
In the Matter of the Compensation of
JAMES W. DUNN, JR., Claimant
WCB Case No. 01-02729, 01-01123
ORDER ON REVIEW
Michael B Dye, Claimant Attorneys
Bottini Et Al, Defense Attorneys
Terrall & Terrall, Defense Attorneys

Reviewing Panel: Members Biehl, Bock, and Phillips Polich.¹

The self-insured employer, West Coast Grocery (West Coast), requests review of that portion of Administrative Law Judge (ALJ) Davis' order that: (1) set aside its denial of claimant's recurrent L5-S1 disc herniation condition; and (2) upheld the Fremont Compensation Insurance Group's (Fremont's) denial of claimant's "new injury" claim for the same condition. In addition, Fremont moves to strike West Coast's appellant's brief as untimely filed. On review, the issues are motion to strike and responsibility.

We deny the motion to strike and adopt and affirm the ALJ's order with the following supplementation.

Motion to Strike

Fremont moves to strike West Coast's appellant's brief on the basis that it was not timely "filed." Based on the following reasoning, we deny Fremont's motion.

Pursuant to OAR 438-011-0020(2), an appellant's brief must be filed within 21 days after the date of mailing of the transcript to the parties. For purposes of appellant briefs, "filing" is defined as "the physical delivery of a thing to any permanently staffed office of the Board, or the date of mailing." OAR 438-005-0046(1)(a). An attorney's certificate that a thing was deposited in the mail on a stated date is proof of mailing on that date. OAR 438-005-0046(1)(d).

¹ After consultation with the Department of Justice, this Board has chosen to exercise its right to issue orders as a panel of three pursuant to ORS 656.718(2) and (3).

Here, West Coast's appellant's brief was due on September 26, 2001. West Coast mailed its brief on September 26, 2001, as evidenced by West Coast's attorney's certificate that the brief was placed in the mail on that date. Thus, the brief was timely filed. OAR 438-005-0046(1)(d); *see Thomas P. Harris*, 48 Van Natta 985 (1996) (motion to strike brief denied where attorney's certificate indicated that brief was timely deposited in the mail).

In addition, to the extent that Fremont is alleging that West Coast untimely "served" its appellant's brief on Fremont (OAR 438-005-0046(2)), Fremont was able to timely file its respondent's brief. Because Fremont has not been aggrieved by this allegedly untimely service, we decline to strike West Coast's brief. *See Lisa A. Hiner*, 52 Van Natta 2203, n.1 (2000); *David F. Weich*, 39 Van Natta 468 (1987).

Responsibility

Claimant has worked at the same warehouse facility since 1976, although that facility has changed names and insurers over the years. As the ALJ found, West Coast accepted and processed a claim for an L5-S1 disc herniation that resulted from a work injury occurring on February 2, 1986. In March 1986, claimant underwent surgery for removal of the protruded disc at L5-S1 on the right. A Determination Order issued in December 1986 that awarded temporary disability and unscheduled permanent disability. Claimant returned to his regular work duties.

In March 2000, claimant had an onset of low back pain without any specific injury. An August 2000 MRI showed a large disc herniation at the L5-S1 level with right anterolateral recess stenosis, foramina narrowing, and compression of the thecal sac. Claimant was diagnosed with a recurrent L5-S1 disc herniation and filed a claim with West Coast. After West Coast denied the claim, claimant filed a new injury claim with Fremont.

Applying ORS 656.308(1)², the ALJ determined that responsibility remained with West Coast. On review, West Coast agrees that the accepted condition in

² ORS 656.308(1) provides:

“When a worker sustains a compensable injury, the responsible employer shall remain responsible for future compensable medical services and disability relating to the compensable condition unless the worker sustains a new compensable injury involving the same condition. If a

1986 was an L5-S1 disc herniation. However, it argues that the ALJ erred in applying ORS 656.308(1), contending that responsibility should be determined under the last injurious exposure rule. Specifically, West Coast argues that ORS 656.308(1) is not applicable because claimant's recurrent L5-S1 disc herniation is not the "same condition" as the one it accepted in 1986 because the 1986 disc herniation was surgically repaired; *i.e.*, the extruded disc material involved in the 1986 disc herniation was removed. We disagree.

ORS 656.308(1) applies only where there is an earlier accepted claim and a later injury involves the same condition as did the earlier accepted claim. *Sanford v. Balteau Standard*, 140 Or App 177, 181 (1996); *SAIF v. Yokum*, 132 Or App 18 (1994). Under ORS 656.308(1), a new compensable injury "involves" the same condition for which another carrier is responsible if the new compensable injury meets either of the following definitions: "to have within or part of itself : CONTAIN, INCLUDE * * * c: to have effect on : concern directly : AFFECT * * *." *Multifoods Specialty Distribution v. McAtee*, 333 Or 629, ___ (April 11, 2002) (quoting *Webster's Third New Int'l Dictionary*, 1191 (unabridged ed 1993)).

Here, the persuasive medical evidence establishes that claimant's recurrent L5-S1 disc herniation involves the same condition as the earlier accepted injury; *i.e.*, it has the earlier compensable L5-S1 disc herniation within or as part of itself. (Exs. 16, 19, 21, 22, 26, 27). Dr. Hubbard, claimant's treating neurosurgeon, explained that an injured disc space does not heal itself normally. (Ex. 26-7-8). He explained that the mechanism of a disc herniation involves a tear in the annulus of the disc that results in extrusion of disc material into the spinal canal where it can push against the nerve root. (Ex. 26-10-11). Reviewing the 1986 operative report, Dr. Hubbard determined that claimant's disc herniation resulted in a free fragment rupturing through the annulus and coming out of the disc completely. (Ex. 26-11-13).

Dr. Hubbard also explained that surgical repair of a herniated disc, with removal of the herniated material, would result in the body regenerating disc

new compensable injury occurs, all further compensable medical services and disability involving the same condition shall be processed as a new injury claim by the subsequent employer. The standards for determining the compensability of a combined condition under ORS 656.005(7) shall also be used to determine the occurrence of a new compensable injury or disease under this section."

material and creating a “scar-type” disc. (Ex. 26-13-15). He explained that the torn annulus itself could not be repaired; instead, the ruptured edges are allowed to scar together, a process that also involves the body regenerating disc material. (Ex. 26-14, 26-26-27). This entire process leaves a thin area of support in the disc and results in greater susceptibility for recurrent disc herniations, with larger annulus tears creating more susceptibility. (Ex. 26-14-15).

Dr. Hubbard opined that claimant’s current disc herniation consists of the regenerated “scar-type” disc material that resulted from the 1986 herniation. (Ex. 26-16). Dr. Hubbard concluded that claimant’s recurrent disc herniation was in the same area as the prior herniation, where claimant had a tear in the disc space that caused the prior herniation to occur. (Ex. 26-18). Dr. Hubbard also noted that claimant had no degenerative disc disease at any level other than L5-S1. (Ex. 26-9). Given all of this, Dr. Hubbard concluded that, although claimant’s current work activities contributed to his recurrent L5-S1 disc herniation, the major contributing cause of the recurrent herniation was the 1986 disc herniation and surgery.

Dr. Reimer, neurologist, and Dr. Sacamano, orthopedist, examined claimant on behalf of Fremont. (Ex. 21, 27). They also opined that the 1986 disc herniation and surgery are responsible for claimant’s recurrent L5-S1 disc herniation.

Only Dr. Williams, neurologist, who examined claimant on behalf of West Coast, offers a contrary opinion. (Exs. 18, 24). However, for the reasons explained by the ALJ, we do not find Dr. Williams’ opinion persuasive. Instead, based on the well-reasoned opinion of Dr. Hubbard, as supported by the opinions of Drs. Reimer and Sacamano, we find that claimant’s recurrent L5-S1 disc herniation involves the same condition as the earlier accepted injury; *i.e.*, it has the earlier compensable L5-S1 disc herniation within or as part of itself. Therefore, ORS 656.308(1) applies to determine responsibility. For the reasons explained by the ALJ, we find that West Coast is responsible for claimant’s recurrent L5-S1 disc herniation.

ORDER

The ALJ’s order dated July 25, 2001 is affirmed.

Entered at Salem, Oregon on May 7, 2002