
In the Matter of the Compensation of
LARA E. CONLEY, Claimant
WCB Case No. 03-04545
ORDER ON REVIEW
Ransom et al, Claimant Attorneys
Larry D Schucht, Defense Attorneys

Reviewing Panel: Members Langer, Kasubhai and Bock. Member Kasubhai dissents.

Claimant requests review of Administrative Law Judge (ALJ) Kekauoha's order that: (1) denied her motion to continue the hearing to obtain final rebuttal evidence; and (2) upheld the SAIF Corporation's denial of her injury claim for an L5-S1 disc herniation. On review, the issues are continuance, evidence and compensability.

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

In denying claimant's continuance motion, the ALJ reasoned that SAIF, not claimant, had the right to obtain and present final rebuttal evidence because it had the burden of proof under ORS 656.266(2)(a) (2001) to establish that an otherwise compensable injury was not the major contributing cause of the disability or need for treatment of a "combined condition" under ORS 656.005(7)(a)(B). On review, claimant argues that the ALJ's decision was incorrect because she had the burden to establish the compensability of an otherwise compensable injury and thus had the right to present final rebuttal evidence. We disagree.

As the ALJ noted, SAIF conceded that the medical evidence established an otherwise compensable injury, but that it was not the major contributing cause of the disability or need for treatment of a combined condition. Given this concession, it was not necessary for claimant to present final rebuttal evidence to establish an "otherwise compensable injury." Claimant asserts, however, that SAIF could not stipulate to a compensable injury and then argue that it is not compensable, thereby depriving her of her right to last presentation of evidence. Once again we disagree with claimant's argument.

SAIF did not stipulate to a compensable injury. Instead, SAIF conceded that the injury claim would "otherwise" be compensable, but for the fact the otherwise compensable injury combined with a preexisting condition and the compensability of this condition was not established. Under ORS 656.266(2)(a), SAIF was within

its rights. Moreover, because we agree with the ALJ's reasoning that the combined condition standard of ORS 656.005(7)(a)(B) applied, we further agree with the ALJ that, as the party with the burden of proof under ORS 656.266(2)(a), SAIF, not claimant, had the right to the last presentation of evidence.¹ Consequently, we find no abuse of discretion in the ALJ's evidentiary ruling.

Claimant also contends that SAIF amended its denial at hearing to effectively change the burden of proof to major contributing cause and therefore prejudiced claimant's case. We do not find this argument persuasive.

SAIF's May 8, 2003 denial asserted that claimant's alleged work injury combined with a preexisting condition and that the injury was not the major contributing cause of the disability or need for treatment of the combined condition. (Ex. 20). Thus, claimant was on notice before the hearing that the major contributing cause standard of ORS 656.005(7)(a)(B) was being asserted. Moreover, claimant's attorney elicited medical evidence addressing the major cause standard. (Ex. 22). Under these circumstances, we do not find that the ALJ abused his discretion in not continuing the hearing. *See SAIF v. Kurcin*, 334 Or 399 (2002) (because Board's continuance rule stated that an ALJ "may" continue a hearing for further proceedings, the standard of review of ALJ's continuance ruling was for an abuse of discretion).

Finally, in upholding SAIF's denial, the ALJ found persuasive the medical opinion of Dr. Dordevich, an examining physician. Citing *Kuhn v. SAIF*, 73 Or App 768 (1985), claimant argues that the ALJ should have discounted the persuasiveness of Dr. Dordevich's opinion because it conflicted with the "law of the case" when he concluded that claimant's condition was not occupationally related. Claimant asserts that Dr. Dordevich's opinion is in conflict with SAIF's concession that the record established an otherwise compensable injury.

On *de novo* review of an aggravation claim in *Kuhn*, the court disregarded a doctor's opinion that an injury resulted from non-work related conditions because of a previous determination that the injury was compensable. The court found the

¹ The ALJ's ruling adroitly addresses the interplay between ORS 656.266(2)(a) and the "last presentation of evidence" requirement under OAR 438-007-0023. [As this order explains, where the carrier concedes the existence of an "otherwise compensable injury," as the party with the burden of proof under ORS 656.266(2)(a)(2001), it has the right to the last presentation of evidence under OAR 438-007-0023 to establish that the compensable injury is not or is no longer the major contributing cause of the disability or need for treatment of the combined condition.]

physician's opinion conflicted with the "law of the case" that permanent disability resulted from the industrial injury. 73 Or App at 772.

In contrast to *Kuhn*, here there was no prior determination that the claim was compensable. In addition, SAIF has not accepted the disputed L5-S1 disc condition. While SAIF conceded that the record would establish an "otherwise" compensable injury but for the fact that there was a noncompensable "combined condition," this stipulation did not operate as an acceptance of a claim.² Accordingly, we do not discount the persuasiveness of Dr. Dordevich's opinion on "law of the case" grounds.

In conclusion, we find no abuse of discretion in the ALJ's continuance ruling and affirm the ALJ's compensability determination.

ORDER

The ALJ's order dated September 18, 2003 is affirmed.

Entered at Salem, Oregon on May 18, 2004

Member Kasubhai dissenting.

The majority affirms the ALJ's order, which includes a finding that the SAIF Corporation satisfied its burden of proving that claimant's "combined" low back condition is not compensable. In doing so, the majority rejects claimant's contention that the opinion of Dr. Dordevich, the examining physician on whose opinion the ALJ relied, was unpersuasive because it conflicted with the "law of the case," as that principle is articulated in *Kuhn v. SAIF*, 73 Or App 768 (1985). Because I disagree with the majority's disposition of the "law of the case" argument, I respectfully dissent.

The majority correctly determines that, under ORS 656.266(2)(a) (2001), SAIF has the burden of proving the combined low back condition is not compensable. In order to do so, it must adduce persuasive medical evidence to support its position that the compensable injury is not the major contributing cause

² In reaching this conclusion, we observe that a "two-step" analysis in combined condition claims was specifically rejected in *Tektronix, Inc. v. Nazari*, 117 Or App 409 (1992), *on recon* 120 Or App 590, *rev den* 318 Or 27 (1993). In *Charles L. Grantham*, 48 Van Natta 1094 (1996), we determined that the *Nazari* analysis remained viable under *amended* ORS 656.005(7)(a)(B) (1995).

of the disability or need for treatment of the “combined condition.” As part of its burden, SAIF was required to ask the correct questions in the context of the “law of the case,” which is based on SAIF’s concession that claimant established an “otherwise” compensable injury.

As claimant argues, Dr. Dordevich concluded that claimant’s low back condition was not occupationally related. This opinion was in direct conflict with SAIF’s concession that claimant proved an otherwise compensable injury. Unlike the majority, I would find SAIF’s concession that claimant sustained an otherwise compensable injury equivalent to the determination in *Kuhn* that the claimant’s injury was compensable. Thus, I would find *Kuhn* controlling and, further, that Dr. Dordevich’s opinion is unpersuasive.

Because Dr. Dordevich’s opinion is unpersuasive, it follows that SAIF cannot satisfy its burden of proof under ORS 656.266(2)(a) (2001). Therefore, I would reverse the ALJ’s compensability determination.