
In the Matter of the Compensation of
KENT C. ROGERS, Claimant
WCB Case Nos. 10-03329, 10-01145
ORDER ON REVIEW
Hooton Wold & Okrent LLP, Claimant Attorneys
Thaddeus J Hettle & Assoc, Defense Attorneys

Reviewing Panel: Members Weddell and Lowell.

The self-insured employer requests review of those portions of Administrative Law Judge (ALJ) Sencer's order that: (1) set aside its denial of claimant's combined cervical spine condition; and (2) found that claimant's disputed medical services were causally related to his accepted cervical spine conditions. On review, the issues are compensability and medical services. We reverse.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact," as modified and supplemented herein.

Claimant was compensably injured in June 2008. His claim was initially accepted as a nondisabling injury for "cervical, thoracic, lumbosacral strain."

On July 23, 2009, the employer issued a modified Notice of Acceptance for "cervical, thoracic, lumbosacral strain, cervical facet syndrome combined with preexisting multilevel cervical spondylosis (arthritis)," and dated that acceptance back to the June 2008 date of injury (Ex. 64). On July 26, 2009, the employer issued a denial, stating that, "as of November 2, 2009, [claimant's] accepted injury was no longer the major contributing cause of [the] cervical condition for which [he] ha[d] continued to receive treatment."¹ (Ex. 65). The employer also refused to pay for certain medical services from November 2, 2009 through May 7, 2010.

Claimant requested a hearing, challenging the validity of the combined condition acceptance and denial, as well as the medical services denial.

¹ The parties agree that the employer's denial was of claimant's current combined cervical condition.

CONCLUSIONS OF LAW AND OPINION

In challenging the denials, claimant argued that his preexisting multilevel cervical spondylosis did not qualify as “arthritis” within the meaning of ORS 656.005(24)(a) and *Hopkins v. SAIF*, 349 Or 348, 364 (2010), and was, therefore, not a statutory “preexisting condition.” More specifically, he contended that the *Hopkins* definition of “arthritis” required “a causal chain” with joint inflammation occurring first and resulting in “structural change.” (Tr. 18-20). Thus, according to claimant, *Hopkins* defined “arthritis” to include “psoriatic or rheumatoid arthritis, but not osteoarthritis,” because with the latter condition “the structural change comes first and the inflammation is a secondary consequence of [that change].” (Tr. 18). Asserting that his preexisting cervical spondylosis is a form of “osteoarthritis,” claimant contended that it did not constitute “arthritis” or, consequently, a statutory “preexisting condition.” Therefore, he asked the ALJ to set aside the employer’s combined condition “ceases” denial, as well as its medical services denial, both of which were predicated on a determination that his neck condition involved a “combined condition.”

The ALJ set aside the employer’s denials, agreeing with claimant’s theory outlined above. On review, the employer challenges that theory. Alternatively, the employer contends that, if not “arthritis,” claimant’s preexisting cervical spondylosis qualifies as an “arthritic condition” under ORS 656.005(24)(a)(A). Therefore, the employer requests that we uphold its denials.

For his part, claimant requests that we affirm the ALJ’s order (and adopt that reasoning). In the event that we find that claimant’s spondylosis is “arthritis” within the meaning of ORS 656.005(24)(a), he argues that we should nevertheless set aside the employer’s denial because that condition did not contribute to his disability or need for treatment. Alternatively, claimant contends that the employer was precluded from issuing its denial under *Georgia-Pacific v. Piwovar*, 305 Or 494 (1988).

We agree with the employer that its denials should be upheld because it has proven that claimant’s multilevel cervical spondylosis is “arthritis,” and, therefore, a statutory “preexisting condition.”² We further reject claimant’s assertion that *Piwovar* bars the employer’s denial. We reason as follows.

² Consequently, we do not address whether the cervical spondylosis is an “arthritic condition” within the meaning of ORS 656.005(24)(a)(A).

Compensability

If an “otherwise compensable injury” combines with a “preexisting condition” to cause or prolong disability or a need for treatment, the combined condition is compensable only insofar as the “otherwise compensable injury” is the major contributing cause of the disability or need for treatment of the combined condition. ORS 656.005(7)(a)(B). A “combined condition” requires that two conditions merge or exist harmoniously. *Luckhurst v. Bank of Am.*, 167 Or App 11, 16-17 (2000); *Multifoods Specialty Distrib. v. McAtee*, 164 Or App 654, 662 (1999).

If the carrier asserts that a claimant suffers from a “combined condition,” the carrier bears the burden to show a “combined condition” by proving that the claimant suffers from a preexisting condition, as defined by ORS 656.005(24), and that the claimant’s condition is a combined condition. ORS 656.005(7)(a)(B); ORS 656.266(2)(a); *SAIF v. Kollias*, 233 Or App 499, 505 (2010); *Peter L. Busby*, 64 Van Natta 396, 397 (2012). Unless the carrier makes that showing, an acceptance of a “combined condition” is invalid. *Efren S. Alonso-Santos*, 64 Van Natta 1340, 1341 (2012); *Dezi Meza*, 63 Van Natta 67, 70 (2011).

After a carrier accepts a combined condition, it may deny the combined condition if the otherwise compensable injury ceases to be the major contributing cause of the combined condition. ORS 656.262(6)(c), (7)(b). In combined condition injury claims, the carrier bears the burden to prove such a cessation. ORS 656.266(2)(a); *Washington County-Risk v. Jansen*, 248 Or App 335 (2012); *Wal-Mart Stores, Inc. v. Young*, 219 Or App 410, 419 (2008).

For injury claims, a “preexisting condition” must be an injury, disease, congenital abnormality, personality disorder, or similar condition that contributes to disability or need for treatment. ORS 656.005(24)(a). Additionally, unless it is “arthritis or an arthritic condition,” claimant must have been diagnosed with such condition, or obtained medical services for symptoms of the condition, before the initial injury. (*Id.*)

Here, the employer does not contend that claimant was diagnosed with or received medical services for the symptoms of his preexisting multilevel cervical spondylosis condition before the June 2008 work injury. *See* ORS 656.005(24)(a)(A). Therefore, claimant may only have a statutory “preexisting condition” if it was “arthritis or an arthritic condition.” (*Id.*) It is that question that primarily divides the parties. Therefore, we turn to that dispute.

In *Hopkins*, 349 Or at 355, the court “beg[a]n by confirming that the meaning of a statutory term [such as “arthritis”] is a matter of law, not a question of fact for expert testimony.” To “identify the correct interpretation” of “arthritis,” the court began “by considering the meaning of that term and the context in which the legislature used it,” and then determined that it was necessary to “consult the legislative history that the parties proffer[ed].” *Id.* at 356 (citing *State v. Gaines*, 346 Or 160 (2009), and *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610 (1993)). After reviewing that history, the court concluded that “the legislature intentionally left the word ‘arthritis’ undefined and understood that the task of defining it would be left to the common law, the board, and the appellate courts.” *Id.* at 360.

“With that understanding of the legislature’s intent,” the court “proceeded as follows”:

“First, we must identify the various definitions or usages that the term ‘arthritis’ had in 2001 and endeavor to identify their common elements. Those common or core elements would have been considered essential to the definition of the term ‘arthritis,’ and the legislature surely intended to include them within its meaning. After identifying those common or core elements, we will then consider the parties’ arguments that we interpret the term ‘arthritis’ to include additional elements or concepts.”
(*Id.*)

Relying on *Webster’s Third New Int’l Dictionary* 123 (unabridged ed 1993), medical dictionaries (*Stedman’s Medical Dictionary* 149 (27th ed 2000), and *Dorland’s Illustrated Medical Dictionary* 151 (29th ed 2000)), and “appellate court cases decided before 2001,” the court “conclude[d] that ‘inflammation of a joint’ is a core element of the meaning of the term ‘arthritis.’” *Id.* at 361.

The court then observed that *Webster’s* also included “the requirement that inflammation be ‘due to infectious, metabolic, or constitutional causes.’” (*Id.*) The court agreed that such “causes operate to exclude traumatic injury as a cause of ‘arthritis’ and that the legislature intended such an exclusion.” *Id.* at 361-62. Thus, the court “conclude[d] that a core element of the definition of ‘arthritis’ is that inflammation of the joint occur over time and that the *Webster’s* definition requiring that the inflammation of a joint result from ‘infectious, metabolic, or constitutional causes’ carries that concept.” *Id.* at 362.

Next, the court consulted *Black's Medical Dictionary* 42 (39th ed 1999), *Webster's*, and “[e]xpert testimony recounted in appellate cases decided before [2001 that] referred to ‘arthritis’ as ‘degenerative.’” (*Id.*) After doing so, it “conclude[d] that a core element of the definition of ‘arthritis’ is that inflammation of a joint result in breakdown, degeneration, or structural change.” (*Id.*)

The court then addressed the claimant’s contention that “arthritis” should “be limited to inflammation of moveable, or what [the claimant called] ‘freely articulating,’ joints.” *Id.* at 363. In rejecting that contention, the court observed that the medical dictionary definitions relied on by the claimant in support of her position were “definitions of ‘osteoarthritis.’” (*Id.*) Noting that the claimant might be “correct in her definition of ‘osteoarthritis,’ the court concluded that “the legislature did not limit the term ‘arthritis’ to a particular form of ‘arthritis’— ‘osteoarthritis.’” (*Id.*) The court further disagreed with the claimant’s contention that Board cases or appellate cases that had been decided in 2001 supported the proposition that “the legislature intended to limit ‘arthritis’ to the inflammation of mobile joints or to certain joints in the back and not to others.” *Id.* at 363-64.

Finally, noting that neither party proposed “includ[ing] other elements in the definition of the statutory term ‘arthritis,’ the court “decline[d] to do so,” and concluded that the legislature “intended the term ‘arthritis’ to mean the inflammation of one or more joints, due to infectious, metabolic, or constitutional causes, and resulting in breakdown, degeneration, or structural change.” *Id.* at 364.

Here, claimant contends that, under *Hopkins*, the core elements of “arthritis” must occur in a distinct order—*i.e.*, infectious, metabolic or constitutional causes must produce joint inflammation, which then must result in breakdown, degeneration, or structural change. If, however, the aforementioned causes first produce breakdown, degeneration, or structural change, resulting in joint inflammation, claimant contends such conditions are not “arthritis” under *Hopkins*. Relying on Dr. Yoo’s opinion, claimant contends that his preexisting “osteoarthritis” is not “arthritis” because the “causal chain” of that condition does not mirror the purported “chain” required by *Hopkins*. Specifically, claimant contends that Dr. Yoo’s opinion establishes that the degeneration in his cervical spine preceded the joint inflammation. (*See Ex. 70-19-22*).

We find claimant’s contentions unconvincing for several reasons. To begin, we disagree with the assertion that *Hopkins* requires that all three “core elements” of “arthritis” occur in a specific chronological progression. We acknowledge that the court’s summary holding—that the legislature “intended the term ‘arthritis’ to

mean the inflammation of one or more joints, due to infectious, metabolic, or constitutional causes, and resulting in breakdown, degeneration, or structural change”—provides some support for claimant’s position. *See id.* at 364. Nevertheless, when read in context with the rest of the court’s decision, and in light of the issue presented to the court in *Hopkins*, we are not convinced that the court intended to impose, in claimant’s parlance, a strict “causal chain.”

As set forth above, the court’s primary concern in *Hopkins* was identifying the “core elements” of the statutory term “arthritis,” and deciding whether such elements should include the claimant’s proposed limitation of certain joints. The court was not asked to address whether a strict “causal chain” was required for a condition to be “arthritis,” *i.e.*, whether breakdown, degeneration, or structural change resulting in joint inflammation did not qualify as “arthritis.”

Notably, the *Hopkins* court did impose a timing/chronology requirement in one particular respect. Specifically, the court rejected the idea that “traumatically caused inflammation of a joint” qualified as “arthritis,” but rather “conclude[d] that a core element of the definition of ‘arthritis’ is that inflammation of the joint occur over time.” *Id.* at 362. The court explained that the requirement that joint inflammation “result from ‘infectious, metabolic, or constitutional causes’” *carrie[d] that concept.* (*Id.*)

The court made no such express proclamation, however, regarding whether or not the legislature intended to exclude from the definition of “arthritis” those conditions where breakdown, degeneration, or structural change (occurring over time) resulted in joint inflammation, as opposed to the other way around. In the absence of such an express mandate by the court, we decline to hold, as claimant requests, that a condition does not constitute “arthritis” even though all three “core elements” identified in *Hopkins* are otherwise present, but where the joint inflammation results from breakdown, degeneration, or structural change, rather than vice-versa.

Our conclusion is strengthened by other portions of the court’s decision. In declining to adopt the claimant’s proposed limitation of “arthritis,” the court concluded that “the legislature did not limit the term ‘arthritis’ to a particular form of ‘arthritis’—‘osteoarthritis.’” (*Id.*) Claimant’s theory advanced in this case, however, would limit “arthritis” to particular forms of “arthritis.” Specifically, claimant argues that *Hopkins* limited “arthritis” to include only “psoriatic or rheumatoid arthritis” and not “osteoarthritis.” *Hopkins*, however, expressly rejected the idea that “arthritis” should be limited to particular forms. (*Id.*)

Moreover, as the above passage indicates, *Hopkins* implicitly recognized that “arthritis” under ORS 656.005(24)(a)(A) would, at a minimum, include “osteoarthritis.” *See id.* Yet, claimant acknowledges that his proposed interpretation of *Hopkins* would mean that “osteoarthritis” *must be excluded* as “arthritis” under the statute. We decline to endorse such an interpretation.

Claimant does not argue, and the record establishes, that his multilevel preexisting cervical spondylosis involved joint inflammation due to infectious, metabolic or constitutional causes, and resulted in breakdown/degeneration/structural change in his cervical spine. Therefore, we find that the employer has satisfied its burden of establishing that claimant’s preexisting cervical spondylosis is “arthritis” (and, therefore, a “preexisting condition”) within the meaning of ORS 656.005(24)(a) and *Hopkins*.

We now turn to claimant’s assertion that his spondylosis does not qualify as a statutory “preexisting condition” because it did not contribute to any disability or need for treatment, as required by ORS 656.005(24)(a) and (c). According to claimant, his spondylosis merely rendered him more susceptible to his injury. *See* ORS 656.005(24)(c) (a statutory “preexisting condition” does not include a condition that “merely renders the worker more susceptible to the injury”). We disagree.

Drs. Koon, Higby, and Yoo all specifically concluded that claimant’s spondylosis contributed to his need for treatment, and that, after November 2, 2009, it was the major contributing cause of that need for treatment. (Exs. 58-2, 59-3, 66-8-10, 67-17, -25, 72-3, 74-18). With respect to Dr. Yoo, claimant requests that we disregard that portion of his opinion because Dr. Yoo agreed that claimant’s spondylosis also made him “susceptible to a greater condition as a result of the injury.” (*See* Ex. 74-48, -49). It does not follow, however, as claimant contends, that his spondylosis *did not contribute at all* to his need for treatment because it *also* made him susceptible to a more significant injurious condition. As set forth above, Drs. Yoo, Koon, and Higby all agreed that claimant’s spondylosis contributed to his need for treatment, and ultimately became the *major contributing cause* of that need for treatment. Consequently, the record persuasively establishes that claimant’s preexisting cervical spondylosis contributed to his need for treatment and did more than “merely render[] [him] more susceptible to [his] injury.” *See* ORS 656.005(24)(c).

Finally, claimant contends that the employer's denial must be set aside pursuant to *Piwowar*, 305 Or at 494. In *Piwowar*, the employer accepted the claimant's claim for a "sore back," and it was later determined that her condition was caused by a preexisting disease, ankylosing spondylitis. The employer then denied compensability of that disease and terminated the claimant's disability payments. *Id.* at 496-98.

In setting aside the employer's denial, the court explained that the scope of an acceptance "corresponds to the condition specified in the acceptance notice," and that "once an [employer] accepts a claim, it must compensate for that claim. Whether the claim * * * arose from a noncompensable cause is irrelevant." *Id.* at 501. Thus, the court concluded that a carrier is required to compensate a claimant for the condition specified in the notice of acceptance, "regardless of the cause of that condition." (*Id.*) Applying those principles, the court held that, because the employer had accepted a claim for a "sore back" and because the claimant's sore back was "merely a symptom" of her underlying disease of ankylosing spondylitis—not a separate condition—the employer was precluded from denying compensability of the underlying disease. *Id.* at 501-02; *see also Cloud v. Klamath County Sch. Dist.*, 191 Or App 610, 614, (2004).

The Court of Appeals has identified "[t]he rule of *Piwowar*" to be "that an employer [that] accepts compensability of a condition cannot deny compensability of the disease that causes that condition." *Cloud*, 191 Or App at 614 (quoting *Boise Cascade Corp. v. Katzenbach*, 104 Or App 732, 735 (1990), *rev den*, 311 Or 261 (1991)). Thus, "when an employer accepts a symptom such as 'back pain' or 'sore back,' or a condition such as 'dislocated knee,' it also accepts the underlying preexisting disease or condition that is the cause of the accepted symptom or condition." *Id.* at 615 (quoting *Hill v. Qwest*, 178 Or App 137, 141 (2001)).

"[H]owever, if the accepted condition or symptom and the preexisting condition are separate conditions * * *, then the accepted condition does not include the preexisting condition or disease, and an employer may subsequently deny responsibility for it in a later claim." (*Id.*) "[A] condition 'solely' caused by a preexisting condition is not a 'separate condition.'" "However, when a notice of acceptance describes a condition not solely caused by a preexisting condition, the acceptance does not necessarily include the preexisting condition. Instead, the scope of acceptance is a question of fact for the board." (*Id.*)

Relevant to this dispute, the employer accepted a “combined condition” of cervical facet syndrome combined with preexisting multilevel cervical spondylosis (arthritis). (Ex. 64). The employer then issued a denial on the ground that, as of November 2, 2009, the otherwise compensable injury was no longer the major contributing cause of the combined condition or need for treatment. (Ex. 65); *see also* ORS 656.005(7)(a)(b); ORS 656.262(6)(c).

Claimant contends that, under *Piowar*, the employer was precluded from issuing its denial. As we understand claimant’s argument, he contends that: (1) the employer accepted “cervical facet syndrome”; (2) “cervical facet syndrome” is “a constellation of symptoms that arise from cervical facet arthropathy or degeneration”; (3) “cervical facet syndrome” is not a separate condition from “facet arthropathy”; and (4) by accepting “cervical facet syndrome,” the employer “has actually accepted * * * the facet degeneration itself.” (Claimant’s Respondent’s Brief, p. 13).³

We disagree with claimant’s contentions for several reasons. At the outset, we do not find that the employer’s acceptance implicates the rule of *Piowar* that “function[ed] to determine the scope of ambiguous or vague acceptances such as ‘sore back.’” *See Cloud*, 191 Or App at 615. Rather, the employer’s acceptance of cervical facet syndrome combined with preexisting multilevel cervical spondylosis (arthritis) referred to a specific combined condition; it was not ambiguous or vague. *See id.*

We also reject claimant’s assertion that the employer impermissibly issued a denial for the same condition that it accepted. As previously noted, the employer accepted a “combined condition” of cervical facet syndrome combined with preexisting multilevel cervical spondylosis (arthritis). (Ex. 64). Thus, the scope of acceptance explicitly distinguished the preexisting cervical arthritis condition and the otherwise compensable facet syndrome. Therefore, as a factual matter, we do not find that the scope of the employer’s acceptance encompassed accepting the preexisting cervical spondylosis as an independently compensable condition, such that the employer was precluded from issuing its denial. *See also Cloud*, 191 Or App at 615 (“when a notice of acceptance describes a condition not solely caused by a preexisting condition, the acceptance does not necessarily include the preexisting condition”).

³ This argument presumes that “facet degeneration” is synonymous with “cervical spondylosis.” Even granting claimant that presumption, however, his argument fails for the reasons set forth in this order.

Additionally, even were we to extend *Piowar* in the manner suggested by claimant, the record does not establish that the accepted cervical facet syndrome was “solely caused” by the preexisting cervical spondylosis condition, such that acceptance of the former means acceptance of the latter. *Id.* On that point, Dr. Koon expressly stated that the cervical facet syndrome and the preexisting cervical spondylosis were different conditions. (Ex. 67-14-16). Moreover, other medical evidence indicates that the work injury also contributed to and caused the accepted cervical facet syndrome, such that the syndrome was not solely caused by the preexisting cervical spondylosis. (Exs. 74-12, -13). Consequently, we do not find that the scope of the employer’s combined condition acceptance extends to accepting claimant’s preexisting cervical spondylosis as a compensable condition in its own right. Therefore, *Piowar* does not bar the employer from issuing its denial.

In sum, we find that the employer has established that a statutory “preexisting condition” of multilevel cervical spondylosis (arthritis) combined with claimant’s otherwise compensable cervical facet syndrome to cause or prolong his disability/need for treatment. Claimant does not otherwise challenge the employer’s denial, and the persuasive medical evidence establishes that, as of November 2, 2009, the preexisting condition, rather than the otherwise compensable injury, was the major contributing cause of claimant’s need for treatment for that combined condition. Therefore, we reverse and uphold the employer’s denial.

Medical Services

Because claimant’s condition involves a “combined condition,” the second sentence of ORS 656.245(1)(a) governs the medical services dispute. “[T]wo requirements must be met for [those] medical services to be compensable”: (1) claimant’s current neck condition must be “caused in major part” by his compensable 2008 injury; and (2) the November 2, 2009 through May 7 2010 disputed medical services of Drs. Harp and Koon must be “directed to” his current neck condition. *See SAIF v. Sprague*, 346 Or 661, 673 (2009). Given our finding above that claimant’s current neck condition was not caused in major part by his compensable 2008 injury, the disputed medical services are not compensable.⁴

⁴ Claimant acknowledges that the disputed medical services are compensable only if we conclude that the multilevel cervical spondylosis is not a statutory “preexisting condition.”

ORDER

The ALJ's order dated June 20, 2012 is reversed. The employer's denials are reinstated and upheld. The ALJ's \$10,000 assessed attorney fee and costs awards are also reversed.

Entered at Salem, Oregon on March 12, 2013