

FILED: December 14, 2011

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Sherrian M. Stephens, Claimant.

SAIF CORPORATION
and HOMEWATCH CAREGIVERS,
Petitioners,

v.

SHERRIAN M. STEPHENS,
Respondent.

Workers' Compensation Board
0802848, 0802250

A143526

Argued and submitted on February 08, 2011.

David L. Runner argued the cause and filed the briefs for petitioners.

Jodie Phillips Polich argued the cause and filed the brief for respondent.

Before Haselton, Presiding Judge, and Armstrong, Judge, and Duncan, Judge.

ARMSTRONG, J.

Reversed.

1 ARMSTRONG, J.

2 The Workers' Compensation Board determined that SAIF denied *de facto*
3 claimant's new or omitted medical condition claim for coccydynia. The board also
4 determined that claimant's coccydynia is compensable as a new or omitted medical
5 condition and that SAIF unreasonably delayed processing of the claim. The board
6 assessed attorney fees as well as a penalty. SAIF seeks review of the board's order. We
7 conclude that the board erred in ordering SAIF to accept coccydynia and in assessing a
8 penalty and attorney fees, and we therefore reverse.

9 Claimant, who worked for employer as a caregiver, suffered an injury on
10 June 13, 2007, when she fell at work and landed on her tailbone. On July 20, SAIF
11 accepted a claim for a lumbar contusion and lumbar strain. On July 31, claimant began to
12 receive treatment from Dr. Kelly, who noted that claimant had pain at the junction of the
13 lower sacrum and coccyx, and along the length of the coccyx. Kelly identified
14 "coccydynia," which she subsequently defined as "pain in the coccyx."

15 SAIF closed the claim in December 2007 with accepted conditions of
16 lumbar strain and lumbar contusion and no award of permanent partial disability.
17 Claimant sought reconsideration of the notice of closure, which the Appellate Review
18 Unit ultimately upheld based on a report by a medical arbiter. That report opined that all
19 of claimant's current symptoms were due to a preexisting degeneration in the lumbar
20 spine.

21 Claimant continued to experience pain in the area of her tailbone. Kelly
22 referred claimant to Dr. North, a neurologist, who examined her in January 2008. North

1 ordered a CT scan, which was negative for a fracture but consistent with "a focal bone
2 bruise of the coccyx or injury to the anococcygeal ligament." On January 31, 2008,
3 claimant requested acceptance of a new or omitted medical condition, "coccydynia." In
4 February 2008, SAIF sent Kelly an inquiry with a number of questions concerning
5 "coccydynia." Among them, SAIF elicited responses to the following questions (the
6 doctor's responses are described in italics):

7 "1. Please define coccydynia and explain the etiology of this condition.
8 *Kelly underlined 'define' and wrote: Pain in the coxxyx; Kelly underlined*
9 *'etiology' and wrote: Trauma.*

10 "2. Is coccydynia a diagnosis, or a symptom of some other condition? If
11 so, what is the condition? *Kelly underlined 'diagnosis.'*"

12 On March 28, 2008, SAIF issued a modified notice of acceptance
13 indicating that it was accepting a coccyx bone bruise. The claim was reopened for
14 processing of the newly accepted condition and then closed on March 31, 2008, without
15 an award of additional disability.

16 Claimant requested a hearing, seeking attorney fees and a penalty for an
17 alleged *de facto* denial of coccydynia. Before the administrative law judge (ALJ) and the
18 board, claimant asserted that, in failing to either accept or deny her claim for coccydynia,
19 SAIF had denied *de facto* the claim. SAIF subsequently corresponded with Kelly in aid
20 of litigation and asked whether "coccyx bone bruise," the condition that SAIF had
21 accepted, could be considered the underlying condition that was causing claimant's
22 coccydynia or "pain in the coccyx." Kelly responded by checking a box indicating

1 "yes."¹

2 SAIF argued before the ALJ and the board that its March 28, 2008,
3 amended notice of acceptance, which included acceptance of a coccyx bone bruise, was a
4 legally sufficient response to claimant's new or omitted condition claim for coccydynia,
5 because coccydynia was a symptom rather than a condition and the medical evidence
6 showed that the underlying cause of the symptom was a coccyx bone bruise.

7 The board, in affirming the ALJ, concluded that SAIF's response to
8 claimant's request for acceptance of coccydynia by including "coccyx bone bruise" in its
9 amended notice of acceptance did not comply with ORS 656.262(7)(a) or ORS
10 656.267(1), which require acceptance or denial of a new or omitted medical condition
11 claim within 60 days after the insurer receives notice of the claim. In an order on
12 reconsideration, the board rejected SAIF's contention that SAIF's modification of its
13 notice of acceptance to include "coccyx bone bruise" satisfied the requirements of the
14 statutes because it reasonably apprised claimant of the nature of her compensable
15 condition. The board explained that, in response to claimant's new or omitted medical

¹ SAIF wrote to Kelly:

"[Claimant's] claim was recently accepted for a coccyx bone bruise. Her attorney has asked that we accept 'coccydynia' which your 2/22/08 letter to SAIF defines as 'pain in the coccyx.'

"1. [SAIF] has accepted a coccyx bone bruise secondary to the slip and fall incident of 6/13/07. Can the coccyx bone bruise be considered the underlying condition that is causing the coccydynia, or 'pain in the coccyx'?"

Kelly responded by checking a box marked "yes."

1 condition claim, it was incumbent on SAIF to either accept or deny the claimed
2 condition, "coccydynia." If, as SAIF asserted, it believed that coccydynia was a
3 symptom rather than a condition, the board said that it would have been permissible for
4 SAIF to deny the claim on the basis that it was a symptom, not a condition. Instead, the
5 board concluded, SAIF impermissibly disregarded claimant's formal request for
6 acceptance of coccydynia and accepted a different and unclaimed condition, "coccyx
7 bone bruise." Accordingly, the board held that SAIF had failed to adequately respond to
8 the claim for "coccydynia" and that the failure to respond was a *de facto* denial. The
9 board assessed attorney fees under ORS 656.386(1)(b)(B) for claimant's counsel's
10 services at the hearing, on review, and on reconsideration in obtaining acceptance of the
11 claim for "coccydynia." It also assessed a penalty and penalty-related attorney fees under
12 ORS 656.262(11), having concluded that SAIF's failure to either accept or deny the claim
13 was unreasonable.

14 On judicial review, we address first SAIF's contention that its inclusion of
15 "coccyx bone bruise" in its amended notice of acceptance complied with ORS
16 656.262(7)(a) and ORS 656.267(1) and that the board therefore erred in determining that
17 it had denied *de facto* the claim. SAIF's primary rationale is that, because both statutes
18 speak in terms of new or omitted medical "conditions," and because the medical evidence
19 shows that the claimed condition, "coccydynia," is a symptom and not a condition, there
20 was no obligation under ORS 656.262 or ORS 656.267 to either accept or deny the claim.

21 Setting aside for the moment the question whether the claim was,
22 medically, a condition or a symptom, we conclude that the board reached the correct

1 result in its analysis of SAIF's processing obligation. Even if SAIF had correctly
2 concluded that coccydynia was a symptom, it still had the obligation to either accept or
3 deny the claim. As we recently explained in [Crawford v. SAIF](#), 241 Or App 470, 250
4 P3d 965 (2011), if a claimant files a new or omitted medical condition claim pursuant to
5 ORS 656.267 by clearly requesting formal written acceptance, the insurer's response must
6 be by written notice of acceptance or denial within 60 days. In that circumstance, a mere
7 letter of clarification or amendment of the notice of acceptance does not suffice.
8 *Crawford*, 241 Or App at 480. The failure of an insurer to respond to an omitted
9 condition claim by either accepting or denying it within 60 days is a procedural
10 deficiency that gives rise to a denied claim. *Id.* at 481. Because claimant complied with
11 the provisions of ORS 656.267 by expressly requesting acceptance of "coccydynia,"
12 SAIF had an obligation to process that claim by either accepting or denying coccydynia,
13 and the board correctly concluded that its failure to do so was a *de facto* denial.

14 We now turn to SAIF's contention that, despite any processing deficiency,
15 the medical evidence shows that claimant's coccydynia is not a separate condition but is,
16 rather, a symptom and that the board therefore erred in setting aside SAIF's *de facto*
17 denial and ordering SAIF to accept coccydynia.

18 SAIF focuses on Kelly's responses to its inquiries, in particular, her
19 definition of coccydynia as "pain in the coccyx," which would appear to be descriptive of
20 a symptom. SAIF also cites Kelly's affirmative response to its further inquiry as to
21 whether "the coccyx bone bruise [accepted by SAIF]" can "be considered the underlying
22 condition that is causing claimant's coccydynia, or 'pain in the coccyx.'"

1 The board was aware of that evidence but found, nonetheless, that
2 claimant's coccydynia is a "condition" and not a symptom. The board was particularly
3 persuaded by Kelly's response that coccydynia was a "diagnosis" and not a symptom of
4 "another condition." Considering that response, as well as the totality of Kelly's
5 responses, the board said that it was "not persuaded that the coccydynia diagnosis
6 represents nothing more than symptoms of a bruise. Instead, we conclude that the
7 diagnosis represents a physical status of claimant's body."

8 SAIF contends that the board's conclusion is not consistent with our
9 opinion in [Young v. Hermiston Good Samaritan](#), 223 Or App 99, 104, 194 P3d 857
10 (2008). In *Young*, we approved the board's definition of "condition" as "the physical
11 status of the body as a whole or one of its parts." We concluded that the board had
12 properly determined, based on the medical evidence, that the claimant's radiculopathy,
13 which had been defined by the medical evidence as "pain that radiates along the course of
14 a nerve root that exits from the spine," was a symptom and not a condition. SAIF asserts
15 that, similarly here, claimant's coccydynia, which the medical evidence has defined as
16 "pain in the coccyx," is not a physical status of the body but a mere symptom of a
17 physical status.

18 In determining whether the board's finding that coccydynia is a condition is
19 supported by substantial evidence, it is not this court's function to substitute its judgment
20 for that of the board. The question is whether a reasonable person could find, based on
21 the record as a whole, that the coccydynia was a "condition." ORS 183.482(8);
22 [Deatherage v. Pernsteiner](#), 239 Or App 161, 172, 243 P3d 865 (2010). It is undisputed

1 that the issue turns on the medical evidence and that an interpretation of Kelly's opinion
2 is central to a resolution of the dispute. We have examined the record, and we conclude
3 that, when it is considered in its entirety, and especially in light of Kelly's definition of
4 the term coccydynia and her statement that a coccyx bone bruise can be considered as the
5 underlying condition causing the coccydynia, the only reasonable interpretation of Kelly's
6 opinion is that claimant's condition is a coccyx bone bruise and that coccydynia describes
7 a symptom rather than a condition. We therefore conclude that substantial evidence does
8 not support the board's finding that coccydynia is a condition and not a symptom.
9 Accordingly, we conclude that the board erred in ordering SAIF to accept coccydynia as
10 a new or omitted medical condition.

11 Having concluded that SAIF was not required to separately accept
12 coccydynia, it follows that claimant was not entitled to insurer-paid attorney fees under
13 ORS 656.386(1)(b)(B). The remaining question is whether, in light of SAIF's *de facto*
14 denial, the penalty and attorney fees assessed by the board under ORS 656.262(11)(a)
15 should be upheld based on SAIF's unreasonable failure to accept or deny the claim.
16 Under the circumstances, in particular the confused state of the law concerning an
17 insurer's obligation to respond to a new or omitted medical condition claim, *see*
18 *Crawford*, 241 Or App at 479, we conclude that SAIF's failure to respond by accepting or
19 denying the new or omitted medical condition claim was not unreasonable.

20 Reversed.