

In the Matter of the Compensation of
CHRISTOPHER L. ROWLES, Claimant

WCB Case No. 12-01543

ORDER ON RECONSIDERATION

Swanson Thomas & Coon, Claimant Attorneys

Sather Byerly & Holloway, Defense Attorneys

Reviewing Panel: Members Johnson, Weddell, and Somers.

On August 21, 2014, we reversed those portions of an Administrative Law Judge's (ALJ's) order that had not awarded claimant's attorney a fee for prevailing over a void denial of a bilateral hip degenerative condition at hearing and had upheld the self-insured employer's denials of claimant's new/omitted medical condition claim for left hip posttraumatic arthritis and of his current combined condition. Contending that these denials should be reinstated, that claimant's attorney should not have been awarded a fee for prevailing over the void denial, and that our attorney fee award for services at hearing and on review regarding the new/omitted medical condition and current condition denials was excessive, the employer requests reconsideration. Having received claimant's response, we proceed with our reconsideration. For the following reasons, as supplemented below, we adhere to our previous order.

New/Omitted Medical Condition

In our initial order, we analyzed claimant's left hip posttraumatic arthritis claim as a new/omitted medical condition claim. Accordingly, we determined that claimant bore the initial burden to prove that the condition existed and that the work accident was a material contributing cause of his disability or need for treatment of the condition. *See* ORS 656.005(7)(a); ORS 656.266(1); *Knaggs v. Allegheny Techs.*, 223 Or App 91, (1008); *Maureen Y. Graves*, 57 Van Natta 2380, 2381 (2005).

Additionally, we reasoned that after claimant carried that burden, because he did not dispute that his left hip posttraumatic arthritis combined with a preexisting arthritic condition, the employer bore the burden to prove that the combined condition was not compensable by showing that the otherwise compensable injury was not the major contributing cause of the disability or need for treatment of the combined condition. ORS 656.005(7)(a)(B); ORS 656.266(2)(a); *Jack G. Scoggins*, 56 Van Natta 2534, 2535 (2004). In finding claimant's left hip posttraumatic arthritis compensable, we relied on the opinions of Dr. Teed, an orthopedic surgeon, Dr. Schmitt, a medical arbiter, Dr. Puziss, a consulting physician, and Dr. Gritzka, a worker-requested medical examiner.

The employer asserts that we did not clearly explain how claimant's preexisting condition, his left hip posttraumatic arthritis, and current left hip arthritic condition related to each other. In response, we offer the following clarification of our factual conclusions regarding claimant's left hip posttraumatic arthritis.

Claimant had preexisting arthritic changes in his left hip. (Exs. 85A-6-7, 89-1, -39, 90-13, 91-23, 96-26). He fell at work. The medical evidence persuasively establishes that the trauma of the work injury caused additional arthritic changes ("posttraumatic arthritis") in his left hip, which combined with the preexisting arthritic changes to create claimant's current, symptomatic left hip arthritic condition. (Exs. 85A-8, 89-2, 90-14, 91-45, -49). Finally, the medical evidence persuasively supports a conclusion that the otherwise compensable injury was the major contributing cause of claimant's disability and need for treatment of the combined condition.¹ (Exs. 87A-2, 91-23, -39, 92-31).²

The employer asserts that claimant must prove that his requested posttraumatic arthritis must exist as a specific condition separate from his preexisting arthritis condition or his overall arthritis condition.³ The employer essentially contends that an otherwise compensable injury that merges with

¹ The employer contends that our order's analysis of the opinions of Drs. Teed, Schmitt, Puziss, and Gritzka, supported only a possibility of posttraumatic arthritis. See *Gormley v. SAIF*, 55 Or App 1055 (1981) (persuasive medical opinions must be based on medical probability, rather than possibility). However, as we explained in our order, their opinions "explained how the work injury could have caused a posttraumatic component to claimant's arthritic condition. They further explained why they concluded that *it actually, rather than merely possibly, did so in this case.*" (Emphasis supplied). Thus, we determined that their opinions support compensability to a degree of medical probability, rather than mere possibility.

² Our conclusion is consistent with *Brown v. SAIF*, 262 Or App 640, 651 (2014), which holds that an "otherwise compensable injury" refers to a work-related injury/incident. Here, for the reasons expressed above and those articulated in our initial order, the persuasive medical evidence establishes that claimant's work-related injury/incident was a material contributing cause of his post-traumatic arthritis and that this "otherwise compensable injury" (the effects of that work-related injury/incident) were the major contributing cause of his combined arthritic condition.

³ The employer cites *Virginia L. Gould*, 61 Van Natta 2206 (2009), and *Jonathan E. Thayer*, 58 Van Natta 1151 (2006). In *Thayer*, we did not hold that the new/omitted medical condition did not exist if it merged with a preexisting condition, but instead simply held that the medical evidence did not establish that the claimed new/omitted medical condition existed. 58 Van Natta at 1152. Likewise, in *Gould*, where the claimant had claimed a combined condition, including a specific preexisting condition, we found that the claimed "combined condition" did not exist because, as the claimant conceded, there was no statutory preexisting condition and thus no "combined condition." 61 Van Natta at 2210. Here, by contrast, we have found persuasive evidence of the existence, and the cause, of the claimed left hip posttraumatic arthritis.

a preexisting condition to form a combined condition, rather than coexisting separately, may not satisfy the requirement that the condition “exist.” However, a combined condition exists if an otherwise compensable injury combines with a preexisting condition to cause or prolong disability or need for treatment. ORS 656.005(7)(a)(B); *Multifoods Specialty Distribution v. McAtee*, 333 Or 629, 636-37 (2002).

Here, we have found that claimant suffered from left hip posttraumatic arthritis as well as his preexisting condition, and that claimant therefore had “two medical problems simultaneously,” which constituted a “combined condition.” See *McAtee*, 333 Or at 636. Accordingly, the new/omitted left hip posttraumatic arthritis condition “exists” and is subject to the “major contributing cause” standard of ORS 656.005(7)(a)(B) and the burden-shifting provision of ORS 656.266(2)(a).

The employer also contends that compensability is not determined by ORS 656.005(7)(a)(B) and ORS 656.266(2)(a). The employer first argues that because we have concluded that claimant’s arthritis worsened, his claim for left hip posttraumatic arthritis should be analyzed as one for an occupational disease based on the worsening of a preexisting condition. Such a claim requires a claimant to prove that employment conditions were the major contributing cause of the combined condition and pathological worsening of the disease. ORS 656.802(2)(b).

An “occupational disease” is distinguished by its gradual, rather than sudden, onset. *Mathel v. Josephine County*, 319 Or 235, 240 (1994); see also *Smirnoff v. SAIF*, 188 Or App 438, 443 (2003) (an occupational disease results from conditions that develop gradually over time, whereas an injury is sudden, arises from an identifiable event, or has an onset traceable to a discrete period of time). As discussed above, the medical evidence establishes that claimant’s posttraumatic arthritis was caused by a discrete event. Such circumstances do not support an “occupational disease” analysis, even if the posttraumatic arthritic changes continued to worsen after the specific work injury. *Linas V. Cernius*, 65 Van Natta 2499, 2505 (2013) (worsening of preexisting arthritis was not an “occupational disease” where it was attributed solely to a specific work injury); see also *Donald Drake Co. v. Lundmark*, 63 Or App 261 (1983), *rev den*, 296 Or 350 (1984) (injury occurred suddenly, although the symptoms grew progressively worse over six weeks of employment); *Tony L. Fairbanks*, 61 Van Natta 74 (2009) (infection analyzed as an “injury” rather than “occupational disease” because the injurious exposure and onset of the infection occurred suddenly, during a discrete period of time).

The employer next argues that ORS 656.225 requires claimant to prove a worsening of the preexisting arthritis under the major contributing cause standard. ORS 656.225 addresses the compensability of “disability solely caused by or medical services solely directed to a worker’s preexisting condition.” As discussed above, claimant’s disability and need for treatment of his combined arthritic condition are not *solely* caused by his preexisting condition, but are instead caused in major part by his posttraumatic arthritis. Accordingly, ORS 656.225 does not apply. *Luckhurst*, 167 Or App at 17; *Charles I. Sullenger*, 59 Van Natta 1146, 1147 (2007).

The employer also contends that the claimed posttraumatic arthritis “appears no different than the already accepted combined condition,” and “once that combined condition acceptance issued, it essentially made the post traumatic arthritis issue moot.” We do not disagree that, on its face, the employer’s eventual acceptance of “otherwise compensable injury combined with left hip degenerative join[t] disease (aka degenerative arthritis)” appears to encompass the disputed new/omitted medical condition, which claimant concedes is a combined condition including preexisting degenerative arthritis.

Yet, throughout this litigation proceeding, the employer has continued to defend its new/omitted condition claim denial. Under such circumstances, the denial remained unresolved. As such, our resolution of that disputed claim was necessary.

If the employer had accepted the previously-denied posttraumatic arthritis condition, that acceptance would have constituted a rescission of the new/omitted medical condition denial. Under such circumstances, claimant’s attorney would have been entitled to an attorney fee under ORS 656.386(1)(a), but further litigation of the denial would have been unnecessary.

However, neither party argued at hearing that this “combined condition” acceptance accepted the previously-denied posttraumatic arthritis condition. Instead, they agreed that the denial remained disputed, and the employer defended the denial. (Tr. 1-2). Moreover, the employer has continued to defend the denial through its present reconsideration request. Under such circumstances, even if the dispute should have been resolved by the employer’s “combined condition” acceptance, the denial remained at issue, and continues to remain at issue.

Current Condition

The employer renews its contention that the medical evidence persuasively establishes that the work injury has resolved and the preexisting condition is now the major contributing cause of claimant's combined condition. However, the employer cites no evidence that the otherwise compensable injury, including claimant's posttraumatic arthritis, has ceased to be the major contributing cause of the combined condition. Further, as noted in our order, Drs. Teed, Schmitt, Puziss, and Gritzka opined that the otherwise compensable injury remains the major contributing cause of claimant's disability and need for treatment of the combined condition. (Exs. 87A-2, 90-15, 91-23, -39, 92-30). As noted above, we find their opinions most persuasive. Accordingly, the employer has failed to carry its burden. *See* ORS 656.266(2)(a); ORS 656.262(6)(c).

Attorney Fees

The employer contends that claimant's attorney should not have been awarded an attorney fee under ORS 656.386(1) for services at hearing regarding the void denial. Additionally, the employer contends that our attorney fee award for services at hearing and on review regarding the new/omitted medical condition denial and combined condition denial is excessive. Based on the following reasoning, we adhere to our previous determinations.

It is undisputed that the November 21, 2011 form 827 did not properly initiate a new/omitted medical condition claim because it did not clearly request formal written acceptance of a new/omitted medical condition. Nevertheless, on January 27, 2012, the employer issued a denial of a "claim for the 11/21/11 omitted condition request," which it identified as a "claim for bilateral hip degenerative disc disease." (Ex. 75-1). The denial stated that the claimed condition was "not materially related to the industrial injury and did not arise out of or in the course of employment." (*Id.*)

The employer does not dispute that the January 27, 2012 denial was invalid because it was not issued in response to a valid claim. Instead, it contends that claimant did not prevail over the denial. The employer asserts that *Cervantes v. Liberty Northwest Ins. Corp.*, 205 Or App 316, 323 (2006), which held that "the terms of [ORS 656.386] do encompass circumstances where a denial is eventually determined to be void," is distinguishable.

The employer argues that whereas the denial in *Cervantes* was confusing and referenced a condition that was later accepted, its January 27, 2012 denial was narrowly tailored and did not purport to deny the current or previously accepted claim, and that claimant's attorney's efforts did not result in the acceptance of a condition.

We disagree with the employer's characterization of its January 27, 2012 denial. As the employer later acknowledged, the "hip degenerative disc" condition that it purported to deny was an anatomical impossibility. Nevertheless, the employer's denial purported to deny a degenerative hip condition. Further, the record indicates that until June 2012, the parties had interpreted the January 27, 2012 denial as disputing the compensability of claimant's hip arthritis. As discussed above, his left hip posttraumatic arthritis is compensable. Thus, the January 27, 2012 denial was confusing and appeared to deny a condition that has ultimately been found to be compensable.

In any event, it is sufficient that the denial purported to deny a claim for compensation. *Cervantes*, 205 Or App at 323; *Robyn E. Stein*, 62 Van Natta 290, 294 (2010). Such circumstances support an attorney fee award under ORS 656.386(1) even if there is no outstanding claim and the claimant receives no immediate financial benefit when the claim is set aside. *Stein*, 62 Van Natta at 297.

We turn to the employer's challenge to our attorney fee award for claimant's attorney's efforts at the hearing level and on review regarding the new/omitted medical claim denial and the combined condition denial is excessive. The employer argues that claimant did not prevail on the interim compensation issue, did not establish compensability of "bilateral hip degenerative disc disease," and devoted considerable efforts to attorney fee issues. However, as explained in our prior order, our determination of a reasonable attorney fee award did not consider such issues, but rather was limited to claimant's attorney's efforts at hearing and on review regarding the new/omitted medical condition denial and the combined condition denial.

The employer also argues that overcoming the denial of the new/omitted medical condition claim for left hip posttraumatic arthritis had no value/benefit to claimant because that condition is indistinct from the accepted combined condition. However, the employer continued to defend its denial by disputing the compensability of the left hip posttraumatic arthritis condition after it had accepted claimant's "otherwise compensable injury combined with left hip degenerative join[t] disease (aka degenerative arthritis)." Based on this record, we conclude that the value/benefit of this issue, as well as the time devoted, were substantial.

Claimant's attorney is entitled to an assessed fee for services on reconsideration. ORS 656.382(2). After considering the factors set forth in OAR 438-015-0010(4) and applying them to this case, we find that a reasonable fee for claimant's attorney's services on reconsideration regarding the denial issues is \$500, payable by the employer. In reaching this conclusion, we have particularly considered the time devoted to the issues (as represented by claimant's response to the employer's reconsideration request), the complexity of the issues, the values of the interests involved, and the risk that claimant's counsel may go uncompensated.

Accordingly, we withdraw our August 21, 2014 order. On reconsideration, as supplemented, we adhere to and republish our August 21, 2014 order. The parties' 30-day rights of appeal shall begin to run from the date of this order.

IT IS SO ORDERED.

Entered at Salem, Oregon on September 16, 2014