
In the Matter of the Compensation of
RANDI P. AYRES, Claimant
WCB Case No. 09-01523
ORDER ON REVIEW
Schoenfeld & Schoenfeld, Claimant Attorneys
Reinisch Mackenzie PC, Defense Attorneys

Reviewing Panel: Members Langer and Weddell.

The self-insured employer requests review of Administrative Law Judge (ALJ) Mills's order that set aside its denial of claimant's new/omitted medical condition claims for right foot conditions. On review, the issue is compensability. We affirm.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact."¹ We summarize the pertinent facts.

Claimant was compensably injured on April 25, 2008. The employer accepted a right foot strain. (Ex. 8).

Thereafter, claimant requested that the employer accept two new/omitted medical conditions: right foot navicular fracture and avascular necrosis in the navicular bone. (Ex. 18). The employer denied each of these conditions. (Ex. 21; Tr. 1-2).

CONCLUSIONS OF LAW AND OPINION

Analyzing the claimed conditions as "combined conditions," the ALJ set aside the employer's denial of both conditions. On review, the employer concedes the existence of the claimed conditions, and that the work injury was a material contributing cause of the disability/need for treatment for each condition. See ORS 656.266(1); *Betty J. King*, 58 Van Natta 977 (2006); *Maureen Y. Graves*, 57 Van Natta 2380, 2381 (2005). Consequently, claimant has established that each claimed condition (right foot navicular fracture and avascular necrosis in the navicular bone) constitutes an "otherwise compensable injury." See *SAIF v. Kollias*, 233 Or App 499, 503 n 1 (2010) (citing *Schuler v. Beaverton Sch. Dist.*

¹ Dr. Borman's deposition is Exhibit "27."

No. 48J, 334 Or 290, 296-97 (2002)) (“An ‘otherwise compensable injury’ * * * refers to a work-related injury that would be compensable under the material contributing cause standard of proof if not for the fact that it combines with a preexisting condition.”).

The employer maintains, however, that each claimed condition is a “combined condition.” Consequently, to set aside its denial of either or both conditions, the employer must prove that: (1) claimant suffers from a statutory “preexisting condition”; (2) claimant’s condition is a “combined condition”; and (3) the “otherwise compensable injury” is not the major contributing cause of the disability/need for treatment of the combined condition(s). ORS 656.005(7)(a)(B); ORS 656.266(2)(a); *Kollias*, 233 Or App at 505 (2010); *Jack G Scoggins*, 56 Van Natta 2534, 2535 (2004).

Here, the only “statutory preexisting condition” is degenerative arthritis in the joint around the navicular bone. *See* ORS 656.005(24)(a); *Hopkins v. SAIF*, 349 Or 348, 364 (2010).² The parties do not dispute, and the record establishes, that the degenerative arthritis combined with each “otherwise compensable injury” (the right foot navicular fracture and avascular necrosis) to cause claimant’s disability/need for treatment of each claimed “combined condition.”

Thus, to meet its burden of proof under ORS 656.266(2)(a), the employer must satisfy the third *Kollias* prong, namely that each “otherwise compensable injury” is not the major contributing cause of the disability/need for treatment of each claimed combined condition.³ ORS 656.005(7)(a)(B); ORS 656.266(2)(a); *Kollias*, 233 Or App at 505 (2010). With respect to the combined right foot navicular fracture and degenerative arthritis condition, the employer does not

² Before the work injury, claimant had not been diagnosed with either the navicular fracture or avascular necrosis condition. He also had not received medical services for the symptoms of either condition. Likewise, the record does not establish that either condition was “arthritis or an arthritic condition” as set forth in *Hopkins* and ORS 656.005(24)(a). Therefore, those conditions do not qualify as the “preexisting condition” component of a “combined condition” under ORS 656.005(7)(a)(B) and (24)(a), regardless of whether they predated the work injury.

³ A “combined condition” consists of two components: (1) “an otherwise compensable injury”; and (2) a statutory “preexisting condition.” ORS 656.005(7)(a)(B); *Susan E. Deshon*, 63 Van Natta 1391, 1394 (2011); *see also Paul D. Beer*, 63 Van Natta 1191, 1192 (2011) (a “combined condition” cannot exist in the absence of a “preexisting condition,” as defined by ORS 656.005(24)); *Hollis L. Strickland*, 62 Van Natta 2790, 2792 n 1 (2010) (a “combined condition” analysis is not appropriate in the absence of an “otherwise compensable injury”). Here, as set forth above, at issue is the compensability of two separate combined conditions. (*See also* Tr. 1-2). Moreover, the record establishes that claimant’s “arthritis” constitutes the only “statutory preexisting condition” component of each claimed combined condition.

identify, nor have we located, medical evidence that would establish that the otherwise compensable navicular fracture is not the major contributing cause of claimant's disability/need for treatment for the combined fracture/arthritis condition. Likewise, we are unable to locate expert medical evidence establishing that the otherwise compensable avascular necrosis is not the major contributing cause of the combined necrosis/arthritis condition.

In requesting that we uphold its denial of each condition, the employer references and relies on medical opinions concerning whether the “*work injury*” was not the major contributing cause of claimant's disability/need for treatment of the claimant's overall current right foot condition. As set forth above, however, to meet its requisite statutory burden of proof, the employer must establish that the “*otherwise compensable injury*” is not the major contributing cause of the disability/need for treatment of the *claimed* combined condition(s). See ORS 656.005(7)(a)(B); ORS 656.266(2)(a); *Kollias*, 233 Or App at 505 (2010).

On this record, we are unable to infer that the medical experts relied on by the employer intended to use “*work injury*” as synonymous with the statutory term “*otherwise compensable injury*” for purposes of the “*combined condition*” analysis set forth in *Kollias*. See *Benz v. SAIF*, 170 Or App 22, 26 (2000) (although we may draw reasonable inferences from the medical evidence, we are not free to reach our own medical conclusions in the absence of such evidence); *SAIF v. Calder*, 157 Or App 224, 228 (1998) (the Board is not an agency with specialized medical expertise and must base its findings on evidence in the record). Specifically, Dr. Borman's opinion does not establish an understanding of the distinction between the “*statutory preexisting condition*” of the arthritis and the “*otherwise compensable injury*” conditions of right foot navicular fracture and avascular necrosis. (See Ex. 27-71 through 76). Likewise, Dr. Higgins's opinion does not reflect such an understanding, but rather suggests that he viewed the “*otherwise compensable injury*” conditions as “*preexisting*” conditions. (See Ex. 35-32).

In sum, claimant has established, and the employer does not dispute, that each claimed condition (right foot navicular fracture and avascular necrosis) constitutes an “*otherwise compensable injury*,” *i.e.*, that his work injury is a material contributing cause of his need for treatment/disability for his right foot navicular fracture and avascular necrosis. Nonetheless, for the reasons set forth above, the record does not establish that: (1) the otherwise compensable right foot navicular fracture is not the major contributing cause of the disability/need for treatment of the claimed combined right foot navicular fracture and degenerative

arthritis condition; or (2) the otherwise compensable avascular necrosis is not the major contributing cause of the disability/need for treatment of the separately claimed combined avascular necrosis and degenerative arthritis condition. Therefore, the employer's denial of each condition must be set aside.

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 \$2,800, payable by the employer. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by claimant's respondent's brief and his counsel's uncontested fee submission), the complexity of the issue, and the value of the interest involved.

Finally, 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 the employer. See ORS 656.386(2); OAR 438-015-0019; *Gary E. Gettman*, 60 Van Natta 2862 (2008). The procedure for recovering this award, if any, is prescribed in OAR 438-015-0019(3).

ORDER

The ALJ's order dated February 7, 2011 is affirmed. For services on review, claimant's attorney is awarded an assessed fee of \$2,800, to be paid by the employer. 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 the employer.

Entered at Salem, Oregon on September 20, 2011