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In the Matter of the Compensation of  
**WAUNITA M. PANNELL, Claimant**  
WCB Case No. 08-03132  
ORDER ON REVIEW  
Unrepresented Claimant  
Jeff Gerner, SAIF Legal, Defense Attorneys

Reviewing Panel: Members Lowell and Biehl.

Claimant, *pro se*, requests review of Administrative Law Judge (ALJ) Poland's order that: (1) upheld the SAIF Corporation's denial of claimant's new/omitted medical condition claim for bilateral sacroiliitis, lumbago, and L2-3, L3-43, L4-5 and L5-S1 disc bulges; and (2) declined to assess penalties and attorney fees for allegedly unreasonable claim processing. On review, the issues are scope of acceptance, estoppel, compensability, penalties and attorney fees.<sup>1</sup>

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

Claimant sustained a low back injury when she fell at work on February 20, 1980. Dr. Eaves, a chiropractor, diagnosed a lumbar strain and provided conservative treatment through July 1980. (Exs. 1-5).

On March 5, 1980, SAIF accepted claimant's injury claim without specifying the nature of the compensable condition. (Ex. 6). A 1981 Determination Order awarded no permanent disability. Claimant requested a hearing. Following litigation, a Board order awarded 15 percent unscheduled permanent disability for claimant's low back and directed SAIF to pay medical bills and related penalties and attorney fees. (Ex. 69).

In 1982, claimant requested a hearing contesting SAIF's denial of ongoing responsibility for medical treatment under the 1980 claim. A May 3, 1985 stipulation ultimately resolved this matter. (Ex. 76). Claimant also requested

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<sup>1</sup> Because claimant is unrepresented, she may wish to consult the Ombudsman for Injured Workers. She may contact the Ombudsman, free of charge, at 1-800-927-1271, or write to:

OMBUDSMAN FOR INJURED WORKERS  
DEPT OF CONSUMER & BUSINESS SERVICES  
PO BOX 14480  
SALEM, OR 97309-0405

a hearing when SAIF did not pay for treatment provided by Dr. Herbert, a chiropractor, in 1983. An August 3, 1984 stipulation resolved this matter. (Ex. 73).

Claimant experienced ongoing and worsening low back pain, with intermittent leg symptoms thereafter. In 2005, she sought treatment from Dr. McDonald, a neurosurgeon. Based on Dr. McDonald's diagnoses, claimant asked SAIF to accept bilateral sacroiliitis, lumbago, and L2-3, L3-4, L4-5, and L5-S1 disc bulges under the 1980 claim. SAIF denied claimant's request and asserted that the accepted condition was a "lumbar strain." (Ex. 109). Claimant requested a hearing.

The ALJ upheld SAIF's denial, finding that the scope of SAIF's acceptance was limited to a lumbosacral strain. The ALJ reasoned that SAIF's denial of the newly claimed conditions was neither precluded by prior litigation orders or stipulations, nor estopped by SAIF's claim processing. In addition, the ALJ found the medical evidence insufficient to establish that the claimed conditions were compensable. Finally, the ALJ held that claimant was not entitled to penalties or attorney fees for SAIF's allegedly unreasonable claim processing.

Claimant renews her argument that SAIF accepted more than a lumbar strain, contending that it was aware that the 1980 injury never was just a "strain." Claimant relies on evidence generated after SAIF's March 1980 acceptance. However, as the ALJ explained, we determine the scope of the unspecified formal acceptance by examining the *contemporaneous* medical evidence; *i.e.*, the medical evidence existing at the time of acceptance.

Here, at the time of the acceptance, the only condition identified was a lumbar strain -- as diagnosed by Dr. Eaves, claimant's then-treating chiropractor. (See Ex. 5). Based on this evidence, we agree with the ALJ's conclusion that SAIF only accepted a lumbar strain.<sup>2</sup> See *Judy A. Cooper*, 62 Van Natta 884, 885-86 (2010) (where the only condition identified as affecting the claimant's low back at the time of the carrier's acceptance was a "sprain-strain," a later-diagnosed disc condition was outside the scope of the "sprain-strain" acceptance).

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<sup>2</sup> We acknowledge claimant's contention that Ex. 101A, entitled "WCD History Report" (with a caption that includes a SAIF logo and a footer indicating "created on 3/10/2008"), establishes that SAIF knew that the 1980 injury included spinal injury. However, because the record does not establish that SAIF had such information when it accepted the claim in March 1980, this document does not establish the scope of the acceptance.

Claimant also argues that “post-acceptance” litigation orders, stipulations, SAIF’s payment of medical bills, and the Board’s previous 15 percent permanent disability award establish that the accepted condition was not just a lumbar strain. However, as the ALJ explained, neither the permanent disability award nor payment for medical services constitute acceptances of conditions. Therefore, neither the award nor the payments precluded SAIF from denying the new/omitted medical condition claim. *See* ORS 656.262(10); *see, e.g., Ronald D. Schumacher*, 60 Van Natta 3194, 3195 (2008) (carrier not precluded from denying the claimant’s arthritis, which had not been formally accepted, even if it had been rated in a prior final litigation order).

Moreover, neither the Board’s prior orders nor the parties’ stipulations expand or amend SAIF’s 1980 formal acceptance. *See, e.g., James M. McEnroe, III*, 62 Van Natta 684, 686 (2010) (pursuant to its *de novo* review authority, a Board order replaces an ALJ’s order) (citing *Patricia L. McVay*, 48 Van Natta 317 (1996)).

Finally, we agree with the ALJ’s conclusion that the record does not establish that SAIF falsely represented the scope of its acceptance. Accordingly, because SAIF is not estopped from denying claimant’s new/omitted medical condition claim, we next consider whether the claims are compensable, based on the medical evidence.<sup>3</sup>

For purposes of this discussion, we assume that Dr. McDonald’s 2006 diagnoses (bilateral sacroiliitis, lumbago, and L2-3, L3-4, L4-5, and L5-S1 disc bulges) accurately describe claimant’s low back condition. *See Maureen Y. Graves*, 57 Van Natta 2380, 2381 (2005) (proof of the existence of the condition is a fact necessary to establish the compensability of a new/omitted medical condition). For convenience, we refer to these conditions hereafter as claimant’s “current low back condition.”

Considering the passage of time since the 1980 injury, the causation issue is a complex medical question that must be resolved by medical evidence. *See Uris v. State Comp. Dep’t*, 247 Or 420, 426 (1967); *Barnett v. SAIF*, 122 Or App 279, 283 (1993).

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<sup>3</sup> Our decision does not mean that claimant no longer has an accepted low back strain. On the contrary, the low back strain remains accepted and claimant is entitled to lifetime medical services that are materially related to that condition. *See* ORS 656.245(1).

Drs. Bert, Neumann, and Vessely, orthopedists, provide the medical evidence addressing the etiology of claimant's current low back condition. Drs. Neumann and Vessely examined her at SAIF's request in 2008 and 2009.

Claimant challenges the ALJ's reliance on the opinions of Drs. Neumann and Vessely, contending that they were based on an inaccurate history that she had low back degeneration before her injury.<sup>4</sup> (*See* Ex. 130-12-13). We need not determine whether the examining physicians' opinions were based on accurate histories, because we find the medical evidence insufficient to prove the current claim without relying on those opinions (and even if claimant did not have significant lumbar degeneration before the 1980 work injury). We reason as follows.

Claimant relies on the opinion of Dr. Bert, an orthopedist who provided conservative low back treatment in 1980, 1981, and 2008. (*See* Exs. 29, 33, 35, 38, 116, 154).<sup>5</sup> Claimant notes that Dr. Bert examined claimant just months after her compensable injury, whereas the examining physicians did not see her until 27 and 29 years after the injury.

In 2008, Dr. Bert examined claimant (after not seeing her for 27 years) and reviewed her history, films, and test results. His impression was "Multi-level disk disease with chronic pain worsening." Dr. Bert opined, "I believe her pain is a combination of injury and age related changes and that the injury she had back in 1980 certainly would contribute to the acceleration of multi-level disk degeneration in her low back."<sup>6</sup> (Ex. 116-3).

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<sup>4</sup> Drs. Cornog, Matteri, and Bert provided the contemporaneous medical evidence describing claimant's 1980 and 1981 low back film findings. According to Dr. Cornog, claimant's lumbar spine was "normal," with "minimal arthritic change, if any." (Exs. 1, 21, 34). According to Drs. Bert and Matteri, claimant's spine was "somewhat degenerated," with "mild L5-S1 spondylosis." (Exs. 13, 23, 29-2, 33, 38; *see* Exs. 11, 46). We need not evaluate the significance of these opinions, however, because they do not impact our reasoning regarding the cause of claimant's current low back condition.

<sup>5</sup> In November 1980 (after the March 1980 acceptance), Dr. Bert examined claimant, reviewed her history and x-rays, and opined: "This has elements of chronic subacute disc syndrome." (Ex. 29-2). In January 1981, noting claimant's symptoms, and the absence of gross or sensory impairment on examination, Dr. Bert commented, "I feel we are still dealing with a lumbar strain." (Ex. 35). In March 1981, Dr. Bert reported that claimant had "a chronic lumbar strain with some degenerative disc disease." (Ex. 38).

<sup>6</sup> Finally, in 2010, Dr. Bert opined that claimant had severe work restrictions because of her multi-level degenerative disk disease. (Ex. 154).

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Thus, in describing claimant's current low back pain, Dr. Bert did not expressly address any of the currently claimed conditions. In the absence of a thorough analysis attributing specific conditions to either claimant's work injury or her accepted low back strain, the record does not persuasively establish the compensability of her new/omitted medical condition claims.<sup>7</sup> ORS 656.005(7)(a), (A).

Accordingly, we affirm the ALJ's decision upholding SAIF's denial of claimant's new/omitted medical condition claim for bilateral sacroiliitis, lumbago, and L2-3, L3-4, L4-5 and L5-S1 disc bulges.

### ORDER

The ALJ's order dated August 12, 2011 is affirmed.

Entered at Salem, Oregon on January 24, 2012

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<sup>7</sup> We acknowledge claimant's argument that doctors should not be required to use "magic words." However, as noted, the etiology of claimant's current condition must be determined by medical experts. *See Benz v. SAIF*, 170 Or App 22, 25 (2000) (although the Board may draw reasonable inferences from the medical evidence, it is not free to reach its own medical conclusions in the absence of such evidence).