

In the Matter of the Compensation of  
**JIM W. ANGLIN, Claimant**

WCB Case No. 02-02558, 01-05844

ORDER ON REVIEW

Juli Upton, Claimant Attorneys

Johnson Nyburg & Andersen, Defense Attorneys

Hornecker Cowling et al, Defense Attorneys

Reviewing Panel: Members Lowell and Kasubhai.

Liberty Northwest Insurance Corporation (Liberty) requests review of Administrative Law Judge (ALJ) Spangler's order that: (1) set aside its denial of claimant's occupational disease claim for cervical spondylosis, including a C5-6 disc condition; and (2) upheld Roseburg Forest Product's (Roseburg's) denial of the same condition. Roseburg moves to strike claimant's reply brief. On review, the issues are motion to strike, compensability and responsibility. We grant the motion to strike, affirm in part, and vacate in part.

#### FINDINGS OF FACT

Claimant compensably injured his neck while assembling plywood veneer for Roseburg in 1988. Roseburg accepted a neck strain. Although claimant's acute cervical pain subsided, he continued to treat conservatively for ongoing neck and headache pain.

An August 1990 Determination Order closed claimant's injury claim with awards of temporary disability and 5 percent unscheduled permanent disability. Claimant's aggravation rights under the 1988 claim expired on August 1, 1995.

In March 1991, claimant began working as a bridge inspector for Liberty's insured. Claimant's neck pain and related symptoms worsened.

On March 30, 2001, Roseburg denied compensability of and responsibility for claimant's current neck condition. Claimant requested a hearing.

On March 19, 2002, Dr. Bert performed a cervical discectomy and fusion at C5-6.

On March 25, 2002, Liberty denied responsibility for claimant's cervical condition. Claimant requested a hearing from that denial.

On August 9, 2002, Roseburg denied compensability of an occupational disease claim. Claimant requested a hearing from that denial.

At hearing, Roseburg clarified that its denial pertained to a claim for cervical spondylosis at C5-6 under both an occupational disease claim and its 1988 injury claim. (Tr. 7). Roseburg and Liberty also took the position that claimant's C5-6 disc condition was not compensable. Alternatively, if the condition was compensable, each carrier argued that the other carrier was responsible for it.

On February 13, 2004, we issued an Interim Order directing Roseburg to process claimant's new medical condition claim under the 1988 injury claim and to issue an Own Motion Recommendation regarding that claim. *Jim W. Anglin*, 56 Van Natta 532 (2004). Having received Roseburg's Own Motion Recommendation, we proceed with our review.<sup>1</sup>

### CONCLUSIONS OF LAW AND OPINION

A hearing was held in August 2003. It resulted in an order purporting to resolve compensability of and responsibility for the "post-aggravation rights" new medical condition claim (*i.e.*, cervical spondylosis, including a C5-6 disc condition) under the 1988 "Roseburg claim," as well as responsibility for the same condition under the new occupational disease claims with Liberty and Roseburg. However, because claimant's aggravation rights under the 1988 claim expired in 1995 (before claimant initiated his "new medical condition" claim with Roseburg for his C5-6 condition), neither the Hearings Division nor the Board on review have authority to consider compensability of claimant's "post-aggravation rights" new medical condition claim. *See 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). Accordingly, we vacate the portion of the ALJ's order that addressed claimant's "post-aggravation rights" new medical condition claim for cervical spondylosis, including a C5-6 disc condition (under claimant's 1988 injury claim with Roseburg).<sup>2</sup>

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<sup>1</sup> We issued an Own Motion Order today, declining to grant claimant's request for Own Motion relief under his 1988 Roseburg claim. *Jim W. Anglin*, 56 Van Natta \_\_\_\_ (Issued this date).

<sup>2</sup> Roseburg issued a formal written "denial" of the "post-aggravation rights" new or omitted medical condition claim. At the time this claim was made and the denial was issued, the Own Motion system did not provide for such a denial. Instead, Own Motion claim processing required the carrier to timely submit an Own Motion recommendation to the Board or to voluntarily reopen the claim. OAR 438-012-0030(1).

However, the compensability of and responsibility for the new occupational disease claims with Roseburg and Liberty is within the Hearings Division's jurisdiction. Accordingly, we proceed to address matters raised on Board review of the ALJ's order pertaining to the compensability of and responsibility for claimant's new occupational disease claims with Roseburg and Liberty.

### Motion to Strike

As a preliminary matter, we address Roseburg's motion to strike claimant's "Reply Brief." The relevant circumstances are as follows.

Liberty requested review of the ALJ's order and submitted an appellant's brief; claimant and Roseburg filed respondents' briefs; Liberty filed a reply brief; then claimant filed a "Reply Brief," responding to Roseburg's respondent's brief.

Roseburg asks us to disregard claimant's arguments submitted in response to its respondent's brief, because the Board's briefing rules do not allow a respondent to file a reply brief, unless otherwise authorized by the Board. *See* OAR 438-011-0020(2). We agree that claimant's "Reply Brief" was not authorized. Consequently, we grant Roseburg's motion to strike.

### Compensability and Responsibility

We adopt the ALJ's reasoning and conclusion regarding these issues, with the following modification and supplementation. We do not find Dr. Brett's opinion the most persuasive and we do not find that the accepted 1988 injury *alone* is the major contributing cause of claimant's cervical condition.

Instead, we rely on Dr. Bernstein's opinion, because we find it the most persuasive.<sup>3</sup> *Somers v. SAIF*, 77 Or App 259, 263 (1983). Based on that opinion,

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Administrative rules have subsequently been adopted that provide for formal written denial of "post-aggravation rights" new or omitted medical condition claims under certain circumstances. *See* WCB Admin. Order 2-2003, Order of Adoption, July 9, 2003; OAR 438-012-0024; OAR 438-012-0070; OAR 438-012-0075. However, the amended rules regarding such denials apply to such claims filed or initiated on or after September 1, 2003. OAR 438-012-0018; WCB Admin. Order 2-2003, Order of Adoption, page 21. Thus, the amended rules are not applicable to this claim, which was initiated in 2002. *See Keith A. Broeckel*, 55 Van Natta 3572 (2003).

<sup>3</sup> We note that Dr. Bernstein was in a particularly advantageous position to evaluate claimant's condition after the 1988 compensable injury and before the subsequent work exposure, because he treated claimant in 1989 and 1990. *See Dillon v. Whirlpool Corp.*, 172 Or App 484, 489 (2001) (we may or may

we conclude that the 1988 injury and claimant's subsequent work exposure with Liberty's insured *together* were the major contributing cause of claimant's condition. (See Exs. 68A, 79A,<sup>4</sup> 80, 84, 94, 97). Under such circumstances, Liberty is responsible for claimant's cervical condition. See *Roger L. Hager*, 53 Van Natta 637, 639 (2003) (claim compensable and later carrier responsible under the "last injurious exposure rule," where the claimant's work injury and subsequent employment both caused his cervical condition); compare *SAIF v. Webb*, 181 Or App, 205, 211 (2002) ("Employers with an accepted claim are liable for a consequential condition if the accepted injury is the major contributing cause."); *Jesus R. Cobian*, 56 Van Natta 719, 721 (2004) (carrier with accepted injury claim responsible for consequential condition, where accepted injury was the major contributing cause of the condition).

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 \$2,700, payable by Liberty. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by claimant's respondent's brief and claimant's counsel's uncontested statement of services), the complexity of the issues, and the value of the interest involved.

### ORDER

The ALJ's order dated September 15, 2003 is vacated in part and affirmed in part. That portion of the order that addressed claimant's "post-aggravation rights" new medical condition claim for cervical spondylosis, including a C5-6 disc condition (under claimant's 1988 injury claim with Roseburg) is vacated. Claimant's request for hearing regarding that claim is dismissed. The remainder of the ALJ's order is affirmed. For services on review, claimant's attorney is awarded a \$2,700 attorney fee to be paid by Liberty.

Entered at Salem, Oregon on May 17, 2004

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not give greater weight to the opinion of a treating physician, depending on the record in each case).

<sup>4</sup> We note that 2 exhibits are labeled "79A." In this instance, we refer to Dr. Bernstein's July 12, 2002 deposition.