

In the Matter of the Compensation of
MICHAEL W. MILLSAP, Claimant

WCB Case No. 08-03749

ORDER ON REVIEW

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Reviewing Panel: Members Langer and Biehl.

Claimant requests review of those portions of Administrative Law Judge (ALJ) Poland's order that: (1) found that the SAIF Corporation had properly processed claimant's new/omitted medical condition claims for right knee medial meniscus tear and right knee inflamed/impinging synovium; (2) did not award an attorney fee under ORS 656.386(1) for an alleged *de facto* denial of a "combined condition"; and (3) declined to award penalties and attorney fees for allegedly unreasonable claim processing. On review, the issues are claim processing, penalties and attorney fees. We affirm.

FINDINGS OF FACT

Claimant sustained a work-related right knee injury on October 8, 2007. After initially denying the claim, SAIF accepted a right knee strain.

On April 28, 2008, claimant wrote a letter to SAIF, asserting that:

"This letter is claimant's request for formal written acceptance of a new medical condition or an omitted medical condition as required by ORS 656.262(6)(d) and 656.267. Please consider this as a claim for a combined condition if there is a preexisting condition as defined by Oregon law. Please process the following conditions pursuant to pertinent Oregon law:

- "1. Right knee medical [sic] meniscus tear; and/or
- "2. Hypertrophic [sic] plica, inflamed synovium, and impinging synovium anteromedially.

"My review of the record indicates that [claimant] may have a preexisting condition, arthritis, and that this may be properly processed as a combined condition claim." (Ex. 14; *see* Ex. 18) (Emphasis in original).

On May 1, 2008, SAIF issued a Modified Notice of Acceptance, which provided that:

“Your claim was previously accepted as disabling for: right knee strain.

“In addition to the accepted condition(s) previously identified, SAIF Corporation also accepts: right knee medial meniscus tear.

“The accepted condition(s) does not include a combined condition unless specifically indicated in this modified notice of acceptance.” (Ex. 15).

On June 9, 2008, SAIF issued another Modified Notice of Acceptance that stated:

“Your claim was previously accepted as disabling for: right knee strain, right knee medial meniscus tear and hypertrophic plica.

“In addition to the accepted condition(s) previously identified, SAIF Corporation also accepts: inflamed synovium and impinging synovium anteromedially, right knee.” (Ex. 21; *see* Ex. 22).

Like the first modified acceptance, this letter also provided that the accepted conditions “do not include a combined condition unless specifically indicated in this modified notice of acceptance.” (Ex. 21).

On June 13, 2008, claimant requested a hearing, contesting an alleged *de facto* denial of claims for “combined” right knee conditions and seeking penalties and attorney fees. (Tr. 1-2). The parties agreed to submit the matter to the ALJ on the written record.

CONCLUSIONS OF LAW AND OPINION

Finding that claimant did not have a “preexisting condition” under ORS 656.005(24)(a) or a “combined condition” under ORS 656.005(7)(a)(B), the ALJ concluded that claimant had not prevailed over “any *de facto* denial.”

Consequently, the ALJ declined to award an assessed attorney fee under ORS 656.386(1) and denied claimant's request for penalties and attorney fees pursuant to ORS 656.262(11)(a).

Claimant contends that SAIF's claim processing was unreasonable because it failed to timely accept or deny her "combined condition" claim. Based on the following reasoning, we disagree with claimant's contention.

Under ORS 656.262(11)(a), a penalty and attorney fee shall be assessed if a carrier unreasonably delays acceptance or denial of a claim. Whether SAIF's conduct was unreasonable depends on whether it had a legitimate doubt of its liability. *See Int'l Paper Co. v. Huntley*, 106 Or App 107 (1991). If so, the denial was not unreasonable. "Unreasonableness" and "legitimate doubt" are to be considered in light of all evidence available to SAIF. *Brown v. Argonaut Ins.*, 93 Or App 588, 591 (1988).

Because the alleged "combined condition" claim was a claim for a new or omitted medical condition, ORS 656.267(1) describes the requirements for making such a claim.¹ *Rafael L. Ortiz-Lopez*, 60 Van Natta 1341, 1342 (2008). That statute provides that a claim for a new or omitted medical condition "must clearly request formal written acceptance of a new medical condition or an omitted medical condition[.]" Where a claimant does not make a clear request, there is no new or omitted medical condition claim for a carrier to accept or deny. *See Emma R. Traner*, 62 Van Natta 669, 673 (March 15, 2010) (where the claimant did not clearly request acceptance of a specifically identified "combined condition," the carrier did not unreasonably fail to process such a claim); *Ortiz-Lopez*, 60 Van Natta at 1342; *see also Ralph L. Morris*, 50 Van Natta 69, 71 (1998) (the carrier's denial of a new/omitted medical condition was without legal effect because it was issued in the absence of a "clear request" for "formal written acceptance").

Here, claimant's request listed the following conditions for SAIF to process: right knee medial meniscus tear and hypertrophic plica, inflamed synovium, and impinging synovium anteromedially. SAIF timely accepted those conditions. (Exs. 15, 21).

¹ ORS 656.267(1) provides in pertinent part:

"To initiate omitted medical condition claims under ORS 656.262(6)(d) or new medical condition claims under this section, the worker must clearly request formal written acceptance of a new medical condition or an omitted medical condition from the insurer or self-insured employer."

Claimant contends that her request included a separate “combined condition” claim because it included the following language: “Please consider this as a claim for a combined condition *if there is a preexisting condition as defined by Oregon law.*” (Ex. 14) (Emphasis in original). The letter also stated that claimant “*may* have a preexisting condition, arthritis, and that this *may* be properly processed as a combined condition claim.” (*Id.*) (Emphasis added). Thus, although claimant’s letter identified an alleged *potential* “preexisting condition” (*i.e.*, arthritis), it merely speculated that claimant “*may*” have a “combined condition.”

In other words, claimant’s request for acceptance of a “combined condition” was speculative, not clear. Because the letter only asserted that claimant may or may not have a “combined condition,” it did not “clearly request” acceptance of a “combined condition.” *Traner*, 62 Van Natta at 673; *Ortiz-Lopez*, 60 Van Natta at 1342. Under these circumstances, we find that claimant’s request was insufficient to trigger a duty to process a claim for a “combined condition” and SAIF’s processing did not unreasonably delay acceptance or denial of a claim, or otherwise resist payment of compensation. Consequently, claimant is not entitled to penalties and attorney fees based on SAIF’s claim processing.

Finally, claimant is not entitled to an attorney fee under ORS 656.386(1), because he has not prevailed over a denied claim.

ORDER

The ALJ’s order dated May 4, 2009 is affirmed.

Entered at Salem, Oregon on March 26, 2010