

In the Matter of the Compensation of
RONALD CRAWFORD, Claimant

WCB Case No. 07-03041

ORDER ON REVIEW

Ransom Gilbertson et al, Claimant Attorneys
James B Northrop, SAIF Legal, Defense Attorneys

Reviewing Panel: Members Lowell and Weddell.

Claimant requests review of Administrative Law Judge (ALJ) Pardington's order that upheld the SAIF Corporation's *de facto* denial of claimant's new/omitted medical condition claim for an "intra-articular distal radius fracture left wrist." In its respondent's brief, SAIF contends that there was no *de facto* denial because there was no perfected new or omitted medical condition claim for that condition. On review, the issues are claim processing and, potentially, compensability.¹ We reverse.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact."

CONCLUSIONS OF LAW AND OPINION

A large piece of machinery fell on claimant as he was working on August 8, 2006. SAIF initially accepted left open tibia and fibular fracture, displaced left distal radius fracture, intraarticular fragment left knee, and lateral process fracture of the right talus. Claimant subsequently requested acceptance of "anterior crucial ligament damage left knee, proximal tibial plateau fracture medial plateau left knee, and intra-articular distal radius fracture left wrist."

SAIF amended its Notice of Acceptance to include the tibial and medial plateau fracture and the anterior cruciate ligament tear within 60 days after receiving claimant's request. However, at the same time, SAIF responded to the request for acceptance of the "intra-articular distal radius fracture left wrist" by issuing a "No Perfected Claim" letter, asserting that no new or omitted medical

¹ Claimant also contends that he is entitled to a penalty and attorney fee for allegedly unreasonable claim processing. Claimant did not raise this issue below. Accordingly, we decline to address the issue for the first time on review. See *Stevenson v. Blue Cross of Oregon*, 108 Or App 247, 252 (1991); *Gary Despois*, 55 Van Natta 105, 106 (2003).

condition claim had been perfected because the request did not involve a condition other than the conditions previously accepted. Claimant requested a hearing, alleging that SAIF had *de facto* denied a compensable condition.

Reasoning that SAIF was required to respond to claimant's request for acceptance of the intra-articular distal radius fracture with either an acceptance or denial, the ALJ construed SAIF's failure to formally accept the condition as a *de facto* denial. Further finding that the intra-articular distal radius fracture had already been accepted as a displaced distal radius fracture, the ALJ upheld SAIF's denial.

On review, claimant contends that because the intra-articular distal radius fracture was an admittedly compensable condition for which a new or omitted medical condition claim had been made, SAIF was obligated to issue a Notice of Acceptance for that condition. In its respondent's brief, SAIF contends that claimant had not perfected a new or omitted medical condition claim and, therefore, it was not required to issue an acceptance or denial in response.

For the following reasons, we find that the intra-articular distal radius fracture was a compensable omitted medical condition for which an omitted medical condition claim was properly made. We base our decision on the following reasoning.

We first address SAIF's argument that it did not *de facto* deny an omitted medical condition claim because no omitted condition claim was perfected.

A claim for a new or omitted medical condition may be made in writing pursuant to the provisions of ORS 656.267.² ORS 656.262(6)(d), (7)(a). The claim must be directed to the carrier and "must clearly request formal written

² ORS 656.267(1) provides:

"To initiate omitted medical condition claims under ORS 656.262(6)(d) or new medical condition claims under this section, the worker must clearly request formal written acceptance of a new medical condition or an omitted medical condition from the insurer or self-insured employer. A claim for a new medical condition or an omitted condition is not made by the receipt of medical billings, nor by requests for authorization to provide medical services for the new or omitted condition, nor by actually providing such medical services. The insurer or self-insured employer is not required to accept each and every diagnosis or medical condition with particularity, as long as the acceptance tendered reasonably apprises the claimant and the medical providers of the nature of the compensable conditions. Notwithstanding any other provision of this chapter, the worker may initiate a new medical or omitted condition claim at any time."

acceptance of a new medical condition or an omitted medical condition.” ORS 656.267(1). Such a claim “is not made by the receipt of medical billings, nor by requests for authorization to provide medical services for the new or omitted condition, nor by actually providing such medical services.” *Id.*

Within 60 days after receiving written notice of a new or omitted medical condition claim, the carrier must furnish to the claimant written notice of acceptance or denial of the claim. ORS 656.262(7)(a). No response other than an acceptance or denial, such as a “clarification,” is permissible. *Rose v. SAIF*, 200 Or App 654, 664 (2005). Therefore, any other response is a *de facto* denial of the claim. *Ann M. Carstens*, 57 Van Natta 2865, 2867 (2005).

SAIF contends that claimant did not “request formal written acceptance of a new medical condition or an omitted medical condition” because, as a medical matter, claimant’s intra-articular distal radius fracture was the same condition that it had already accepted as a displaced distal radius fracture. Thus, SAIF reasons, it was neither “new” nor “omitted,” and the claim for it was not a claim for a new or omitted condition. Accordingly, SAIF argues that claimant has not perfected a new or omitted medical condition claim for an intra-articular distal radius fracture, and its failure to accept or deny the condition was not a *de facto* denial of the claim.

In support of its argument, SAIF cites *John J. O’Brien*, 58 Van Natta 2714 (2006), *Llance A. Peterson*, 57 Van Natta 3279 (2005), *Dale A. Helvie*, 57 Van Natta 821 (2005), *Adrian Rodriguez*, 53 Van Natta 504 (2001), *Terrance W. Heurung*, 51 Van Natta 1272 (1999), *Steven J. Clum*, 51 Van Natta 1017 (1999), *Billy W. Wilson*, 50 Van Natta 1747 (1998), *Raymond A. Graves*, 50 Van Natta 1520, *on recons*, 50 Van Natta 1827 (1998), *aff’d without opinion*, 166 Or App 551 (2001), and *Royal S. Buell*, 50 Van Natta 702, *aff’d without opinion*, 157 Or App 723 (1998).³ SAIF contends that those cases set forth a two-step

³ SAIF also cites *Amador R. Gallardo*, 52 Van Natta 487 (2000), and *Linda K. Swanson*, 51 Van Natta 1869 (1999). In those cases, we found that the claimants had not perfected aggravation claims. However, those cases addressed a procedural requirement that a claim for an aggravation “be accompanied by the attending physician’s report establishing by written medical evidence supported by objective findings that the claimant has suffered a worsened condition attributable to the compensable injury.” ORS 656.273(3) (1995). The statutes placing procedural requirements on new or omitted medical condition claims, by contrast, require only that the claim be in writing and that it clearly request formal written acceptance of a new medical condition or an omitted medical condition from the insurer or self-insured employer. ORS 656.262(6)(d), (7)(a); ORS 656.267(1). Because *Gallardo* and *Swanson* addressed requirements for claim perfection that are inapplicable to new or omitted medical condition claims, they are not relevant.

process in which the perfection of a claim for a new or omitted medical condition is evaluated first, and only if the claim is perfected is the claim evaluated on its merits. In those cases, we found that the carrier was not required to accept a claimed new or omitted medical condition because the claim was actually for a symptom, rather than a distinct condition. However, they do not support SAIF's position.

In none of the cited cases did we find that the carrier had not denied the new or omitted condition claim. To the contrary, we specifically addressed *de facto* denials of new or omitted medical conditions in *O'Brien*, *Heurung*, and *Wilson*. *O'Brien*, 58 Van Natta at 2715; *Heurung*, 51 Van Natta at 1272; *Wilson*, 50 Van Natta at 1748. In *Clum*, we explained that where the claimant requested acceptance of symptoms of an accepted condition that arose after the issuance of the Notice of Acceptance, the request was most appropriately processed as a "new medical condition claim." 51 Van Natta at 1017 n 1. Although we found that a symptom of an accepted condition was not, itself, a new or omitted medical condition that the carrier was obligated to accept, our analysis turned on the merits of the claim rather than the procedural issue of perfection.

Further, we have specifically rejected SAIF's contention that the perfection of a new or omitted medical condition claim depends on the merits of whether the claim is for a new or omitted medical condition. In *Francisco G. Rodriguez*, 59 Van Natta 2422 (2007), the carrier had accepted a left eighth rib fracture. The claimant then requested acceptance of "chronic chest wall pain as a result of the 8th rib fracture condition" as a new or omitted medical condition. The carrier issued a "No Perfected Claim" letter that asserted that the claimant had requested acceptance of a symptom rather than a condition.

We reasoned that regardless of whether, on the merits, the "chronic chest wall pain as a result of the 8th rib fracture condition" was a condition or merely a symptom of the accepted eighth rib fracture, the claimant had clearly requested that the carrier accept the "chronic chest wall pain as a result of the 8th rib fracture condition" as a new or omitted medical condition. 59 Van Natta at 2425. Thus, regardless of whether "chronic chest wall pain as a result of the 8th rib fracture condition" was a new or omitted medical condition, we determined that the claimant had properly initiated a *claim* for a new or omitted medical condition. *Id.* Accordingly, we held that the carrier's failure to respond to the claim with an acceptance or denial was a *de facto* denial of a new or omitted medical condition claim. *Id.* at 2426.

Here, claimant clearly requested, in writing, that SAIF accept the intra-articular distal radius fracture. Because it was in existence at the time of the initial Notice of Acceptance, the claim was for the condition as an omitted medical condition. See *Mark A. Baker*, 50 Van Natta 2333, 2336 (1998) (defining an omitted condition as “a condition that is in existence at the time of the notice, but is not mentioned in the notice or is left out”). Because SAIF did not respond to the omitted medical condition claim in a timely manner, it *de facto* denied the claim.

Accordingly, we turn to the merits of the *de facto* denial. As discussed above, we have held that carriers were not required to accept claims for new or omitted medical conditions if the claimed “conditions” were actually *symptoms* of, or *treatments* for, previously accepted conditions. In such cases, the claimants did not prove new or omitted medical conditions because no new or omitted medical conditions were present.

SAIF contends that because it accepted a displaced distal radius fracture, the claimed intra-articular distal radius fracture was not omitted. Accordingly, SAIF argues, no omitted medical condition was present. The medical evidence does not support SAIF’s position.

As discussed above, whether a condition was “omitted” depends on whether it was “not mentioned” in, and “left out” of, the Notice of Acceptance. *Baker*, 50 Van Natta at 2336. Here, the question was addressed by Dr. Ellis, who performed surgery on claimant’s left wrist. Dr. Ellis was asked:

“Is the claimed condition of intra-articular distal radius fracture of the left wrist medically the same condition as the accepted displaced left distal radius fracture? Is there a realistic or material difference between the two terminologies, or are they just different names or descriptive terms for the same condition? Why or why not? Please fully explain.” (Ex. 39).

Dr. Ellis replied, “The term intra-articular distal radius fracture is more precise becau[se] it describes the orientation of the fracture & illustrates how the fracture goes into the joint itself & is at higher risk to develop arthritis.” (*Id.*)

Dr. Ellis was explicitly asked whether the claimed intra-articular distal radius fracture was the same condition as the accepted displaced distal radius fracture. Rather than stating that the conditions were synonymous, Dr. Ellis explained the difference between the two diagnoses and stated that “intra-articular

distal radius fracture” is a more accurate description of claimant’s condition. Accordingly, we find that claimant’s “intra-articular distal radius fracture left wrist” was not mentioned, and was left out, when SAIF accepted “displaced left distal radius fracture.”

Based on the above reasoning, we find that SAIF *de facto* denied an omitted medical condition claim for “intra-articular distal radius fracture left wrist.” Moreover, because the compensability of the claimed omitted medical condition is not contested, we set aside SAIF’s *de facto* denial. Accordingly, we reverse the ALJ’s order.

ORDER

The ALJ’s order dated September 7, 2007 is reversed. SAIF’s *de facto* denial is set aside and the claim is remanded to SAIF for processing according to law.

Entered at Salem, Oregon on June 26, 2008