
In the Matter of the Compensation of
SHERRIAN M. STEPHENS, Claimant
WCB Case Nos. 08-02848, 08-02250
ORDER ON RECONSIDERATION
Jodie Phillips Polich, Claimant Attorneys
James B Northrop, SAIF Legal, Defense Attorneys

Reviewing Panel: Members Biehl, Langer, and Herman. Member Langer dissents.

On April 29, 2009, we withdrew our April 10, 2009 Order on Review that: (1) set aside the SAIF Corporation's *de facto* denial of claimant's new/omitted medical condition claim for coccydynia; (2) awarded an attorney fee under ORS 656.386(1); and (3) assessed a penalty and attorney fee for SAIF's unreasonable claim processing. We took this action to consider SAIF's contentions regarding our reasoning and conclusions. Having considered the parties' arguments, we proceed with our reconsideration.

On review, SAIF argued that the new/omitted medical condition claim for coccydynia was nothing more than a claim for symptoms of the "coccyx bone bruise" condition that it accepted after claimant filed the claim for coccydynia. Thus, SAIF asserted that it was not required to accept or deny the new/omitted medical condition claim for coccydynia.

In our initial order, we found that, based on the medical record, the claim for coccydynia was a claim for a condition -- not just symptoms of previously accepted conditions. We held that the claim was *de facto* denied because SAIF's acceptance of a "coccyx bone bruise" (which had never been expressly claimed) did not satisfy its duty to process the claim for coccydynia.

On reconsideration, SAIF argues that its acceptance of a "coccyx bone bruise" reasonably apprised claimant and her medical providers of the nature of her compensable condition. Based on the following reasoning, we disagree.

SAIF's acceptance of an unclaimed "coccyx bone bruise" on March 28, 2008 did not encompass, or include as accepted, the diagnosed "coccydynia." To the contrary, when asked if "coccydynia was a symptom or a condition," Dr. Kelly unambiguously indicated it was a "condition" and concluded that the mechanism of injury was consistent with the development of this *condition*. (Ex. 29-1). Additionally, Dr. Kelly described permanent impairment and treatment that were directed toward the coccydynia *condition*. (*Id.*)

SAIF cites *Michal A. Fleming*, 52 Van Natta 383 (2000), in support of its position. In *Fleming*, the compensable condition was a “Le Fort III fracture.” *Id.* at 383. The claimant requested acceptance of a “CES fracture.” *Id.* In holding that the carrier was not required to accept CES fracture, we explained that the medical evidence established that the “Le Fort III fracture referred to a pattern of fractures and encompassed the CES fracture.” *Id.* Based on such medical evidence, we reasoned that the carrier’s acceptance reasonably encompassed the claimed CES fracture.

Here, in contrast to *Fleming*, the medical evidence does not establish that the “coccyx bone bruise” encompassed or included as accepted the diagnosed “coccydynia.” Consequently, we find *Fleming* distinguishable.

Pursuant to ORS 656.267(1), a worker “must clearly request formal written acceptance of a new medical condition or an omitted medical condition from the insurer or self-insured employer.” Here, claimant complied with the statutory requirements. We have consistently held that requests for acceptance of “pain,” trigger a carrier’s claim processing obligations pursuant to ORS 656.262(6)(a).

For instance, in *Francisco G. Rodriguez*, 59 Van Natta 2422 (2007), the claimant had made a written request for “chronic chest wall pain as a result of [the] fracture condition.” The carrier neither accepted nor expressly denied the claim, but rather issued a “No Perfected Claim” letter. On review, we determined that the claimant’s written request constituted a perfected claim for a new medical condition, requiring timely acceptance or denial. *Id.* at 2425; *see also Juli R. Steward*, 61 Van Natta 291, 292 (2009).

In *John R. Waldrupe*, 61 Van Natta 619 (2009), the claimant had requested acceptance of “pain in my right hip and my left shoulder.” *Id.* at 621. There, we again determined that such a request was sufficient to initiate the insurer’s claim processing obligations under ORS 656.262(6)(a). Thus, should the medical evidence persuasively establish that the claimed condition is a symptom, rather than a condition, a denial of a “symptom” is appropriate. *See Young v. Hermiston Good Samaritan*, 223 Or App 99, 107 (2008) (because the claimant did not request acceptance of a “condition,” as opposed to symptoms of a previously accepted condition, denial was upheld); *John J. O’Brien*, 58 Van Natta 2714 (2006) (upholding denial of a claim for a symptom of an accepted condition because the symptom was not a “condition”).

Here, similarly, claimant's request that SAIF accept "coccydynia" triggered its claim processing obligations under ORS 656.262(6)(a). Had SAIF believed that such a condition was a "symptom," as opposed to a condition, it could have timely denied it as such consistent with *Young and O'Brien*. Contrary to SAIF's assertions, however, the statute does not allow a carrier to disregard a claimant's formal written request made pursuant to ORS 656.267(1). *Rose v. SAIF*, 200 Or App 654, 664 (2006).

In summary, we continue to conclude that the claim for coccydynia was a claim for a previously unaccepted condition. Because SAIF did not timely process that claim, it was *de facto* denied.

SAIF alternatively argues that: (1) claimant's counsel is not entitled to a carrier-paid attorney fee pursuant to ORS 656.386(1)(b)(B) under the circumstances in this case; or (2) our \$6,500 attorney fee award should be reduced. These assertions rely on premises that are contrary to our decision; *i.e.*, that coccydynia is nothing more than a symptom of a bone bruise and that the claim for coccydynia was not *de facto* denied. For the reasons stated in this and our previous order, we continue to conclude that claimant's counsel is entitled to an attorney fee for services at hearing and on review regarding the compensability issue. Additionally, because we continue to find that SAIF's failure to accept or deny the claim was unreasonable, we adhere to our determination that a penalty and penalty-related attorney fee are appropriate.

Claimant's attorney is also entitled to an assessed fee for services on reconsideration for defending against SAIF's request for reconsideration regarding the compensability issue. After considering the factors set forth in OAR 438-015-0010(4) and applying them to this case, we find that a reasonable assessed attorney fee for claimant's counsel's services on reconsideration concerning the compensability issue is \$1,500, to be paid by SAIF. In reaching this conclusion, we have particularly considered the time devoted to the compensability issue (as represented by claimant's response to SAIF's request for reconsideration and claimant's counsel's uncontested attorney fee request on reconsideration), the complexity of the issue, and the value of the interest involved.

Accordingly, on reconsideration, we republish our April 10, 2009 order as supplemented herein. The parties' rights of appeal shall begin to run from the date of this order.

IT IS SO ORDERED.

Entered at Salem, Oregon on September 10, 2009

Member Langer dissenting.

On reconsideration, I continue to agree with SAIF that: (1) it was not required to accept coccydynia; and (2) no penalty or penalty related attorney fee should be awarded. I reason as follows.

The majority directs SAIF to accept claimant's new/omitted medical condition claim for coccydynia, that, as the undisputed medical evidence unambiguously establishes, is nothing more than "pain in the coccyx." (Ex. 35). SAIF is simply not required to accept symptoms of pain in addition to the condition causing the pain. *John J. O'Brien*, 58 Van Natta 2714 (2006) (upholding denial of a claim for a symptom of an accepted condition because the symptom was not a "condition"). Additionally, contrary to the majority's opinion, I find that SAIF accepted the condition causing the pain. (Ex. 35).

On January 25, 2008, Dr. Siker, who evaluated claimant's MRI, indicated that claimant's findings "may be a focal bone bruise of the coccyx[.]" (Ex. 27). Additionally, on March 25 2008, Dr. Denard mentioned that claimant's January 2008 MRI "revealed increased signal around the coccyx consistent with a bone bruise[.]" (Ex.30-2). Thereafter, SAIF modified its acceptance to include "coccyx bone bruise."

In light of the foregoing, the diagnosis of "coccyx bone bruise" was made before SAIF's acceptance of that condition. Moreover, although the majority focuses on Dr. Kelley's earlier opinions, her opinion ultimately supports SAIF's processing actions. On June 13, 2008, Dr. Kelly opined that coccyx bone bruise was the underlying condition causing the coccydynia, or "pain in the coccyx." (Ex. 35).

SAIF, consistent with its statutory claim processing responsibilities, reviewed claimant's medical record to determine the nature of her condition and chose to issue an acceptance consistent with the medical opinions in that record. Further, in light of Dr. Kelly's opinion noted above, I would conclude that such acceptance "reasonably apprises," or encompasses, the requested "coccydynia." *Michal A. Fleming*, 52 Van Natta 383 (2000) (carrier not required to accept the requested new/omitted medical condition including CES fracture, where the accepted Le Fort III fracture referred to a pattern of fractures and encompassed the CES fracture and "reasonably apprised" the medical providers of the nature of the compensable condition). Consequently, I conclude that SAIF was not required to accept "coccydynia."

In addition, I disagree with the imposition of a penalty or penalty related attorney fee. In dissenting from the majority's opinion regarding the penalty/attorney fee issue, I consider the following conduct: (1) SAIF's investigation of the medical records following claimant's request; (2) SAIF's clarification request to claimant's physician after claimant's expansion request, but before it modified its acceptance; and (3) the fact that SAIF *voluntarily accepted* the condition causing the coccyx pain symptoms – a “coccyx bone bruise” within the statutory time limits.

The majority's analysis conflicts with ORS 656.267(1) by requiring the carrier to “accept each and every diagnosis or medical condition with particularity.” The statute clearly states that a carrier “*is not required* to accept each and every diagnosis or medical condition with particularity.” ORS 656.267(1) (emphasis added). Indeed, for SAIF's failure to do so, and contrary to the statutory scheme, majority has characterized SAIF's conduct as “unreasonable” and assessed penalties/attorney fees. From this determination, I must continue to dissent.