
In the Matter of the Compensation of
WCB Case No. 14-05972
PARIS JENNINGS, Claimant
ORDER ON REVIEW
Colin Hackett Law PC, Claimant Attorneys
Sheridan Levine LLP, Defense Attorneys

Reviewing Panel: Members Johnson and Lanning.

Claimant requests review of Administrative Law Judge (ALJ) Ogawa's order that: (1) upheld the self-insured employer's denial of claimant's occupational disease claim for a right eye traumatic glaucoma condition; (2) found that the employer's denial did not constitute an invalid "back-up" denial of a previously accepted injury-related right eye traumatic glaucoma condition; (3) found that the employer's denial did not constitute a void denial of a new/omitted medical condition claim for a right eye traumatic glaucoma condition; and (4) declined to award an attorney fee under ORS 656.386(1). On review, the issues are claim processing and attorney fees.

We adopt and affirm the ALJ's order with the following supplementation.

On February 20, 2007, claimant sustained a compensable right eye injury, which was accepted as a traumatic retinal detachment, traumatic cataract, and traumatic glaucoma. (Ex. 21).

On September 25, 2014, Dr. Scott, claimant's eye surgeon, submitted an 827 form, checking the box for "request for acceptance of a new or omitted medical condition on an existing claim." (Ex. 70). He identified the condition as "traumatic glaucoma OD." (*Id.*) The form was not signed by claimant. (*Id.*)

On December 3, 2014, the employer denied traumatic glaucoma as an occupational disease, asserting that "[the] condition is an injury claim not an occupational disease claim." (Ex. 83-1). Referring to the February 20, 2007 injury and claim number, the denial reiterated the employer's acceptance of traumatic glaucoma and stated that benefits for the condition would continue to be processed. (*Id.*) Claimant requested a hearing.

On June 3, 2015, in response to claimant's inquiry, Dr. Scott stated that "'OD' is a common term used by eye doctors that means right eye, or, in Latin, *oculus dextra*." (Ex. 95-2).

The ALJ upheld the employer's denial. In doing so, the ALJ determined that the employer denied a separate occupational disease claim, unrelated to the initial injury claim, and did not issue an impermissible "back-up" denial. Noting that claimant conceded that his traumatic glaucoma is related to his accepted injury claim, and is not compensable as an occupational disease, the ALJ reasoned that the employer was not required to accept a condition that it had already accepted.

Claimant requested reconsideration of the ALJ's order. Citing *Cervantes v. Liberty Northwest Ins. Co.*, 205 Or App 316 (2006), and asserting that the denial was void in the absence of a valid claim, he sought an attorney fee award under ORS 656.386(1).

The ALJ's reconsideration order did not award attorney fees. The ALJ concluded that claimant had not "prevailed" against the denial and, even if claimant had not made a claim, the denial did not indicate a refusal to pay compensation for the already accepted traumatic glaucoma condition. The ALJ reasoned that the legal predicate for an award of attorney fees under ORS 656.386(1) was not present as there was no "denied claim." See ORS 656.386(1)(b)(A) (defining a "denied claim" as "[a] claim for compensation which an insurer or self-insured employer refuses to pay on the express ground that the injury or condition for which compensation is claimed is not compensable or otherwise does not give rise to an entitlement to any compensation").

On review, claimant reiterates that the denial should be set aside as an improper "back-up" denial because it put the compensability of the accepted condition at issue. Alternatively, he contends that the denial was "void" because it was not issued in response to a valid new or omitted medical condition claim. In either event, he seeks an "ORS 656.386(1)" attorney award for his counsel's services.

First, for the following reasons, we agree with the ALJ's conclusion that the denial is not a "back-up" denial. Where a carrier attempts to deny a previously accepted condition, such a denial constitutes an impermissible "back-up" denial of that condition under ORS 656.262(6)(a). See *Bauman v. SAIF*, 295 Or 788, 794 (1983) (a carrier may not accept a condition and later assert a position that contradicts the express language of its acceptance); *Iris A. Schenk*, 56 Van Natta 1239, *recons*, 56 Van Natta 1537 (2004) (because the carrier's denial attempted to deny the previously accepted claim for the right de Quervain's syndrome, its denial constituted an impermissible "back-up" denial of that condition under ORS 656.262(6)(a)).

Here, the employer did not “revoke” its prior acceptance of traumatic glaucoma or attempt to deny the previously accepted claim. To the contrary, the employer’s denial specifically stated that the claim is “currently accepted for * * * traumatic glaucoma and benefits for this condition will continue to be processed[.]” (Ex. 83-1). The denial also stated that “[the] condition is an injury claim not an occupational disease claim as defined under Oregon law.” (*Id.*) Based on its express statements, we do not consider the employer’s denial to constitute a “back-up” denial. *See Randy S. Gehrs*, 64 Van Natta 2094, 2095 (2012) (although the carrier’s denial referenced the same date of injury as the previously accepted claim, the denial was not an invalid “back-up” denial where it was prompted by the claimant’s new occupational disease claim).

We turn to claimant’s argument that the denial was “void.” Based on the following reasoning, we disagree with that contention.

Under ORS 656.267(1), a worker must request acceptance of a new or omitted medical condition from the carrier. The statute does not allow anyone other than the “worker” to file a new or omitted medical condition claim. *Andria D. Costello*, 55 Van Natta 498 (2003), *aff’d without opinion*, 193 Or App 484 (2004) (no legislative intent to allow physicians to file a new or omitted medical condition claim on behalf of workers).

Here, the denial purported to deny a new or omitted medical condition claim for traumatic glaucoma as an occupational disease. (Ex. 83-1). That denial was issued in response to Dr. Scott’s 827 form. (Ex. 70). Yet, claimant did not sign the 827 form. (*Id.*) Thus, he did not initiate a new/omitted medical condition claim under ORS 656.267(1). *Id.* at 502. In the absence of a valid new/omitted medical condition claim, if the employer’s denial was interpreted as pertaining to a new/omitted medical condition claim, such a denial would be invalid. *See Barbara J. Ferguson*, 63 Van Natta 2253, 2258 (2011).

Yet, despite its references to the date of injury and claim number for the previously accepted claim, it is apparent that the employer interpreted the 827 form as a claim for an occupational disease, not as a new/omitted medical condition pertaining to the previously accepted February 2007 injury claim. It is well established that a physician’s report may constitute an initial claim, which triggers a carrier’s claim processing obligations. *See Kachel v. Weyerhaeuser Co.*, 210 Or App 46, 51 (2006) (although the type of claim being asserted might not be apparent at the time a “post-acceptance” 827 form is filed, the carrier is not expected to treat the receipt of the form as an unsuccessful or ineffective attempt to file a new/

omitted medical condition claim, but is expected to treat the receipt of the form as a “claim,” which requires a response).¹

Claimant argues that the employer’s denial is similar to the denial in *Cervantes*, which resulted in an “ORS 656.386(1)” attorney fee award. “We disagree with claimant’s contention.”

In *Cervantes*, the carrier had accepted an injury-related left inguinal hernia. After a surgical procedure indicated that the claimant did not have a left inguinal hernia, the carrier issued a denial, stating that his current condition was not work-related. The same day of the carrier’s denial, a doctor diagnosed the claimant’s injury as a left adductor tendonitis. After the claimant requested a hearing and before the hearing was held, the carrier modified its acceptance listing a left inguinal hernia. On appeal, the carrier acknowledged that its denial was inartfully worded and confusing. The *Cervantes* court concluded that the claimant’s attorney was instrumental in securing the carrier’s clarification that the denial ultimately denied nothing (*i.e.*, the claimant “prevailed” over the denial). In doing so, the court reasoned that the issuance of the carrier’s modified acceptance clarified that the original accepted condition remained accepted. Accordingly, the court held that the claimant was entitled to an attorney fee award under ORS 656.386(1).

Here, in contrast, we have interpreted the employer’s denial as pertaining to an occupational disease. That denial has been upheld. Moreover, claimant’s attorney was not instrumental in obtaining a rescission of the denial or clarification that the original accepted condition remained accepted; rather, the denial stated that claimant’s injury-related traumatic glaucoma continued to be accepted.

Under such circumstances, claimant did not “prevail” against the employer’s denial. Consequently, an attorney fee award under ORS 656.386(1) is not warranted. Accordingly, we affirm.

ORDER

The ALJ’s order dated July 30, 2015, as reconsidered on September 18, 2015, is affirmed.

Entered at Salem, Oregon on March 4, 2016

¹ Claimant does not contend that his claim is compensable as an occupational disease. Therefore, we affirm the ALJ’s order upholding the employer’s denial of the occupational disease claim.