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In the Matter of the Compensation of  
**DAVIS W. DAWLEY, Claimant**  
WCB Case No. 11-04292  
ORDER ON REVIEW  
Hooton Wold & Okrent LLP, Claimant Attorneys  
Holly O'Dell, SAIF Legal, Defense Attorneys

Reviewing Panel: Members Weddell and Langer.

Claimant requests review of Administrative Law Judge (ALJ) Fulsher's order that upheld the SAIF Corporation's denial of his new/omitted medical condition claim for left hip osteoarthritis. On review, the issue is compensability. We affirm.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact," with the following summary.

Claimant sustained a work-related left hip injury in 2008. In May 2009, SAIF accepted "left femoral neck bone bruise combined with one or more qualifying statutory preexisting conditions, including arthritis of the left hip[] and left hip strain combined with one or more qualifying statutory preexisting conditions, including arthritis of the left hip." (Ex. 22). A week later, SAIF denied the accepted combined condition, asserting that the accepted injury was no longer the major contributing cause of the combined condition. (Ex. 25). The claim was closed on May 26, 2009.<sup>1</sup> (Ex. 26).

On July 7, 2009, claimant requested acceptance of "symptomatic osteoarthritis of the left hip" and requested that the acceptance also be modified to eliminate all references to a combined condition. (Ex. 27). On January 21, 2010, a hearing was held before a prior ALJ concerning the *de facto* denial of that condition, as well as claimant's objections to the accepted combined condition and SAIF's "ceases" denial. (Ex. 35A). Finding that the claimed new/omitted medical condition was a combined condition and that SAIF had met its burden of proving that the major cause of the condition was not the injury, the prior ALJ upheld the *de facto* denial of claimant's new/omitted medical condition claim. (Ex. 36-5). The prior ALJ also upheld SAIF's "combined condition" denial under ORS 656.262(6)(c), as it related to the accepted combined hip strain and contusion conditions. (Ex. 36-6).

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<sup>1</sup> A September 25, 2009 Order on Reconsideration affirmed the Notice of Closure. (Ex. 32).

On review, we affirmed the prior ALJ's order as it pertained to SAIF's current combined condition denial. We also affirmed the prior ALJ's conclusion that claimant's new/omitted medical condition claim for "systematic osteoarthritis" was not compensable, but on different grounds. *Davis W. Dawley*, 62 Van Natta 2850 (2010). We reasoned that the new/omitted medical condition claim was for symptoms of previously accepted conditions (left hip strain and left femoral neck bone bruise combined with preexisting osteoarthritis), and did not exist as a condition distinguishable from the accepted combined condition. Because claimant's new/omitted medical condition claim was for symptoms of the preexisting osteoarthritis condition, and not for a "condition," the *de facto* denial was upheld. *Id.* at 2852-53; (*see also* Ex. 37-3-4).

In June 2011, claimant asked SAIF to modify its acceptance to include "osteoarthritis of the left hip." (Ex. 38). SAIF denied the claim, contending that the claim was precluded by our prior order. (Ex. 39). Subsequently, SAIF also asserted that the claimed condition was not compensably related to the work injury. (Exs. 39, 39A). Claimant requested a hearing.

### CONCLUSIONS OF LAW AND OPINION

The ALJ concluded that claimant's left hip osteoarthritis condition was part of a "combined condition," and that a preponderance of the evidence supported a conclusion that the work injury was not the major contributing cause of the disability or need for treatment of the combined osteoarthritis condition.<sup>2</sup> Consequently, the ALJ upheld SAIF's denial.

We agree with the ALJ's decision that SAIF's denial should be upheld. However, we reach that conclusion because the record does not establish that claimant's osteoarthritis in its status as an "independent" claim exists separately from its status as the "preexisting condition" component of the previously accepted combined condition(s).<sup>3</sup> We reason as follows.

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<sup>2</sup> In its closing argument to the ALJ, SAIF clarified that it "does not necessarily believe that any preclusion argument is appropriate; for or against claimant." Specifically, SAIF concluded that it "would agree in this case that there is no preclusive effect regarding any party because of previously accepted and litigated 'different' conditions." Based on SAIF's position, the ALJ's order stated that "SAIF did not raise" a preclusion argument. (O & O, p. 4, n 1). This conclusion is not contested on review.

<sup>3</sup> There is no dispute that the preexisting condition that was previously accepted as part of the combined conditions was also preexisting "osteoarthritis," or for that matter, that claimant's osteoarthritis qualifies as a preexisting condition under ORS 656.005(24). (*See also* Exs. 36, 37).

Following a November 2008 evaluation, Dr. Button assessed a left femoral neck bone contusion related to claimant's August 2008 work incident. She also noted that claimant had preexisting severe bilateral hip osteoarthritis that was asymptomatic before the work incident. (Ex. 10-4). Dr. Button expected the pain from the bone contusion to resolve, but that "at some point if [claimant] has continued pain, then [his underlying, though previously asymptomatic osteoarthritis] may be the primary issue." (*Id.*)

In December 2008, Dr. Kayser, one of claimant's treating physicians, indicated that the osteoarthritis was preexisting and that claimant might have had a twisting incident to his hip that should rapidly resolve and that the twisting incident could have aggravated his preexisting condition and prolonged the need for treatment and disability. He opined that the major contributing factor of claimant's hip condition was the previous arthritic hip and not the twisting incident. (Ex. 12).

Thereafter, claimant returned to Dr. Button with continued pain that was "similar or perhaps a little bit worse." (Exs. 13, 14). Dr. Button explained that a bone bruise may take quite a while to heal, and she reiterated that "at some point" the hip osteoarthritis would be the "primary pain generator," which "should be amenable to treatment in physical therapy" and that claimant should consider a left hip joint injection in the future, which she believed would "relieve the portion of his pain coming from osteoarthritis." (Exs. 13-2, 14-2). Dr. Button later agreed with Dr. Herman, another treating physician, that claimant also had a work-related left hip strain "superimposed" on his preexisting osteoarthritis. (Ex. 17-2).

By February 26, 2009, claimant's pain had continued to worsen. Dr. Button performed a left hip joint injection on March 5, 2009. (Exs. 15-2, 17-1). Based on claimant's "excellent response" to the injection (which "significantly decreased" his pain), Dr. Button concluded that "the hip strain or a bone bruise were no longer the primary contributing factors to pain generation at some time prior to the injection of March 5, 2009," and that "the primary cause of disability and need for treatment by the time of the March 5, 2009 injection had already become the now symptomatic osteoarthritis of the left hip." (Ex. 20-3).

Dr. Vessely examined claimant on behalf of SAIF on March 23, 2009. He diagnosed "probable compressive injury from August 27, 2008, at least causing bone edema in the left femoral neck," and "preexisting advanced osteoarthritis, bilateral hips, greatest left side." (Ex. 19-8). He opined that, although the work incident was a material contributing cause of claimant's need for treatment/disability for the bone bruise, claimant's "major problem" by the time of

his examination was the preexisting osteoarthritis. (Ex. 19-8, -9). He determined that the work incident combined with the preexisting condition, and that the work incident was the major cause of the need for treatment “up until March 2009.” (Ex. 19-10).

Although agreeing that the injury caused the preexisting osteoarthritis to become “symptomatic,” Dr. Vessely did not believe that the incident caused a “pathological worsening” of the condition. (Ex. 35-8, -9). He also stated that the treatment modalities performed by Dr. Button during the “open period” of claimant’s claim, such as the hip injection, were directed towards the acute conditions related to the injury, namely the hip strain and bone bruise, and were not directed at the underlying osteoarthritis. He explained that a strain and bone bruise can cause inflammation of the hip that the injection will relieve. (Ex. 33-1).

During deposition, Dr. Vessely was asked to explain why the injury would not still be the major contributing cause of the disability until claimant had returned to “baseline.” To answer that, Dr. Vessely responded that he would have to weigh claimant’s symptoms and his pathology. He explained that, “in my opinion, the symptoms never come up – then we’re talking about a combined condition. The symptoms never come up to the major contributing level of comparing his pathology. Now, if there’s any contribution and if there’s any association between pain and the responsibility for treatment, then you have a connection, and I’d have to say yes, I do believe that his hip has been more painful after the incident than was before the incident.” (Ex. 35-15).

Dr. Button agreed with Dr. Vessely that claimant’s condition requiring treatment was properly characterized as a combined condition consisting of his preexisting osteoarthritis combined with a hip strain and/or a femoral neck bone bruise, and that the strain and bruise conditions were no longer the major contributing cause of claimant’s disability and need for treatment. (Ex. 24-1). Dr. Button also agreed that the injury was the major cause of claimant’s “symptoms from his osteoarthritis,” but was not the major cause of the condition itself. (Ex. 34-13; *see also* Ex. 30).

Thus, the medical evidence up until the time of the prior litigation (January 2010) was in agreement that claimant’s August 2008 injury made his preexisting osteoarthritis condition “symptomatic,” and that those symptoms required treatment, but that the preexisting condition was the major contributing cause of claimant’s need for treatment by March 2009, when the “otherwise compensable” contusion and strain injuries “ceased to be” the major contributing cause.

As previously discussed, in our November 2010 order, we held that claimant's new/omitted medical condition claim for "symptomatic osteoarthritis of the left hip" was for symptoms of the preexisting osteoarthritis condition, and not for a "condition." *Id.* at 2852-53; (*see also* Ex. 37-3-4). Following our decision, in response to SAIF's inquiry, Dr. Vessely opined that claimant had a "separate" osteoarthritis condition that existed independent from those previously accepted, and that it was a "combined condition." (Ex. 40). He explained that the osteoarthritis preexisted the injury in an asymptomatic state, but the kinetic energy of the injurious event combined with the preexisting asymptomatic osteoarthritis condition to change "the character" of the condition into a symptomatic osteoarthritis condition. (Ex. 40-3). He explained that in this instance, the combination was one where the injury contributed to bringing about a new characteristic of the whole preexisting osteoarthritis condition, and that it was "this aspect of the osteoarthritis, its current symptoms, that were treated following the injury incident of August 2008 and is this aspect of the osteoarthritis that is the medical condition involved in this combined condition." (*Id.*) Finally, Dr. Vessely opined that although the work injury may have contributed to claimant's treatment for the osteoarthritis following the injury, the injury was never the major contributing cause of the need for treatment of the combined osteoarthritis condition. (Ex. 40-4).

We acknowledge that claimant can bring an "independent" claim for his left hip osteoarthritis. *See* ORS 656.267; *Kenneth Anderson*, 60 Van Natta 2538, 2543 (2008), *aff'd without opinion*, 233 Or App 227 (2010) (addressing the compensability of "lumbar facet joint injury syndrome" as an independent claim under ORS 656.267, which was separate and distinct from the condition as a component of the combined lumbar strain condition, and the ongoing compensability of the combined lumbar strain condition under ORS 656.262(6)(c)). However, here, Dr. Vessely's opinion does not persuasively explain a difference between the currently claimed osteoarthritis and the arthritis that was previously accepted as a "preexisting condition" component of the combined condition. Given Dr. Vessely's earlier opinions regarding the nature of claimant's osteoarthritis condition and its existence as a preexisting condition that combined with the otherwise compensable strain and contusion conditions, we do not find particularly persuasive his singular opinion (prompted by the current litigation) that the osteoarthritis exists as an independent condition distinct from its status as the preexisting component of the previously accepted combined conditions.

Moreover, for a combined condition, there must be “two conditions that merge or exist harmoniously.” See *Luckhurst v. Bank of Am.*, 167 Or App 11, 17 (2000) (a combined condition may exist where there are “two conditions that merge or exist harmoniously”); *Multifoods Specialty Distrib. v. McAfee*, 164 Or App 654, 662 (1999) (a “combined condition” may exist as “either an integration of two conditions or the close relationship of those conditions, without integration”). As indicated by the above opinions, claimant does not have two separate osteoarthritis conditions. Rather, the medical record supports a conclusion that his disability/need for treatment was attributable to his work-related contusion/strain in combination with his preexisting osteoarthritis condition (which was made symptomatic by the work injury). The fact that the injury made his preexisting condition symptomatic does not lead to the conclusion that there are two separate *conditions* that merged or existed harmoniously.

Under these circumstances, we agree with the ALJ’s conclusion that SAIF’s denial of claimant’s new/omitted medical condition claim for left hip osteoarthritis should be upheld. Accordingly, we affirm.

#### ORDER

The ALJ’s order dated March 29, 2012 is affirmed.

Entered at Salem, Oregon on November 26, 2012