
In the Matter of the Compensation of
MADINE F. WARDEN, Claimant
WCB Case No. 01-04929
ORDER ON REVIEW
Malagon Moore et al, Claimant Attorneys
Sheridan Levine LLP, Defense Attorneys

Reviewing Panel: Members Langer and Phillips Polich.

The self-insured employer requests review of Administrative Law Judge (ALJ) Pardington's order that set aside its denial of claimant's current low back condition. On review, the issues are the procedural validity of the denial and (potentially) compensability.

We adopt and affirm the ALJ's order with the following supplementation.

Claimant compensably injured her low back on August 5, 2000, when she fell at work. (Exs. 62; 63; Tr. 12). The employer accepted a "lumbosacral strain/sacral contusion" on November 1, 2000. (Ex. 77).

On March 29, 2001, Drs. Reimer and Fuller examined claimant at the employer's request. (Ex. 84). Based on that examination (which included a review of claimant's medical records), Drs. Reimer and Fuller diagnosed: (1) lumbosacral strain/contusion, resolved; (2) mechanical back pain, related to preexisting degenerative discopathy; and (3) chronic recurring lumbar back pain since 1982. (Ex. 84-7). Drs. Reimer and Fuller opined that the work injury had combined with claimant's preexisting problems, and that by the time of their examination (about seven-and-a-half months after the injurious event), the major cause of claimant's ongoing disability and need for treatment was the preexisting degenerative discopathy. (Ex. 84-7; 84-8).

On May 23, 2001, the employer issued the following documents: (1) a "Modified Notice of Acceptance" accepting ("as of this date") "lumbosacral strain/contusion, combined with preexisting degenerative discopathy and chronic recurring lumbar back pain;" and (2) a current condition denial stating that claimant's current condition and need for treatment was due in major part to her preexisting conditions. (Exs. 87; 88). Claimant requested a hearing.

The ALJ determined that the employer had not accepted a "combined" condition before it had issued its major contributing cause (combined condition)

denial. Consequently, the ALJ concluded that the employer's May 23, 2001 denial was procedurally invalid.

On review, the employer asserts: (1) the procedural validity of its denial was not at issue; and (2) there was insufficient evidence to determine whether the May 23, 2001 Modified Acceptance issued "later than" its May 23, 2001 denial. Alternatively, the employer contends that it accepted a "combined" condition on November 1, 2000. As explained below, we reject each of the employer's assertions.

As a preliminary matter, we note that, at the commencement of the hearing, claimant's attorney expressly identified both the substantive and procedural validity of the May 23, 2001 denial as contested issues. (Tr. 2). The employer's attorney expressly agreed with claimant's counsel's statement of the issues. (*Id.*) Consequently, we reject the employer's argument that the procedural validity of its May 23, 2001 denial was not in issue.

ORS 656.262(6)(c) provides:

"An insurer's or self-insured employer's acceptance of a combined or consequential condition under ORS 656.005(7), whether voluntary or as a result of a judgment or order, shall not preclude the insurer or self-insured employer from later denying the combined or consequential condition if the otherwise compensable injury ceases to be the major contributing cause of the combined or consequential condition."

In order for the denial to be procedurally proper under the statute, "the acceptance of a combined condition must precede the denial of a combined condition."

Blamires v. Clean Pak Systems, Inc., 171 Or App 263, 267 (2000) (discussing *Croman v. Serrano*, 163 Or App 136 (1999); see *Columbia Forest Products v. Woolner*, 177 Or App 639 (2001).

In *John J. Shults*, 53 Van Natta 383 (2001), the carrier issued a denial of a "combined condition" on the same day that it accepted a "combined condition." In determining whether the carrier's acceptance preceded its denial of a "combined condition," we examined the language of the denial and found that it referred to the

acceptance of a “combined condition.” 53 Van Natta at 385. From this we inferred that the carrier had already accepted a “combined condition” when it issued the denial. (*Id.*) Consequently, we held that the denial was procedurally valid. (*Id.*)

Here, in contrast to *Shults*, the employer’s denial does not refer to the acceptance of a “combined condition.” To the contrary, the denial itself refers to the accepted condition as “lumbosacral strain/contusion.” (Ex. 88-1). Moreover, the employer’s modified acceptance expressly stated the combined condition was accepted “as of this date;” *i.e.*, May 23, 2001. Therefore, unlike *Shults*, the employer’s acceptance of a “combined” condition did not relate back to its initial acceptance of August 5, 2000. 53 Van Natta at 385 n2. Thus, applying the *Shults* rationale, we find insufficient evidence to support the inference that the employer’s acceptance of a “combined condition” preceded its denial.¹ Accordingly, we find the employer’s denial procedurally invalid. *Blamires*, 171 Or App at 267.

We turn to the employer’s assertion that it accepted a “combined condition” on November 1, 2000. While the contemporaneous medical record (at the time of initial acceptance) demonstrated that claimant had degenerative changes at L5-S1, it did not contain evidence establishing the existence of a “combined” condition. Such evidence did not exist until Drs. Reimer and Fuller issued their March 29, 2001 opinion. (Ex. 84). Moreover, in its May 23, 2001 Modified Acceptance, the employer stated that “recent information received in [the] claim” necessitated modification to the status of the claim. (Ex. 87). The most recent information in the record at that time was the attending physician’s concurrence with Drs. Reimer and Fuller. (Ex. 85). Under such circumstances, we conclude that the employer did not accept a “combined condition” on November 1, 2000.

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 \$1,500, to be paid by the self-insured employer. In reaching this conclusion, we have particularly considered the time devoted to the

¹ The employer asserts that, because the record was insufficiently developed, the ALJ had no basis to conclude that the May 23, 2001 denial was not issued “later” than the modified acceptance. We treat the employer’s assertion as a motion to remand. We remand only if the record is improperly, incompletely or otherwise insufficiently developed. ORS 656.295(5). Here, we do not find the record insufficiently developed. Based on our review of the language of both the denial and the modified acceptance, we find sufficient evidence to decide whether the employer’s acceptance of a “combined” condition preceded its denial of a “combined” condition. Accordingly, we deny the employer’s request for remand.

case (as represented by claimant's respondent's brief), the complexity of the issue, and the value of the interest involved.

ORDER

The ALJ's order dated February 7, 2002 is affirmed. For services on review, claimant is awarded a \$1,500 assessed attorney fee, payable by the self-insured employer.

Entered at Salem, Oregon on October 22, 2002