
In the Matter of the Compensation of
NANCY E. EGGERT, Claimant
WCB Case No. 16-00198
ORDER ON REVIEW
Julene M Quinn LLC, Claimant Attorneys
SAIF Legal, Defense Attorneys

Reviewing Panel: Members Johnson, Lanning, and Somers. Member Johnson dissents in part.

Claimant requests review of those portions of Administrative Law Judge (ALJ) Brown's order that: (1) found that the SAIF Corporation's "contingent" Notice of Acceptance did not constitute a *de facto* denial once its appeal of an earlier compensability decision was dismissed; and (2) 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 in part and reverse in part.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact" and provide the following summary.

Claimant injured her left knee at work on February 17, 2013. (Ex. 3). She submitted an 801 form on May 28, 2013. (*Id.*) SAIF denied the claim on July 11, 2013. (Ex. 5).

On September 25, 2014, a prior ALJ's order set aside SAIF's denial. (Ex. 8). SAIF requested Board review. (Ex. 9).

On December 18, 2014, SAIF reported on a 1502 form that it was accepting the claim and that it had appealed the prior ALJ's order. (Ex. 10). The next day, SAIF issued an Initial Notice of Acceptance, which stated,

"SAIF was ordered to accept the conditions listed below by Opinion and Order dated September 25, 2014. SAIF's acceptance of these conditions has been challenged on appeal, and the acceptance of the conditions is contingent on the outcome of the appeal. SAIF is not required to pay any permanent disability compensation or medical

payments for any condition under appeal unless and until the condition is found to be compensable after all litigation is final.” (Ex. 11-1).

The notice identified a left medial meniscus tear as the “contingent accepted medical condition.” (*Id.*)

On January 13, 2015, claimant asked SAIF to reimburse her for mileage and pharmacy expenses. (Ex. 31-5, -6, -7). On February 19, 2015, SAIF advised claimant that it would not be paying any reimbursements “due to the pending appeal[.]” (Ex. 31-4).

On May 5, 2015, we affirmed the prior ALJ’s order setting aside SAIF’s denial. *See Nancy Eggert*, 67 Van Natta 761 (2015).

A May 6, 2015 Notice of Closure awarded two percent whole person impairment for the left knee condition. (Ex. 18-1). The closure notice stated that payment of the impairment award was stayed pending the outcome of the compensability appeal. (*Id.*) The accompanying Updated Notice of Acceptance at Closure reiterated that SAIF’s acceptance was contingent on the outcome of the appeal. (Ex. 18-3).

On May 20, 2015, SAIF petitioned the court for judicial review. (Ex. 20). On July 22, 2015, SAIF moved to dismiss its petition. (Ex. 23). The court entered an Order of Dismissal and Appellate Judgment on July 23, 2015, which it amended (to award costs) on August 5, 2015. (Exs. 24, 27).

SAIF paid the permanent impairment award on August 5, 2015. (Ex. 28).

On October 8, 2015, claimant asked SAIF to provide a “clarified Notice of Acceptance that does not state it is conditional or contingent upon any outcome of litigation, since all litigation regarding initial compensability has been concluded.” (Ex. 30). Claimant also asked SAIF to reimburse her previously submitted claim-related expenses. (*Id.*)

On January 14, 2016, claimant requested a hearing, asserting “*de facto* denial/challenge to Notice of Acceptance/medical services” and seeking penalties and attorney fees. (Ex. 32-1). Claimant stated that she had not received any response from SAIF to her October 8, 2015 letter requesting “amendment of deficient notice of acceptance and reimbursement of claim-related expenses.” (Ex. 32-2).

On the same day, claimant asked the Workers' Compensation Division (WCD) to resolve the medical services dispute involving "unreasonable resistance to the payment of compensation/reimbursement" of her January 13, 2015 reimbursement request. (Ex. 31).

On February 1, 2016, the WCD approved the parties' agreement to resolve the "claim-related expense reimbursement" dispute. (Ex. 35). Pursuant to the agreement, SAIF reimbursed claimant's travel and pharmacy expenses and paid a \$500 attorney fee. (Exs. 36, 37).

Several months later, in her written closing argument at the hearing level,¹ claimant contended that SAIF's lack of response to her request for an "unconditional" Notice of Acceptance was a *de facto* denial of her claim. She also asserted a *de facto* denial of medical services for non-reimbursement of claim-related expenses following the final determination of the compensability issue. Claimant sought an attorney fee for prevailing over the *de facto* denial and penalties and attorney fees for unreasonable claim processing and the delay in payment/reimbursement of claim-related expenses.

The ALJ concluded that SAIF was not required by statute or case precedent to amend its acceptance after the dismissal of its request for judicial review. The ALJ further determined that the parties had resolved the medical services dispute in the WCD proceeding. Accordingly, the ALJ declined to assess attorney fees or penalties.

On review, claimant seeks an order that: (1) requires SAIF to issue a "non-contingent" Notice of Acceptance; (2) awards an ORS 656.386(1) attorney fee for prevailing over the alleged *de facto* denial; (3) awards a penalty and attorney fee pursuant to ORS 656.262(11)(a); and (4) awards an attorney fee pursuant to ORS 656.382(1). For the following reasons, we conclude that SAIF was obligated to respond to claimant's request for clarification, and its lack of response was unreasonable, but did not result in a denied claim.

We have previously held that, on the issuance of a litigation order finding a claim compensable, the claim is considered accepted, albeit involuntarily, and the carrier is obligated to process the claim as though it was accepted pending appeal. *See Albert D. Avery*, 51 Van Natta 814 n 1, *recons*, 51 Van Natta 927 (1999).

¹ The parties agreed to present their positions on the written record, without a hearing. The written closing argument schedule was completed in May 2016.

When the carrier determines that the claim qualifies for claim closure, ORS 656.262(7)(c) requires the carrier to issue “an updated notice of acceptance that specifies which conditions are compensable.” The related administrative rule requires an Updated Notice of Acceptance at Closure to include: “A list of all compensable conditions that have been accepted, even if a condition was denied, ordered accepted by litigation, and is under appeal.” OAR 436-030-0015(1)(c)(A)(ii) (WCD Admin. Order No. 15-052, eff. 3/1/2015).

When a carrier appeals a “compensability” determination, its “clear and unqualified” acceptance will result in dismissal of the appeal. *See SAIF v. Mize*, 129 Or App 636, 639 (1994). Following *Mize*, we have dismissed requests for Board review when we have found that a carrier accepted a claim without making it contingent on the result of an appeal. *See Mandy Bowdoin*, 65 Van Natta 2555 (2013). Conversely, we have held that a carrier that has been directed by a litigation order to accept a claim may issue a “qualified” acceptance of the claim and continue to assert on appeal of that order that the claimant’s condition is not compensable. *See Valerie Barbeau*, 49 Van Natta 1189 (1997); *Donna J. Calhoun*, 47 Van Natta 454 (1996).

Here, after a prior ALJ’s order set aside its denial, SAIF requested Board review and accepted the claim, “contingent on the outcome of the appeal.” (Ex. 11-1). In other words, SAIF’s acceptance represented that the left medial meniscus tear was being processed as a compensable/accepted claim, but SAIF was still pursuing its appeal of the compensability decision. Pursuant to ORS 656.313(1), SAIF stayed reimbursement of claimant’s claim-related expenses. (Ex. 31-4). *See* ORS 656.313(1) (allowing for a stay of compensation during a carrier’s appeal).

While the appeal was pending, SAIF determined that the claim qualified for claim closure. In compliance with OAR 436-030-0015(1)(c)(A)(ii), SAIF issued an Updated Notice of Acceptance at Closure that included the denied condition that was under appeal and closed the claim. Pursuant to ORS 656.313(1), SAIF stayed payment of the resulting permanent impairment award. *Id.*

SAIF was bound by the express language of its acceptance. *See Mize*, 129 Or App at 639 (binding the carrier to its “clear and unqualified” acceptance). Thus, notwithstanding the reference to “contingent,” the claim was in “accepted” status after the prior ALJ’s order set aside SAIF’s denial. In other words, in the absence of a reviewing body’s reversal of the prior ALJ’s compensability

determination, SAIF could not revoke its acceptance without complying with ORS 656.262(6)(a). *Id.* at 640. Therefore, when the court dismissed SAIF's request for judicial review, ending the litigation, the "appeal" contingency expired.

When a worker "believes that a condition has been incorrectly omitted from a notice of acceptance, or that the notice is otherwise deficient," under ORS 656.262(6)(d), the worker must communicate her written objections to the carrier "pursuant to ORS 656.267." ORS 656.262(6)(d). The carrier has 60 days from its receipt of the worker's communication "to revise the notice of acceptance or make other written clarification in response." *Id.*

ORS 656.267 relates to the filing of new and omitted medical condition claims. To initiate an omitted medical condition claim under ORS 656.262(6)(d), the worker must clearly request formal written acceptance of an omitted medical condition from the carrier. ORS 656.267(1). Where a worker "properly" initiates an omitted medical condition claim "pursuant to ORS 656.267," 656.262(7)(a) compels the carrier to accept or deny the claim within 60 days after it receives written notice of the claim. Therefore, when the alleged deficiency in an acceptance notice is an omitted medical condition, and the worker has initiated an omitted medical condition claim, the carrier's response must include a written notice of acceptance or denial within 60 days after the carrier receives written notice of the claim. ORS 656.262(6)(d); ORS 656.262(7)(a); ORS 656.267.

Alternatively, when the worker seeks clarification of a notice of acceptance or asks that the notice be amended, but does not expressly request acceptance of an omitted medical condition, the carrier's obligation to respond may be satisfied by revising the notice or by making other relevant clarification. ORS 656.262(6)(d).

In *Crawford v. SAIF*, 241 Or App 470, 480 (2011), the court stated that "the nature of the claimant's request will dictate the required response." In that case, the court considered the "interplay of [ORS 656.262(6)(d)] with ORS 656.267(1) and ORS 656.262(7)(a)" in determining whether there was a "denied claim" for the purpose of a carrier-paid attorney fee under ORS 656.386(1)(b)(B). *Id.* at 480. The court explained that:

"When the worker seeks a clarification of a notice of acceptance by, for example, inquiring whether it encompasses a particular condition or diagnosis or asking that a notice of acceptance be amended to expressly 'accept or deny' a particular condition, but does not

expressly request that a condition be accepted, that type of inquiry is not a ‘claim for compensation for a condition omitted from a notice of acceptance’; it is a mere request for clarification. The insurer’s obligation to respond within 60 days may be satisfied either by revising the notice or by making other relevant clarification. ORS 656.262(6)(d). * * * If, however, as here, the identified deficiency is an omitted condition that the claimant expressly seeks to have accepted, then the insurer must respond by processing the omitted condition claim pursuant to ORS 656.262(7)(a), by either accepting or denying it within 60 days.” *Id.*

In that case, where the claimant had expressly sought the acceptance of an omitted medical condition, the court concluded that the carrier’s response (a letter stating that claimant had not properly initiated; *i.e.*, had not “perfected,” a new/omitted medical condition claim under ORS 656.267) was not adequate under ORS 656.262(6)(d), ORS 656.262(7)(a), and ORS 656.267. Instead, the carrier was obligated to accept/deny the omitted condition claim within 60 days, and its failure to do so gave rise to a “denied claim” under ORS 656.386(1)(b)(B). *See also Rose v. SAIF*, 200 Or App 654, 663 (2005) (where the claimant filed a claim for a new medical condition, the carrier was obligated to accept or deny the claim); *Joyce A. Dietrich*, 63 Van Natta 2507 (2011), *recons*, 64 Van Natta 153, 155 (2012) (because the claimant’s letter was not merely seeking clarification of an acceptance notice, but rather was specifically asking the carrier to accept a condition, the carrier was obligated to timely accept/deny the claim); *cf. Troupe v. Labor Ready, Inc.*, 191 Or App 258, 262 (2003) (where the claimant requested clarification of a Notice of Acceptance; *i.e.*, asked the carrier to amend the notice to accept or deny certain left shoulder conditions, the carrier could “revise the notice or make other written clarification of it”); *see also Tobbi A. Countryman*, 62 Van Natta 1331, 1333 (2010) (distinguishing the *Rose* decision, which compels a carrier to accept or deny a claim for a new or omitted medical condition, and the *Troupe* decision, which directs a carrier to revise the notice or to make other written clarification in response to a claimant’s written request for clarification); *Ann M. Carstens*, 57 Van Natta 2856, 2867 (2005) (same).

Here, in contrast to *Crawford*, *Rose*, *Dietrich*, and their progeny, claimant did not request formal written acceptance of a new or omitted medical condition. Instead, she asked that the Notice of Acceptance be “clarified” to show that the acceptance was no longer “contingent.” Therefore, in accordance with the

Crawford rationale, SAIF was obligated, under ORS 656.262(6)(d), to respond by revising the Notice of Acceptance or by making other written clarification. *Id.* In other words, claimant’s request did not require written notice of acceptance or denial under ORS 656.262(6)(d). *Id.*

Moreover, because claimant did not make a “claim for compensation for a condition omitted from a notice of acceptance” pursuant to ORS 656.262(6)(d), SAIF’s lack of response did not result in a “denied claim.” *See* ORS 656.386(1)(b)(B) (for purposes of recovery of attorney fees, expenses, and costs in appeal on denied claim, a “denied claim” is “[a] claim for compensation for a condition omitted from a notice of acceptance, made pursuant to ORS 656.262(6)(d), which the insurer * * * does not respond to within 60 days.”); *Crawford*, 241 Or App at 480.

Nonetheless, ORS 656.262(6)(d) directed SAIF to revise the notice or to make other written clarification in response to claimant’s written communication within 60 days of its receipt. *Id.* Because SAIF did not make any response to claimant’s request for clarification and expense reimbursement (which had been stayed pending the outcome of SAIF’s appeal), and offered no persuasive explanation for its failure to do so, we conclude that it unreasonably delayed or refused to pay compensation under ORS 656.262(11)(a).

ORS 656.262(11)(a) provides for a penalty of up to 25 percent of the “amounts then due” for unreasonable delay or refusal to pay compensation. Here, at the time that SAIF was obligated by ORS 656.262(6)(d) to revise its acceptance or make other written clarification (in December 2015), it had not paid claimant’s January 13, 2015 request for reimbursement of claim-related mileage and pharmacy expenses, even though the stay of compensation had ended with the court’s July 2015 dismissal order. (Ex. 32-6). Although SAIF subsequently paid claimant (pursuant to the February 1, 2016 WCD-approved settlement agreement), those amounts were due and unpaid at the time that the statutory period for SAIF’s response under ORS 656.262(6)(d) expired. Accordingly, we assess a 25 percent penalty (based on the then unpaid claim-related expenses, which were “then due” at the time of SAIF’s unreasonable claim processing inaction) for SAIF’s failure to revise the acceptance notice or to make other written clarification as mandated in ORS 656.262(6)(d).²

² The dissent contends that SAIF’s lack of response to claimant’s request for a “clarified” Notice of Acceptance did not cause the delay/refusal to reimburse claimant’s expenses. We disagree. Claimant’s October 8, 2015 request sought both a “clarified” acceptance notice and reimbursement. (Ex. 30).

In addition, claimant's attorney is entitled to a penalty-related attorney fee under ORS 656.262(11)(a) for services at the hearing level and on review regarding SAIF's unreasonable claim processing. *See SAIF v. Traner*, 273 Or App 310, 320-21 (2015); *Stanley T. Castle*, 67 Van Natta 2055, 2057 (2015). That attorney fee shall be in a reasonable amount that is proportionate to the benefit to claimant and that takes into consideration the factors set forth in OAR 438-015-0010(4), giving primary consideration to the results achieved and to the time devoted to the case. OAR 438-015-0110(1), (2). The attorney fee awarded, at each level of this proceeding, may not exceed \$4,225, absent a showing of extraordinary circumstances. ORS 656.262(11)(a); OAR 438-015-0110(3) (WCB Bulletin No. 1, eff. July 1, 2016); *Traner*, 273 Or App at 320-21.

Here, claimant neither asserts, nor do we find, "extraordinary circumstances" warranting a fee in excess of the statutory maximum \$4,225 attorney fee. Based on our review (including the hearing record, claimant's appellate briefs, her counsel's fee submission, and SAIF's objection) and considering the aforementioned factors, we award \$3,000 for her counsel's services at the hearing level and on Board review, to be paid by SAIF, as a reasonable penalty-related attorney fee for SAIF's unreasonable claim processing.³

ORDER

The ALJ's order dated June 22, 2016 is affirmed in part and reversed in part. Claimant is awarded a penalty equal to 25 percent of the amounts "then due" as identified in this order. For services at the hearing level and on review regarding the penalty issue, claimant's counsel is awarded a \$3,000 penalty-related attorney fee, payable by SAIF. The remainder of the ALJ's order is affirmed.

Entered at Salem, Oregon on April 18, 2017

³ Claimant's counsel is not entitled to attorney fee awards under both ORS 656.262(11)(a) and ORS 656.382(1) for the same unreasonable conduct. *See Cayton v. Safelite Glass Corp.*, 232 Or App 454, 463 (2009); *Silviu V. Moisescu*, 68 Van Natta 244, 248 (2016) (a claimant's counsel is not entitled to attorney fee awards under both ORS 656.262(11)(a) and ORS 656.382(1) for the same misconduct, citing *Cayton*). Therefore, because we have awarded an attorney fee pursuant to ORS 656.262(11)(a) for SAIF's nonresponse under ORS 656.262(6)(d), claimant's counsel is not entitled to an "ORS 656.382(1)" attorney fee for the same misconduct.

Member Johnson dissenting in part.

I agree with the majority opinion that finds that, under ORS 656.262(6)(d), SAIF was obligated to respond to claimant's written communication by revising the Notice of Acceptance or by making other written clarification. *See* ORS 656.262(6)(d); *Crawford v. SAIF*, 241 Or App 470, 480 (2011). However, under the circumstances presented in this case, I would conclude that SAIF's lack of response did not give rise to penalties or attorney fees under ORS 656.262(11)(a). Therefore, I respectfully dissent in part.

ORS 656.262(11)(a) provides for the payment of penalties/attorney fees where the carrier unreasonably delays/refuses to pay compensation, attorney fees, or costs or unreasonably delays acceptance/denial of a claim.

Here, as discussed in the majority opinion, SAIF's lack of response to claimant's request for an amended acceptance notice did not result in a denial. Accordingly, SAIF's lack of response also did not result in a delay in acceptance/denial of the claim under ORS 656.262(11)(a).

Additionally, the record does not establish that SAIF's failure to revise the acceptance notice or make other written clarification resulted in a delay/refusal to pay compensation under ORS 656.262(11)(a). To the contrary, SAIF processed the claim while it was appealing the ALJ's compensability decision. After the Court of Appeals entered its order dismissing the appeal, SAIF paid the "stayed" compensation.

The majority reasons that at the time that SAIF's response to claimant's request for clarification was due, SAIF had not reimbursed her claim-related expenses. I would not find that the record establishes that SAIF's lack of response to the "amended acceptance notice" request caused the delay/refusal to reimburse claimant. Moreover, claimant asked the WCD to resolve the "claim-related expense reimbursement" dispute and, before the hearing, the parties agreed to resolve this dispute (with WCD's approval), with SAIF paying a \$500 attorney fee to claimant's counsel. (Ex. 35).

Accordingly, I would conclude that the requirements for application of ORS 656.262(11)(a) have not been satisfied and, therefore, no penalty or penalty-related attorney fee is available under the statute. *See Leah Recor*, 69 Van Natta 575 (2017) (no penalty-related attorney fee under ORS 656.262(11)(a) awarded for discovery violation where the violation did not result in a delay in acceptance/

denial of the claim or a delay/refusal to pay compensation); *Dawn Turner (Turner II)*, 69 Van Natta 569 (2017) (same); *Dawn Turner (Turner I)*, 69 Van Natta 444 (2017) (same). Because the majority finds otherwise, I respectfully dissent in part.