
In the Matter of the Compensation of
SUSAN GINTHER, Claimant
WCB Case No. 08-01860
ORDER ON REVIEW
Peter O Hansen, Claimant Attorneys
Reinisch Mackenzie PC, Defense Attorneys

Reviewing Panel: Members Biehl and Lowell.

Claimant requests review of Administrative Law Judge (ALJ) Wren's order that upheld the self-insured employer's denial of claimant's new/omitted medical condition claim for L4-5 and L5-S1 disc conditions, sciatica, and radiculopathy. On review the issue is compensability.¹

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

In August 2004, claimant was injured while lifting heavy airplane parts. The employer accepted cervical, sacroiliac, and lumbosacral strains. (Ex. 27). Claimant underwent a course of physical therapy and, in September 2004, Dr. Stream declared claimant's accepted conditions medically stationary and released her to regular work. (Ex. 26).

In February 2006, claimant experienced right low back and hip symptoms after lifting an airplane brake at work. She treated with several physicians, including Dr. Davis. In June 2006, claimant sought acceptance of L5-S1 right paracentral disc bulging, L4-5 right paracentral posterior disc protrusion, radiculopathy, lumbar/lumbosacral intervertebral joint complex dysfunction, and right sciatica.² (Ex. 51).

¹ In her reply brief, claimant challenges portions of Dr. Jones's deposition testimony. Specifically, she asserts that certain questions posed by the employer to Dr. Jones exceeded the scope of the ALJ's continuance ruling. In response, the employer argues that claimant's objections are untimely raised. We need not resolve that objection because we find no abuse of discretion in the ALJ's consideration of Dr. Jones's testimony. Inasmuch as the hearing was expressly continued for the employer's opportunity to present "rebuttal" evidence on this "combined condition" case (Tr. 1-2), we do not consider the employer's questioning of Dr. Jones to exceed the scope of the ALJ's continuance ruling. Moreover, we note that claimant cross-examined Dr. Jones following the testimony in dispute and did not seek an opportunity to further develop the record in response to such testimony.

² The employer accepted an aggravation claim in 2006, paying claimant temporary disability from February 23, 2006 through November 13, 2006. (Ex. 87). In its acceptance, the employer clarified that the conditions that were the basis of the claim reopening (*i.e.*, lumbosacral, sacroiliac, and cervical strains) were the only conditions considered at claim closure. (Ex. 86).

In November 2006, Dr. Davis diagnosed L4-5 and L5-S1 disc herniations.³ Claimant requested acceptance of these conditions, as well as sciatica. (Ex. 80).

The employer denied the compensability of the claimed conditions.⁴ (Ex. 84). Claimant requested a hearing.

The ALJ upheld the employer's denial, reasoning that claimant did not establish the existence of either sciatica or radiculopathy, and that her work injury was not a material contributing cause of her disability/need for treatment for L4-5 and L5-S1 disc herniations.

On review, claimant argues that, as a matter of law, she has an accepted aggravation claim. Therefore, she contends that the 2004 work injury was at least a material contributing cause of her disability/need for treatment of the denied disc conditions in 2006. We disagree with claimant's contention.

While it is true that the employer accepted an aggravation claim in 2006, this acceptance only means that claimant experienced an actual worsening of her *accepted* lumbar, sacroiliac, and cervical strains. *See Evelyn R. Crossman*, 56 Van Natta 1076, 1078-79 (2004) (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). It does not establish that claimant's *unaccepted* conditions are compensable.

To prevail on her new/omitted medical conditions claims for sciatica, radiculopathy, and L4-5 and L5-S1 disc herniations, claimant must first establish that the claimed conditions exist, and that her 2004 work injury is a material contributing cause of her disability/need for treatment for those conditions. ORS 656.005(7)(a); ORS 656.266(1); *Maureen Y. Graves*, 57 Van Natta 2380, 2381 (2005). Because we agree with the ALJ's reasoning, we find that claimant has not satisfied her burden of proof. Consequently, we affirm.

³ While treating claimant, Dr. Davis variously described her disc pathology as "protrusions" and "herniations." The record supports the conclusion that Dr. Davis did not draw a distinction between the two terms. (*See, e.g.*, Exs. 63, 69). In contrast, Dr. Jones opined that claimant did not have disc "herniations," but instead had disc "protrusions," which were bulges that were a result of a degenerative condition. (Ex. 81-9).

⁴ The parties agreed that the conditions to be litigated were those listed by the ALJ in his order, which included radiculopathy. (Tr. 4).

ORDER

The ALJ's order dated October 22, 2009, as reconsidered on December 1, 2009, is affirmed.

Entered at Salem, Oregon on September 3, 2010