

In the Matter of the Compensation of
GEORGIE J. TURNER, Claimant
WCB Case No. 02-02747, 01-09021
ORDER ON REVIEW
Glen J Lasken, Claimant Attorneys
Jill Gragg, SAIF Legal, Defense Attorneys
Sather Byerly & Holloway, Defense Attorneys

Reviewing Panel: Members Biehl and Langer.

Claimant requests review of Administrative Law Judge (ALJ) Podnar's order that: (1) upheld aside ESIS' denial, on behalf of Precision Cast Parts Company/Schlosser Casting Company (PCC/Schlosser) of claimant's new injury claim for a C3-4 disc condition; and (2) set aside the SAIF Corporation's denial, on behalf of the Irwin Company, of claimant's "new medical condition" claim for the same condition. On review, the issues are jurisdiction, compensability and (potentially), responsibility. We vacate in part and affirm in part.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact," except for the last sentence, with the following supplementation.

In 1990, SAIF accepted claimant's cervical injury claim as a cervical strain. Dr. Newby performed four operations on claimant's neck: a C5-6 discectomy in 1987, a C4-5 discectomy in 1990, a C4-5 foraminotomy in 1990, an anterior cervical discectomy in 1991, and a posterior cervical fusion with Halifax clamps in 1993. (Exs. 16, 27, 33, 48). The claim was closed on October 26, 1993, with an award of 44 percent unscheduled permanent disability. (Exs. 56, 58, 61).

Claimant's aggravation rights under the 1990 injury claim expired on October 26, 1998. In September 2001, claimant filed a claim for a new cervical injury. ESIS denied the claim.

CONCLUSIONS OF LAW AND OPINION

The ALJ upheld SAIF's denial of claimant's "new medical condition" claim (under the 1990 injury) for a C3-4 disc condition and the employer's denial of her new (2001) injury claim for the same condition. Based on the medical evidence, the ALJ found that claimant did not have a herniated C3-4 disc, her condition was

the result of the natural progression of the arthritic process, and the 2001 injury was not the major contributing cause of her need for C3-4 treatment. We vacate the portion of the ALJ's order that upheld SAIF's denial and affirm the portion of the order that upheld the employer's denial, based on the following reasoning.

Jurisdiction/"1990 SAIF" Injury

The threshold issue is whether the Hearings Division or the Board on review of the ALJ's order has original jurisdiction to address compensability of claimant's "new medical condition" claim for a C3-4 condition under the 1990 cervical strain injury claim (for which SAIF is responsible).

The pivotal facts are: (1) the issue is compensability of a new medical condition; (2) claimant's aggravation rights under the "1990 SAIF" claim expired in 1998; and (3) the "new medical condition" claim was initiated after the January 1, 2001 effective date of amended ORS 656.278(1)(b) and 656.267(3). See OAR 438-012-0030; *Pamela A. Martin, D'cd*, 54 Van Natta 1852 (2002) (applying *James J. Kemp*, 54 Van Natta 491 (2002), Board determined that the Hearings Division did not have jurisdiction over a "post-aggravation rights" new medical condition claim). Under these circumstances, original jurisdiction over the matter rests with the Board *in its Own Motion* jurisdiction and the ALJ lacked authority to resolve the dispute. *Id.* Consequently, we vacate the portion of the ALJ's order that purported to uphold SAIF's denial of claimant's new medical condition claim.¹

Compensability/2001 New Injury

We note at the outset that a definitive diagnosis is not required to establish compensability. Instead, the issue is whether claimant's condition is work related, whatever the diagnosis. See *Boeing Aircraft Co. v. Roy*, 112 Or App 10, 15 (1992); *Tripp v. Runner Ridge Timber Services*, 89 Or App 355 (1988); *Suellen A. Shoemaker*, 53 Van Natta 1067 (2002). Nonetheless, we agree with the ALJ that claimant's 2001 new injury claim is not compensable, based on the following reasoning.

¹ In an Own Motion order issued this date under ORS 656.278(1)(b), we have considered the compensability of claimant's "post-aggravation rights" new medical condition claim.

Dr. Newby provides the only medical opinion relating claimant's C3-4 condition primarily to the 2001 work injury. Dr. Newby acknowledged that claimant had preexisting C3-4 degeneration that combined with the 2001 injury to cause claimant's current symptoms and need for treatment. (Ex. 82). He opined that the 2001 injury was more than 75% responsible for her C3-4 condition, and the "prior neck injuries and surgery" were less than 25% responsible. (Ex. 87).

Dr. Newby's opinion is based primarily on the temporal relationship between claimant's acute 2001 symptoms and the injury, and her lack of prior treatment since 1993. (*Id.*; Ex. 88-2). Moreover, although Dr. Newby stated that his opinion was also based on his reading of claimant's 2001 MRI, he did not explain how or why he discounted the preexisting causal contributors that he identified. (*Id.*). Under these circumstances, we find Dr. Newby's opinion inadequately reasoned and unpersuasive. See *e.g.*, *Sharron R. Clark*, 54 Van Natta 2220 (2002) (doctor's opinion based on temporal relationship between work exposure and symptoms inadequately explained); *Vicki F. Brown*, 51 Van Natta 1961 (1999) (treating doctor's opinion inadequately explained and unpersuasive because it was based on the temporal relationship between the claimant's work and her symptoms, without explaining why work contributed more than undisputed preexisting condition). Accordingly, absent persuasive medical evidence indicating that claimant's 2001 work injury was the major contributing cause of her disability and/or need for treatment for her current "combined" C3-4 condition, we agree with the ALJ that the claim fails.² See ORS 656.005(7)(a)(B).

ORDER

The ALJ's order dated July 31, 2002 is vacated in part and affirmed in part. That portion of the order that set aside the SAIF Corporation's denial, on behalf of the Irwin Company, is vacated. Claimant's request for hearing regarding the "SAIF claim" is dismissed.

Entered at Salem, Oregon on March 17, 2003

² We acknowledge claimant's contention that, "for purpose of causation, [she] is allowed to essentially lump together" her accepted 1990 injury and her 2001 claim to prove compensability. Claimant appears to rely on "the last injury rule." See *SAIF v. Webb*, 181 Or App 205, 208 (2002). However, the rule does not apply here, because there is only one accepted claim. See *Kimberley K. Ackley*, 54 Van Natta 1199, 1201 (2002) ("last injury rule" inapplicable where there is only one accepted claim).