
In the Matter of the Compensation of
DIANNA D. WILLIAMS, Claimant
WCB Case No. 01-02122
ORDER ON REVIEW
Ernest M Jenks, Claimant Attorneys
Thaddeus J Hettle & Assoc, Defense Attorneys

Reviewing Panel: Members Langer and Phillips Polich.

The self-insured employer requests review of Administrative Law Judge (ALJ) Kekauoha's order that directed it to modify/amend a notice of acceptance to include claimant's left shoulder and thoracic conditions. On review, the issues are scope of the issues, scope of acceptance and compensability/claim processing.

We adopt and affirm with the following supplementation.

In September 1997, claimant injured herself during the course and scope of her employment as a bus driver. The employer accepted an injury claim in February 1998 for a disabling left trapezius and left shoulder strain. (Ex. 20). In March 1998, the claim was closed with an award of temporary partial disability. (Ex. 19).

In February 2000, claimant developed increasing pain in the neck and left shoulder that became constant. She sought treatment and came under the care of Dr. Isaacs, who diagnosed a left trapezius muscle strain. (Ex. 26). Claimant returned to light duty and received physical therapy. She continued to have persistent pain in the left neck, left upper back, left shoulder and left arm, and was later diagnosed by Dr. Isaacs with a cervical and upper back strain. (Ex. 34-1).

On March 9, 2000, and again on March 17, claimant saw Dr. Dover (Dr. Isaacs' associate) with complaints of worsening and pain in the neck, left trapezius, left shoulder and arm. (Exs. 39; 41). A few days later, on March 21, 2000, claimant was driving her bus and was struck by a vehicle on the front driver's side. (Ex. 42). She sought emergency room treatment for pain in the left neck and left arm and was diagnosed with a left arm and neck strain. (Ex. 45).

On May 19, 2000, the employer denied a claim for an aggravation of the 1997 compensable injury. (Ex. 62). Claimant requested a hearing concerning the denial, but the denial was upheld by Opinion and Order dated August 24, 2000. (Ex. 71).

In June 2000, claimant was examined by Dr. Tesar, orthopedic surgeon, at the employer's request. Dr. Tesar diagnosed an acute cervical strain with aggravation of preexisting left neck, left shoulder girdle (including upper trapezius), and left shoulder pain syndrome. (Ex. 63-6). He felt that the acute injuries had resolved and that the current pain complaints were due to the preexisting condition. (Ex. 63-7).

The March 2000 injury claim was accepted for a disabling acute cervical strain. (Ex. 67). In June 2000, the claim was closed by Notice of Closure that awarded temporary disability. (Ex. 66). Claimant requested reconsideration of the closure notice, and the closure notice was affirmed in November 2000. (Ex. 74).

By letter dated November 22, 2000, claimant's attorney requested that the employer expand its acceptance of the March 2000 injury claim to include conditions involving the neck, left shoulder, mid-back, trapezius, and left two fingers. (Ex. 75A) On March 1, 2001, the employer denied the request on the ground that its acceptance of a "cervical strain" reasonably apprised claimant and the medical providers of the nature of the compensable condition. (Ex. 76A). Claimant requested a hearing.

The ALJ set aside the portion of the employer's denial that declined to modify the notice of claim acceptance to include left shoulder, mid and upper back, and left trapezius conditions. In doing so, the ALJ relied on the deposition testimony of Dr. Isaacs, claimant's attending physician.

On review, the employer argues that the ALJ erred in finding that claimant established that the thoracic and left shoulder conditions were due in major part to the March 2000 incident, at least for a brief period of time. It asserts that the disputed conditions should be processed under the 1997 injury claim. The employer also contends, alternatively, that its acceptance of a "cervical strain" was sufficient to reasonably apprise claimant or her physicians of the compensable thoracic strain or left shoulder strain, and that the ALJ erred in concluding otherwise.¹

In response, claimant contends that the employer is attempting to raise new grounds for its denial that were not presented at hearing. Alternatively, claimant

¹ Under ORS 656.267(1) (formerly ORS 656.262(7)(a)), a carrier "is not required to accept each and every diagnosis or medical condition with particularity, as long as the acceptance tendered reasonably apprises the claimant and the medical providers of the nature of the compensable conditions."

asserts that, even if the employer's belated arguments are considered, her thoracic and left shoulder conditions are a compensable component of her March 2000 injury claim.

We need not resolve the procedural issue posed by claimant's response. We reach this conclusion because, even if the employer's arguments are considered, we find the disputed thoracic and left shoulder conditions to be compensable under the March 2000 injury claim. Our conclusion is based on the following reasoning.

The parties agree that the major contributing cause standard applies to this claim. *See* ORS 656.308(1); ORS 656.005(7)(a)(B). Therefore, to establish the compensability of her "new injury" claim, claimant must prove that the work accident of March 2000 contributed more to the disability or need for treatment of her current conditions than all other factors combined. *See, e.g., McGarrah v. SAIF*, 296 Or 145, 146 (1983). A determination of the major contributing cause involves the evaluation of the relative contribution of different causes of claimant's disability or need for treatment of the claimed conditions and deciding which is the primary cause. *Dietz v. Ramuda*, 130 Or App 397 (1994), *rev dismissed* 320 Or 416 (1995). Because of possible alternative causes for the claimed conditions, resolution of this matter is a complex medical question that must be resolved by expert medical opinion. *See Uris v. Compensation Dept.*, 247 Or 420 (1967).

Dr. Isaacs directly addressed the causal relationship between claimant's thoracic and left shoulder conditions and the March 2000 motor vehicle accident. She testified that because of the March 2000 motor vehicle accident, claimant sustained not only a cervical strain, but also a worsening or aggravation of preexisting left shoulder and upper back/thoracic strains. (Ex. 78 pp. 12-14). Dr. Isaacs explained that she equated the term "aggravation" with "reinjury." (Ex. 78 pp. 15-16). She also testified that her diagnosis at the time of her examinations in late March and April of 2000, the first month after the accident, included left shoulder, cervical and thoracic strains. (Ex. 78-11).

Dr. Isaacs' testimony reflects that she found it difficult to determine whether claimant's condition caused by the 1997 injury or the condition caused by the March 2000 motor vehicle accident amounted to the major contributing cause. (Ex. 78-21 through 25). She did describe at one time the contribution of claimant's respective conditions to her need for treatment as "fifty-fifty." (Ex. 78-21). Nevertheless, she also testified that the motor vehicle accident accelerated claimant's need for treatment (Ex. 78-20) and caused "enough disability to not be able to work." (Ex. 78-25). Upon further questioning, she ultimately concluded

that the motor vehicle accident was the major contributing cause of claimant's initial need for treatment during the first week after the accident. (Ex. 78-28, 38). We conclude that Dr. Isaacs' testimony is sufficient to establish a compensable relationship of claimant's neck, thoracic and left shoulder strains to the March 2000 motor vehicle accident for that period of time.²

Dr. Isaacs' testimony establishes compensability of claimant's thoracic and left shoulder strains under the "major contributing cause" standard. Accordingly, even if we considered the employer's arguments regarding "compensability"/claim processing, we find that claimant's March 2000 motor vehicle accident was the major contributing cause of claimant's initial need for treatment (during the first week) for her neck, thoracic and left shoulder strains.

Claimant's attorney is entitled to an assessed fee for services on review. ORS 656.382(2). After considering the factors set forth in OAR 438-015-0010(4) and applying them to this case, we find that a reasonable fee for claimant's attorney's services on review is \$2,124, payable by the employer. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by claimant's respondent's brief and her counsel's uncontested request), the complexity of the issue, and the value of the interest involved.

ORDER

The ALJ's order dated February 4, 2002 is affirmed. Claimant's attorney is awarded \$2,124 for services on Board review, to be paid by the employer.

Entered at Salem, Oregon on November 25, 2002

² Although Dr. Isaacs had concurred with examiner Dr. Tesar's opinion that claimant's condition returned to pre-motor vehicle accident status by the time of his examination in June 2000 (more than three months after the accident), Dr. Isaacs felt that the motor vehicle accident was the major cause of at least the first week of treatment following the accident. (Ex. 78 pp. 37-38).