
In the Matter of the Compensation of
DONALD E. BELL, Claimant
WCB Case No. 10-00134
ORDER DENYING RECONSIDERATION
Hooton Wold & Okrent LLP, Claimant Attorneys
Cummins Goodman et al, Defense Attorneys

Reviewing Panel: Members Lowell, Lanning, and Herman.¹

Pursuant to ORS 183.482(6) and ORAP 4.35, the self-insured employer has moved for withdrawal of the Board's April 26, 2012 Order on Reconsideration that is currently pending on judicial review before the Court of Appeals (CA No. A151371). The employer requests remand for the admission of new evidence.

The employer timely filed a petition for judicial review of the Board's April 26, 2012 decision. ORS 656.295(8). Because the 30-day period within which to withdraw and reconsider that order has expired, jurisdiction of this matter is currently with the court. ORS 656.295(8); ORS 656.298(1); *see Haskell Corp. v. Filippi*, 152 Or App 117 (1998).

Nevertheless, the employer asks that we exercise our authority to withdraw the appealed order in order to reconsider our decision in light of new evidence. *See* ORS 183.482(6); ORAP 4.35; *Glen D. Roles*, 43 Van Natta 278 (1991). Specifically, the employer contends that the new evidence is directly relevant to the question of what shoulder pathology claimant has that gave rise to his disability and need for treatment. It claims that the new evidence shows that any disability or need for treatment claimant had does not relate to the claimed right shoulder "SLAP tear type IX" condition. For the following reasons, we deny the employer's motion for reconsideration and remand.²

We may remand to the ALJ if we find that the case has been "improperly, incompletely or otherwise insufficiently developed[.]" ORS 656.295(5). There must be a compelling reason for remand to the ALJ for the taking of additional

¹ Although Member Biehl was on the reviewing panel that issued our prior decision, his term subsequently expired. Therefore, Member Lanning has participated in this decision.

² In reaching this decision, we note that we rarely exercise our authority to withdraw a prior order that is presently on appeal to the court. *See, e.g., Carole A. VanLanen*, 45 Van Natta 178 (1993).

evidence. *SAIF v. Avery*, 167 Or App 327, 333 (2000). A compelling reason exists when the new evidence (1) concerns disability; (2) was not obtainable at the time of the hearing; and (3) is reasonably likely to affect the outcome of the case. *Id.*; *Compton v. Weyerhaeuser Co.*, 301 Or 641, 646 (1986).

“Post-hearing” surgery reports may result in remand when they are reasonably likely to affect the outcome of the particular case. *See Gary E. Miller*, 58 Van Natta 2026, 2026-2027 (2006) (remanding for consideration of “post-hearing” surgery report where the new evidence was likely to affect the outcome of the case). Thus, we turn to the question of whether the “post-hearing” surgery report is reasonably likely to affect the outcome of this case. *See Parmer v. Plaid Pantry # 54*, 76 Or App 405 (1985).

The employer argues that the proffered evidence is reasonably likely to affect the outcome of the case because it concerns “post-hearing” surgical findings of a “Type II SLAP tear,” as opposed to the claimed and denied, “SLAP tear type IX.” In support of this proposition, the employer notes that claimant has the burden to prove that this claimed new/omitted medical condition exists. *See Maureen Y. Graves*, 57 Van Natta 2380, 2381 (2005) (“[P]roof of the existence of the condition is a fact necessary to establish compensability of a new or omitted medical condition.”). Here, the treating surgeon, based on direct observations at the “post-hearing” surgery, concluded that claimant did not have and has never had a “type IX” SLAP tear, but instead he has a “type II” SLAP tear. Based on such circumstances, the employer contends that claimant cannot prove the existence of the claimed condition, which “clearly” affects the outcome of the case.

We acknowledge that claimant made a specific claim for a “SLAP tear type IX,” which the employer denied. However, although the specifically denied claim was for “SLAP tear type IX,” the ALJ’s and Board’s orders establish that the compensability issue that was actually litigated was “SLAP tear.”³ *See Weyerhaeuser Co. v. Bryant*, 102 Or App 432, 435 (1990) (parties may, by express or implicit agreement, try an issue that falls outside the express terms of a denial); *Ryan A. Orr*, 64 Van Natta 161 (2012); *Lyle E. Sherburn*, 59 Van Natta 632 (2007).

Furthermore, we recognize that, as a general rule, a claimant is required to establish the existence of a new/omitted medical condition. *See Graves*, 57 Van Natta at 2381. However, based on the ALJ’s order, as well as the Board’s orders,

³ The appellate record has previously been forwarded to the court in response to the employer’s petition for judicial review. Therefore, our decision is based on the ALJ’s order and the Board’s orders, as well the employer’s submission. For the reasons expressed above, those materials do not support a conclusion that the employer’s motion should be granted.

the disputed issue concerned the causal relationship between claimant's work incident and his need for treatment/disability for a "SLAP tear." That description of the contested condition (SLAP tear) did not include a reference to any particular "type" of tear. Thus, the "existence" of the condition (however described) was not contested.⁴ When "existence" of a new/omitted medical condition is not disputed, we need not address that aspect of the claim. *See, e.g., Colt E. Wright*, 65 Van Natta 656 (2013); *Jerry W. Page*, 65 Van Natta 443 (2013); *Kristina Redfern*, 64 Van Natta 1479 (2012). Moreover, there is no indication that there was any objection to proceeding with the compensability issue (as so described).

Under such circumstances, the proffered evidence, which goes to the "existence" of the claimed condition (and does not address the focal issue, *i.e.*, *causation* of claimant's SLAP tear condition (whatever the diagnosis)), is not reasonably likely to affect the outcome of the case. Consequently, there is no compelling reason for remand to the ALJ for the taking of additional evidence. *See Shawn V. Saunders*, 60 Van Natta 2482 (2008) (where "post-hearing" surgery report did not provide enlightenment on the "legal causation" issue, consideration of such a report was unlikely to affect the outcome of the case and remand was denied); *Adelma F. Pena-Hernandez*, 57 Van Natta 2995 (2005) (where the ALJ's order listed the theory of compensability as a consequential condition, and neither party contested that on review, "post-hearing" surgical finding supporting a "direct injury" theory was not reasonably likely to affect the outcome of the case; remand denied); *Carla J. Foster*, 49 Van Natta 1292, *recons*, 49 Van Natta 1439 (1997) (where the primary issue on review was whether the claimant's condition was caused in major part by her work, proffered evidence pertaining to the claimant's *diagnosis* was not reasonably likely to affect the outcome as it did not address the causation of the condition).

Accordingly, we deny the employer's request for withdrawal of the Board's order.

IT IS SO ORDERED.

Entered at Salem, Oregon on April 24, 2013

⁴ The ALJ's order described the issue as compensability of a "new/omitted medical condition claim for a right shoulder SLAP tear." In appealing the ALJ's order, the employer did not dispute that characterization on review. Rather, as reflected in the Board's orders, the compensability issue concerned the causal relationship between claimant's right shoulder SLAP tear and the work event.