

In the Matter of the Compensation of
DANIEL R. MINYARD, Claimant
WCB Case Nos. 07-04111, 07-04082
ORDER ON REVIEW

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Reviewing Panel: Members Biehl and Langer.

The insurer requests review of that portion of Administrative Law Judge (ALJ) Donnelly's order that set aside its denial of claimant's proposed medical services for surgery at L4-5. On review, the issue is medical services.

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

Claimant was compensably injured in June 2003 and the insurer accepted an L4-5 disc herniation. (Ex. 65). In July 2003, a neurosurgeon performed a left L4 hemilaminotomy with L4-5 discectomy. (Ex. 58). The claim was closed in December 2003 with an award of 37 percent unscheduled permanent disability for his low back condition. (Ex. 75). On April 26, 2004, the Board approved a claim disposition agreement (CDA), in which claimant released all rights to benefits for the accepted condition, except for medical benefits under ORS 656.245. (Ex. 76).

Claimant continued to have low back and left leg pain following claim closure. On March 28, 2006, Dr. Keiper performed a "reop left L4-5 microlaminotomy and discectomy with microdissection." The postoperative diagnosis was a recurrent disk on the left at L4-5. (Ex. 83). The insurer paid for the March 2006 surgery.

After the 2006 surgery, claimant continued to have left leg discomfort. A January 12, 2007 lumbar MRI showed a large recurrent left posterior disc extrusion at L4-5. (Ex. 89). Dr. Keiper and Dr. Noonon recommended further surgery. (Exs. 91, 93).

On June 12, 2007, the insurer denied the request for authorization to perform an L4-5 redo microlumbar discectomy and L4-5 transforaminal lumbar interbody fusion on the basis that the requested medical procedure was not causally related to the accepted injury. (Ex. 95). Claimant requested a hearing.

At hearing, the insurer relied on ORS 656.273(1), arguing that claimant's current condition was not compensable because the major contributing cause of his worsened condition was an injury not occurring within the course and scope of his employment, *i.e.*, a March 2006 slip and fall on the ice.

The ALJ rejected that argument, reasoning that claimant did not have any aggravation rights remaining because of the CDA and, therefore, his entitlement to medical services was governed by ORS 656.245(1), rather than ORS 656.273.

On review, the employer again relies on an affirmative defense based on ORS 656.273(1), which provides, in part: "if the major contributing cause of the worsened condition is an injury not occurring within the course and scope of employment, the worsening is not compensable." The employer contends that the CDA did not remove or alter the substantive proof standards or defenses that apply to the benefits remaining on the claim.

We disagree with the employer for the following reasons. First, the employer's affirmative defense on an aggravation claim only applies *after* a claimant has proven that there was an actual worsening of the compensable condition under ORS 656.273. In *Fernandez v. M & M Reforestation*, 124 Or App 38 (1993), the court explained:

"Under [ORS 656.273(1)], claimant has a compensable aggravation if he proves that his compensable injury materially contributed to his worsened condition. *See Grable v. Weyerhaeuser Company*, 291 Or 387, 631 P2d 768 (1981). *If* claimant establishes that, his aggravation claim is compensable unless it is proven that an off-the-job injury is the major cause of his worsened condition." *Id.* at 42 (emphasis added).

The court went on to explain that, because the claimant proved that his compensable injury materially contributed to his worsened condition, the employer had the burden to prove that an off-the-job injury was the major cause of the worsened condition. *Id.*

Here, the employer's defense under ORS 656.273 is not pertinent because claimant is precluded from establishing a compensable aggravation claim based on the April 2004 CDA. The CDA released "all present and future rights * * * and all other workers' compensation benefits that may have otherwise accrued to

the claimant * * * except the claimant's entitlement to medical services * * *." (Ex. 76-3). The employer/carrier was no longer obligated to provide workers' compensation benefits to claimant as a result of this claim "other than for medical benefits as required by ORS 656.245[,] as well as assistance from the re-employment assistance reserve. (*Id.*)

The employer's defense under ORS 656.273(1) only applies *after* a claimant has proven that there was an actual worsening of the compensable condition, which is precluded here because of the CDA. The employer cites *Thomas M. Thorson*, 55 Van Natta 2066 (2003), but we find that the employer's reliance on that case is misplaced, for the following reasons.

In *Thorson*, the claimant entered into a disputed claim settlement (DCS) for denied conditions, as well as a claim disposition agreement (CDA) related to his accepted conditions. Approximately three years later, the claimant requested a hearing seeking to "reopen his claim." The ALJ denied the request for relief, reasoning that the claimant had not initiated either an aggravation or a new or omitted medical condition claim before requesting the hearing.

On review, we explained that the common vehicles for requesting "reopening" of a claim are a new or omitted medical condition claim and an aggravation claim, but there was no evidence that either type of claim had been initiated or perfected. We noted that, in any event, an aggravation claim would likely be denied based on the claimant's entering into the CDA whereby he gave up his aggravation rights in exchange for a sum of money. We concluded that, in the absence of any such claim for a new or omitted medical condition or an aggravation claim, the claimant's request for hearing was premature.

In *Thorson*, we also addressed the claimant's submission of a medical bill and a medical report, which were not presented at hearing. We acknowledged that those documents could be interpreted as a medical services claim for the claimant's current condition. *Id.* at 2068 n 2. However, we found that was a separate issue from that presented at hearing, noting that, on receipt of such a bill, the carrier would be obligated to process or otherwise respond to the medical services claim.

Here, unlike *Thorson*, the issue litigated at hearing pertains to claimant's claim for proposed medical services, which the insurer has denied. Moreover, pursuant to the express terms of ORS 656.236(1), a CDA can have no effect on a claimant's right to medical benefits for any condition that is compensably related to the accepted claim, whether known to arise out of the claim at the time of the

CDA, or that, in the future, could arise out of the claim. *Rash v. McKinstry Co.*, 331 Or 665, 672-73 (2001); *Melva G. Rowton*, 59 Van Natta 598, 602 (2007); *John L. Montgomery*, 52 Van Natta 1318, 1319, *on recons*, 52 Van Natta 1687 (2000).

In *Rowton*, we rejected the employer's argument that the CDA's exception for medical benefits pertained only to the conditions accepted at the time the CDA was made, and did not extend to future new or omitted medical conditions. We explained that, under the current statutory scheme, a worker, by virtue of a CDA, can fully release all past, present and future rights to "non-medical service" benefits for claims involving both currently accepted and future compensable conditions (whether new or omitted, consequential or combined). However, we reasoned that a worker cannot release rights to medical services for such conditions. 59 Van Natta at 603.

Claimant relies on *Steven E. Ballweber*, 60 Van Natta 10, *on recons*, 60 Van Natta 176 (2008). In that case, the issue involved the claimant's claim for medical services for his current low back condition. The claimant had sustained a compensable lumbar strain and L5-S1 herniated disc in 1989, and entered into a CDA in 1992, which provided for a total release of workers' compensation benefits, except for compensable medical services.

In July 2005, the claimant fell while carrying a box at home and experienced worsened low back pain and right leg symptoms, which required medical treatment. The claimant filed an aggravation claim, which was denied. The ALJ reasoned that the claimant had no aggravation rights pursuant to the CDA, but the ALJ construed the insurer's denial as a denial of medical services for the claimant's current condition, which was found compensable.

On review, the insurer argued that the claimant had not proven a compensable aggravation because the 1989 work injury was not a material contributing cause of a worsening of the low back condition or, alternatively, that it had disproved a compensable aggravation by showing that the 2005 accident was the major contributing cause of the back condition. We agreed that the claim must be evaluated as a claim for medical services, explaining that the claimant had released his aggravation rights in the CDA and, in any event, his aggravation rights had expired. 60 Van Natta at 11. We reasoned that, because the claimant could not establish an aggravation claim under ORS 656.273, the only issue that could be litigated was medical services. *Id.* We concluded that the medical services related to the claimant's current low back condition were compensable. *Id.* at 13.

We reach the same conclusion in this case. In light of the April 2004 CDA, claimant has released his aggravation rights and, therefore, ORS 656.273 does not apply.¹ Instead, the only issue that can be litigated is medical services. *See id.* at 11.

Alternatively, even if we assume that the employer may raise an affirmative defense under ORS 656.273(1), we find that the employer has not sustained its burden of proving that “the major contributing cause of the worsened condition is an injury not occurring within the course and scope of employment[.]” In that regard, we agree with the ALJ’s finding that the June 26, 2003 work injury was the major contributing cause of claimant’s need for treatment of the recurrent L4-5 disc herniation.

We turn to the employer’s argument that claimant’s proposed surgery does not fall into any of the categories listed under ORS 656.245(1)(c) and, therefore, a reopening was required in order for him to obtain further medical services in the form of curative surgery to address his worsened condition under the accepted claim.

Because the record does not establish that the employer raised this issue at hearing, we decline to consider this argument on review. *See Stevenson v. Blue Cross of Oregon*, 108 Or App 247, 252 (1991) (Board may refuse to consider issues on review that were not presented at hearing); *Patricia K. Hanke*, 59 Van Natta 1422, 1423-24 (2007) (declining to address the carrier’s argument, raised for the first time on review, that the disputed treatment was not compensable because it occurred after the claimant’s medically stationary date and did not qualify as a compensable medical service under ORS 656.245(1)(c)).

Finally, we address the employer’s argument that if ORS 656.273 does not apply, the ALJ erred by finding the proposed surgery compensable based on a material cause standard. According to the employer, the “major contributing cause” standard applies because claimant has a legally cognizable “preexisting” condition under ORS 656.005(24)(a)(B)(iii) and a “combined condition.” We disagree.

¹ For that reason, it is not necessary to address the employer’s argument that ORS 656.273(2) applies to this claim.

ORS 656.005(24)(a) provides, in part:

“‘Preexisting condition’ means, for all industrial injury claims, any injury, disease, congenital abnormality, personality disorder or similar condition that contributes to disability or need for treatment, provided that:

“(A) Except for claims in which a preexisting condition is arthritis or an arthritic condition, the worker has been diagnosed with such condition, or has obtained medical services for the symptoms of the condition regardless of diagnosis; and

“(B)(i) In claims for an initial injury or omitted condition, the diagnosis or treatment precedes the initial injury;

“(ii) In claims for a new medical condition, the diagnosis or treatment precedes the onset of the new medical condition; or

“(iii) In claims for a worsening pursuant to ORS 656.273 or 656.278, the diagnosis or treatment precedes the onset of the worsened condition.”

ORS 656.005(24)(a)(B)(iii) applies “[i]n claims for a worsening pursuant to ORS 656.273 or 656.278[.]” As discussed above, this is *not* a claim “for a worsening pursuant to ORS 656.273[.]” Rather, this is a claim for medical services pursuant to ORS 656.245(1). For the reasons discussed by the ALJ, we agree that the “major contributing cause” standard in ORS 656.245(1)(a) does not apply because the medical records do not establish that claimant’s L4-5 disc condition is a combined or consequential condition.

ORDER

The ALJ’s order dated December 10, 2007, as reconsidered on January 15, 2008, is affirmed.

Entered at Salem, Oregon on August 14, 2008