
In the Matter of the Compensation of
PENNY I. COOPER, Claimant
WCB Case No. 10-05053
ORDER ON REVIEW
Philip H Garrow, Claimant Attorneys
Scott H Terrall & Associates, Defense Attorneys

Reviewing Panel: Members Biehl and Lowell.

The self-insured employer requests review of those portions of Administrative Law Judge (ALJ) Jacobson's order that: (1) set aside its *de facto* denials of claimant's new/omitted medical condition claims for left ankle conditions; and (2) awarded penalties and attorney fees for allegedly unreasonable claim processing. On review, the issues are claim processing, compensability, penalties, and attorney fees. We affirm in part, reverse in part, and modify in part.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact."¹ We summarize the pertinent facts as follows.

Claimant was compensably injured in June 2008. The employer accepted a disabling left ankle sprain.

In June 2010, claimant asked the employer to accept, *inter alia*, "left ankle sprain with partial tear anterior talofibular ligament" and "instability of lateral ligament."² The employer did not respond to those claims. Claimant requested a hearing.

CONCLUSIONS OF LAW AND OPINION

The ALJ determined that the employer had *de facto* denied claimant's new/omitted medical condition claims in dispute by not responding with an acceptance or denial of those claims within the statutory period in ORS 656.262(7)(a). The ALJ then set aside those *de facto* denials, and awarded an

¹ We do not adopt the ALJ's "Ultimate Findings of Fact."

² Claimant withdrew her request that the employer accept "fracture distal shaft left 5th metacarpal." In June 2010, claimant had also requested that the employer accept "partial tear anterior tib[i]ofibular ligament." The ALJ noted that it was "unclear as to whether this issue [was] in dispute," and proceeded to uphold the employer's *de facto* denial of that claim. On review, claimant does not challenge that portion of the ALJ's order.

assessed attorney fee under ORS 656.386(1) for prevailing against those denials. The ALJ also awarded penalties and attorney fees, finding that the employer did not provide an adequate explanation, in light of settled case law, as to its failure to accept or deny the new/omitted medical condition claims. We address these issues, in turn.

Claim Processing

The employer first asserts that *Rose v. SAIF*, 200 Or App, 654 (2005), and its progeny are incorrect, and that it had no obligation to accept or deny claimant's new/omitted medical condition claims, because the claimed conditions did not qualify as "new" or "omitted" medical "conditions." Therefore, the employer contends that it did not *de facto* deny the new/omitted medical condition claims.

We disagree. If a claimant files a new or omitted medical condition claim pursuant to ORS 656.267 by clearly requesting formal written acceptance, the carrier must respond by written notice of acceptance or denial within 60 days; a mere letter of clarification or amendment of the notice of acceptance does not suffice. *SAIF v. Stephens*, 247 Or App 107, 112 (2011); *Rose v. SAIF*, 200 Or App, 654, 662 (2005); *see also* ORS 656.262(7)(a); *Richard G. Boyce*, 63 Van Natta 2024, 2025 (2011). "The failure of an insurer to respond to an omitted condition claim by either accepting or denying it within 60 days is a procedural deficiency that gives rise to a denied claim." *Stephens*, 247 Or App at 112; *see also Crawford v. SAIF*, 241 Or App 470, 481 (2011).

Here, because claimant complied with the provisions of ORS 656.267 by expressly requesting acceptance of "left ankle sprain with partial tear of the talofibular ligament" and of "left lateral ligament instability" (Ex. 72), the employer had an obligation to process those claims by either accepting or denying the claims for each condition. *Stephens*, 247 Or App at 112; *John R. Waldrup*, 61 Van Natta 619, 621 (2009); *Francisco G. Rodriguez*, 59 Van Natta 2422, 2425 (2007). The lack of an acceptance or denial of the claims constitutes a *de facto* denial. *Stephens*, 247 Or App at 112; *Casey H. Erickson*, 62 Van Natta 2772, 2775 (2010); *William J. LeFave*, 58 Van Natta 1904, 1907 (2006) (on remand); *Denise L. Rose*, 58 Van Natta 1602, 1606 (2006) (on remand).

On review, the employer contends that *Rose* and the aforementioned cases were wrongly decided, and that it should not have to accept or deny new/omitted medical condition claims if the claimed "new" or "omitted" conditions have

allegedly already been “accepted” under a different name, or if the claimed “conditions” are only “symptoms.” We, however, are bound by the court’s decision in *Rose*.

Moreover, the court has reiterated the fundamental premise of *Rose* in *Crawford*, and most recently, in *Stephens* (which issued after the parties submitted their appellate briefs). As set forth above, the *Stephens* court reaffirmed that, if a carrier believes that a claimant has requested acceptance of a “condition” that is not truly “new” or “omitted,” or is merely a “symptom” of a “condition,” the carrier is not relieved of its statutory obligation to accept or deny the claimant’s new/omitted medical condition claim. The carrier may, however, defend its denial of such claims. *See Stephens*, 247 Or App at 112. That holding is in accord with our case precedent, subsequent to the *Rose* decision. Thus, contrary to the employer’s argument, the employer is not compelled by ORS 656.262(7)(a) or *Rose* and its progeny, to *accept* new/omitted medical condition claims for mere “symptoms,” or for the “same condition” that it previously accepted under a “different name.”³ The employer is, however, required to accept or deny such claims within the statutory 60-day period.

Consequently, we find that the employer *de facto* denied claimant’s new/omitted medical condition claims. Therefore, we affirm that portion of the ALJ’s order.

Compensability

Having determined that the employer *de facto* denied claimant’s new/omitted medical condition claims, we now address whether those *de facto* denials should be upheld. *See Stephens*, 247 Or App at 112; *see also Rodriguez*,

³ The employer suggests that, in light of *Rose* and its progeny, a carrier has no adequate statutory response to a claimant who requests acceptance of a condition that the medical evidence establishes is just another “name” for a previously accepted condition. The employer asserts that it cannot deny that “condition,” and that, if it accepts the condition, would have to reopen and process that claim to closure.

We disagree with the employer’s understanding of its statutory obligations. The employer is not required to accept or deny new/omitted medical *conditions*, but new/omitted medical condition *claims*. *See* ORS 656.262(7)(a); *see also Michael L. Long*, 63 Van Natta 2134, *recons*, 63 Van Natta 2330 (2011) (new/omitted medical condition *claims* for conditions that have already been accepted may be denied). Thus, as explained above, if a claimant requests acceptance of only a “symptom,” and not a “condition,” the carrier may deny that new/omitted medical condition *claim*. Likewise, if a claimant requests acceptance of a “condition” that has already been accepted, the carrier may deny that new/omitted medical condition *claim*. *See id.* In such circumstances, the previously accepted condition continues to be accepted, but the new/omitted medical condition *claim* may properly be denied. *Id.*

59 Van Natta at 2425 (the claimant's request for acceptance of "chronic chest wall pain" was sufficient to perfect a new/omitted medical condition claim; whether the request described a condition, as opposed to merely a symptom, was a question to be resolved when determining compensability). With respect to those questions, the employer does not dispute the requisite causal relationship between the work injury and the disability/need for treatment for the claimed "conditions." See ORS 656.005(7)(a); ORS 656.266(1). Rather, the employer asserts that it properly denied the claimed "left ankle sprain with partial tear anterior talofibular ligament" because it effectively already accepted that condition by way of accepting a "left ankle sprain." (See Ex. 41). See *Joyce A. Dietrich*, 63 Van Natta 2507, 2511 (2011) (if a *claim* is found not to be for a new/omitted medical condition, the carrier's denial of the *claim* will be upheld); *Long*, 63 Van Natta at 2135-36 (where the currently claimed "conditions" were previously accepted, denials of new/omitted medical condition claims will be upheld because the claimed conditions were not "new" or "omitted"). Similarly, the employer asserts that it properly denied the "instability of lateral ligament" claim because the claim was for a "symptom," not a "condition." See *Boyce*, 63 Van Natta at 2025-26 (in the event that it is determined that a requested "condition" is a "symptom" that need not be accepted, a carrier's denial of a new/omitted medical condition claim will be upheld); *John J. O'Brien*, 58 Van Natta 2714, 2715-16 (2006) (denial of a claim for a symptom of an accepted condition was upheld because the symptom was not a "condition"); *Terrance W. Heurung*, 51 Van Natta 1272, 1274 (1999) (denial of a new medical condition claim upheld because it claimed a symptom of an accepted condition). We address each claim denial, in turn.

As noted above, the employer contends that its *de facto* denial of claimant's "left ankle sprain with partial tear anterior talofibular ligament" claim should be upheld because the employer effectively already accepted the claimed condition by way of its previous acceptance of "left ankle sprain." (See Ex. 41). We disagree.

Dr. Thompson, who examined claimant at the employer's request, diagnosed "left ankle sprain, *with* partial tearing of the anterior talofibular ligament." (Ex. 45-4) (emphasis added). Dr. Hinz, claimant's treating surgeon, concurred with that diagnosis. (Exs. 48, 79). Dr. Hinz also explained that sprains varied in degrees, and that some sprains did not involve partial ligament tearing, whereas more severe strains involved such partial tearing, or even a full tear. (Ex. 80-6). In other words, according to Dr. Hinz's un rebutted opinion, not all sprains necessarily included partial (or full) ligament tearing. (*Id.*)

Dr. Hinz further explained that claimant sustained “a fairly substantial tear” of her anterior talofibular ligament, which showed evidence of “thinning” that he observed during surgery. (Ex. 80-9, -11). He elaborated that the anterior talofibular ligament was, in fact, “detached.” (Ex. 80-11). He also described medical consequences that resulted from the more substantial condition of an ankle sprain *with* partial tearing of the anterior talofibular ligament. (Ex. 80-6, -9 through 11, -14 through 16). Likewise, Dr. Yodlowski, who examined claimant at the employer’s request, suggested a distinction between an ankle sprain, and a sprain that might also include a ligament tear. (Exs. 71-14, -16, 80-7).

Under these circumstances, we conclude that the claimed “left ankle sprain with partial tear anterior talofibular ligament” is a sufficiently distinct condition from the previously accepted “left ankle sprain,” such that it qualifies as an omitted medical condition. Specifically, the persuasive medical evidence establishes that an ankle sprain may or may not include partial ligament tearing, and that, here, claimant had a sprain “with partial tear [of the] anterior talofibular ligament.” The existence of the partial ligament tearing was observed by Dr. Hinz during surgery, and was noted as being “substantial.” (Ex. 80-9 through 11). Dr. Hinz further explained that the partial tearing had medical consequences for claimant, beyond what would be expected for a sprain that did not include such tearing. (Ex. 80-6, -9 through 11, -14 through 16).

Therefore, we conclude that the claimed “left ankle sprain with partial tear anterior talofibular ligament” constitutes a distinct “physical status of” claimant’s left ankle beyond the accepted “sprain.” *See Stephens*, 247 Or App at 113 (“condition” means “the physical status of the body as a whole or one of its parts”); *accord Young v. Hermiston Good Samaritan*, 223 Or App 99, 104 (2008).⁴ Consequently, the employer’s *de facto* denial of that claim is set aside.

We next turn to the employer’s *de facto* denial of claimant’s claim for “instability of lateral ligament.” The employer asserts that its denial of that claim should be upheld because the claim is for a “symptom,” and not a “condition.” *See Young*, 223 Or App at 107 (“a condition and its symptoms are usually distinct”). We agree with the employer’s assertion.

⁴ We note that a September 21, 2010 Order on Reconsideration, which has become final, also characterized the claimed “partial tearing anterior talofibular ligament” as a separate “condition” from the “accepted condition” of “left ankle sprain,” for purposes of claim closure. (Ex. 76-1).

As noted above, for these purposes, “condition” means “the physical status of the body as a whole or one of its parts.” *Stephens*, 247 Or App at 113; *Young*, 223 Or App at 104. Dr. Hinz stated that the “instability” was “a symptom of” claimant’s damaged ligaments. (Ex. 80-9). Dr. Hinz did not otherwise clarify or assert that the claimed “instability” was more than a symptom of the damaged ligaments, or that the instability constituted “the physical status of the body as a whole or one of its parts.” See *Stephens*, 247 Or App at 113; *Young*, 223 Or App at 104. Moreover, no other expert medical opinion persuasively described the claimed instability as a “condition” or rebutted Dr. Hinz’s opinion that the instability was only a “symptom of” the damaged ligament “condition.”

Therefore, on this record, we are unable to conclude that claimant has established that the claimed “instability of lateral ligament” is a “condition.” See *Benz v. SAIF*, 170 Or App 22, 25 (2000) (although the Board may draw reasonable inferences from the medical evidence, it is not free to reach its own medical conclusions in the absence of such evidence); *SAIF v. Calder*, 157 Or App 224, 227-28 (1998) (the Board is not an agency with specialized medical expertise and must base its findings on medical evidence in the record). Consequently, we reverse that portion of the ALJ’s order that set aside the employer’s *de facto* denial of that claim, and we reinstate and uphold that denial.

Penalties/Attorney Fees

We agree with the ALJ’s determination that the employer offered no legitimate explanation for not accepting or denying the new/omitted medical condition claims within 60 days of receipt of the claim. Therefore, its claim processing is unreasonable. See *Nicholas Otzoy-Mejia*, 61 Van Natta 2555, 2556-57 (2009); *Nancy Ochs*, 59 Van Natta 1785, 1794 (2007). Because we affirmed that portion of the ALJ’s order that set aside the employer’s denial of the “left ankle sprain with partial tear anterior talofibular ligament” condition claim, claimant is entitled to a penalty and penalty-related attorney fee under ORS 656.262(11)(a) concerning the employer’s processing of that claim.

However, because we have reinstated and upheld the employer’s denial of the “instability of lateral ligament” claim, there are no “amounts then due” on which to base a penalty for that claim. Therefore, we reverse that portion of the ALJ’s order that awarded a penalty for the “instability of lateral ligament” claim.

Nevertheless, an attorney fee under ORS 656.262(11)(a) is not contingent on the assessment of a penalty, and such a fee may be awarded in the absence of

“amounts then due.” *Juanita Murillo*, 62 1779, 1785 (2010); *Ochs*, 59 Van Natta at 1793. Therefore, we affirm the ALJ’s attorney fee award under ORS 656.262(11)(a).

The ALJ also awarded a \$6,000 assessed fee under ORS 656.386(1) for claimant’s counsel’s services at hearing for setting aside both of the employer’s denials. However, as set forth above, we have reinstated and upheld the employer’s denial of the “instability of lateral ligament” claim. Therefore, we modify the ALJ’s attorney fee award.

After considering the factors set forth in OAR 438-015-0010(4) and applying them to this case, we find that, in lieu of the ALJ’s award, a reasonable fee for claimant’s attorney’s services at hearing is \$5,000, payable by the employer. In reaching this conclusion, we have particularly considered the time devoted to the compensability issue regarding the claimed “left ankle sprain with partial tear anterior talofibular ligament” condition (as represented by the record), the complexity of the issue, the value of the interest involved, the benefit secured for claimant, and the risk that her counsel may go uncompensated.

Claimant’s attorney is entitled to an assessed fee for services on review.⁵ ORS 656.382(2). After considering the factors set forth in OAR 438-015-0010(4) and applying them to this case, we find that a reasonable fee for claimant’s attorney’s services on review regarding the “left ankle sprain with partial tear anterior talofibular ligament” claim is \$3,000, payable by the employer. In reaching this conclusion, we have particularly considered the time devoted to the issue (as represented by claimant’s respondent’s brief and her counsel’s uncontested fee submission), the complexity of the issue, and the value of the interest involved.

Finally, claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the “left ankle sprain with partial tear anterior talofibular ligament” denial, to be paid by the employer. *See* ORS 656.386(2); OAR 438-015-0019; *Gary E. Gettman*, 60 Van Natta 2862 (2008). The procedure for recovering this award, if any, is prescribed in OAR 438-015-0019(3).

⁵ Claimant’s attorney is not entitled to an attorney fee under ORS 656.382(2) concerning the ALJ’s penalty and attorney fee awards. *Saxton v. SAIF*, 80 Or App 631, *rev den*, 320 Or 159 (1986); *Dotson v. Bohemia, Inc.*, 80 Or App 233, *rev den*, 302 Or 35 (1986).

ORDER

The ALJ's order dated July 29, 2011 is affirmed in part, reversed in part, and modified in part. That portion of the order that set aside the employer's *de facto* denial of the "instability of lateral ligament" condition claim is reversed, and the employer's denial of that claim is reinstated and upheld. In lieu of the ALJ's \$6,000 attorney fee award, claimant's attorney is awarded an assessed fee of \$5,000, for services at the hearing level, to be paid by the employer. That portion of the ALJ's order that awarded a penalty for the "instability of lateral ligament" claim is also reversed. The remainder of the ALJ's order is affirmed. For services on review regarding the denial of the "left ankle sprain with partial tear anterior talofibular ligament" claim, claimant's attorney is awarded an assessed fee of \$3,000, payable by the employer. Claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the "left ankle sprain with partial tear anterior talofibular ligament" claim denial, to be paid by the employer.

Entered at Salem, Oregon on March 2, 2012