

**In the Matter of the Compensation of
PENNY I. COOPER, Claimant**

WCB Case No. 11-02155

ORDER ON REVIEW

Philip H Garrow, Claimant Attorneys

Scott H Terrall & Associates, Defense Attorneys

Reviewing Panel: Members Langer, Biehl, and Herman. Member Langer concurs in part and dissents in part.

The self-insured employer requests review of Administrative Law Judge (ALJ) Sencer's order that: (1) set aside its denial of claimant's medical services claim for her left ankle condition; and (2) awarded an \$8,000 attorney fee award under ORS 656.386(1). On review, the issues are medical services and attorney fees. We affirm.¹

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact," as supplemented and summarized as follows.

Claimant was compensably injured in June 2008. The employer accepted a disabling left ankle sprain.

In April 2009, Dr. Hinz performed left ankle surgery. (Ex. 52). Thereafter, claimant regularly treated with Dr. Hinz and Dr. Stewart. Relevant to this dispute, she most recently treated with Dr. Hinz on September 22, 2010. (Exs. 103, 104). On that date, Dr. Hinz stated that claimant's condition was "medically stationary," and that he did not "have anything else to offer [her] from a surgical or medical perspective as far as further care." (Ex. 103).

¹ Claimant expressly requested a fee of \$8,000 at hearing, and the employer lodged no objection to that request. We are not inclined to address this issue, which the employer has raised for the first time on review. *See Stevenson v. Blue Cross*, 108 Or App 247 (1991) (Board may refuse to consider issues on review that are not raised at hearing); *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 those issues raised by the parties at hearing).

In any event, if we were to address the issue, we would adopt the ALJ's order concerning the attorney fee amount. The employer's arguments on review for reducing the fee awarded at hearing are speculative and unpersuasive.

On October 28, 2010, claimant sought medical treatment at an emergency room (ER) after kicking the leg of her bed with her left foot. (Ex. 111-12). The record does not establish that claimant submitted a medical bill to the employer for those medical services, or that she otherwise requested that the employer pay for those services.

Most recent to the disputed denial (issued on December 23, 2010 and described below), claimant was examined by Dr. Stewart on November 8, 2010 and December 20, 2010. (Exs. 113, 115). Dr. Stewart's November 8 chart note stated that claimant was "post left ankle reconstruction with persistent significant complaints of pain." (Ex. 113). That chart note also recorded tenderness along claimant's "scar line," and further noted Dr. Hinz's surgical finding of chondromalacia, which Dr. Hinz opined was "not a significant issue." (*Id.*)

On December 20, 2010, Dr. Stewart completed a questionnaire from a different carrier related to claimant's "disability claim" with that carrier. (Ex. 115). Dr. Stewart completed that questionnaire, which included an assessment of claimant's physical abilities based on his examination of claimant on that day. (*Id.*)

On December 23, 2010, the employer issued a denial stating:

"Your claim has previously been accepted for a left ankle sprain. Evidence establishes that your current left ankle condition, and any claimed need for treatment and disability associated with your left ankle and foot, is not compensably related to your accepted industrial injury of June 30, 2008. We are therefore denying the compensability of your current left ankle condition. We will continue to process your claim for any benefits that may be found to be compensably related to the accepted injury." (Ex. 116).

On January 18, 2011, Dr. Stewart signed a letter prepared by the employer stating that, despite indicating otherwise on the December 20, 2010 disability form, he was "unable to state whether the disability is causally related to the claimed industrial injury * * *." (Ex. 117-1). Dr. Stewart also indicated that he was unaware of claimant's October 2010 ER visit "in relation to her foot and an additional injury that occurred at home." (*Id.*) After a summary of that ER visit, Dr. Stewart stated that it "further confirms [his] statement that [he was] unable to state a causal relationship between the disability indicated on the December 20, 2010 disability form and the claimed industrial injury * * *." (*Id.*)

Claimant requested a hearing concerning the employer's denial.

CONCLUSIONS OF LAW AND OPINION

The ALJ set aside the employer's denial, which the parties and the ALJ treated as a medical services denial under ORS 656.245.² In reaching that decision, the ALJ found that Dr. Stewart's opinion was unpersuasive.

The employer contends that, regardless of any lack of persuasiveness on the part of Dr. Stewart, claimant has not provided any affirmative evidence that, as of the time of the December 23, 2010 denial, "any claimed need for treatment and disability associated with her left ankle and foot are compensably related to the accepted industrial injury of June 30, 2008." We have not identified, however, any such current *claimed need* for medical services at the time of the December 23, 2010 medical services denial. In other words, we find that there is no medical services "claim" for the employer to deny. We reason as follows.

ORS 656.245(l)(a) provides, in relevant part:

"For every compensable injury, the insurer or the self-insured employer shall cause to be provided medical services for conditions caused in material part by the injury for such period as the nature of the injury or the process of the recovery requires, subject to the limitations in ORS 656.225, including such medical services as may be required after a determination of permanent disability. In addition, for consequential and combined conditions described in ORS 656.005(7), the insurer or the self-insured employer shall cause to be provided only those medical services directed to medical conditions caused in major part by the injury."

If the claimed medical service is "for" an "ordinary" condition, the first sentence of ORS 656.245(l)(a) governs the compensability of medical services. *SAIF v. Sprague*, 346 Or 661, 672 (2009); *Cameron J. Horner*, 62 Van Natta 2904,

² Therefore, the employer's "current condition" denial is distinguishable from the type of "current condition" denial that we found impermissible in *Barbara J. Ferguson*, 63 Van Natta 2253 (2011). However, as set forth in detail below, the employer's "current condition" medical services denial is a nullity for different, albeit related, reasons.

2905 (2010), *aff'd*, 248 Or App 120 (2012). If the claimed medical service is “directed to” a consequential or combined condition, the second sentence of ORS 656.245(l)(a) applies. *Sprague*, 346 Or at 673; *Horner*, 62 Van Natta at 2905.

A necessary predicate to conducting this analysis is the existence of a “claimed medical service” for the employer to deny. In that regard, an employer “has authority to deny a current claimed need for medical services, or specific claims as the claimant presents them, if the medical services are not reasonable and necessary and attributable to the compensable injury.” *Evanite Fiber v. Striplin*, 99 Or App 353, 356-57 (1989) (citing ORS 656.245(1)). When a carrier issues a denial of “a current claimed need for medical services,” that denial only applies to “a current need for treatment” and does not apply to future benefits. *Green Thumb, Inc. v. Basl*, 106 Or App 98, 101-102 (1991).

Thus, even if a “current condition” medical services denial is upheld, a claimant “could make a later claim for medical services of the same kind, if the condition has changed and the request is supported by new facts that could not have been discovered earlier.” *Id.* The claimant may also seek additional services (beyond any current claimed need for particular services) to treat the compensable injury. *Id.*

In *Altamirano v. Woodburn Nursery, Inc.*, 133 Or App 16, 19-20 (1995), the court summarized these principles as follows:

“An employer may not deny future benefits or disability on an accepted claim. An employer may deny specific unpaid services or a current claimed need for treatment; it may deny a current claimed need for treatment, even if there are no remaining unpaid medical bills. *In every instance, however, there must be a claim for medical treatment or disability for the employer to deny.* A ‘claim’ for purposes of acceptances and denials, is ‘a written request for compensation from a subject worker or someone on the worker’s behalf, or any compensable injury of which a subject employer has notice or knowledge.’ ORS 656.005(6).”

Applying those principles to the facts before it, the court explained:

“In this case, [the] employer purported to deny [the] claimant’s unspecified ‘current condition.’ The Board found that ‘there is no evidence in this record that [the] claimant’s ‘current condition’ on [the date of the denial] required medical service or resulted in disability.’ Based on that finding, there was no claim. In the absence of a claim, there cannot be a denial that has any legal effect. Because there was no claim that [the] claimant’s unspecified current condition required medical treatment or resulted in disability, [the] employer’s attempted denial was ineffective.” *Id.*

Thus, although a “current condition” medical services denial is permissible, it must nevertheless be issued in response to a “current claimed need for treatment.” *See id.* In other words, there must be a medical services “claim” for the employer to deny; otherwise, the denial is a nullity. *See id.; Barbara J. Ferguson*, 63 Van Natta 2253, 2255 (2011); *compare William E. Hamilton*, 41 Van Natta 2195, 2198 (1989) (medical services denial issued in the absence of a medical services claim set aside as a nullity), *with Rodney Danielson*, 60 Van Natta 1978, 1981-82 (2008) (the employer’s receipt of an 827 Form, in conjunction with the accompanying chart notes and medical bills, sufficient to establish a “claim” for medical services; therefore, the employer’s denial of “current medical treatment” constituted a valid medical services denial that needed to be addressed on the merits).

Here, as in *Altamirano*, the record does not establish that claimant’s current left ankle condition on December 23, 2010 required medical services. Indeed, much of the employer’s arguments in support of its denial advance that very assertion. However, the absence of required medical services concerning claimant’s left ankle condition on December 23, 2010 (and the lack of any “claim” for such services) means that there was no medical services claim for the employer to deny. *Altamirano*, 133 Or App at 19-20.

Moreover, because the employer issued its medical services denial as a “current condition” denial, we do not conclude, as a factual matter, that the employer has denied “specific unpaid services.” *See id.; see also Longview Inspection v. Snyder*, 182 Or App 530, 536 (2002) (the scope of a denial is a question of fact); *Ferguson*, 63 Van Natta at 2256 (same). Nor does the employer contend that its denial should be so construed. In any event, the record does not establish any such specific unpaid services to which the denial could be attributed.

Consequently, for the foregoing reasons, we affirm.

Claimant's attorney 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 fee for claimant's attorney's services on review concerning the employer's denial is \$4,000, payable by the employer.³ In reaching this conclusion, we have particularly considered the time devoted to the medical services denial issue (as represented by claimant's respondent's brief and his counsel's attorney fee submission), the complexity of the issue, the value of the interest involved, and the risk that claimant's counsel might go uncompensated.

Finally, claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the denial, to be paid by employer. *See* 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 January 13, 2012 is affirmed. For services on review, claimant's attorney is awarded an assessed fee of \$4,000, to be paid by the employer. Claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the denial, to be paid by the employer.

Entered at Salem, Oregon on August 31, 2012

Member Langer concurring in part and dissenting in part.

I concur with the majority's opinion concerning the medical services issue. However, I do not agree that the attorney fee awards at hearing or on review are reasonable.⁴ *See* ORS 656.382(2).

³ No attorney fee is available for claimant's counsel's services devoted to defending the ALJ's attorney fee award. *Dotson v. Bohemia, Inc.*, 80 Or App 233, *rev den*, 302 Or 35 (1986); *Charles M. Lydall*, 62 Van Natta 806 n 1 (2010).

⁴ I further question whether claimant is entitled to a fee in these circumstances. *See Robyn E. Stein*, 62 Van Natta 290, 297 (2010) (Member Langer, dissenting).

After considering the applicable factors, I would award attorney fees that better reflect the value of the interest involved and the benefit secured for the represented party. OAR 438-015-0010(4)(c), (f).

Specifically, because we have determined that there was no “claimed medical service” for the employer to deny, the value of the interest involved, although present, is minimal. Likewise, the benefit secured for claimant is tangible, but not significant. Under such circumstances, I cannot agree that the awarded fees are reasonable. Accordingly, I respectfully dissent on that issue.