

In the Matter of the Compensation of  
**WARREN D. DUFFOUR, Claimant**  
WCB Case No. 10-04095  
ORDER ON RECONSIDERATION  
Ronald A Fontana, Claimant Attorneys  
Cummins Goodman et al, Defense Attorneys

Reviewing Panel: Members Biehl, Lowell, and Herman.

Pursuant to our March 27, 2012 order, we reached the following conclusions: (1) the self-insured employer's modified acceptance of a "traumatic brain injury" constituted a *de facto* denial of other new/omitted medical condition claims; (2) these other claims did not constitute "new/omitted medical conditions;" and (3) awards for penalties and attorney fees were not warranted. Asserting that our upholding of the employer's *de facto* denials treats the claimed conditions as though they are not compensable and conflicts with existing case precedent, claimant contends that we must set aside the *de facto* denials, as well as award penalties and attorney fees.

As claimant accurately notes, there is prior Board case precedent for the proposition that a carrier's contention that a new/omitted medical condition claim is a symptom of a previously accepted condition (or that the claimed condition is synonymous with the already accepted condition) constitutes a concession that the claimed condition is compensable and results in an order setting aside the carrier's denial. *See generally Nichole M. Robinson*, 63 Van Natta 1475 (2011); *Tobbi A. Countryman*, 62 Van Natta 1331 (2010). Nonetheless, subsequent to those decisions, the court issued its decision in *Crawford v. SAIF*, 241 Or App 470 (2011), which held that, where a claimed condition was, in fact, an omitted medical condition, a carrier's *de facto* denial of that claim must be set aside. Consistent with the *Crawford* rationale, we have since reasoned that 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." *Charles W. Hill*, 64 Van Natta 371 (2012); *Joyce A. Dietrich*, 63 Van Natta 2507, 2511 (2011); *Michael L. Long*, 63 Van Natta 2134 (2011).

Here, for the reasons expressed in our previous decision, we have determined that the absence of an express acceptance or denial of the claims in dispute constitute *de facto* denials. Nevertheless, we have also concluded that those claimed conditions (although compensable) do not constitute "new" or "omitted" medical conditions. Consequently, consistent with the *Long* and *Dietrich* rationale, the employer's *de facto* denial of the request to add these "conditions" to the notice of acceptance shall be upheld.

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Finally, as explained in our prior order, in light of the discussion in *Rose v. SAIF*, 200 Or App 654 (2005) of the “reasonably apprises” language concerning the acceptance of new/omitted medical condition claims, we do not consider the employer’s decision to respond to the multiple new/omitted medical conditions claims with an acceptance of one condition to have been unreasonable. Likewise, because of the employer’s timely acceptance of one of the requested new/omitted medical condition claims, we distinguish this case from *Dietrich*, where we found a carrier’s failure to timely accept or deny a new/omitted medical condition claim to have been unreasonable. *See also Penny I. Cooper*, 64 Van Natta 437 (2012); *Patsy M. Sanborn*, 63 Van Natta 2214 (2011).

Accordingly, we withdraw our March 27 order. On reconsideration, as supplemented, we republish our March 27 order. The parties’ 30-day rights of appeal shall begin to run from the date of this order.

**IT IS SO ORDERED.**

Entered at Salem, Oregon on April 26, 2012