

In the Matter of the Compensation of
RANDY G. SIMI, Claimant

WCB Case No. 17-02216

ORDER ON REVIEW

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Reviewing Panel: Members Curey, Lanning, and Wold. Member Lanning dissents.

The self-insured employer requests review of Administrative Law Judge (ALJ) Ian Brown’s order that: (1) directed it to accept and process claimant’s “right shoulder full thickness tear of the supraspinatus tendon” and “tearing of the infraspinatus tendon” as a new/omitted medical condition claim under ORS 656.262(7)(c); and (2) assessed a penalty and attorney fee for its allegedly unreasonable claim processing. On review, the issues are claim processing, penalties, and attorney fees. We reverse.

FINDINGS OF FACT

We adopt the ALJ’s “Findings of Fact,” as summarized and supplemented below.

Claimant was compensably injured in April 2010. As of August 2011, the employer had accepted a right shoulder strain, right wrist strain, and a right rotator cuff tear. (Ex. 5). Subsequently, the employer issued a Notice of Closure. (Ex. 6).

In June 2016, claimant initiated a new/omitted medical condition claim for right shoulder full thickness tear of the supraspinatus tendon and tearing of the infraspinatus tendon. (Ex. 7). In July 2016, the employer denied those conditions, stating:

“Based on the medical evidence currently available, it does not appear the 4/6/2010 injury materially caused right shoulder full thickness tear of the supraspinatus tendon, tearing of the infraspinatus tendon * * * or that it otherwise arose out of and in the course of your employment. Therefore, without waiving any other reason for denial, we hereby deny your request to accept right shoulder full thickness tear of the supraspinatus tendon, tearing of the infraspinatus tendon * * *.”
(Ex. 8).

Claimant requested a hearing.

At a February 2017 hearing, claimant argued that the claimed conditions were “omitted” conditions because they were seen on MRI at the time of the initial tear. (Ex. 13-7). In response, the employer argued that the conditions were encompassed by the previously accepted rotator cuff tear condition and, therefore, were not “new” or “omitted” medical conditions. (Ex. 13-8).

On March 24, 2017, a prior ALJ found that the employer had denied the disputed conditions because they were not compensably related to the work injury, rather than because they were neither new nor omitted.¹ (Ex. 13). Yet, in setting aside the denial, the ALJ reasoned that the infraspinatus and supraspinatus tendon tears (the new/omitted medical conditions) “remain encompassed with[in] the accepted rotator cuff tear claim.” (Ex. 13-13). The ALJ’s order did not remand the claim to the employer for further processing according to law. The employer requested Board review.

On May 23, 2017, claimant filed a request for hearing, contending that the employer had not reopened and processed his new/omitted medical condition claim following the prior ALJ’s order.

On October 3, 2017, the Board adopted and affirmed that portion of the prior ALJ’s order concerning the claimed new/omitted medical conditions. *Randy G. Simi*, 69 Van Natta 1446 (2017) (*Simi I*). In doing so, the Board order provided the following supplementation:

“The employer also argued that the ALJ’s order ‘could create the illusion that [the] employer must process the supraspinatus and infraspinatus tears.’ We note, however, that in setting aside the employer’s denial, the ALJ’s order did not remand the claim to the employer for further processing according to law; rather, the order provided that, ‘[t]hose conditions remain encompassed with[in] the accepted rotator cuff tear claim.’” *Id.* at 1451 n 7.

¹ The employer had also denied an aggravation claim, which was upheld by the prior ALJ’s order that the Board affirmed.

The employer appealed the Board's order, which is presently pending judicial review.

CONCLUSIONS OF LAW AND OPINION

The ALJ concluded that the employer had an obligation to reopen and process the new/omitted medical condition claim. Relying on ORS 656.262(7)(c),² the ALJ reasoned that, because the conditions were found compensable after claim closure, the employer was required to reopen the claim for processing of those conditions. Relying on OAR 436-060-0140(7), the ALJ further noted that, when a claim is reopened, the Notice of Acceptance must specify the condition for which the claim is reopened.³ The ALJ also awarded a penalty and related attorney fee, concluding that the employer lacked a legitimate doubt as to its obligation to reopen the claim and process the new/omitted medical conditions.

On review, the employer contends that, based on the prior ALJ and Board's order, it was not obligated to reopen and process a claim for the "encompassed" conditions, and its conduct was not unreasonable. For the following reasons, under these particular circumstances, we agree with the employer's contention.

As summarized above, claimant filed a new/omitted medical condition claim for "right shoulder full thickness tear of the supraspinatus tendon" and "tearing of the infraspinatus tendon." In *Simi I*, those conditions were not "found compensable" after claim closure by virtue of the prior ALJ's order or the Board's order. Rather, as explained in those decisions, the claimed conditions were determined to be encompassed within an already accepted condition, *i.e.*, claimant's right rotator cuff condition.⁴ The claim for that previously accepted right rotator cuff condition had already been processed to claim closure. Furthermore, the prior ALJ's order/Board decision did not remand the new/omitted medical condition claim to the employer for further processing according to law.

² ORS 656.262(7)(c) provides: "If a condition is found compensable after claim closure, the insurer or self-insured employer shall reopen the claim for processing regarding that condition."

³ OAR 436-060-0140(7) (which concerns the processing of a claim for a new/omitted medical condition) provides that a notice of acceptance must specify the conditions for which the claim is being reopened. Yet, that rule is premised on an acceptance of a new/omitted medical condition and the reopening of a closed claim.

⁴ The "merits" of the "compensability/encompassed" issue is not presently before us. Rather, that issue is pending before the court.

Given these particular circumstances, the employer was not obligated to reopen the claim under ORS 656.262(7)(c) for further processing. *See* ORS 656.267; *see Akins v. SAIF*, 286 Or App 70, 74 (2017) (ORS 656.267 does not require a carrier to “reaccept a condition that, as a factual matter, already has been accepted”); *cf.* ORS 656.262(7)(c) (when a condition is found compensable after claim closure, the carrier must reopen the claim for processing regarding that condition).

Our reasoning is consistent with *Akins*. There, the claimant initiated two “new or omitted medical condition” claims, which were denied. On review, the claimant argued that the carrier was required to accept the claimed conditions even if they were included within the previously accepted condition, and that it could not deny the claims under ORS 656.267. *See Karlynn J. Akins*, 66 Van Natta 1969, 1970 n 1 (2014).

The Board concluded that the carrier properly denied the claims. In so finding, the Board reiterated 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.” Based on the medical evidence, the Board was not persuaded that the current claim for new/omitted medical conditions were separate and distinct “new/omitted” conditions from the previously accepted and denied combined condition. *Id.* at 1977. Therefore, the Board upheld the carrier’s denials. *Id.*

On judicial review, the court agreed. *Akins*, 286 Or App at 74. The court explained that the purpose of ORS 656.267 is to permit a claimant to obtain acceptance of conditions that, as a factual matter, are not included within the scope of a carrier’s acceptance of the claimant’s claim. The court reasoned that nothing in the text, context, or legislative history of the statute supported the proposition that the legislature intended to require a carrier to reaccept (and reprocess) a condition that, as a factual matter, already had been accepted. *Id.* Therefore, the court concluded that the Board did not err in upholding the carrier’s denials of the claimant’s “new or omitted” condition claims. *Id.*

Here, consistent with *Akins*, the Board’s order expressly determined that the claimed right infraspinatus and supraspinatus tears were encompassed within the previously accepted condition. Therefore, those claimed conditions are neither “new” nor “omitted” with respect to an existing notice of acceptance. As a result, those conditions were not “found compensable” after claim closure, but rather at

the time of the original acceptance of the previous condition. Consequently, the employer's claim processing obligations under ORS 656.267 and ORS 656.262(7)(c) were not triggered.⁵

In sum, for the reasons expressed above, the employer was not statutorily obligated to reopen and process the claim to closure for the aforementioned conditions. Furthermore, based on such reasoning, the employer's claim processing was not unreasonable and, as such, penalties and related attorney fees are not warranted. Accordingly, we reverse.

ORDER

The ALJ's order dated October 30, 2017 is reversed. The ALJ's penalty and \$4,225 attorney fee awards are reversed.

Entered at Salem, Oregon on August 7, 2018

Member Lanning dissenting in part.

Because I would find that the disputed right infraspinatus and supraspinatus tears were "found compensable" after claim closure, I respectfully dissent.⁶

I agree with the current ALJ's conclusion that the employer had an obligation to reopen and process the claim for the new/omitted medical conditions. ORS 656.262(7)(c) unambiguously obligates a carrier to reopen/process any claim where a condition has been "found compensable" after claim closure.⁷ Because the

⁵ We acknowledge claimant's argument that the language of the employer's denial controls under *Tattoo v. Barrett Bus. Serv.*, 118 Or App 348, 351 (1993); *i.e.*, that the work injury was not a material contributing cause of the need for treatment/disability for the disputed new/omitted medical conditions. We further recognize that the compensability of the disputed claim was not at issue in *Akins*. Yet, those issues are not determinative where, as here, the employer's denial was set aside based on an express finding that the claimed conditions were encompassed within the previously accepted condition, and the ALJ's/Board's orders did not remand the claim to the employer for further processing.

⁶ I agree with the majority's conclusion that, because neither the ALJ nor the Board remanded the claim for further processing of the conditions previously at issue, the employer had a legitimate doubt given those directives. Consequently, the employer acted reasonably in not processing and reopening the claim. Therefore, I do not consider a penalty and related attorney fee to be warranted.

⁷ The ALJ further relied on OAR 436-060-0140(7), noting that the rule required that, when a claim is reopened, the Notice of Acceptance must specify the condition for which the claim is reopened. Consistent with the majority's rationale, I would not adopt that portion of the ALJ's reasoning.

employer denied the claimed conditions (on the explicit basis that they were not compensable) and because those conditions were “encompassed” within the previously accepted condition, I would consider them to have been “found compensable” after claim closure. Consequently, even though the ALJ and the Board orders did not remand the claim for processing, it does not absolve the employer from its legal obligations under ORS 656.262(7)(c).

In reaching this conclusion, I distinguish *Akins v. SAIF*, 286 Or App 70 (2017). In *Akins*, the compensability of the disputed new/omitted medical condition was not at issue. Rather, the denial asserted that the claim was not “perfected” either because it was not for a “condition” or that it did not specify the nature or location of a condition. Consequently, the parties framed the issue as arising under ORS 656.267.

Here, in contrast, the employer chose to deny the compensability of the claimed conditions, in addition to arguments that those conditions were encompassed within the previous acceptance, even though it could have simply asserted the latter. Moreover, the denial expressly stated that the injury did not “materially cause” the conditions or that they “otherwise arose out of and in the course of” claimant’s employment. (Ex. 8). See *Tattoo v. Barrett Bus. Serv.*, 118 Or App 348, 351 (1993) (a carrier is bound by the express language of its denial). Therefore, the employer denied the compensability of the claimed conditions and, by virtue of the prior ALJ’s order and Board decision, those conditions were “found compensable” after closure. Thus, ORS 656.262(7)(c) applies to this situation, rather than ORS 656.267 (which was at issue in *Akins*).⁸

In conclusion, based on the aforementioned reasons, as well as that expressed in the ALJ’s order, I would conclude that the disputed new/omitted medical conditions were “found compensable” after claim closure, and that the employer was obligated to process and reopen the claim for those conditions. Accordingly, I respectfully dissent from those portions of the majority’s opinion which reach a different conclusion.

⁸ Had the employer simply initially denied the claimed conditions as neither “new” nor “omitted” medical conditions, such a denial would have been upheld and this claim processing dispute would never have arisen. However, the employer chose to initially unambiguously deny the claimed conditions as not compensable. Because that position was eventually rejected, it logically follows that the conditions were “found compensable” after claim closure. See ORS 656.262(7)(c). Therefore, regardless of whether the ALJ’s/Board’s orders expressly remanded the claim to the employer for further processing, because its compensability denial was overturned, the employer was statutorily obligated to reopen the claim and process it to closure.