

In the Matter of the Compensation of
WARREN D. DUFFOUR, Claimant

WCB Case No. 10-04095

ORDER ON REVIEW

Ronald A Fontana, Claimant Attorneys
Cummins Goodman et al, Defense Attorneys

Reviewing Panel: Members Biehl, Lowell, and Herman.

Claimant requests review of those portions of Administrative Law Judge (ALJ) Otto's order that: (1) determined that the self-insured employer's modified acceptance of a "traumatic brain injury" did not constitute a *de facto* denial of other claimed new/omitted medical condition claims; and (2) declined to award penalties and attorney fees under ORS 656.386(1), ORS 656.262(11)(a), and ORS 656.382(1). On review, the issues are claim processing, penalties and attorney fees. We affirm, as modified.

FINDINGS OF FACT

We adopt the ALJ's findings of fact with the following changes. On page 4, we replace the third full paragraph with the following:

"In a September 15, 2010 concurrence letter from the employer, Dr. Davies explained that traumatic encephalopathy, traumatic brain injury, concussive closed head injury, and post-traumatic amnesia were symptomatic expressions of traumatic brain injury and that the acceptance of traumatic brain injury reasonably apprised claimant and his medical providers of the nature of his compensable conditions. Dr. Davies stated that vertigo was not always secondary to traumatic brain injury. (Ex. 35)."

We provide the following summary of the relevant facts.

Claimant was compensably injured on February 21, 2010, when he was struck in the head. On April 15, 2010, the employer accepted left temporal parietal subarachnoid hemorrhage, right frontal subarachnoid hemorrhage with intraparenchymal hematoma, nasal fracture, left periorbital ecchymosis and contusion, and scalp laceration. (Ex. 17).

Claimant was treated by Dr. Wilson and referred to Dr. Tilson, neuropsychologist. In July 2010, he was examined by Dr. Davies, psychologist/neuropsychologist, on behalf of the employer.

By letter dated May 26, 2010, claimant asked the employer to modify the acceptance to include traumatic encephalopathy, traumatic brain injury, concussive closed head injury, post-traumatic amnesia, and vertigo. (Ex. 21).

On July 23, 2010, the employer issued a “Modified Notice of Claim Acceptance,” which listed the previously accepted conditions, but added “traumatic brain injury.” (Ex. 31). On the same date, the employer wrote to claimant “in response to this new/omitted condition request.” The employer explained that it had received medical information that “traumatic brain injury” appropriately took into account the requested new/omitted conditions and appropriately apprised his medical providers of the nature of his compensable conditions. (Ex. 30).

On July 26, 2010, claimant requested a hearing regarding the employer’s July 23, 2010 “*de facto* denial” of traumatic encephalopathy, concussive closed head injury, post-traumatic amnesia, and vertigo, and requested penalties, attorney fees, and costs.

CONCLUSIONS OF LAW AND OPINION

The ALJ determined that claimant’s May 26, 2010 letter to the employer was a request for acceptance of new or omitted medical conditions, which the employer was required to accept or deny within 60 days. The ALJ found that the employer complied with ORS 656.267(1) by accepting claimant’s “traumatic brain injury” on July 23, 2010. The ALJ reasoned that, based on the medical evidence, any reasonable person would believe that acceptance of claimant’s traumatic brain injury included the other newly claimed conditions. Consequently, the ALJ determined that there was no *de facto* denial.

On review, claimant argues that the employer *de facto* denied his new/omitted medical condition claims for traumatic encephalopathy, concussive closed head injury, post-traumatic amnesia, and vertigo. He contends that the employer was required to clearly accept or deny each of the requested conditions within 60 days of his May 26, 2010 new/omitted medical condition claim. Based on the following reasoning, we agree.

To begin, we find that claimant's May 26, 2010 letter constituted new/omitted medical condition claims for the listed conditions. *See Crawford v. SAIF*, 241 Or App 470, 480 (2011) (the nature of the claimant's request will dictate the required response; if "the identified deficiency is an omitted condition that the claimant expressly seeks to have accepted, then the insurer must respond by processing the omitted condition claim pursuant to ORS 656.262(7)(a), by either accepting or denying it within 60 days"). The issue is whether the employer appropriately responded to claimant's letter.

After issuance of the ALJ's order, the court issued *SAIF v. Stephens*, 247 Or App 107 (2011). In that case, the claimant filed a new/omitted medical condition claim for "coccydynia," and in response the carrier modified its acceptance to accept a "coccyx bone bruise." The court rejected the carrier's argument that its acceptance of "coccyx bone bruise" complied with ORS 656.262(7)(a) and ORS 656.267(1). *Id.* at 111. Citing *Crawford*, the court reiterated that a carrier's response to a new/omitted medical condition claim must be by written notice of acceptance or denial within 60 days. Noting further that a mere letter of clarification or amendment of the notice of acceptance does not suffice, the *Stephens* court reasoned that the failure of a carrier to respond by either accepting or denying such a claim within 60 days is a procedural deficiency that gives rise to a denied claim. *Id.* at 112. Because the claimant complied with the provisions of ORS 656.267 by expressly requesting acceptance of "coccydynia," the court determined that the carrier had an obligation to process that claim by either accepting or denying coccydynia, and that we had correctly concluded that its failure to do so was a *de facto* denial. *Id.*

This claim differs in some respects from *Stephens*, where the claimant requested acceptance of a single condition and the carrier accepted a condition different from what was requested. By contrast, here, claimant requested acceptance of multiple conditions in one letter, one of which was accepted as requested. Moreover, the employer in this case provided a clarifying letter, stating that it had received medical information affirming that the condition accepted in its modified acceptance (traumatic brain injury) "appropriately [took] into account" the requested new/omitted conditions and apprised the medical providers of the nature of the compensable conditions. (Ex. 30). Despite these factual differences, we are persuaded that *Stephens* requires that, where a claimant requests acceptance of multiple conditions in one letter, the carrier must accept or deny each condition separately.

In this case, the employer did not separately accept or deny each of the other new/omitted medical conditions listed in claimant's letter: post-traumatic amnesia, vertigo, traumatic encephalopathy, and concussive head injury. Consequently, consistent with *Stephens*, we conclude that such processing results in *de facto* denials of each of the aforementioned conditions.

We turn to the question of whether these *de facto* denials should be set aside. Concerning the post-traumatic amnesia and vertigo, we conclude that these claims were for symptoms of the accepted traumatic brain injury. Therefore, those *de facto* denials are upheld for the following reasons.

In *Stephens*, the carrier argued that the medical evidence showed that the claimant's coccydynia was not a separate condition, but was instead a symptom, for which its *de facto* denial should not be set aside. 247 Or App at 112. The carrier relied on *Young v. Hermiston Good Samaritan*, 223 Or App 99 (2008), contending that the claimant's coccydynia, which the medical evidence had defined as "pain in the coccyx," was not a physical status of the body, but a mere symptom of a physical status. *Stephens*, 247 Or App at 113. After analyzing the medical evidence, the court concluded that the only reasonable interpretation of that medical opinion was that the claimant's condition was a coccyx bone bruise and that coccydynia described a symptom rather than a condition. *Id.*

Thus, whether a specific claimed condition is a symptom of a previously accepted condition, or is a separate medical condition, is a question of fact, the resolution of which depends on the medical evidence. *Young*, 223 Or App at 107.

Here, Dr. Davies concluded that post-traumatic amnesia was a symptom of traumatic brain injury, rather than a separate condition.¹ (Ex. 26-11). Dr. Tilson explained that post-traumatic amnesia and vertigo described symptoms related to the accepted traumatic brain injury. (Ex. 37-2). Dr. Doucette, audiologist, explained that vertigo was not a condition, but was a symptom of an underlying condition. (Ex. 39). Dr. Wilson concluded that vertigo was a symptom of traumatic brain injury. (Ex. 41).

¹ In reaching our conclusion, we acknowledge that in Dr. Davies's September 15, 2010 concurrence letter, he agreed that traumatic encephalopathy, concussive closed head injury, and post-traumatic amnesia were "symptomatic expressions" of a traumatic brain injury that did not "require additional specific acceptances." (Ex. 35). However, Dr. Davies did not explain what he meant by "symptomatic expressions." In his July 2010 report, Dr. Davies stated that traumatic encephalopathy was synonymous with traumatic brain injury. (Ex. 26-11). He also explained that a concussive closed head injury was a "subgroup" of traumatic encephalopathy/traumatic brain injury. (*Id.*) In light of Dr. Davies's more detailed July 2010 report, we do not interpret his opinion to mean that traumatic encephalopathy and concussive closed head injury were "symptoms" of traumatic brain injury.

Based on the aforementioned medical opinions, we find that claimant's post-traumatic amnesia and vertigo were symptoms of the accepted traumatic brain injury. Under such circumstances, the employer was not required to accept post-traumatic amnesia or vertigo as new/omitted medical condition claims. *See Stephens*, 247 Or App at 113-14; *Michael L. Long*, 63 Van Natta 2134, *recons*, 63 Van Natta 2300 (2011) (because the medical evidence on which the claimant relied indicated that the new claims were for symptoms of previously accepted conditions, the claim was not for "new" or "omitted" conditions and the carrier's denial was upheld). Therefore, we uphold the employer's *de facto* denials of claimant's claims for post-traumatic amnesia and vertigo.

We turn to the employer's *de facto* denials of the new/omitted medical condition claims for traumatic encephalopathy and concussive closed head injury. Based on the following reasoning, we also uphold the *de facto* denials as to those claimed conditions.

Regarding these claimed conditions, we examine whether the employer's acceptance of "traumatic brain injury" was sufficient to reasonably apprise claimant and the medical providers of the nature of the compensable conditions. The "reasonably apprised" standard is an objective standard. *Michal A. Fleming*, 52 Van Natta 383, 384 (2000). For the following reasons, we conclude that the employer's acceptance of "traumatic brain injury" met the "reasonably apprised" standard as to those aforementioned claimed conditions.

Dr. Tilson explained that claimant's traumatic brain injury, traumatic encephalopathy, and concussive closed head injury were terms that describe the same condition and were considered synonymous. (Exs. 37-1, 43-12, -27). Dr. Tilson concluded that the acceptance of traumatic brain injury reasonably apprised him and other medical providers of the nature and extent of claimant's compensable conditions. (Ex. 37-2). Similarly, Dr. Wilson opined that the acceptance of traumatic brain injury encompassed traumatic encephalopathy and concussive closed head injury, and that it reasonably apprised claimant and other medical providers of the nature of the compensable conditions. (Ex. 41). Dr. Davies opined that traumatic encephalopathy and traumatic brain injury referred to the same condition. (Ex. 26-11).

The record does not include persuasive evidence rebutting the aforementioned medical opinions. Under such circumstances, we conclude that the medical evidence establishes that traumatic encephalopathy and concussive closed head injury were encompassed within "traumatic brain injury." Consequently,

the employer's acceptance of traumatic brain injury was sufficient to reasonably apprise claimant and the medical providers of the nature of his compensable injury. Therefore, we uphold the employer's *de facto* denials of claimant's new/omitted medical condition claims for traumatic encephalopathy or concussive closed head injury.

Accordingly, in lieu of the ALJ's reasoning, we conclude that the employer's conduct constituted *de facto* denials of the aforementioned new/omitted medical condition claims. However, for the reasons expressed above, those denials are upheld. Furthermore, because claimant did not prevail over a "denied claim," there is no basis for an assessed attorney fee under ORS 656.386(1).

Finally, claimant seeks penalties and related attorney fees for the employer's allegedly unreasonable claim processing. For the following reasons, we conclude that claimant is not entitled to penalties or related attorney fees.

Under ORS 656.262(11)(a), if a carrier unreasonably delays acceptance or denial of a claim, the carrier shall be liable for an additional amount up to 25 percent of the amounts then due plus any attorney fees assessed under that section. ORS 656.382(1) applies to a carrier's unreasonable resistance to the payment of compensation. The standard for determining unreasonableness is whether, from a legal standpoint, the carrier had a legitimate doubt as to its liability. *Int'l Paper Co. v. Huntley*, 106 Or App 107 (1991).

In *Rose v. SAIF*, 200 Or App 654 (2005), the claimant requested the acceptance of a new medical condition, and the carrier responded by stating that the previously accepted condition encompassed the claimed new medical condition. *Id.* at 657. The court reasoned that ORS 656.267(1) did not provide an exception to the carrier's obligation to accept or deny the claim. *Id.* at 662. The court explained:

"Moreover, the wording of ORS 656.267(1) itself makes clear that 'the acceptance' that the statute mentions refers to the acceptance of the new medical condition claim itself, not any acceptance that an employer may have issued in the past. The opening sentence of subsection (1) provides that a worker filing a new or omitted medical condition claim must 'clearly request formal written acceptance' of the condition. There follows the statement that, in response to the new or omitted medical

condition claim, the employer ‘is not required to accept each and every diagnosis or medical condition with particularity as long as *the acceptance* reasonably apprises’ the claimant and the medical providers of the nature of the compensable conditions. (Emphasis added.) The use of the definite article makes clear that the reference to ‘the acceptance’ is to the same acceptance that is mentioned earlier in the same sentence and earlier in the same subsection, namely, the acceptance of the new or omitted medical condition claim itself. In other words, ORS 656.267(1) provides that, when an employer accepts a new or omitted medical condition claim, *that acceptance* need not specify each and every medical diagnosis or medical condition as long as it reasonably apprises the claimant and the medical providers of the nature of the compensable conditions that are being accepted.” *Id.* at 662-63 (emphasis in original).

Here, the employer did not simply rely on its initial acceptance. Instead, the employer accepted a new/omitted medical condition claim and then responded that such an acceptance “appropriately apprise[d]” claimant’s medical providers of the nature of his compensable conditions. (Exs. 30, 31). In *Stephens*, 247 Or App at 111-12, the court clarified that a letter of clarification or amendment of the notice of acceptance is not a sufficient response. Nevertheless, because the *Stephens* decision issued after the ALJ’s order, the *Rose* court’s discussion of the “reasonably apprises” language with regard to the acceptance of a new/omitted medical condition provided the employer with a legitimate doubt as to its claim processing responsibilities in this case.

In reaching our conclusion, we distinguish *Joyce A. Dietrich*, 63 Van Natta 2507 (2011), *recons*, 64 Van Natta 153 (2012). In *Dietrich*, we determined that the claimant was entitled to a penalty-related attorney fee under ORS 656.262(11)(a) because the carrier’s failure to timely accept or deny a new/omitted medical condition claim (but rather the issuance of a letter stating that it could not process her right hip condition claim because it could not accept a “body part”) was unreasonable in light of longstanding Board case precedent. Although the carrier relied on the court’s decision in *Stephens* in seeking reconsideration of our penalty-related attorney fee award, we found that case distinguishable. We explained that the *Stephens* court cited *Crawford* and had apparently relied on its own case precedent in determining the reasonableness of the carrier’s claim

processing. In contrast, we relied on Board case law since 2006, which had previously rejected a “no perfected claim” letter as a statutorily authorized response to a new/omitted medical condition claim.

Here, unlike *Dietrich*, the carrier did issue an acceptance of one of the requested new/omitted medical condition claims. We find that the employer’s claim processing was not unreasonable because prior Board cases have not addressed a carrier’s claim processing responsibilities under similar facts.² Moreover, as discussed above, the *Rose* court’s discussion of the “reasonably appraises” language with regard to the acceptance of a new/omitted medical condition arguably provided support for the employer’s claim processing responsibilities in this case. Under these circumstances, we conclude that claimant is not entitled to a penalty or related attorney fees.

ORDER

The ALJ’s order dated April 20, 2011 is affirmed, as modified.

Entered at Salem, Oregon on March 27, 2012

² See *Barbara J. Ferguson*, 63 Van Natta 2253, 2260 (2011) (where existing case precedent at the time of the disputed claim processing provides an objectively reasonable basis for the carrier’s actions, a penalty for allegedly unreasonable claims processing was not justified); *Darryl R. Harris*, 56 Van Natta 3176, 3181 (2004) (no penalties assessed regarding the carrier’s denial because no legal precedent had addressed the claimant’s particular situation when the denial was issued).