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In the Matter of the Compensation of  
**GERALD W. MOGENSEN, Claimant**  
WCB Case No. 12-05059  
ORDER ON REVIEW  
Moore Jensen, Claimant Attorneys  
Gress & Clark LLC, Defense Attorneys

Reviewing Panel: Members Lowell, Lanning, and Somers. Member Lanning dissents in part.

Claimant requests review of Administrative Law Judge (ALJ) Poland's order that: (1) declined to set aside the self-insured employer's denial of claimant's new/omitted condition claim for complex regional pain syndrome (CRPS); (2) declined to award penalties and attorney fees for allegedly unreasonable claim processing; and (3) dismissed claimant's request for hearing. On review, the issues are jurisdiction, compensability, claim processing, penalties, and attorney fees. We vacate the ALJ's order, reinstate claimant's hearing request, and set aside the employer's denial.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact," as summarized below.

In 2011, claimant compensably injured his left index finger. The employer accepted a partial amputation of the distal left index finger. (Ex. 31-1).

Thereafter, claimant had residual pain. Drs. Starr and Haber, pain management specialists, diagnosed and treated claimant for CRPS/reflex sympathetic dystrophy (RSD). (Exs. 72-3, -4, 130-1, -2).

In August 2012, claimant asked the employer to accept CRPS as a consequence of his injury and accepted finger amputation. (Ex. 123).

Dr. Button, an orthopedic surgeon, performed an examination for the employer. Dr. Button opined that claimant did not have CRPS/RSD. (Ex. 127-6, -7).

In October 2012, the employer denied the claim for CRPS, asserting that medical evidence did not establish the existence of the condition. (Ex. 128). Claimant requested a hearing.

In April 2013, Dr. Ochoa, a neurologist, examined claimant for the employer. Dr. Ochoa opined that claimant had a digital nerve injury, describing it as CRPS 2. (Exs. 146-6, 152-11). He agreed that claimant did not have RSD, describing that as CRPS 1. (*Id.*)

Thereafter, Dr. Ochoa's report was forwarded to Dr. Haber for review. Agreeing that claimant did not have CRPS 1/RSD, Dr. Haber confirmed that claimant had CRPS 2 related to his 2011 injury. (Ex. 153).

In July 2013, claimant amended his request for hearing, alleging that the employer unreasonably failed to accept CRPS 2.

### CONCLUSIONS OF LAW AND OPINION

Reasoning that "CRPS" was an ambiguous diagnosis, the ALJ considered the contemporaneous medical record in identifying the claimed condition. Based on that review, the ALJ determined that claimant's request for acceptance and the employer's denial were limited to CRPS 1, a condition that was not in existence. Concluding that the CRPS 2 condition had not been claimed, the ALJ held that the employer was not obligated to process a new/omitted medical condition for claimant's CRPS 2 condition. Accordingly, the ALJ dismissed claimant's request for hearing.<sup>1</sup>

On review, claimant contends that the employer's denial should be set aside. We agree, reasoning as follows.

To prevail on his new/omitted medical condition claim, claimant has the burden to prove that his claimed condition exists. *See Maureen Y. Graves*, 57 Van Natta 2380, 2381 (2005). In addition, because claimant contends that his CRPS condition is a consequence of his 2011 work injury and accepted finger amputation, he must prove that his 2011 injury is the major contributing cause of the consequential CRPS condition. ORS 656.266(1); ORS 656.005(7)(a)(A). Resolution of these matters is a complex medical question that must be resolved by expert medical evidence. *Barnett v. SAIF*, 122 Or App 279, 283 (1993).

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<sup>1</sup> Because claimant's request for hearing raised matters concerning a claim, the appropriate action was not to dismiss the hearing request. *See Tamara R. Bain*, 66 Van Natta 577, 580 (2014) (reinstating a hearing request regarding an alleged *de facto* denial, although the claimant was not entitled to the relief requested because there was no *de facto* denial).

Here, claimant specifically requested acceptance of “CRPS.” In doing so, he did not further describe a particular type of CRPS. Thus, the question before us is not what “type” of CRPS would best describe the claimed condition, but whether the claimed “CRPS” exists as a new/omitted medical condition, the disability/need for treatment of which was caused in major part by the work injury. *See Jeremy Schaffer*, 65 Van Natta 2191 (2013) (where the claimant made a claim for “crush injury” and opposing medical evidence indicated that his clinical findings correlated more with a “contusion,” the question was not what diagnosis would *best* describe his right hand injury, but whether the claimed crush injury existed as a new/omitted medical condition, the disability/need for treatment of which was caused in material part by the work accident); *April L. Shabazz*, 60 Van Natta 2475 (2008) (evidence regarding a right biceps tendonitis diagnosis supported compensability of the claimed right rotator cuff strain/sprain where the medical evidence established that both diagnoses addressed the same condition); *cf.*, *Heriberto F. Gonzalez*, 59 Van Natta 1238 (2007) (where the compensability issue concerned a new/omitted medical condition claim, rather than an initial claim, the claimant was required to prove that the condition for which he specifically requested acceptance, in fact, existed).

Here, the record supports the existence of “CRPS.” Although Drs. Starr and Haber initially diagnosed CRPS/RSD, Dr. Haber subsequently acknowledged that claimant had, and was treating for, CRPS 2. (Ex. 153). In conclusion, the record establishes that claimant claimed “CRPS,” and in doing so, did not further particularize his claimed condition, by referring to any particular “type” of CRPS. The record further supports a conclusion that a “CRPS” condition exists and is causally related to claimant’s 2011 compensable injury/accepted amputation.<sup>2</sup> ORS 656.005(7)(a)(A). Therefore, the claim is compensable. Accordingly, we reverse that portion of the ALJ’s order that upheld the employer’s denial.<sup>3</sup>

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<sup>2</sup> As previously noted, claimant must prove that his 2011 compensable injury/accepted amputation is the major contributing cause of his claimed CRPS condition pursuant to ORS 656.005(7)(a)(A). *See* ORS 656.266(1). Although he disagreed with the “CRPS/RSD” diagnosis, Dr. Button attributed claimant’s symptoms and complaints to the 2011 injury/amputation. (Ex. 126-6, -7). Similarly, Dr. Ochoa attributed claimant’s chronic pain, described as “CRPS 2,” to the 2011 injury/amputation. (Exs. 146-6, 151-6). Dr. Haber’s responses to these reports attributed the claimed “CRPS” condition to the 2011 injury/amputation as well. (Exs. 131-1, 153). Considering these medical opinions, we conclude that the medical record persuasively establishes that claimant’s compensable injury/accepted amputation was the major contributing cause of his claimed “CRPS.”

<sup>3</sup> Any dispute as to which “type” of “CRPS” will be accepted is a claim processing matter that may arise when the employer issues its Modified Notice of Acceptance. Should claimant disagree with that acceptance notice, he may submit an objection pursuant to ORS 656.262(6)(d) at that time. To engage in such an analysis at this point, in the context of claimant’s “generic” CRPS claim, would be premature.

Citing ORS 656.262(b)(F), claimant also seeks penalties and attorney fees for unreasonable resistance to the payment of compensation. Based on the following reasoning, we conclude that penalties and related attorney fees are not warranted.

When a carrier issues a Notice of Acceptance, it must specify what conditions are compensable. ORS 656.262(6)(b)(A). Additionally, it has the duty to modify the acceptance “from time to time as medical or other information changes a previously issued notice of acceptance.” ORS 656.262(6)(b)(F). Here, assuming without deciding whether this statute applies while a carrier’s denial of a new/omitted medical condition claim is in litigation, we conclude that the employer had legitimate doubt regarding its responsibility to modify its acceptance notice.

Specifically, the record contains medical evidence from Dr. Button at the time of the denial that claimant did not have the claimed “CRPS.” (Ex. 127-6, -7). We acknowledge that the subsequent medical opinions from Drs. Ochoa and Haber diagnosed CRPS 2 and related it to the accepted finger amputation. (Exs. 146-6, 152-11, 153). However, given the existence of medical evidence that claimant did not have CRPS related to the compensable injury, the record supports a conclusion that the employer had a legitimate doubt as to its liability for the CRPS condition. *See* ORS 656.262(11)(a); *International Paper Co. v. Huntley*, 106 Or App 107, 110 (1991) (employer’s refusal to pay is not unreasonable if it has legitimate doubt about its liability); *Brown v. Argonaut Insurance*, 93 Or App 588, 591 (1988) (“unreasonableness” and “legitimate doubt” are to be considered in the light of all the evidence available to the carrier). Therefore, we do not consider it unreasonable for the employer to have denied the claim and maintained that denial while awaiting the ALJ’s determination of the disputed issues. *See Randy L. Carter*, 48 Van Natta 1271 (1996). Accordingly, penalties and attorney fees under ORS 656.262(11) are not warranted.

Claimant’s attorney is entitled to an assessed fee for services at hearing and on review regarding the denied claim. ORS 656.386(1). 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 at hearing and on review is \$11,000, payable by the employer. In reaching this conclusion, we have particularly considered the time devoted to the issue (as represented by the record,

claimant's appellate briefs, and his counsel's uncontested fee submission), the complexity of the issue, the value of the interest involved, and the risk that counsel may go uncompensated.<sup>4</sup>

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. *See* ORS 656.386(2); OAR 438-015-0019; *Nina Schmidt*, 60 Van Natta 169 (2008); *Barbara Lee*, 60 Van Natta 1, *recons*, 60 Van Natta 139 (2008). The procedure for obtaining this award, if any, is prescribed in OAR 438-015-0019(3).

### ORDER

The ALJ's order dated September 30, 2013 is vacated. The hearing request is reinstated. The employer's denial of CRPS is set aside and the claim is remanded to the employer for processing in accordance with law. For services at hearing and on review regarding the denial, claimant's attorney is awarded an assessed fee of \$11,000, payable 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. Claimant's request for penalties and a related attorney fee award is denied.

Entered at Salem, Oregon on June 4, 2014

Member Lanning, concurring in part and dissenting in part.

I concur with that portion of the majority's opinion that sets aside the employer's denial and awards an attorney fee under ORS 656.386(1). Because I disagree with the majority's conclusion that the employer's claim processing was not unreasonable, I respectfully dissent.

ORS 656.262(6)(b)(F) explicitly provides that a carrier is obligated to modify its acceptance "from time to time as medical or other information changes a previously issued notice of acceptance." In her concurring opinion in *Mai K. Moua*, 66 Van Natta 848, 852 (May 13, 2014), Member Weddell addressed this statute, reasoning that, although a claimant has a right to pursue a new/omitted

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<sup>4</sup> Claimant's counsel is not entitled to an attorney fee for services on review devoted to the penalty and related attorney fee issues.

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medical condition claim under ORS 656.262(6)(d) and (7)(a), such a right does not relieve a carrier of its independent duty to initially determine what conditions are compensable and, pursuant to ORS 656.262(6)(b)(F), to modify its acceptance based on changes in its knowledge of a compensable condition.

I share Member Weddell's interpretation of the statutory scheme and a carrier's claim processing obligations. Applying that statutory analysis to the present case, I agree that Dr. Button's opinion initially provided the employer with a legitimate doubt for its claim denial, as well as its decision not to modify its Notice of Acceptance. Nevertheless, because subsequent "medical information" (*i.e.*, opinions from other physicians) established that claimant was actually suffering from CRPS Type 2, which was causally related to his work-related finger amputation, I am persuaded that any legitimate doubt regarding the employer's statutory responsibility to modify its acceptance notice had been extinguished by the time of hearing.

Under such circumstances, I would conclude that the employer's claim processing was unreasonable and, as such, an assessment of penalties and attorney fees under ORS 656.262(11)(a) was justified. Because the majority reaches a contrary conclusion, I respectfully dissent from that portion of their opinion.