
In the Matter of the Compensation of
FELIX R. SANCHEZ, Claimant
WCB Case No. 11-02388
ORDER ON REVIEW
Hooton Wold & Okrent LLP, Claimant Attorneys
Lyons Lederer LLP, Defense Attorneys

Reviewing Panel: Members Lowell and Weddell.

Claimant requests review of Administrative Law Judge (ALJ) Jacobson's order that upheld the self-insured employer's denial of his occupational disease claim for L4-5 and L5-S1 degenerative disc disease. In its respondent's brief, the employer contests that portion of the ALJ's order which determined that claimant's occupational disease claim for the L5-S1 level was not precluded. On review, the issues are claim preclusion, administrative notice, and compensability.¹ We affirm.

FINDINGS OF FACT

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

CONCLUSIONS OF LAW AND OPINION

With its respondent's brief, the employer has attached a transcript of a previous hearing before another ALJ and requests that we take administrative notice of it for the limited purpose of establishing the procedural posture and chronology of prior litigation.

We have no authority to consider evidence not in the record. However, we may take administrative notice of facts "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned," including agency orders. *See* ORS 40.065(2); ORS 656.295(5); *Groshong v. Montgomery Ward Co.*, 73 Or App 403 (1985); *Gary L. Goodeagle*, 47 Van Natta 628 (1995).

¹ The employer contends that those portions of claimant's reply brief that address the compensability issue should be stricken because he did not timely file an appellant's brief and because it confined its respondent's brief to only the "claim preclusion" issue. Yet, the employer's respondent's brief also included statements requesting that the ALJ's order upholding its claim denial should be affirmed. Under such circumstances, claimant's reply is not solely limited to the preclusion issue. Consequently, claimant's arguments have been considered. *See George T. Cooper*, 44 Van Natta 493 (1992); *Virgil E. Brogan*, 40 Van Natta 67 (1988) (where the carrier filed a respondent's brief requesting that the referee's order be affirmed, the claimant was entitled to file a reply, despite not filing an appellant's brief).

Here, we need not decide whether we may take administrative notice of the transcript, because, even if we could do so, it would not affect the outcome of this appeal.² We reason as follows.

The ALJ rejected the employer's argument that claimant's occupational disease claim for L5-S1 degenerative disc disease was barred by claim preclusion. On review, the employer contests that determination.

Regardless of whether the claim is barred, we agree with the ALJ's reasoning that medical evidence does not establish that claimant's work activities were the major contributing cause of the claimed "occupational disease" conditions. We further supplement the ALJ's reasoning as follows.

In upholding the employer's denial of claimant's occupational disease claim for both L5-S1 and L4-5 degenerative disc disease, the ALJ determined that Dr. Gritzka's opinion supporting compensability was unpersuasive. Claimant contests that determination, arguing that Dr. Gritzka's opinion is sufficient to carry his burden of proof. We disagree.

Dr. Gritzka testified at one point that, because he lacked "data" about claimant's job, he could not say that claimant's employment was the major contributing cause of the disputed degenerative disc disease. (Ex. 88-21). Yet, Dr. Gritzka subsequently testified that claimant's employment activities were the major contributing cause of the disputed conditions. *Id.* at 28. Dr. Gritzka's testimony implied that the reason for his changed testimony was information provided about "jackhammering" that claimant performed. *Id.* Nevertheless, Dr. Gritzka had documented that activity in his initial report. (Ex. 79A-2). Under such circumstances, we do not find Dr. Gritzka's opinion to be persuasive.

Accordingly, we are not persuaded that claimant has satisfied his burden of proof. Thus, we affirm.

ORDER

The ALJ's order dated May 28, 2013 is affirmed.

Entered at Salem, Oregon on December 4, 2013

² We further note that the employer has not explained why this transcript was unobtainable through the exercise of due diligence at the time of the hearing. In the absence of such an explanation, we would be disinclined to consider the transcript for "administrative notice" purposes.