
In the Matter of the Compensation of
JUAN V. SANTOS-VILLA, Claimant
WCB Case No. 15-00455
ORDER ON REVIEW
Dodge And Associates, Claimant Attorneys
Kenneth R Searce, Defense Attorneys

Reviewing Panel: Members Lanning and Johnson.

Claimant requests review of those portions of Administrative Law Judge (ALJ) Naugle's order that: (1) upheld the insurer's denial of a new/omitted medical condition claim for a "somatic symptom and related disorder" condition; and (2) awarded claimant's counsel an \$8,000 attorney fee under ORS 656.386(1) for prevailing over the insurer's *de facto* denial of a new/omitted medical condition claim for concussion/closed head injury/traumatic brain injury condition. The insurer cross-requests review of those portions of the ALJ's order that: (1) set aside its *de facto* denial of claimant's new/omitted medical condition claim for a "concussion/closed head injury/traumatic brain injury" condition; and (2) awarded a penalty and attorney fee under ORS 656.262(11)(a) for allegedly unreasonable claim processing. On review, the issues are compensability, penalties, and attorney fees.

We adopt and affirm the ALJ's order with the following supplementation to address the compensability issues.

In September 2013, claimant fell from a ladder at work. (Tr. 35). He was taken to an emergency room where he was diagnosed with a closed head injury. (Ex. 1A-5). In October 2013, he followed-up with Dr. Sally, a trauma specialist, who assessed a concussion. (Ex. 1B-1).

The insurer accepted jaw, upper back, right thigh, and right middle finger contusions, and cervical and lumbar strains. (Exs. 2, 4).

In December 2013, Dr. Button, a physical medicine and rehabilitation specialist, who became claimant's attending physician, assessed a concussion. (Exs. 3A-3, 3C).

In April 2014, Dr. Hoppert, an orthopedic surgeon, and Dr. Reimer, a neurologist, performed an examination at the insurer's request. It was their impression that claimant had sustained closed head trauma. (Ex. 7-11).

On November 24, 2014, claimant asked the insurer to accept “concussion/closed head injury/traumatic brain injury.” (Ex. 13A). The insurer did not accept or deny the claim. Claimant requested a hearing regarding the *de facto* denial and sought penalties and attorney fees.

In March 2015, Dr. Wicher, a psychologist, performed a neuropsychological evaluation at the insurer’s request. Dr. Wicher diagnosed a conversion disorder, attributing it to claimant’s underlying personality structure. (Ex. 14-7, -9).

On April 8, 2015, claimant asked the insurer to accept, “In this claim or in a new claim, as an injury and or as an occupational disease, * * * work related emotional conditions, including adjustment disorder, anxiety disorder, depressive disorder, somatic symptom and related disorder, trauma and stressor related disorder.” (Ex. 15).

On April 22, 2015, the insurer denied the claimed conditions, asserting that there was no medical evidence “diagnosing these conditions.” (Ex. 17). Claimant requested a hearing.

On July 29, 2015, Dr. Johnson, a psychologist, performed an evaluation at claimant’s request. Dr. Johnson diagnosed a “somatic symptom disorder with predominant pain.” (Ex. 24-5). He opined that the condition was a consequence of claimant’s injuries. (Ex. 24-5, -6).

Based on the testimony of N. Santos-Villa and P. Santos-Villa, claimant’s brothers, that claimant was “knocked out” or “stunned” after falling, Dr. Johnson opined that claimant had suffered a concussion, traumatic brain injury, or closed head injury. (Tr. 27, 32, 39). He also opined that the injuries sustained from falling off the ladder were the major contributing cause of claimant’s somatic pain disorder. (Tr. 23).

Based on the observations of claimant’s brothers, the emergency room diagnosis, and the assessments of Drs. Sally, Button, and Hoppert, the ALJ determined that the evidence established the claimed “closed head injury/concussion/traumatic brain injury” condition’s existence. Finding the claimed condition compensable, the ALJ awarded claimant’s counsel an assessed fee of \$8,000 under ORS 656.386(1). Further lacking any explanation for why the insurer had not accepted or denied the claim, the ALJ awarded claimant a 25 percent penalty of “amounts then due” at the time of hearing and a penalty-related attorney fee of \$1,000. *See* ORS 656.262(11)(a). Lastly, the ALJ concluded that

Dr. Johnson’s opinion did not persuasively establish the compensability of the claimed “somatic symptom and other disorder” condition.¹ In doing so, the ALJ analyzed the claim for a mental disorder under ORS 656.802(2)(a).

On review, claimant contends that his “emotional conditions” are compensable as a “consequential condition” under ORS 656.005(7)(a)(A). In its cross-request, the insurer contends that the medical evidence does not establish the existence of the “concussion/closed head injury/traumatic brain injury” condition. For the following reasons, we agree with the ALJ’s conclusions.

Somatic Symptom Disorder

If a claim for a mental disorder is brought as an independent claim, it must be brought under ORS 656.802 as a claim for an occupational disease. However, if a mental disorder results from a compensable injury, it may be analyzed as a claim for a consequence of an injury. *See Boeing Co. v. Young*, 122 Or App 591, 596 (1993); *Julie A. Gentry*, 67 Van Natta 1791 (2015). In either event, the claimant must satisfy the “major contributing cause” standard. *See* ORS 656.802(2); ORS 656.005(7)(a)(A); *English v. Liberty Northwest Ins. Corp.*, 271 Or App 211, 214 (2015) (defining the compensable injury from which a consequential condition must result as the “work-related injury incident” under *Brown v. SAIF*, 262 Or App 640, 656 (2014), *rev allowed*, 356 Or 397 (2014)).

Determination of the major contributing cause of claimant’s somatic symptom disorder is a complex medical question that must be resolved on the basis of expert medical opinion. *Jackson County v. Wehren*, 186 Or App 555, 559 (2003) (citing *Uris v. Comp. Dep’t.*, 247 Or 420, 424 (1967)). To be persuasive, the opinion regarding the major contributing cause of a consequential condition must evaluate the relative contribution of other potential causes to determine whether the compensable injury contributed more than all other causes combined. *See SAIF v. Willcutt*, 160 Or App 568, 574 (1999) (applying *Dietz* to consequential conditions); *Dietz v. Ramuda*, 130 Or App 397 (1994), *rev dismissed*, 320 Or 416 (1995) (stating rule regarding combined conditions under ORS 656.005(7)(a)(B)).

Here, Dr. Johnson concluded that claimant’s injuries from falling off the ladder were the major contributing cause of his somatic symptom disorder. (Tr. 14, 23; Ex. 24-6). In doing so, Dr. Johnson reasoned that claimant did not

¹ At hearing, claimant withdrew his challenge to the insurer’s denial of the claimed “adjustment disorder, anxiety disorder, depressive disorder, and the trauma and stress or related disorders” conditions and proceeded only on the claimed “somatic symptom and related disorder” condition. (Tr. 2, 3).

have pain or “somatoform issues” before the work injury. (Tr. 14, 23; Ex. 24-6). Yet, Dr. Johnson acknowledged that the diagnostic standard for somatic symptom disorder identifies other potential causes, including genetic and biological factors, family influence, personality trait of negativity, decreased awareness of or problems processing emotions, and learned behavior. (Ex. 30-1; Tr. 21, 22). He also conceded that Dr. Wicher diagnosed a conversion disorder secondary to personality issues. (Ex. 24-2). However, Dr. Johnson’s opinion does not show that he evaluated claimant’s personality or other potential causes identified by the diagnostic standard for the somatic symptom disorder condition. (Tr. 23). Therefore, we do not consider Dr. Johnson’s opinion sufficiently persuasive to establish that the work injury was the major contributing cause of claimant’s somatic symptom disorder.

No other medical evidence supports a compensable consequential condition. Accordingly, claimant’s claimed condition is not compensable under a “consequential condition” theory.

Closed Head Injury/Concussion/Traumatic Brain Injury

To prevail on a new/omitted medical condition claim, claimant must prove that the claimed condition exists and that the work injury was a material contributing cause of his disability or need for treatment of the condition. ORS 656.005(7)(a); ORS 656.266(1); *Maureen Y. Graves*, 57 Van Natta 2380, 2381 (2005).

Here, claimant was diagnosed with a closed head injury in the emergency room immediately after the incident. (Ex. 1A-5). Approximately two weeks later, Dr. Sally assessed a concussion. (Ex. 1B-1). In April 2014, Drs. Hoppert and Reimer opined that claimant had sustained closed head trauma. (Ex. 7-11).

The insurer argues that no physician opined that claimant suffered a traumatic brain injury. Citing *Benz v. SAIF*, 170 Or App 22, 25 (2000), and *SAIF v. Calder*, 157 Or App 224, 227-28 (1998), the insurer contends that we lack the expertise to conclude that claimant had a traumatic brain injury.

Yet, Dr. Johnson testified that the record suggests that claimant had a traumatic brain injury. (Tr. 18). He further testified that “striking the head with a loss of consciousness” is consistent with a closed head injury and a traumatic brain injury. (Tr. 23). Finally, after listening to claimant’s brothers’ testimony,

Dr. Johnson opined, over the insurer's objection to his qualifications, that claimant had suffered a concussion, a traumatic brain injury, or a closed head injury.² (Tr. 40).

Based on the foregoing reasoning, the record supports the existence of a head injury condition, whether diagnosed as a closed head injury or traumatic brain injury. *See De Los-Santos v. Si Pac Enters.*, 278 Or App 254 (2016) (requiring the claimant to prove the existence of the claimed new or omitted radiculitis/radiculopathy condition rather than a mere symptom); *Labor Ready v. Mogensen*, 275 Or App 491, 498 n 9 (2015) (ORS 656.262(7)(a) and ORS 656.267 require notice of new medical *conditions*, not diagnoses; emphasis in original); *Tiffany Goosing*, 68 Van Natta 479 (2016) (it was the claimant's burden to show that the claimed "disc bulge" existed as a new/omitted condition, not that it was the best diagnosis to describe her condition). Therefore, we affirm.

Claimant's attorney is entitled to an assessed fee for services on review regarding the insurer's appeal of the ALJ's order regarding the denied "closed head injury/concussion/traumatic brain injury" condition and related penalties and attorney fees. ORS 656.382(2), (3). After considering the factors set forth in OAR 438-015-0010(4) and applying them to this case, we find that a reasonable attorney fee award concerning these issues is \$3,000, to be paid by the insurer. In reaching this conclusion, we have particularly considered the time devoted to the aforementioned issues (as represented by claimant's cross-respondent's brief), the complexity of the issues, the values of the interest involved, and the risk that claimant's counsel might go uncompensated.

Finally, claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the denial of the "closed head injury/concussion/traumatic brain injury" condition, to be paid by the insurer. *See* ORS 656.386(2); OAR 438-015-0019; *Gary Gettman*, 60 Van Natta 2862 (2008). The procedure for recovering this award, if any, is described in OAR 438-015-0019(3).

² On review, the insurer does not challenge Dr. Johnson's expertise or qualifications to express a medical opinion concerning claimant's condition. In any event, the record does not support a conclusion that Dr. Johnson's opinion should be discounted based on his qualifications.

ORDER

The ALJ's order dated November 6, 2015 is affirmed. For services on review regarding the "closed injury/concussion/traumatic brain injury" denial and penalty/attorney fee issues, claimant's attorney is awarded an assessed fee of \$3,000, payable by the insurer. Claimant is awarded reasonable expenses for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the insurer's aforementioned denial, to be paid by the insurer.

Entered at Salem, Oregon on May 31, 2016