hearing record, claimant's counsel's statement of services, and the employer's objections), the complexity of the issues, the values of the interest involved, the nature of the proceeding, and the risk that claimant's counsel may go uncompensated. In reaching this conclusion, we note that claimant's counsel is not entitled to a fee for services devoted to the "current condition denial" and the degenerative disc disease denial issues.

Claimant 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 attorney fee for claimant's attorney's services on review regarding the lumbar instability and bilateral lumbar radiculopathy conditions is \$1,500, to be paid by the employer. In reaching this conclusion, we have particularly considered the time devoted to those compensability issues (as represented by the record on review), the complexity of the issues and the value of the interest involved. We note that no attorney fee award is available for that portion of claimant's brief devoted to the attorney fee issue. *Dotson v. Bohemia, Inc.*, 80 Or App 233, rev den 302 Or 35 (1986). Likewise, no fee is granted for claimant's counsel's services devoted to the "current condition denial" issue.

ORDER

The ALJ's order dated November 4, 2002 is affirmed in part and reversed in part. The employer's denial is set aside insofar as it denied claimant's mechanical lumbar instability and bilateral lumbar radiculopathy conditions. The remainder of the employer's denial is reinstated and upheld. The remainder of the ALJ's order is affirmed. For services on review, claimant's attorney is awarded \$1,500, to be paid by the employer.

Entered at Salem, Oregon on May 9, 2003