
In the Matter of the Compensation of
WCB Case No. 15-00178
LINDA J. CURTIS, Claimant
ORDER ON REVIEW (REMANDING)
Julene M Quinn LLC, Claimant Attorneys
Law Offices of Sharon J Bitcon, Defense Attorneys

Reviewing Panel: Members Johnson and Lanning.

Claimant requests review of Administrative Law Judge (ALJ) Fisher's order that upheld the self-insured employer's denial of her new/omitted medical condition claim for a left TFCC tear. Claimant also submits a "post-hearing" documents and moves for remand to the ALJ for further development of the record. On review, the issues are remand and compensability. We vacate the ALJ's order and remand.

The hearing was held on March 31, 2015, and the record closed on August 17, 2015. In upholding the employer's denial, the ALJ found that, to the extent that the claimed left TFCC tear existed, it was not related to claimant's August 25, 2011 work injury.

On review, claimant disputes the ALJ's evaluation of the medical evidence. Additionally, claimant moves for remand for the admission of further evidence pertaining to her claimed left TFCC tear condition, asserting that the "post-hearing" documents support the opinion of Dr. Buncke, her attending physician and treating surgeon.¹ The proffered evidence consists of a "post-hearing" October 9, 2015 operative report by Dr. Mirarchi, with attached medical literature. (*See Proposed Ex. 58*).

Our review is limited to the record developed by the ALJ. 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 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).

¹ Dr. Buncke treated claimant and performed various left wrist surgeries, and submitted previous medical opinions regarding the claimed left TFCC tear condition.

Inasmuch as the proffered evidence relates to claimant's left TFCC condition, it concerns disability. Moreover, because the surgery did not take place until after the March 2015 hearing and August 2015 record closure, the evidence was not obtainable with due diligence at the time of the hearing. *See George P. Black*, 55 Van Natta 43, 46 (2003); *Wanda Kelley*, 47 Van Natta 146 (1995) (evidence from a "post-hearing surgery not obtainable with due diligence).

We turn to the issue of whether the new evidence is reasonably likely to affect the outcome of the case. Claimant argues that it will because the existence of the claimed left TFCC tear, and whether it was traumatic or degenerative in nature, was at issue at hearing. The employer responds that the new evidence will not likely affect the outcome because the ALJ determined that, "to the extent" that the condition existed, it was not related to claimant's August 2011 work injury, and because the denial on the basis that the condition was unrelated to her work injury. Based on the following reasoning, we agree with claimant's arguments.

Here, the issue at hearing was the compensability of claimant's new/omitted medical condition claim for a left TFCC tear. Thus, claimant must establish that the claimed condition exists, and that her August 2011 work injury was a material contributing cause of the disability/need for treatment. ORS 656.005(7)(a); ORS 656.266(1); *Maureen Y. Graves*, 57 Van Natta 2380, 2381 (2005).

Dr. Buehler performed a left wrist scapholunate interosseous repair in December 2011 and did not find a TFCC tear. (Exs. 8, 54). Dr. Nolan, who examined claimant at the employer's request, opined that any TFCC tear was degenerative in nature. (Exs. 45, 55).

In contrast, Dr. Buncke opined that claimant sustained a left TFCC injury and a scapholunate ligament injury as a result of her August 2011 work injury. (Exs. 53, 57). Dr. Buncke acknowledged that Dr. Buehler did not see a TFCC injury during the December 2011 surgery, but explained that the TFCC was difficult to visualize during surgery because of its location. (*Id.*) Dr. Buncke further explained that he was unable to visualize a TFCC tear during his January 2015 surgery due to significant scarring from claimant's previous surgeries.² (*Id.*)

² On January 27, 2015, Dr. Buncke performed a left wrist radial styloidectomy and arthroscopy with synovectomy. (Ex. 51AA). However, noting that the TFCC area was not well-visualized during surgery, he did not proceed with the TFCC repair. (*Id.*)

The proffered evidence is a “post-hearing” October 9, 2015 surgical report from Dr. Mirarchi that found a “Type 1A TFCC tear,” which was debrided. According to the attached medical literature, a “Type 1A” TFCC tear is a traumatic horizontal tear adjacent to the radius. (*See Proposed Ex. 58*).

This case is similar to *Parmer v. Plaid Pantry # 54*, 76 Or App 405 (1985), which involved the compensability of a proposed low back surgery. The opinion of a physician who attributed the need for the proposed surgery to the accepted injury was premised on the possibility that the accepted injury caused additional scarring at the site of previous surgery, which was deemed by the hearing referee to be insufficient to establish compensability. 76 Or App at 408. On review, the claimant submitted a letter from that physician regarding “post-hearing” surgical findings, and moved for remand to the referee to take additional evidence. *Id.* at 408-09. The *Parmer* court noted that the proffered evidence was submitted as a basis for remand to the hearing referee, rather than as a complete medical report on the causation issue. *Id.* at 409. Reasoning that the claimant “should have an opportunity to explore fully the medical opinions following the surgery[,]” the court remanded the case to the hearing referee to take additional evidence. *Id.* at 409-10.

Here, the proffered evidence addresses the issues litigated at hearing: whether the claimed left TFCC tear exists and, if so, whether it was traumatic or degenerative in nature. In light of the “post-hearing” surgical report documenting the existence of a left TFCC tear that is coded as a “traumatic” tear, we conclude that the new evidence is “reasonably likely to affect the outcome of the case.” In reaching this conclusion, we note that Dr. Buncke previously indicated that he was not able to provide further treatment for the TFCC because it was beyond his expertise, and recommended that claimant be referred to another facility. (Ex. 53).

Under these particular circumstances, and consistent with the *Parmer* court rationale, we find that claimant should have an opportunity to explore the medical opinions following the surgery. *Parmer*, 76 Or App at 409-10. Accordingly, we find a compelling reason to remand for the ALJ for the taking of additional evidence. ORS 656.295(5); *Compton*, 301 Or at 646.³

This order should not be interpreted as offering a decision on the compensability of the claimed condition. Resolution of the compensability issue rests with the ALJ on remand.

ORDER

The ALJ's order dated August 26, 2015 is vacated. This matter is remanded to ALJ Fisher for further proceedings consistent with this order, including consideration of claimant's submitted exhibit, as well as other exhibits the ALJ may consider appropriate. Those proceedings may be conducted in any manner that the ALJ deems achieves substantial justice. ORS 656.283(7). The ALJ shall then issue a final, appealable order.

Entered at Salem, Oregon on March 11, 2016