

In the Matter of the Compensation of
RICK L. BORDINARO, Claimant
WCB Case No. 05-01536, 05-01527
ORDER ON REVIEW
Malagon Moore et al, Claimant Attorneys
Johnson Nyburg & Andersen, Defense Attorneys

Reviewing Panel: Members Biehl and Lowell.

The insurer requests review of those portions of Administrative Law Judge (ALJ) Rissberger's orders¹ that set aside its partial denials of claimant's "post-aggravation rights" new or omitted medical condition claim for L4-5 and L5-S1 disc bulges and degenerative disc disease and his medical services claim for a current low back condition. Claimant cross-requests review of those portions of the orders that awarded a total insurer-paid attorney fee of \$4,500. On review, the issues are compensability and attorney fees. We reverse.

FINDINGS OF FACT

Claimant sustained a compensable injury on August 11, 1988. The insurer accepted a back strain.

The claim was first closed on December 22, 1989, with an award of 7 percent unscheduled permanent disability. Claimant's aggravation rights expired on December 22, 1994.

Claimant treated conservatively for periodic flare-ups of low back symptoms from 1990 into 1994. His claim was reopened for an aggravation in 1994 and closed again on March 9, 1995, with an additional 9 percent unscheduled permanent disability award.

¹ The ALJ issued a July 11, 2005 Opinion and Order in WCB Case No. 05-01527 that addressed compensability of claimant's medical services claim for a current low back condition. The ALJ also issued a July 11, 2005 "Proposed and Final Own Motion Order" in WCB Case No. 05-01536 that addressed compensability of claimant's "post-aggravation rights" new or omitted medical condition claim under the Board's Own Motion jurisdiction. *See* OAR 438-012-0090(2) (WCB Admin. Order No. 1-2004, eff. September 1, 2004). However, as of January 1, 2006, compensability issues regarding new or omitted medical condition claims that have not become final prior to that date are processed under ORS 656.262, whether or not the claimant's aggravation rights have expired. *See* House Bill 2294, section 4 (2005) (HB 2294 §4); ORS 656.267(2) (2005); WCB Admin. Order No. 3-2005, eff. January 1, 2006, Order of Adoption, pages 2-4; *James W. Jordan*, 58 Van Natta 34 (2006). Because such issues are not in our Own Motion jurisdiction, we treat the ALJ's "Proposed and Final Own Motion Order" as an "Opinion and Order." Consequently, we proceed with our review of the ALJ's orders under our appellate review jurisdiction pursuant to ORS 656.295.

Claimant did not require treatment for his low back again until the spring and summer of 1997, but he continued to seek treatment for periodic flare-ups of symptoms thereafter.

On December 28, 2004, the insurer was asked to amend its acceptance to include L4-5 and L5-S1 disc bulges and degenerative disc disease. Thereafter, the insurer denied claimant's request. Following a hearing, the ALJ set aside the insurer's partial denial of L4-5 and L5-S1 disc bulges and degenerative disc disease.

We adopt the "Findings of Fact" contained in the ALJ's "Proposed and Final Own Motion Order."²

CONCLUSIONS OF LAW AND OPINION

Based on the following reasoning, we find that claimant's claims for "post-aggravation rights" new or omitted medical conditions (L4-5 and L5-S1 disc bulges and degenerative disc disease) and medical services for a current low back condition are not compensable.

Claimant bears the burden of proving that the claimed new medical conditions are compensably related to the 1988 injury or the accepted back sprain. See ORS 656.266;³ ORS 656.005(7)(a). See *Albany General Hospital v. Gasperino*, 113 Or App 411 (1992) (condition or need for treatment that is directly caused by an industrial accident is analyzed under a material contributing cause standard; condition or need for treatment that is caused by a compensable condition is analyzed under the major contributing cause standard as a consequential condition); *Sandra K. Hodges*, 56 Van Natta 1153, 1156 (2004) (where the claimant's "post-aggravation rights" new medical condition was a combined condition involving a preexisting condition, inquiry was whether the compensable injury was the major contributing cause of the claimant's disability or need for treatment of her combined condition under ORS 656.005(7)(a)(B) (2001)).

² In the third and fourth paragraphs on page 3, the dates referenced as "2002" are changed to "1992."

³ See *James R. Laycock*, 54 Van Natta 2348, 2349 n3 (2002) (the burden shifting amendments to ORS 656.266 do not apply to claims involving pre-January 1, 2002 injuries).

The ALJ found claimant's disc and degenerative conditions compensable largely based on the insurer's past administration of the 1988 back sprain injury claim, including awards of permanent disability benefits. However, the insurer's past provision of benefits is not evidence of compensability and it did not constitute acceptance of conditions other than the accepted back sprain. *See* ORS 656.262(10) (providing, in part: "Merely paying or providing compensation shall not be considered acceptance of a claim or an admission of liability * * *").

The ALJ also relied on the opinion of Dr. Hurley, claimant's current treating physician.⁴ Dr. Hurley related claimant's current low back problems primarily to his L4-5 disc bulge and the ongoing consequences of the 1988 injury. He opined that the injury probably caused the disc condition. Although Dr. Hurley acknowledged that claimant "may have" had some preexisting degeneration in 1988, he discounted its contribution, based on claimant's age (32, at the time of the 1988 injury) and his lack of prior low back problems. (Ex. 70).

We do not find Dr. Hurley's reason for discounting claimant's degeneration persuasive, considering the more contemporaneous medical record.⁵ That is, for several years after the injury, all physicians agreed (at least in retrospect) that claimant *did* have disc degeneration, which they described as preexisting, not injury-related. (*See* Exs. 2, 21, 22, 37). Under these circumstances, we find that Dr. Hurley's opinion that claimant was too young to have significant preexisting degeneration amounts to an inaccurate history. Moreover, because Dr. Hurley's causation conclusion is based largely on that history, we do not rely on it. *See Somers v. SAIF*, 77 Or App 259, 263 (1986).

Accordingly, absent persuasive medical evidence supporting the new medical condition claim of L4-5 and L5-S1 disc conditions and degenerative disc disease, we uphold the insurer's partial denial, regardless of the standard of proof.

⁴ The insurer argues that Dr. Hurley is not entitled to deference as claimant's attending physician, because he did not examine claimant until 2004, some 16 years after the 1988 injury. *See McIntyre v. Standard Utility Contractors*, 135 Or App 298 (1995). We agree.

⁵ The ALJ also discounted the opinions of Drs. Bell and Schilperoort (insurer-arranged examining physicians), in part because they believed that claimant's injury involved little or no twisting or torsion — whereas the ALJ found that claimant "may have turned or twisted in an effort to catch himself when he fell." (Proposed and Final Own Motion Order, p 9). (*See* Ex. 67). However, the contemporaneous record does not suggest that claimant's fall involved twisting, turning, or torsion. (In fact, the medical record begins with an MRI report dated almost nine months after the injury.) Under these circumstances, we are not persuaded that the examining physicians misunderstood the mechanism of claimant's injury.

See ORS 656.005(7)(a)(A) and (B). Moreover, because claimant's conditions are not compensable, it follows that medical services for those conditions are also not compensable. *See* ORS 656.245(1)(a). Consequently, we uphold the insurer's denial of medical services. Finally, the ALJ's assessed attorney fee awards totaling \$4,500 is reversed.

ORDER

The ALJ's orders dated July 11, 2005 are reversed. The insurer's denials are reinstated and upheld. The ALJ's \$4,500 attorney fee awards are reversed.

Entered at Salem, Oregon on February 17, 2006