

In the Matter of the Compensation  
**DOROTHY H. LATTA, Claimant**

WCB Case No. 05-01890

ORDER ON REVIEW

Kryger et al, Claimant Attorneys

VavRosky MacColl Olson et al, Defense Attorneys

Reviewing Panel: Members Lowell and Kasubhai.

The self-insured employer requests review of Administrative Law Judge (ALJ) Otto's order that set aside its denial of claimant's consequential condition claim for C4-5 and C6-7 disc conditions. The employer also contends that claimant's claim is barred by her failure to timely appeal a previous aggravation denial. On review, the issues are claim preclusion and compensability.

We adopt and affirm the ALJ's order with the following change and supplementation. In footnote 1, we change the last line to refer to "the accepted cervical strain."

On June 15, 1990, claimant compensably injured her neck in a motor vehicle accident (MVA). The employer accepted an acute cervical strain. (Ex. 5). In October 1990, Dr. Franks performed an anterior cervical discectomy and interbody fusion at C5-6. (Ex. 14). An April 16, 1992 Notice of Closure closed her claim. Thus, claimant's aggravation rights expired on April 16, 1997.

After surgery, claimant continued to experience neck and upper extremity symptoms. A September 2004 MRI showed a large disc protrusion at C4-5 compromising the spinal cord, and a mild to moderate left paracentral disc protrusion at C6-7. (Ex. 48). On October 6, 2004, Dr. Makker performed a re-exploration of the cervical fusion with partial corpectomies of C4 and C5 with C4-5 discectomy for spinal cord and nerve root decompression and an anterior cervical interbody arthrodesis at C4 and C5. (Ex. 52).

Dr. Makker signed an "aggravation" form on October 27, 2004, which referred to claimant's MVA. (Ex. 54). The employer's December 29, 2004 denial referred to claimant's claim as follows: "On 10/1/04, you submitted an 'Own Motion' industrial aggravation claim based on a 10/27/04 Aggravation claim submitted by Dr. Makker."<sup>1</sup> (Ex. 56). The employer notified claimant that "we are

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<sup>1</sup> The record does not include claimant's October 1, 2004 submission of an "Own Motion" claim.

unable to accept your claim and we are denying compensability and responsibility for your *aggravation* claim.” (Ex. 56; emphasis added). Claimant’s hearing request from that denial was untimely. (Ex. 62).

At hearing, the employer asserted an affirmative defense that claimant did not timely appeal the December 29, 2004. Claimant conceded that her appeal of that denial was untimely. (Tr. 2). The ALJ reasoned that any suggestion by the employer that the December 2004 denial encompassed compensability of the C4-5 and C6-7 disc conditions was not supported by the clear language of that denial, which limited itself to an “aggravation claim.”

The employer argues that claimant’s untimely appeal of the December 29, 2004 “aggravation” denial bars her claim for the C4-5 and C6-7 disc conditions. According to the employer, the scope of its December 2004 denial included claimant’s C4-5 and C6-7 disc conditions and she is therefore precluded from litigating compensability of those conditions.

Claimant contends that the December 29, 2004 denial denied only an “aggravation claim,” not her “current condition,” reasoning that the “aggravation” denial only addressed a claim for a worsening of the accepted condition, which at the time included only a cervical strain. Claimant argues that ORS 656.267(1) allows her to bring a new condition claim at any time. Further, she contends that any attempt to deny a new condition claim or consequential condition claim that had not yet been made would be a procedurally improper, premature denial. For the following reasons, we find that the December 29, 2004 denial did not preclude litigating compensability of the C4-5 and C6-7 disc conditions.

Claimant’s aggravation rights on the 1990 injury claim expired in April 1997. Therefore, the claim is in our Own Motion jurisdiction.<sup>2</sup> *Miltenberger v. Howard’s Plumbing*, 93 Or App 475 (1988). By definition, claims in Own Motion status do not have “aggravation rights” and are not governed by ORS 656.273, the statute addressing “aggravation” procedures for claims within their aggravation

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<sup>2</sup> However, compensability/responsibility issues regarding “post-aggravation rights” new or omitted medical condition claims and “worsened condition” claims are in the Hearings Division’s jurisdiction in the first instance, with review to the Board in its “regular jurisdiction” and the courts. ORS 656.267 (2005); ORS 656.278; *Jimmie L. Taylor*, 58 Van Natta 75 (2006); *James W. Jordan*, 58 Van Natta 34 (2006). “Claim reopening” issues regarding such claims are in the Board’s Own Motion jurisdiction. ORS 656.267(3) (2005); ORS 656.278(1)(a), (b).

rights.<sup>3</sup> Instead, Own Motion claims are governed by ORS 656.278. Therefore, where, as here, aggravation rights have expired, there can be no “aggravation” claim under ORS 656.273.

Here, the employer submitted Own Motion recommendations for claimant’s “post-aggravation rights” new or omitted medical conditions and “worsened condition” claims. We address those matters in a separate Own Motion Order issued today’s date. (WCB Case Nos. 05-0235M and 05-0143M).

The question before us now is whether the unappealed December 2004 “aggravation” denial precludes litigation of the “post-aggravation rights” new or omitted medical conditions (C4-5 and C6-7 disc conditions). As explained below, we conclude that it does not.

At the time of the employer’s December 29, 2004 denial of claimant’s “aggravation” claim, the accepted condition was an acute cervical strain. (Ex. 5). The employer did not accept a C5-6 disc herniation related to the 1990 MVA until September 6, 2005. (Ex. 74).

Furthermore, at the time of the employer’s “aggravation” denial, claimant had not submitted a claim for a new medical condition or a consequential condition. On August 2, 2005, several months after the aggravation denial, claimant requested that the employer amend the acceptance pursuant to ORS 656.262(7)(a) to include a central disc protrusion at C4-5 and a left paracentral disc protrusion at C6-7. (Ex. 66).

Claim preclusion applies in workers’ compensation cases when there is an opportunity to litigate an issue before a final determination and the party against whom the doctrine could be applied fails to litigate the issue. *Drews v. EBI Companies*, 310 Or 134, 140-42 (1990). However, the legislature has the authority to create exceptions to the doctrine by enacting statutory provisions that a determination will not preclude another action or proceeding on the same claim. *Id.* at 141-42.

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<sup>3</sup> Under ORS 656.273(1), a worsened condition resulting from the original injury must be established by medical evidence of an actual worsening of the compensable condition supported by objective findings. An aggravation claim must be for a compensable condition that has been accepted and processed in accordance with ORS 656.262 and ORS 656.268. *Evelyn R. Crossman*, 56 Van Natta 1076, 1078 (2004).

In *Evangelical Lutheran Good Samaritan Soc. v. Bonham*, 176 Or App 490, 497-98 (2001), *rev den*, 334 Or 75 (2002), the court held that ORS 656.262(7)(a) (1995) provided a statutory exception to the doctrine of claim preclusion for new medical condition claims. In other words, ORS 656.262(7)(a) barred the application of claim preclusion principles to new medical condition claims. ORS 656.262(7)(a) (1995) provided, in part: “Notwithstanding any other provision of this chapter, the worker may initiate a new medical condition claim at any time.” Effective January 1, 2002, some of the provisions of ORS 656.262(7)(a) (1995) were incorporated in ORS 656.267(1).<sup>4</sup> Although ORS 656.262(7)(a) has since been amended, the holding in *Bonham* still applies. *Darnell M. Lucas*, 57 Van Natta 799, 802 n 3 (2005), *aff’d without opinion*, *Lucas v. Barrett Business Services, Inc.*, 205 Or App 111 (2006).

ORS 656.267(1) bars the application of claim preclusion to claimant’s August 2, 2005 new medical condition claim for a central disc protrusion at C4-5 and a left paracentral disc protrusion at C6-7. (Ex. 66). *See Bonham*, 176 Or App at 498; *Connie L. Vick*, 56 Van Natta 2316 (2004) (claim preclusion did not apply to the new medical condition claim).

In any event, notwithstanding the provisions of ORS 656.267(1), the December 2004 “aggravation” denial did not include claimant’s C4-5 and C6-7 disc conditions. We reason as follows.

A general denial will put at issue all relevant medical conditions of which the employer was aware when it issued the denial. *Sound Elevator v. Zwingraf*, 181 Or App 150, 154-55 (2002). On the other hand, a limited and specific denial does not encompass all relevant medical conditions that existed at the time it was rendered if the employer did not know of them. *Longview Inspection v. Snyder*, 182 Or App 530, 536 (2002).

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<sup>4</sup> ORS 656.267(1) provides:

“To initiate omitted medical condition claims under ORS 656.262 (6)(d) or new medical condition claims under this section, the worker must clearly request formal written acceptance of a new medical condition or an omitted medical condition from the insurer or self-insured employer. A claim for a new medical condition or an omitted condition is not made by the receipt of medical billings, nor by requests for authorization to provide medical services for the new or omitted condition, nor by actually providing such medical services. The insurer or self-insured employer is not required to accept each and every diagnosis or medical condition with particularity, as long as the acceptance tendered reasonably apprises the claimant and the medical providers of the nature of the compensable conditions. *Notwithstanding any other provision of this chapter, the worker may initiate a new medical or omitted condition claim at any time.*” (Emphasis added).

Here, the employer's December 29, 2004 denial was not broad and general. Rather, the employer notified claimant that it was "denying compensability and responsibility for your *aggravation* claim." (Ex. 56) (emphasis supplied). The employer is bound by the express language of its December 29, 2004 denial. *See Tattoo v. Barrett Business Service*, 118 Or App 348, 351-52 (1993).

We acknowledge that the denial indicated that it was "based on the medical opinion that you have pre-existing degenerative disc disease which is the major contributing cause of your current condition and need for treatment." (Ex. 56). However, in light of the employer's statement that it was denying compensability and responsibility of the "aggravation claim," we do not construe the December 29, 2004 denial to include a denial of claimant's "current condition." *See Paul D. Bauer*, 54 Van Natta 2654 (2002), *aff'd without opinion*, *United States Bakery v. Bauer*, 192 Or App 602 (2004) (unappealed denial's reference to the claimant's "current condition" was qualified by its references to the claimant's strain and preexisting degeneration; it was not so broad that it encompassed conditions other than those conditions); *compare Sound Elevator v. Zwingraf*, 181 Or App at 155 (denial of the claimant's "current condition and need for treatment" was broad enough to include the medial meniscus condition noted in the physician's notes sent to the employer).

Furthermore, the issue in this case involves a different claim and different conditions. Because the scope of the employer's December 2004 denial did not include claimant's C4-5 and C6-7 disc conditions, we do not agree with the employer that she was precluded from litigating compensability of those conditions. *See Lourdes A. Cruz*, 54 Van Natta 1585 (2002) (unappealed denial of a right wrist sprain did not preclude the claimant from filing a claim for torn triangular cartilage); *compare Popoff v. J. J. Newberrys*, 117 Or App 242, 244 (1992) (the claimant was barred by claim preclusion from asserting claims from medical services when the claimant failed to request a hearing after the employer's denial).

Finally, we adopt and affirm the ALJ's analysis and conclusion that the compensable C5-6 disc herniation and subsequent cervical fusion were the major contributing cause of claimant's C4-5 and C6-7 disc conditions. Therefore, we affirm.

Claimant's attorney is entitled to an assessed fee for services on review. ORS 656.382(2). The employer objects to the requested fee (\$3,000) as excessive.

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In deciding whether the requested fee is appropriate, we consider the factors in OAR 438-015-0010(4), which include time devoted to the case, the complexity of the issues, the value of the interest involved, the skill of the attorneys, the nature of the proceedings, the benefits secured, and the risk that an attorney's efforts may go uncompensated. *See Schoch v. Leupold & Stevens*, 325 Or 112, 118-19 (1997) (Board must explain rationale for the attorney fee award).

Here, we find that the compensability issue was of above average complexity in light of the employer's "preclusion" defense and the medical evidence. Because claimant's C4-5 and C6-7 disc conditions have been found compensable, she is entitled to workers' compensation benefits, and the interest involved and the benefits secured for claimant are significant. The attorneys involved in this matter are skilled litigators with substantial experience in workers' compensation law. Finally, considering the conflicting medical evidence regarding the compensability issue and the employer's vigorous defense of the claim, there was a risk that claimant's counsel's efforts might have gone uncompensated.

Consequently, after considering the factors set forth in OAR 438-015-010(4) and applying them to this case, we find that a reasonable fee for claimant's attorney's services on review is \$3,000, payable by the employer. In reaching this conclusion, we have particularly considered the time devoted to the issue on review (as represented by claimant's respondent's brief and the employer's objections), the complexity of the issues, the value of the interest involved, and the risk that claimant's counsel might have gone uncompensated.

#### ORDER

The ALJ's order dated January 20, 2006 is affirmed. For services on review, claimant's attorney is awarded \$3,000, payable by the employer.

Entered at Salem, Oregon on July 10, 2006