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In the Matter of the Compensation of  
**FELIX R. SANCHEZ, Claimant**  
WCB Case No. 03-06989, 03-00224M  
ORDER ON REVIEW  
Hooton Wold & Okrent LLP, Claimant Attorneys  
Scheminske et al, Defense Attorneys

Reviewing Panel: Members Kasubhai and Lowell.

Claimant requests review of those portions of Administrative Law Judge (ALJ) Sencer's order that: (1) determined that the self-insured employer had previously accepted a lumbosacral strain; and (2) upheld the employer's *de facto* denial of his new or omitted medical condition claim for an L5-S1 disc herniation. The employer also contests the ALJ's interim order that denied its motion to dismiss claimant's hearing request. On review, the issues are the motion to dismiss, jurisdiction, scope of acceptance and compensability.

We adopt and affirm the ALJ's order with the following change and supplementation. In the second full paragraph on page 9, we change the second date in the first sentence to "August 23, 1990." We provide the following supplementation to provide the procedural background concerning claimant's jurisdictional arguments and the employer's motion to dismiss.

Claimant compensably injured his back on January 28, 1988. The claim was accepted, but the accepted condition was not identified. (*See* Ex. 1). Claimant injured his back on August 23, 1990, and the employer processed that claim as an aggravation of the January 1988 claim. (Ex. 22A-24). Claimant's aggravation rights expired on July 15, 1993.

Claimant continued to have back problems. On December 17, 2002, claimant sought treatment from Dr. Metzger for pain in his low back and left lower extremity. Dr. Metzger reported that claimant had picked up a roll of chain-linked fence in mid-September 2002 and felt a burning sensation in the low back, buttocks and thigh area. (Ex. 14). On February 3, 2003, Dr. Metzger performed L5 and S1 laminotomies and a discectomy for claimant's L5-S1 herniated disk. (Ex. 16).

Claimant's attorney wrote to the employer's attorney on February 13, 2003, requesting disclosure of documents related to the January 1988 injury. The letter also provided:

“This is also to advise you that [claimant] recently underwent surgery for a herniated disk in his low back, which he alleges to be related to the January 28, 1988 injury. \* \* \* I would appreciate your cooperation in advising your client of the need to file an own-motion reopening recommendation with the Workers’ Compensation Board regarding these incidents and claimant’s current disability and need for treatment.” (Ex. 16A).

On April 7, 2003, Dr. Metzger performed a “redo” laminotomy and discectomy for a recurrent L5-S1 disc herniation. (Ex. 19).

The employer’s May 30, 2003 “Carrier’s Own Motion Recommendation” indicated that claimant had not submitted a claim for a compensable new or omitted medical condition. (Ex. 19B-3). The form did not respond to the question “Has claimant submitted a request to reopen a claim for which the aggravation rights have expired?” but the employer checked a box stating “Recommend deny.” (*Id.*) The employer referred to claimant’s “current condition” as “[l]ow back pain[.]” (Ex. 19B-4). Among other things, the employer indicated that the current condition was not causally related to the previously accepted condition and that it was not responsible for claimant’s current condition.

On June 10, 2003, the Board’s Own Motion Coordinator wrote to the parties, requesting clarification of the parties’ positions and explaining that the Own Motion Recommendation was incomplete. A briefing schedule was implemented to obtain the parties’ responses.

In the meantime, claimant prepared an affidavit on June 9, 2003 and wrote to the Board’s Own Motion Coordinator on June 11, 2003, responding to the employer’s Own Motion Recommendation. (Exs. 19A, 19AA). Among other things, claimant contended that his February and April 2003 surgeries were compensably related to his January 28, 1988 claim, but he noted that he had no information regarding that claim because the employer had not yet provided discovery related to that claim. Claimant requested that the Board defer action on the Own Motion claim or refer the claim to the Hearings Division for findings of fact on the compensability issues. (Ex. 19AA).

The employer wrote to the Board’s Own Motion Coordinator on June 24, 2003, requesting referral to an ALJ for a fact finding hearing. The employer indicated that it was in the process of providing the information requested by claimant. The employer asserted that claimant’s current claim for benefits was precluded by a November 2002 Disputed Claim Settlement (DCS).

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On July 23, 2003, claimant responded to the employer's June 24, 2003 letter, disagreeing with its argument regarding the DCS, but requesting that the Board resolve that issue.

The Board's Own Motion Coordinator wrote to the parties on August 28, 2003, requesting the parties' positions on the effect, if any, that the Board's recent decision in *Eva M. Tucker*, 55 Van Natta 2577 (2003), might have on their dispute.

The employer responded to the request on September 11, 2003. (Ex. 20A). The employer contended that claimant's February 13, 2003 letter was not specific as to whether he was alleging that his current condition represented a worsening of his accepted 1988 injury claim or whether he was presenting a claim for a "post-aggravation rights" new/omitted medical condition. The employer asserted that it did not appear that claimant had made a claim for a "post-aggravation rights" new/omitted medical condition. According to the employer, it issued a denial of claimant's "current condition" in the November 2002 DCS. (Ex. 20A-2). The employer argued that, based on *Tucker*, because there had been a denial of claimant's current condition, claimant's recourse was to invoke the jurisdiction of the Board by requesting a hearing to challenge the "current condition" denial. (Ex. 20A).

On September 25, 2003, claimant responded to the employer's September 11, 2003 letter. (Ex. 20B). Claimant disagreed with every element of the employer's response. Claimant argued that the employer had not previously issued a denial of his "current disability and need for treatment related to his January 8, 1988 injury claim." Claimant acknowledged that the employer had issued a current condition denial in a DCS that identified only an unrelated shoulder claim. Claimant's letter further provided:

"Claimant is willing to accept, however, that the employer's September 11, 2003 statement of its position demonstrates that it believes that the claimant's current lumbar disc condition is not compensable. The letter states the legal and factual basis for that condition, and therefore, at least partially meets the requirements for a formal written denial. Absent express notice language, the denial does not conform to the rule, and claimant has no obligation to bale [*sic*] this employer out of an untenable legal position by requesting a hearing prior to the provision of full discovery, (which, by the way, still has not been provided, at this point 8 months from the original notice of a claim and request for discovery.)

“However, since, at this point, it is painfully obvious that the employer is content to do nothing and hope for the best, claimant has requested a hearing for “*de facto*” denial of the current claim. A copy of that request for hearing is attached. Claimant requests that this matter be remanded to the Hearings Division for a determination of compensability. Claimant also advises both the Board, for further consideration in the event of an appeal, and the employer, that it is the intent of the claimant to argue that the employer should be bound by its statement of its position regarding the compensability of this claim and that, if the ALJ concludes that the claimant is correct and a DCS of an unrelated shoulder claim cannot be the vehicle for a universal elimination of all claims accepted by the employer, the employer’s *de facto* denial should be set aside and the claim found compensable without further consideration of causation. Claimant further seeks to place the Board and the employer on notice that any change in the legal and factual basis for causation that makes it necessary for the claimant to prepare on the issue of causation, resulting in a postponement of the hearing, will give rise to a request for penalty related attorney fees under ORS 656.382 for unreasonable resistance or delay in the payment of compensation.” (Ex. 20B).

Claimant requested a hearing on September 25, 2003, raising issues of compensability of a “*de facto* denial,” as well as discovery, penalties and fees.

The employer responded on October 1, 2003. Among other things, the employer rejected claimant’s contention that the employer’s September 11, 2003 letter to the Board constituted a denial of a claim. The employer asserted that, if claimant chose to pursue that theory, he should be prepared to prove all elements of any case.

On October 22, 2003, the Board consolidated the Own Motion matter with the pending litigation with the Hearings Division and issued an Own Motion Order Referring for Fact Finding Hearing. (Ex. 20C). *Felix Sanchez*, 55 Van Natta 3607 (2003).

On November 25, 2003, the ALJ issued an Interim Order granting claimant’s motion to compel production. In January 2004, the ALJ indicated that the fact finding hearing would be deferred pending his disposition of the employer’s motion to dismiss claimant’s request for hearing based on the legal effect of a prior DCS.

The employer's February 26, 2004 Motion to Dismiss asserted that claimant's request for benefits allegedly related to his January 28, 1988 low back injury claim "and/or" an incident in mid-September 2002 was precluded by the parties' November 2002 DCS. (Employer's Motion to Dismiss at 1). The employer stated that it "has rejected claimant's claim for a herniated L5-S1 disc on the basis, *inter alia*, the current claim for low back benefits is barred by the parties' November 8, 2002 global settlement, and, in particular, the parties' DCS." (*Id.* at 3).

In claimant's March 25, 2004 response to the employer's Motion to Dismiss, he acknowledged that the employer had rejected his claim for a herniated L5-S1 disc on the basis the current claim was barred by the DCS, but he asserted that he was unaware of any other reason for the employer's current rejection of the claim. Claimant asserted that the "claim has been unprocessed and no formal denial has issued." (Claimant's Response to Motion to Dismiss at 2). Among other things, claimant argued that the DCS did not make a "claim" in language sufficient to meet the requirements of ORS 656.267(1) for new medical conditions related to his low back. (*Id.* at 7).

The employer's April 14, 2004 reply agreed that the "*inter alia*" reference in its Motion to Dismiss was unnecessary for purposes related solely to the dismissal motion and, without waiving any basis upon which to reject the claim substantively, the employer deleted that phrase from the stipulated facts.

### Motion to Dismiss

The ALJ denied the employer's motion to dismiss in an April 29, 2004 Interim Order. The ALJ explained that the November 8, 2002 DCS pertained to an April 29, 1998 right shoulder claim and did not refer to the January 1988 low back injury claim. (Ex. 11). The ALJ reasoned that the DCS did not identify the date or nature of the January 28, 1988 claim and did not recite that a bona fide dispute existed concerning that claim. Consequently, the ALJ concluded that claimant retained all of his rights under the 1988 claim.

On review, the employer continues to assert that its Motion to Dismiss should have been granted. The employer contends that the November 2002 DCS, Claim Disposition Agreement (CDA) and "Termination Agreement and Release in Full of All Claims" (termination agreement) establish that the parties settled not only the disputed shoulder claim, but also every other claim allegedly arising out of the work claimant performed for the employer, including his claims for an L5-S1 disc herniation. For the following reasons, we disagree with the employer's contention.

ORS 656.289(4) authorizes the parties to enter into a DCS “where there is a bona fide dispute over compensability of a claim,” and the parties have agreed to “make such disposition of the claim as is considered reasonable.” *See* OAR 438-009-0001(2) (a DCS is a “written agreement pursuant to ORS 656.289(4), executed by all parties in which the parties agree to make a reasonable disposition of all or part of a claim in which there is a bona fide dispute over the compensability of the claim”). OAR 438-009-0010(2) provides, in part, that a DCS shall recite:

“(a) The date and nature of the claim;

“(b) That the claim has been denied and the date of the denial;

“(c) That a bona fide dispute as to the compensability of all or part of the claim exists and that the parties have agreed to compromise and settle all or part of the denied and disputed claim under the provisions of ORS 656.289(4);

“(d) The factual allegations and legal positions in support of the claim;

“(e) The factual allegations and legal positions in support of the denial of the claim;

“(f) That each of the parties has substantial evidence to support the factual allegations of that party\* \* \* [.]”

Here, the DCS approved on November 8, 2002 referred to an August 29, 1998 right shoulder strain, which was accepted on July 15, 1999. (Ex. 11). The DCS explained that in October 2000, the employer accepted an aggravation claim and impingement syndrome of the right shoulder. Claimant submitted a new medical condition claim for osteoarthritis of the AC joint of the right shoulder, which was denied on June 26, 2001. The DCS further provided, in part:

“On February 15, 2002, claimant submitted a new medical condition claim for a condition described by claimant as adhesive capsulitis of the right shoulder. Insurer hereby denies compensability of that condition. In addition, insurer hereby denies compensability of all current conditions, disorders, diseases and symptoms, including all disability arising therefrom, all conditions, disease and disorders caused thereby and all medical care and other health care, whether diagnostic or curative, related, in any way thereto.” (Ex. 11-1, -2).

The DCS provided that claimant “hereby requests a hearing to challenge all of the denials which exist in this matter \* \* \*.” (Ex. 11-2).

In the employer’s February 26, 2004 motion to dismiss, the employer argued that claimant’s request for benefits that were allegedly related to his January 28, 1988 low back injury claim “and/or” an incident in mid-September 2002, was precluded by the parties’ November 2002 DCS. Among other things, the employer asserted that the current condition denial in the DCS was sufficiently broad to include the conditions caused by the 1988 low back injury “and/or” caused by the mid-September 2002 incident. The employer relied on additional language in the DCS denial to assert that it was the parties’ intent that the current condition denial was not limited to claimant’s shoulder problems.

In *Trevisan v. SAIF*, 146 Or App 358 (1997), the DCS provided, in part, that the parties “agree that a bona fide dispute exists between them as to the compensability of the condition(s) and/or services which have been denied.” *Id.* at 360-61. After examining the statutory and administrative requirements for a DCS, the court held that, as a matter of law, “the DCS did not settle [the] claimant’s headache claim, because the headache claim was not denied at the time that the parties entered into the DCS.” *Id.* at 362.

Similarly, in *Jeffrey N. Davila*, 50 Van Natta 1687, *on recons*, 50 Van Natta 1797 (1998), we concluded that, as a matter of law, the scope of the DCS concerned only the denied low back strain claim. We explained that compensability of the claimant’s spondylosis, herniated discs and disc bulge was not denied at the time of the DCS, and the carrier did not issue the denial of those conditions until after the parties entered into the DCS. Consequently, we concluded that the DCS had no preclusive effect on the spondylosis, herniations and bulge, whether or not they had been diagnosed at the time of the DCS.

Here, the DCS expressly pertained to claimant’s conditions as they related to his 1998 right shoulder injury. The DCS did not specifically refer to any disputes involving claimant’s 1988 back claim. Moreover, although at the time of the November 2002 DCS, the employer had accepted claimant’s January 1988 low back injury and the 1990 aggravation, the record does not establish that the employer was aware of claimant’s September 2002 back injury until at least December 2002, after the DCS was approved. The record before us indicates that on December 17, 2002, claimant sought treatment from Dr. Metzger for pain in his low back and left lower extremity. Dr. Metzger reported that claimant had picked up a roll of chain-linked fence in mid-September and felt a burning sensation in the low back, buttocks and thigh area. (Ex. 14). An MRI showed a large herniated

disc fragment that was displacing the S1 nerve root and Dr. Metzger recommended surgery. On December 17, 2002, claimant changed his attending physician to Dr. Metzger. (Ex. 15).

The record indicates that claimant first initiated a claim for an L5-S1 herniated disc in his February 13, 2003 letter to the employer, which advised that he had recently undergone surgery for a herniated disk in his low back and alleged that it was related to the January 28, 1988 injury. (Ex. 16A). The record does not establish that, at the time the DCS was approved on November 8, 2002, there was a claim for a herniated disc.

In any event, even if we assume that the employer was aware of the September 2002 incident and need for medical treatment at the time the DCS was approved, the record does not establish that a L5-S1 disc herniation claim had been denied at the time that the parties entered into the DCS. *See Trevison*, 146 Or App at 361-62. In other words, the record does not establish that in November 2002, there was a “bona fide dispute over compensability” of an L5-S1 disc herniation. *See* ORS 656.289(4); OAR 438-009-0001(2); OAR 438-009-0010(2). We conclude that the DCS had no preclusive effect on claimant’s L5-S1 disc herniation.<sup>1</sup> We therefore affirm the ALJ’s denial of the employer’s motion to dismiss.

### Jurisdiction

At the August 30, 2004 hearing, claimant argued that it was premature to address his July 16, 2004 new medical condition claim for an L5-S1 herniated disc because the employer had 90 days to process the claim. (Tr. 3). The ALJ denied claimant’s motion to postpone the hearing, reasoning that claimant had asserted compensability of the L5-S1 disc herniation and that claimant had an opportunity to prepare his case. The ALJ noted that the claim had been pending for well over a year. (Tr. 23-24).

In closing argument, claimant reiterated that the ALJ only had jurisdiction to address his claim for a worsening, not a new or omitted medical condition claim. (Closing argument tr. 3). The employer asserted that the issue was

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<sup>1</sup> The employer’s motion to dismiss referred to a “global settlement,” which included the DCS, a CDA and a termination agreement. The employer relied primarily on the DCS, but also asserted that the termination agreement provided important context for determining the parties’ intent. We agree with claimant that the termination agreement did not resolve any workers’ compensation matters. Furthermore, the CDA related only to claimant’s accepted shoulder condition and had no effect on any other conditions. *See Simmons v. Lane Mass Transit Dist.*, 171 Or App 268, 272 (2000) (a CDA involves an accepted claim; a CDA does not resolve all issues that arise in the processing of a claim).

“compensability of L5-S1 disc herniation as a new or worsened condition related to an injury of January 1988.” (*Id.* at 4). The ALJ adhered to his conclusion that he had jurisdiction to address the new or omitted medical condition claim.

On review, claimant again argues that the ALJ only had jurisdiction to address his claim for a worsened condition. For the following reasons, even if we assume, without deciding, that claimant first presented a new medical condition claim for an L5-S1 herniated disc on July 16, 2004 (approximately six weeks before the August 30th hearing), we conclude that the ALJ had jurisdiction to address that claim.

On September 25, 2003, claimant filed a request for hearing regarding a “*de facto*” denial. Claimant did not specify what condition(s) had been “*de facto*” denied. A hearing was originally scheduled for December 22, 2003, but was rescheduled.

At the August 30, 2004 hearing, claimant argued that it was premature to address his July 16, 2004 new medical condition claim<sup>2</sup> for an L5-S1 herniated disc, which the employer still had time to process, so it would be premature to raise a *de facto* denial with respect to that claim. (Tr. 3). Claimant asserted that the L5-S1 disc was “the same condition that has been the subject of everything that’s been going before us at this point \* \* \*.” (*Id.*) He requested a postponement to allow the employer time to process the new medical condition claim. (Tr. 4). Claimant asserted that, once the 90-day period expired, assuming the employer did not respond, he would have “another *de facto* denial request.” (*Id.*) Claimant acknowledged that the issue of compensability of the L5-S1 disc as a worsening was properly before the ALJ. (Tr. 11-12).

The employer’s attorney asserted at hearing that was the first time he had seen claimant’s July 16, 2004 letter claiming an L5-S1 herniated disc. (Tr. 4-5). The employer argued that a claim had been made for that condition on at least two occasions. (Tr. 15-18; *see* Exs. 16A, 19AA, 20B). The employer asserted that, even if no claim had been filed, the claim had been denied and a request for hearing was filed and, therefore, the parties could proceed to hearing. (Tr. 18). The employer stated that there was no confusion between the parties that the L5-S1 disc herniation was the claimed condition. (*Id.*) Claimant acknowledged that he had notice and an opportunity to prepare for the issue of compensability of the L5-S1 disc condition. (Tr. 21).

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<sup>2</sup> Claimant’s July 16, 2004 letter pertaining to a new medical condition is not included in the record. The employer does not dispute that claimant filed a new medical condition claim for an L5-S1 disc herniation on July 16, 2004.

The employer stated that, to the extent the denial required any amendment (and not conceding that it did), compensability of claimant's L5-S1 disc herniation was denied on all the bases and claimant was expected to prove compensability with respect to all elements of his case. (Tr. 30).

ORS 656.267(1) provides that to initiate a new or omitted medical condition claim, the "worker must clearly request formal written acceptance of a new medical condition or an omitted medical condition" from the carrier. Based on claimant's date of injury (January 1988), the claim processing requirements of ORS 656.262(7)(a) (1995) apply.<sup>3</sup> See *Georgiana White*, 57 Van Natta 1943, 1944, *on recons*, 57 Van Natta 2079, *on recons*, 57 Van Natta 2165 (2005). Pursuant to that statute, for a "new medical condition" claim, the employer had 90 days from its receipt of claimant's written notice to respond. ORS 656.262(7)(a) (1995). Here, at the time of the August 30, 2004 hearing, the time period for responding to claimant's July 16, 2004 new medical condition claim had not expired.

In *Longview Inspection v. Snyder*, 182 Or App 530, 537 n 2 (2002), the carrier had initially argued that the claimant's failure to file a new condition claim could not be waived because it was "jurisdictional." However, the court explained: "In light of our decision in *Sound Elevator v. Zwingraf*, 181 Or App 150, 45 P3d 958 (2002) (claimant may contest denial of new or omitted condition even if no new or omitted condition claim was filed), employer has correctly abandoned that argument."

Here, although claimant argued at hearing that it was premature to address his July 16, 2004 new medical condition claim, the employer expressed no such concern and argued instead that the issue should be litigated. The employer stated that, to the extent the denial required any amendment, compensability of claimant's L5-S1 disc herniation was denied on all the bases and claimant was expected to prove compensability with respect to all elements of his case. (Tr. 30). Under these circumstances, we find that the employer waived the 90-day period for processing the claim and issued a denial at hearing of claimant's new medical condition claim for an L5-S1 disc herniation.

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<sup>3</sup> ORS 656.262(7)(a) was amended in 2001, but the amendments apply to claims with a date of injury on or after January 1, 2002. Or Laws 2001, ch 865, § 22(1). Because claimant's date of injury occurred before January 1, 2002, we apply the prior version of the statute.

At hearing, claimant requested a postponement to allow the employer time to process the new medical condition claim (Tr. 4), but the employer made no such request. The record establishes that the parties were prepared to litigate compensability of an L5-S1 disc herniation, and claimant acknowledged that he had notice and an opportunity to prepare for litigation of that issue. (Tr. 21).

The ALJ reasoned that the L5-S1 disc condition was an issue all along and therefore claimant was not in a position to request a postponement to add compensability of the condition that had already been at issue. (Tr. 9). The ALJ inquired about why claimant needed a postponement. (Tr. 14-15). The ALJ asked why the parties could not proceed, assuming that the employer denied the new medical condition claim. (Tr. 15). Claimant asserted that the employer had not yet denied the claim (Tr. 15), but the employer responded that it denied compensability of claimant's L5-S1 disc herniation "on all the bases[.]" (Tr. 30).

After reviewing the record, we conclude that, at least by July 16, 2004, claimant had made a new medical condition claim for an L5-S1 disc herniation. Although the 90-day period for processing the new medical condition claim had not expired at the time of the August 30, 2004 hearing, we find that the employer waived the 90-day processing period and denied compensability of the L5-S1 disc herniation on all bases.

The record does not establish that claimant was surprised that a new medical condition claim for an L5-S1 disc herniation would be litigated and claimant acknowledged that he had notice and an opportunity to prepare for the issue of compensability of that condition. (Tr. 21). Under these circumstances, we conclude that the ALJ had jurisdiction to decide compensability of a new medical condition claim for an L5-S1 disc herniation.<sup>4</sup>

### ORDER

The ALJ's order dated May 12, 2006 is affirmed.

Entered at Salem, Oregon on February 28, 2007

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<sup>4</sup> Furthermore, we agree with the ALJ's conclusion that there were no "extraordinary circumstances" to justify the postponement claimant's scheduled hearing. *See* OAR 438-006-0081 (a postponement requires "a finding of extraordinary circumstances beyond the control of the party or parties requesting the postponement").