
In the Matter of the Compensation of
JUSTIN T. JONES, Claimant
WCB Case Nos. 15-04887, 15-03631, 15-01447
ORDER ON REVIEW
Dodge & Associates, Claimant Attorneys
Law Offices of Kathryn R Morton, Defense Attorneys

Reviewing Panel: Members Weddell and Johnson.

Claimant requests review of Administrative Law Judge (ALJ) Sencer's order that: (1) upheld the insurer's denial of his new/omitted medical condition claim for left hand and finger conditions; and (2) declined to award a penalty and attorney fee for an alleged discovery violation. On review, the issues are compensability, penalties, and attorney fees.

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

In August 2007, claimant's left hand was injured at work when a heavy metal piece fell on it. (Ex. 1A-2). Dr. Henry evaluated claimant, noting a history of "crush injury of distal phalange * * * of the little finger." (*Id.*) He diagnosed a finger laceration and finger contusion. (Ex. 1A-3).

On August 2, 2007, claimant was evaluated by Dr. Nicholson. He noted a left fifth finger laceration and swelling and black and blue discoloration of the fourth finger. (Ex. 1B-2). Dr. Nicholson diagnosed a laceration and contusion of the left hand. (*Id.*)

On August 23, 2007, the insurer accepted a laceration and contusion to the left little finger. (Ex. 3)

On November 17, 2014, claimant's counsel faxed a letter requesting discovery. (Ex. 6). The "banner" at the top of the letter indicates it was faxed by claimant's attorney's office, and contains the date sent, and claimant's attorney's fax number. There is no confirmation of the fax number to which the letter was faxed or whether the insurer received the faxed letter. (*Id.*)

In April 2015, the insurer provided the requested discovery. (Ex. 9).

In May 2015, claimant requested acceptance of “left hand and fourth and fifth fingers crush injury/conditions, left fourth finger contusion” as new/omitted medical conditions. (Ex. 12).

In July 2015, the insurer denied the new/omitted medical condition claim. (Ex. 15).

The ALJ noted that Dr. Henry did not diagnose a crush injury, instead listing a finger laceration and contusion as the diagnoses. Consequently, the ALJ upheld the insurer’s denial. Regarding the alleged untimely discovery, the ALJ concluded that the record did not establish when the insurer received claimant’s discovery request.

On review, citing *Jeremy Schaffer*, 65 Van Natta 2191, 2194 (2013), claimant contends that Dr. Henry’s history of a “crush injury” establishes the compensability of that condition as a new/omitted medical condition. Based on the following reasoning, we disagree.

Claimant must first prove that the claimed new/omitted medical conditions exist. ORS 656.266(1); *Maureen Y. Graves*, 57 Van Natta 2380, 2381 (2005) (proof of existence of the condition is a fact necessary to establish the compensability of a new/omitted condition). A “condition” is defined as “the physical status of the body as a whole * * * or of one of its parts.” *Young v. Hermiston Good Samaritan*, 223 Or App 99, 105 (2008).

A carrier is required to accept a “condition,” not a mechanism of injury. *See Royal S. Buell*, 50 Van Natta 702 (1998), *aff’d without opinion*, 157 Or App 723 (1998). The distinction between a “condition” and a “mechanism of injury” is an issue of fact that is determined on a case-by-case basis. We rely on the medical record to distinguish between a “condition” and a “mechanism of injury.” *Id.* at 702 (record persuasively established that “crush injury” described a mechanism of injury, not a distinct medical condition).

In *Schaffer*, specific medical evidence established that a “crush injury” was not only a mechanism of injury, but was also an appropriate medical diagnosis describing the claimant’s specific condition. 65 Van Natta at 2193; *see also Jeffrey S. Lyski*, 54 Van Natta 1875, 1876 (2002) (a “condition” was established where “electrocution” was diagnosed and a trauma specialist expressly opined that the diagnosis was a medical condition).

Here, Dr. Henry used the term “crush injury” to describe the history of the injury, but did not list it as a diagnosis. (Ex. 1A-2). Rather, he listed finger laceration and contusion as the diagnoses. (Ex. 1A-3). Accordingly, in contrast to *Schaffer*, we are unable to determine from this particular record that Dr. Henry’s mention of a “crush injury” represents a “physical status of the body as a whole * * * or one of its parts.” *See Young*, 223 Or App at 105. Consequently, we do not consider it to be a “condition.” As such, the insurer was not required to accept a “crush injury.”¹

We turn to claimant’s contention that the insurer violated a discovery rule. Based on the following reasoning, we agree with the ALJ’s determination that a discovery violation has not been established.

OAR 438-007-0015(2) provides that an insurer shall provide documents pertaining to claims within 15 days of “mailing or delivering” of a written demand (accompanied by a retainer agreement) or hearing request. Failure to comply with discovery responsibilities may result in the imposition of penalties and attorney fees. OAR 438-007-0015(8); *Micah Blotter*, 65 Van Natta 1578, 1580 (2013).

Here, claimant argues that the insurer unreasonably failed to respond to his November 17, 2015 discovery request. In doing so, he contends that the banner on the top portion of his counsel’s faxed request for discovery establishes that it was sent to the insurer on November 17, 2015. (Ex. 6). However, that banner only confirms the time that the letter was sent by claimant’s counsel’s fax number, without establishing what fax number it was sent to, and whether it was received. (Ex. 6). In the absence of corroborating evidence, the aforementioned banner does not establish that the discovery request was either “mailed” or “delivered.” *See, e.g., Wilmer T. Parker II*, 57 Van Natta 3218, 3222 (2005) (banner showing when a faxed document was sent was inadequate to establish when and whether the document had been received by the carrier). Moreover, unlike a “mailed” document, there is no statutory presumption concerning the receipt of a faxed document. *See David J. Lampa*, 66 Van Natta 1052, 1055 (2014) (distinguishing the evidence necessary to establish receipt of a mailed document as compared to a faxed document).

¹ Additionally, we are unable to determine that the claimed “crush injury” would represent a “new” or “omitted” medical condition distinct from the accepted finger laceration and contusion. *See Michael L. Long*, 63 Van Natta 2134, *recons*, 63 Van Natta 2300 (2011) (a new/omitted medical condition claim may be denied, even if the claimed condition is compensable, if the claimed condition is neither “new” nor “omitted.”)

Accordingly, based on the aforementioned reasoning, the record does not establish that the insurer violated the “discovery” rule. Therefore, neither penalties nor attorney fees are warranted.

ORDER

The ALJ’s order dated November 20, 2015 is affirmed.

Entered at Salem, Oregon on May 16, 2016