
In the Matter of the Compensation of
RALPH NISBET, Claimant
WCB Case Nos. 15-00223, 15-00222
ORDER ON REVIEW
Julene M Quinn LLC, Claimant Attorneys
H Thomas Andersen, Defense Attorneys

Reviewing Panel: Members Lanning and Johnson.

Claimant requests review of Administrative Law Judge (ALJ) Ogawa's order that: (1) upheld the self-insured employer's denial of a new/omitted medical condition claim for a hematoma associated with a partial tear of the plantaris tendon; and (2) upheld the employer's denial of a new/omitted medical condition claim for tears at the distal medial and lateral heads of the left gastrocnemius muscle and hematoma. On review, the issues are compensability, penalties, and attorney fees.

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

On December 16, 2011, claimant injured his left calf muscle at work. (Ex. 3). A December 22, 2011 MRI showed myofascial edema involving the medial and lateral heads of the gastrocnemius muscle, a hematoma interposed between the gastrocnemius and soleus muscles, and abnormal signal intensity in the plantaris tendon. (Ex. 5). Dr. Wang, the radiologist, assessed a tear at the distal medial and lateral heads of the gastrocnemius muscle, a hematoma, and a partial tear of the plantaris tendon. (*Id.*)

On December 23, 2011, Dr. Ingle, claimant's then-attending physician, assessed a "gastroc strain with significant tearing." (Ex. 6).

The claim was accepted for a left gastrocnemius strain. (Ex. 10).

On June 1, 2012, Dr. Ingle found that claimant was medically stationary and had no permanent impairment. (Ex. 16). The claim was closed by a June 8, 2012 Notice of Closure. (Ex. 17).

In May 2014, Dr. Edwards assumed claimant's care. (Ex. 18). Claimant reported that he had developed muscle spasms in his left calf the previous week, while performing a "pre-placement" physical examination, and had not qualified for the job. (Ex. 19-1). Dr. Edwards diagnosed a left gastrocnemius strain. (Ex. 19-3).

On August 28, 2014, the employer did not authorize palliative care on the basis that claimant was not employed. (Ex. 25).

On September 17, 2014, claimant initiated a new/omitted medical condition claim for a “tear at the distal medial and lateral heads of the gastrocnemius muscle and a partial tear of the plantaris tendon with a hematoma interposed between the two muscle groups.” (Ex. 26).

On November 24, 2014, the employer accepted a partial tear of the left plantaris tendon. (Ex. 27). On the same day, the employer denied the claim for a hematoma, asserting that the hematoma was encompassed in its acceptance of the left plantaris tendon tear. (Ex. 28). In a separate document, the employer also denied the claim for tears at the distal medial and lateral heads of the left gastrocnemius muscle and hematoma, asserting that the tears and hematoma were encompassed in its acceptance of the left gastrocnemius strain. (Ex. 29). That denial also asserted, in the alternative, that the tear of the lateral head of the gastrocnemius muscle did not exist. (*Id.*) Claimant requested a hearing concerning the employer’s denials.

In March 2015, Dr. Toal, an orthopedic surgeon, performed a records review at the employer’s request. Dr. Toal opined that the acceptance of the gastrocnemius strain encompassed the tear of the medial head and, assuming there was a tear of the lateral head, it would also be encompassed.¹ (Ex. 30-7). He further stated that muscle “tear” and muscle “strain” are synonymous terms. (Exs. 30-6, -7; 31-2). Lastly, reasoning that a hematoma is a natural consequence of, and accompanies, all muscle tears/strains, he concluded that the acceptance of a strain would reasonably apprise medical providers of the nature of the compensable condition, including the hematoma. (Ex. 30-7).

The parties agreed to submit the dispute on the written record. In his closing argument, claimant asserted that the acceptance did not reasonably apprise him and the medical providers of the nature of the compensable conditions. Claimant also argued that the employer’s denial took inconsistent positions regarding the claimed tear of the lateral head of the gastrocnemius muscle, resulting in a “back-up” denial.

¹ Dr. Toal explained that the medial and lateral heads of the gastrocnemius are the two parts of that muscle. (Ex. 30-6). He also opined that the December 2011 MRI showed edema involving the medial head of the gastrocnemius, but not the lateral head, which had no apparent injury. (Ex. 30-5, -6).

Relying on the opinion of Dr. Toal, the ALJ concluded that the claimed new/omitted conditions did not constitute “new” or “omitted” medical conditions. Accordingly, the ALJ upheld the employer’s denials and concluded that a penalty was not warranted.

On review, claimant renews his argument that the acceptance of a strain did not reasonably apprise him or medical providers that the tears or hematoma are compensable. Claimant also seeks penalties and attorney fees, asserting that the employer’s “encompassed” position resulted in a rescission of its denial or, alternatively, that the denial was a “back-up” denial of an accepted condition. For the following reasons, we affirm the ALJ’s decision.

To prevail on his new/omitted medical condition claims, claimant must establish that the claimed conditions exist and that the injury is a material contributing cause of his disability/need for treatment of those conditions. *See* ORS 656.005(7)(a); ORS 656.266(1); *Maureen Y. Graves*, 57 Van Natta 2380, 2381 (2005).

A new/omitted medical condition claim must be for a “condition” that is either “new” or “omitted.” ORS 656.267(1); *Labor Ready v. Mogensen*, 275 Or App 491, 498 n 9 (2015) (a new/omitted medical condition requires notice of a new or omitted condition, rather than a new diagnosis). A condition is “new” if it arose after acceptance of an initial claim, was related to an initial claim, and involved a condition other than the condition initially accepted. *Johansen v. SAIF*, 158 Or App 672, 679 (1999). A condition is “omitted” if it was in existence at the time of the acceptance, but was not mentioned in the notice or left out. *Mark A. Baker*, 50 Van Natta 2333, 2336 (1998).

A new/omitted condition claim may be denied if the condition has already been accepted. *See Penny I. Cooper*, 64 Van Natta 437, 439 (2012) (new/omitted medical condition claims for conditions that have already been accepted may be denied); *Michael Long*, 63 Van Natta 2134, 2135, *recons*, 63 Van Natta 2300 (2011) (same). Whether a claimed new/omitted condition is distinct from the accepted condition is a question of fact, the resolution of which depends on the medical evidence. *See Young v. Hermiston Good Samaritan*, 223 Or App 99, 107 (2008); *Warren D. Duffour*, 64 Van Natta 619, 622, *recons*, 64 Van Natta 795 (2012).

Here, Dr. Toal opined that the acceptance of a gastrocnemius muscle strain encompassed the tearing of its two parts; *i.e.*, the tear of the medial head and the assumed tear of the lateral head. (Ex. 30-6, -7). Claimant argues that Dr. Toal's discussion of grading or classification of muscle injury² shows that the acceptance does not include a tear. Based on our review of this record, we disagree.

A carrier is not required to accept each and every diagnosis or medical condition, as long as the acceptance reasonably apprises claimant and the medical providers of the nature of the compensable conditions. ORS 656.267(1); *Mogensen*, 275 Or App 491 at 498 n 9. "Reasonably apprises" is an objective standard that does not require that, in every case, the claimant or medical providers subjectively understand what conditions are compensable. *See Duffour*, 64 Van Natta at 623 (the carrier's obligation to tender an acceptance that "reasonably apprises" both the claimant and the medical providers of the "nature of the compensable conditions" was an objective standard). We look to the medical evidence to determine the scope of a carrier's claim acceptance. *Id.*

Here, Dr. Toal's persuasive and un rebutted opinion established that the tears were in the same muscle and synonymous with the accepted strain. Accordingly, this record supports a conclusion that the claimed tears are neither "new" nor "omitted." *Mogensen*, 275 Or App at 497 (medical evidence showed that an ultimately diagnosed "CRPS II" was encompassed within the claimant's new/omitted medical condition claim for "CRPS"); *cf. Cooper*, 64 Van Natta at 440-41 (the claimed "left ankle sprain with partial tearing of the anterior talofibular ligament" qualified as an omitted medical condition where the medical evidence showed that it was a sufficiently distinct condition from the previously accepted "left ankle sprain"). Therefore, we affirm the ALJ's order upholding the employer's denial of tears at the distal medial and lateral heads of the left gastrocnemius muscle because the tears have already been accepted as part of the left gastrocnemius strain.

We turn to the issue of whether the employer was required to accept the claimed hematoma as a new/omitted medical condition. Based on the following reasoning, this record does not establish that the hematoma was a new/omitted medical condition.

² Dr. Toal stated that several grading systems for muscle injury have been proposed in the medical literature. (Ex. 31-1). One system utilized a classification based on injury severity relating to the amount of tissue damage and associated functional loss, ranging from grade 1 (no appreciable muscle tear) to grade 3 (complete tear of the musculotendinous unit and complete loss of function). (*Id.*)

Dr. Toal concluded that the hematoma was accepted within the left gastrocnemius strain. (Ex. 30-6). Reasoning that muscles tear and bleed when they are strained, he opined that hematoma formation is a universal and expected finding after a muscle injury. (Exs. 30-6, 31-2). He acknowledged that “it would be important to list [a hematoma] as a separate condition” if it required surgical evacuation, but he stated that, in this case, the hematoma required no additional treatment. (Ex. 31-2). Consequently, he concluded that the acceptance of a strain would reasonably apprise medical providers of the nature of the compensable condition, including the hematoma. (Ex. 30-7).

Based on Dr. Toal’s persuasive and unrebutted opinion, we conclude that the hematoma did not constitute a distinct condition from the accepted conditions. *Id.* Therefore, the employer was not required to accept the claimed hematoma.

Finally, claimant argues that the employer’s denial of the gastrocnemius muscle tears was a rescission of a denial or a “back-up” denial. Citing *Georgiana White*, 57 Van Natta 1943, *on recons*, 57 Van Natta 2079, *on recons*, 57 Van Natta 2165 (2005), claimant seeks an ORS 656.386(1) attorney fee. Further asserting that the employer’s conduct was unreasonable, claimant seeks penalties and attorney fees under ORS 656.262(11)(a).

We conclude that claimant is not entitled to an ORS 656.386(1) attorney fee or ORS 656.262(11)(a) penalties/attorney fees. We reason as follows.

In *White*, the carrier did not timely respond to the claimant’s request for acceptance of a new/omitted medical condition claim, resulting in a *de facto* denial. The carrier conceded that it had *de facto* denied the claim, but argued that the claimed condition was encompassed within its prior acceptance. We held that the carrier’s *de facto* denial of the claim entitled the claimant’s counsel to an ORS 656.386(1) attorney fee.

Here, the employer complied with the statutory claim processing obligations in timely denying the new/omitted medical condition claim. Since the issuance of *Rose v. SAIF*, 200 Or App 654, 662 (2005), it has been settled that a carrier must respond to a new/omitted medical condition claim by written notice of acceptance or denial within 60 days. If the claimed condition is encompassed in the original acceptance, a carrier may issue a denial. *See Richard G. Boyce*, 63 Van Natta 2024, 2026 (2011) (the denial of a symptom of the accepted condition was not a “back-up” denial).

Here, as previously explained, we have concluded that the claimed conditions were not distinct from the accepted conditions; *i.e.* the claimed conditions were not “new” or omitted” because they were already accepted. Therefore, the employer’s “encompassed condition” denials were the appropriate response to claimant’s new/omitted medical condition claim.

Given this conclusion, it necessarily follows that the employer’s alternative “existence” defense to claimant’s new/omitted medical condition claim does not become ripe for resolution. Because such a defense is not before us, it likewise follows that claimant’s “back-up” denial argument in response to such a defense is moot.

Accordingly, based on the aforementioned reasoning, we conclude that claimant is not entitled to the requested attorney fees and penalty awards.

ORDER

The ALJ’s order dated November 19, 2015 is affirmed.

Entered at Salem, Oregon on October 31, 2016