
In the Matter of the Compensation of
DEBRA DAVIS, Claimant
WCB Case No. 09-07013
ORDER ON REVIEW
Daniel Snyder, Claimant Attorneys
Scott H Terrall & Associates, Defense Attorneys

Reviewing Panel: Members Lowell and Weddell.

The self-insured employer requests review of Administrative Law Judge (ALJ) Fisher's order that: (1) set aside its denial of claimant's "combined" lumbar condition; (2) found that the employer improperly withheld certain documents as "impeachment evidence"; and (3) awarded a \$5,500 attorney fee under ORS 656.386(1). In addition, the employer moves to strike claimant's respondent's brief. On review, the issues are motion to strike, scope of issues, evidence, compensability, and attorney fees. We affirm.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact."

CONCLUSIONS OF LAW AND OPINION

We affirm the ALJ's order based on the following reasoning.¹

Claimant sustained a compensable injury on August 13, 2009. The employer accepted lumbar and thoracic strains. (Exs. 46, 62, 66-6).

On November 19, 2009, the employer closed the claim and issued the following denial:

“[W]e have accepted your workers’ compensation claim for a lumbar and thoracic strain. The medical evidence indicates that the accepted strains are now resolved. The medical evidence further indicates that you have a pre-

¹ As a preliminary matter, the employer argues that claimant's respondent's brief should be stricken as untimely filed. We find that the circumstances surrounding claimant's initial request for an extension of the briefing schedule and her subsequent request for an additional extension constitute extraordinary circumstances that warrant acceptance of her respondent's brief. See OAR 438-011-0030.

existing underlying degenerative disc disease and osteoarthritis of the lumbar spine which combined with the accepted lumbar strain. The current medical evidence indicates that the accepted lumbar strain is no longer the major contributing cause of any claimed need for treatment and/or disability associated with the combined condition. Therefore, we are issuing this partial denial of your current condition involving the lumber spine.” (Ex. 65-1).

Claimant requested a hearing, challenging the denial.

After the hearing, the ALJ requested, and the parties provided, written supplemental argument addressing the procedural validity of the denial. Thereafter, the ALJ held that the denial was procedurally invalid because the employer had not previously accepted a combined condition. The employer requested reconsideration, contending that the ALJ should not have addressed a “procedural” objection to the denial that claimant had not raised.

On reconsideration, the ALJ continued to find that the employer had not accepted a combined condition. Absent acceptance of a combined condition, the ALJ explained that there was no “baseline” for evaluating the validity of the denial under ORS 656.262(6)(c).² Therefore, the ALJ rejected the employer’s argument that it was inappropriate to address the “procedural validity” issue. The ALJ also declined to address the employer’s alternative argument that the denial should be upheld, even if it did not arise under ORS 656.262(6)(c).

On review, the employer contends that the ALJ improperly raised an issue regarding the procedural validity of its denial after the record was closed and that, alternatively, the denial was procedurally valid because it had accepted a combined condition. For the following reasons, we conclude that it was not an abuse of the ALJ’s discretion to reopen the record to consider the procedural validity of the employer’s denial and further that the denial was improper for lack of an accepted “combined condition.”

² ORS 656.262(6)(c) provides:

“An insurer’s or self-insured employer’s acceptance of a combined or consequential condition under ORS 656.005(7), whether voluntary or as a result of a judgment or order, shall not preclude the insurer or self-insured employer from later denying the combined or consequential condition if the otherwise compensable injury ceases to be the major contributing cause of the combined or consequential condition.”

We recognize that claimant did not explicitly challenge the procedural validity of the employer's denial. Moreover, as a general rule, an ALJ should only address issues raised by the parties. *See, e.g., Kenneth L. Devi*, 49 Van Natta 108 (1997) (The ALJ properly did not address a "claim preclusion" theory where the issue was not placed before him on the record). Nevertheless, an ALJ is authorized to request additional argument from the parties. *See generally* OAR 438-007-0025(1) (after the hearing, the ALJ may reopen the record). Under the particular circumstances of this disputed claim, we conclude that it was not an abuse of the ALJ's discretion to reopen the record for argument on the "acceptance/baseline" question regarding the "combined condition/ceases" denial.

In *Washington County-Risk v. Jansen*, 248 Or App 335 (2012), a case involving a "combined condition" occupational disease and a "ceases" denial under ORS 656.262(6)(c), the court held that ORS 656.266(2)(b) allocates the burden of proving the invalidity of that denial to the claimant. By contrast, the court observed that if a claimant requests a hearing on a "combined condition" injury claim, ORS 656.266(2)(a) assigns the *carrier* the burden of proving that, as of the date of the denial, the claimant's compensable injury ceased to be the major contributing cause of the combined condition.

The *Jansen* court clarified that a denial arising under ORS 656.262(6)(c) is not evaluated for "procedural validity." Instead, the court reasoned that "the fundamental issue at a hearing on such a denial is the validity of the denial, and the burden to prove its validity or invalidity is governed by ORS 656.266, not ORS 656.262(6)(c)." *Id.*

Here, claimant requested a hearing contesting a denial that was based on an assertion that the accepted injury was "no longer" the major contributing cause of any treatment or disability. (Ex. 65). Based on this language, and because the denial also referenced an alleged "combined condition" involving the accepted strain injury, the denial is most reasonably interpreted as a "ceases" denial under ORS 656.262(6)(c).³ Therefore, the issue at hearing was whether the employer carried its burden of proving that the otherwise compensable injury was no longer the major contributing cause of claimant's disability or need for treatment of a previously accepted combined condition.

³ Based on the language of the denial, particularly its assertion that the accepted strains had "resolved" and its reference to an alleged "combined condition," we reject the employer's alternative argument that the denial was a valid "current condition" denial. *See Barbara J. Ferguson*, 63 Van Natta 2253, 2260 (2011).

A valid “combined condition” denial under ORS 656.262(6)(c) requires: (1) an acceptance of combined condition establishing the effective date of the acceptance; and (2) a “change” in the accepted condition or circumstances such that the accepted condition is no longer the major contributing cause of the condition since the effective date of the acceptance. *See Oregon Drywall Sys., Inc. v. Bacon*, 208 Or App 205, 210 (2006) (approving the Board’s conclusion that “the effective date of acceptance provides a baseline for determining whether a worker’s condition has changed so that the otherwise compensable injury is no longer the major contributing cause of the disability or need for treatment of the combined condition.”).

Thus, the statute is premised on the existence of an acceptance that establishes a “baseline” for determining whether a carrier has carried its burden of proving the change necessary to carry its burden of proof under ORS 656.266(2)(a) in a “combined condition” injury claim. Considering that the effective date of a combined condition acceptance is an integral component in establishing such a baseline, it was not an abuse of the ALJ’s discretion to request additional argument on the issue of whether the employer had accepted a combined condition.

The employer argues, alternatively, that it did accept a combined condition, thus entitling it to deny claimant’s “current” condition under ORS 656.262(6)(c). The employer cites *Roseburg Forest Products v. Lund*, 245 Or App 65 (2011), and *Columbia Forest Products v. Woolner*, 177 Or App 639 (2001), in support of its position.

In *Lund*, the court approved our finding that an acceptance of a shoulder condition was properly understood to be acceptance of a combined condition, based on prior litigation directing the carrier to accept a shoulder condition described as a combined condition involving preexisting degenerative disease. *Lund* is distinguishable because there is no such prior litigation here.

In *Woolner*, the court held that the scope of acceptance is a question of fact, and concluded that a Notice of Acceptance that failed to employ the specific words “combined condition” is not, for that reason alone, insufficient as a matter of law to constitute an acceptance of a combined condition for purposes of ORS 656.262(7)(a). 177 Or App at 647. In light of its holding, the court remanded the matter for us to determine the scope of the employer’s acceptance.

On remand, we concluded that, as a factual matter, the employer had accepted a combined condition. *Bonnie J. Woolner*, 54 Van Natta 828, 829 (2002) (on remand). We reasoned that the evidence showed that the claimant had a

preexisting condition of “multi-directional instability” that “combined with” the accepted injury conditions of right shoulder and cervical strains. *Id.* The employer had expressly accepted a claim for “multi-directional instability, right shoulder and cervical strain” *Id.* Under those factual circumstances, we found that the employer had accepted a combined condition. *Id.*

Here, unlike in *Woolner*, the employer did not accept a preexisting condition with strain conditions. Moreover, as the ALJ explained, the record includes no acceptance of a “combined condition.” The employer initially accepted only lumbar and thoracic strains. (Exs. 46, 62). When it closed the claim on November 19, 2009, the employer issued an updated notice of acceptance indicating that the accepted conditions were “lumbar strain and thoracic strain.” (Ex. 66-6).

In addition, although the denial references alleged “preexisting” and “combined” conditions, it only acknowledges the acceptance of lumbar and thoracic strains, not “combined conditions.”⁴ Consequently, we find that the employer did not accept a “combined condition.” *See Johnson v. Spectra Physics*, 303 Or 49, 56 (1987) (where there is a written acceptance, the scope of acceptance encompasses only those conditions specifically or officially accepted in writing); *SAIF v. Tull*, 113 Or App 449, 454 (1992) (the scope of an acceptance is a question of fact).

In conclusion, absent acceptance of a combined condition, there is no “baseline” from which the employer might otherwise establish the requisite “ceases” circumstances. Moreover, because a valid denial under ORS 656.262(6)(c) requires a previously accepted combined condition, absent such an acceptance, the employer cannot carry its burden of proving that the otherwise compensable injury “ceased” to be the major contributing cause of claimant’s disability or need for treatment for her low back. *See Lillian A. Wilkinson*, 63 Van Natta 1839, 1843 (2011) (denial of combined condition invalid absent acceptance of a combined condition); *Dezi Meza*, 63 Van Natta 67, 70 (2011) (where acceptance of “combined condition” was invalid, it followed that denial under ORS 656.262(6)(c) was also invalid); *see also Reid v. SAIF*, 241 Or App 496, 503, *rev den*, 351 Or 216 (2011) (in determining the propriety of a combined condition

⁴ We acknowledge that a carrier can accept and deny a “combined condition” in the same document. *Stockdale v. SAIF*, 192 Or App 289 (2004). However, we do not find that the denial here included any such acceptance.

denial, “it is correct * * * to focus on the compensable injury that was shown to have combined with the preexisting condition, and on the actual combined condition that was accepted and then denied.”). Accordingly, we affirm.⁵

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 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 her counsel’s uncontested attorney 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 April 25, 2011, as reconsidered June 6, 2011, is affirmed. For services on review, claimant’s attorney is awarded an assessed fee of \$3,000, 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 April 2, 2012

⁵ We adopt and affirm those portions of the ALJ’s order regarding the evidentiary and attorney fee issues.