
In the Matter of the Compensation of
SAM STEELE, Claimant
WCB Case No. 01-00756
ORDER ON REVIEW (REMANDING)
Michael B Dye, Claimant Attorneys
Bruce A. Bornholdt, SAIF Legal, Defense Attorneys

Reviewing Panel: Members Biehl, Bock, and Haynes. Member Haynes dissents.

Claimant requests review of Administrative Law Judge (ALJ) Howell's order that upheld the SAIF Corporation's denial of his new medical conditions claim for low back conditions. On review, the issue is compensability. We vacate and remand.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact."

CONCLUSIONS OF LAW AND OPINION

Claimant sustained a compensable low back injury on March 13, 2000, that SAIF accepted as a lumbosacral strain. On September 12, 2000, claimant requested that SAIF accept grade 1 spondylolisthesis at L5, spina bifida at S1, narrowing of the L4-5 disc space posteriorly, degenerative disc at L5-S1, herniated disc at L4-5 and thoracic muscular spasm.

On December 8, 2000, SAIF wrote claimant's attorney stating that it would not be formally denying the thoracic muscle spasm because it was a "symptom," not a "condition." (Ex. 30). SAIF then denied all the asserted conditions on December 11, 2000, with the exception of the L4-5 disc herniation, which it accepted on December 13, 2000. (Exs. 31, 32). The basis for the denial was that the claimed conditions were not caused or pathologically worsened by the compensable injury. Claimant requested a hearing from the denial.

At the hearing, claimant argued that the denied conditions were compensable as part of a "combined condition." SAIF, however, asserted that it processed the denied conditions as independently compensable and that it had not processed or denied a "combined condition." (Tr. 2). The ALJ upheld SAIF's denial,

concluding that the denied conditions were not compensable and were not “combined conditions.”

On review, claimant contends that he established the compensability of a “combined condition.” For the following reasons, we conclude that remand is appropriate.

Claimant’s September 12, 2000 request that the disputed conditions be accepted did not include a request that they be accepted as part of a “combined condition” under ORS 656.005(7)(a)(B). (Ex. 22). Claimant merely requested that SAIF amend its acceptance to include the disputed conditions. SAIF accepted one of the conditions (L4-5 disc herniation), indicated it would not be formally denying another (thoracic muscle spasm) and denied the remaining conditions on the ground that they were not caused or worsened by the compensable injury. No combined condition issue was raised by claimant or SAIF until the hearing when claimant's attorney asserted the compensability of a “combined condition.” SAIF, however, stated that it had not processed or denied a “combined condition.”

OAR 438-006-0031 and OAR 438-006-0036 freely allow for amendments to the specification of issues and the responses thereto up to the date of hearing. If a party is surprised and prejudiced by the additional issues so raised, the ALJ may grant a continuance to allow a party to cure the surprise and prejudice. OAR 438-006-0031 and OAR 438-006-0036. Moreover, case law allows a carrier to amend its denial at hearing. *SAIF v. Ledin*, 149 Or App 94 (1997), *on remand Larry L. Ledin*, 50 Van Natta 115 (1998).

Where such an amendment is permitted, to afford due process, the responding party must be given an opportunity to respond to the new issues raised. OAR 436-006-0091(3); *John E. Noyer*, 46 Van Natta 395 (1994); *Patricia N. Hall*, 40 Van Natta 1873, 1874 (1988) (“because claimant has the burden of proving compensability, it is not fair to require claimant to prove a proposition she had no notice of until the hearing convened”). In other words, a party's remedy for surprise and prejudice created by a late-raised issue is a motion of continuance. *Id.*; OAR 438-006-0031, OAR 438-006-0036.

In this case, claimant was entitled to raise additional issues under the above authority. This raises the question of whether SAIF would be entitled to a continuance of the hearing in order to respond to the new issue raised by claimant. Because the original authority to consider motions for continuance of hearings rests with the ALJ, and because SAIF may have been surprised by claimant’s

raising of a “combined condition” issue, we conclude that the case should be remanded to the ALJ to allow SAIF the opportunity to respond to the “combined condition” issue and, if SAIF makes such a motion, for the ALJ to decide whether a continuance is appropriate.¹ See *Sandra L. Shumaker*, 51 Van Natta 1981, 1982 (1999), *on recon* 52 Van Natta 33 (2000).

Accordingly, we vacate the ALJ's order dated May 15, 2001 and remand this case to ALJ Howell for further proceedings. These further proceedings may be conducted in any manner that the ALJ finds will achieve substantial justice. ORS 656.283(7). The ALJ shall then issue a final appealable order.

IT IS SO ORDERED.

Entered at Salem, Oregon on January 31, 2002

Board Member Haynes dissenting.

The majority vacates the Administrative Law Judge's (ALJ's) order and remands to allow SAIF the opportunity to respond to the “combined condition” issue that claimant raised at hearing. Because I would not remand and would instead affirm the ALJ's order, I respectfully dissent.

The majority correctly observes that no combined condition issue was raised until the hearing when claimant's attorney asserted the compensability of a “combined condition.” However, SAIF argued that it had processed the denied conditions as independently compensable and that it had not processed or denied a “combined condition.” Accordingly, it appears that SAIF was “surprised” by claimant's contention at hearing.

¹ The dissent argues that it is inappropriate to remand here because SAIF could not be prejudiced by claimant having raised the “combined condition” issue at hearing because it ultimately prevailed on that issue. However, the record does contain evidence from which it may be concluded that there was a compensable combined condition. (Ex. 20-4, 5; Ex. 28). In this regard, we note that, while a condition may not be compensable in and of itself, it may nevertheless be compensable as part of a “combined condition.” See *Leopoldo Olvera*, 53 Van Natta 998, 999 (2001), citing *Karen S. Carman*, 49 Van Natta 637 (1997) (carrier's acceptance of a preexisting condition as a part of a “combined condition” could coexist with prior denial of the preexisting condition as independently compensable). Under such circumstances, we cannot say that SAIF would not avail itself of the opportunity to seek a continuance now that it knows that a “combined condition” issue was validly raised at the hearing and the medical record arguably supports the compensability of a “combined condition.” Consequently, we continue to conclude that remand is the appropriate remedy.

However, SAIF never requested a continuance and proceeded to litigate the compensability issue. Indeed, SAIF prevailed on the merits. Therefore, SAIF, the party arguably “surprised” by the late-raised issue was not prejudiced in any way by the ALJ having decided the merits of the “combined condition” issue.

The majority cites *Sandra L. Shumaker*, 51 Van Natta 1981 (1999), *on recon* 52 Van Natta 33 (2000) as authority for its decision to remand. I find that case distinguishable.

In *Shumaker*, we held that the employer should have been allowed to amend its aggravation denial at hearing to include causation grounds. Because the claimant lacked pre-hearing notice that causation was an issue in the aggravation context and raised an objection to litigating the issue on that basis, we found that the claimant was surprised by the employer's new issue (defense). Finally, because the claimant was surprised by the employer's new defense at hearing, we also found a compelling basis for remand.

Unlike the claimant in *Shumaker*, SAIF in this case did not object to litigating the “combined condition” issue. Moreover, in *Shumaker*, the claimant at least did not prevail, so it made sense to remand to give the claimant an opportunity to request a continuance due to the employer having untimely raised an issue. Here, however, the party on whose benefit this remand is being carried out (SAIF) did prevail.

Under these circumstances, I do not see the point in remanding for further proceedings when SAIF already had the opportunity to respond to the new issue claimant raised and never requested a continuance. I would be surprised if, on remand, SAIF requested a continuance given that they have already prevailed. Therefore, I see no need to expend additional agency resources and to further delay resolution of litigation by remanding this case. For these reasons, I dissent.