

In the Matter of the Compensation of  
**RONALD L. COONCE, Claimant**  
WCB Case No. 03-05747  
ORDER ON REVIEW  
Bottini et al, Claimant Attorneys  
Radler Bohy et al, Defense Attorneys

Reviewing Panel: Members Langer and Biehl.

The self-insured employer requests review of Administrative Law Judge (ALJ) Mills' order that set aside its denial of claimant's injury claim for low back and left knee conditions. On review, the issue is compensability.

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

Although claimant initially alleged that he sustained his injury on *April 22, 2003*, he testified that he had made a mistake regarding the date of injury and that it should be *April 21, 2003*. (Tr. 27). Despite the discrepancy in the date of injury, the ALJ set aside the employer's denial, finding that claimant's account of his injury and onset of his condition was credible and that the medical evidence based on that history satisfied claimant's burden of proof.

On review, the employer asserts that the ALJ committed reversible error by "unilaterally amending claimant's date of injury" to conform with claimant's testimony, by improperly amending its denial to make it applicable to a different date of injury, and by not giving it the opportunity to process the April 21, 2003 injury claim. We do not find the employer's contentions persuasive.

The employer did not allege surprise or prejudice when claimant corrected the date of injury at the hearing, nor did it move for continuance of the hearing. (Trs. 14, 15, 27, 55). Instead, the hearing proceeded normally. Under these circumstances, we conclude that the parties implicitly agreed to litigate the compensability of the alleged April 21, 2003 injury.<sup>1</sup> *See Weyerhaeuser Co. v.*

<sup>1</sup>

Moreover, we are persuaded the discrepancy in the date of injury was a relatively minor mistake in chronology and does not significantly affect the core issue which is whether claimant suffered a compensable injury on or about April 21, 2003. Significantly, no other injury occurred either on April 21 or 22, 2003, and the precise date on which the claimed injury occurred did not materially affect the written notice of the accident that gave rise to this claim. In addition, we are inclined to agree with claimant that the issue of an improper amendment of a denial should have been raised at hearing. *See Stevenson v. Blue Cross*, 108 Or App 247, 252 (1991) (Board may refuse to consider issues on review that were not presented at hearing).

*Bryant*, 102 Or App 432, 435 (1990) (when it is apparent that the parties tried a case by agreement with a particular issue in mind, it was improper for the ALJ and Board not to decide that issue); *compare Birrer v. Principal Financial Group*, 172 Or App 654 (2001) (Board erred in determining that the parties had implicitly agreed to try an issue outside the express terms of the denial where there was no meeting of the minds on the issue to be tried and the parties had not implicitly consented to try that issue). Accordingly, we conclude that the ALJ did not err in addressing the merits of claimant's injury claim based on an April 21, 2003 date of injury.

The employer also argues on Board review that the medical opinions supporting the claim (those of Drs. Hill and Sutherland) were unpersuasive because the physicians were unaware of claimant's prior low back difficulties. However, the employer tried this case based on legal causation and credibility. The employer presented no medical evidence that would indicate that claimant's prior injuries and conditions played any role in claimant's current condition. Absent medical evidence to that effect, we are not inclined to infer that claimant's medical history is relevant to the medical cause of his current condition.

In conclusion, we agree with the ALJ's decision setting aside the employer's denial. Thus, we affirm.

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, 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), the complexity of the issues, and the value of the interest involved.

#### ORDER

The ALJ's order dated November 21, 2003 is affirmed. For services on review, claimant's attorney is awarded an assessed fee of \$1,500, to be paid by the employer.

Entered at Salem, Oregon on April 27, 2004