In the Matter of the Compensation of
JULIE A. DANIELS-LINTON, Claimant
WCB Case No. 06-07271, 06-02677
ORDER ON REVIEW
Dale C Johnson, Claimant Attorneys
Sather Byerly & Holloway, Defense Attorneys
The Law Office Of Gress & Clark LLC, Defense Attorneys

Reviewing Panel: Members Biehl and Lowell.

InteliStaf Health Care/ESIS Portland WC (InteliStaf) requests review of those portions of Administrative Law Judge (ALJ) Poland's order that: (1) declined to admit a "post-hearing" medical opinion; (2) found that claimant's new or omitted condition claim for an L3-4 annular tear was not precluded; and (3) set aside its partial denial of that claim. On review, the issues are evidence,[1] claim preclusion, compensability, and responsibility.

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

The next-to-last sentence in the first full paragraph on page 8 of the Opinion and Order is replaced with: "Thus, *InteliStaf* relies on the rationale in *Zwingraf* not to facilitate claimant's litigation of a new medical condition claim, as in *Zwingraf*, but to bar claimant from litigating a claim for a new medical condition."

We also offer the following supplementation regarding the preclusion issue.

Claimant filed a new or omitted medical condition claim for an L3-4 annular fissure on October 3, 2006. InteliStaf argues that the claim is precluded, contending that its prior unappealed denials encompassed claimant's subsequently diagnosed L3-4 annular tear. (*See* Exs. 114, 142). According to InteliStaf, the claim is precluded because claimant's condition, "albeit described by varying diagnoses," remained the same following its prior denials. We disagree.

[1] InteliStaf also asserts that the ALJ did not admit proposed Exhibit 183A, claimant's new or omitted medical condition claim for an L3-4 annular fissure. However, Exhibit 184, InteliStaf's denial letter, was admitted. Pursuant to that denial and claimant's request for hearing, the ALJ properly addressed the issue of compensability of the claim for an L3-4 annular fissure. *See Sound Elevator v. Zwingraf*, 181 Or App 150, 154, *rev den*, 334 Or 693 (2002) (once a denial issues on the merits of the claim, a claimant is entitled to a hearing).

The February 17, 2005 denial denied claimant's "current condition and need for treatment," asserting that claimant's current condition and need for treatment was no longer compensably related to her accepted lumbar strain. (Ex. 114-1).

It is axiomatic that an unappealed denial precludes a later claim for the denied condition. *See Stacy Frierson*, 59 Van Natta 399, 400 (2007) ("to the extent that portions of the current denied conditions concern the same conditions that were previously denied by an unappealed denial, litigation of those conditions is precluded").

Here, however, the record does not establish that InteliStaf (or anyone) knew about claimant's L3-4 disc condition until after the February 17, 2005 denial. Therefore, the February 2005 denial did not (and could not) deny the as yet undiagnosed and unclaimed annular tear and the denial does not preclude a claim for that condition. *See Longview Inspection v. Snyder*, 182 Or App 530, 536 (2002), (limited and specific "current condition" denial did not include a specific facet joint injury that existed, but was unknown to the carrier when it issued the denial); *Katherine M. Long*, 57 Van Natta 1100, 1101, n 2 (2005) (Assuming that the claimant had an L5-S1 disc herniation and the carrier was aware of it when the 2002 denial issued, its denial was broad enough so that the parties *could have* litigated compensability of that condition. However, nothing *required* the claimant to litigate the then-unclaimed new or omitted condition).

InteliStaf argues that the claim is precluded because claimant's condition is the same as the condition it previously denied, citing *Darnell M. Lucas*, 57 Van Natta 799, 802 n 3 (2005), *aff'd without opinion*, 205 Or App 111 (2006), *rev den*, 341 Or 80 (2006). In *Lucas*, the "new medical condition" claim was precluded because the purported new condition was nothing more than a new name for the previously denied condition. Under those circumstances, the prior final denial precluded the "new" claim. Here, the record does not establish that claimant's L3-4 annular tear is just another name for a previously denied condition. Therefore, *Lucas* is distinguishable and we do not find that InteliStaf's prior denial encompassed (or could have encompassed) the later-diagnosed and later-claimed L3-4 annular tear.

On June 27, 2005, InteliStaf issued a second partial denial that denied claimant's new or omitted medical condition claim for depression and anxiety reactions.[2] This denial did not, by its terms, address claimant's low back condition. Consequently, it could have no preclusive affect on a new or omitted medical condition claim for a low back condition.

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[2] The June 2005 denial also amended the February 2005 denial to deny responsibility. (Ex. 142-1).

Under these circumstances, we agree with the ALJ that claimant's claim for an L3-4 annular tear was not precluded by InteliStaf's prior denials.

Regarding responsibility, we agree with the ALJ that InteliStaf is responsible for claimant's condition under the "last injury rule" and the presumption created in *Industrial Indemnity Co. v. Kearns*, 70 Or App 583, 588 (1984) (*i.e.*, that the last injury independently contributed to claimant's worsened condition). We also agree with the ALJ that InteliStaf has not rebutted the "*Kearns* presumption," because claimant did not sustain a new compensable injury involving her low back after the March 2004 injury under InteliStaf's coverage.[3]

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 $3,000, payable by InteliStaf. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by claimant's counsel's unopposed attorney fee request and claimant's respondent's brief), the complexity of the issues, and the value of the interest involved.

Finally, because our order issues after the effective date of *amended* ORS 656.386(2) and OAR 438-015-0019, and affirms the ALJ's compensability decision, we consider it appropriate to award reasonable expenses and costs to claimant for records, expert opinions, and witness fees. *See Barbara Lee*, 60 Van Natta 1, *on recons*, 60 Van Natta 139 (2008); *Nina Schmidt*, 60 Van Natta 169 (2008).

Consequently, in accordance with the aforementioned statute and rule, claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the denial, to be paid by InteliStaf. The procedure for recovering this award, if any, is prescribed in OAR 438-015-0019(3).

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[3] We acknowledge InteliStaf's argument that the body part at issue is the L3-4 disc (and that another carrier has the only accepted claim involving that body part). However, we find that the body part at issue is the "low back," not just the L3-4 disc. *See Sister of Providence v. Ridenour*, 162 Or App 467 (1999) ("low back" was the "body part" for purposes of assigning responsibility under the "*Kearns* presumption" -- as between an accepted lumbar strain injury, followed by an accepted L4-5 nerve injury); *Charlene Y. Pearce*, 54 Van Natta 413 (2002) (determining responsibility under the "last injury rule," between accepted claims involving the claimant's cervical condition).

ORDER

The ALJ's order dated August 6, 2007 is affirmed. For services on review, claimant's counsel is awarded a $3,000 attorney fee, payable by InteliStaf. Claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the denial, to be paid by InteliStaf.

Entered at Salem, Oregon on April 24, 2008