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In the Matter of the Compensation of  
**VALERIE M. APPELBAUM, Claimant**  
WCB Case No. 15-02622  
ORDER ON REVIEW  
Dale C Johnson, Claimant Attorneys  
Reinisch Wilson Weier, Defense Attorneys

Reviewing Panel: Members Johnson and Lanning.

Claimant requests review of Administrative Law Judge (ALJ) Naugle's order that upheld the self-insured employer's denial of her occupational disease claim for a mental disorder. On review, the issue is compensability.

We adopt and affirm the ALJ's order with the following supplementation.

In upholding the employer's denial, the ALJ found that claimant, a pharmacist, did not establish the compensability of her mental disorder claim. The ALJ determined that the employment conditions allegedly producing claimant's mental disorder, which included inadequate training on the new pharmacy software system, did not exist in a real and objective sense. In addition, the ALJ found that the employer's implementation of a new software system, which included training on the system, was related to employment conditions generally inherent in every working situation under ORS 656.802(3)(b). Reasoning that Dr. Henderson's opinion did not weigh those statutorily excluded factors and non-work-related factors against non-excluded work-related factors, the ALJ concluded that claimant's mental disorder claim was not compensable. *See Liberty Northwest Ins. Corp. v. Shothafer*, 169 Or App 556, 565-66 (2000).

As an initial matter, claimant contends that the employer's arguments should not be considered because its denial did not include an assertion that claimant's employment conditions allegedly causing her mental disorder did not exist in a "real and objective sense." For the following reasons, we disagree with that contention.

To begin, in its written denial of claimant's mental disorder claim, the employer explained that: "It is our position your on-the-job stressors are excluded from consideration pursuant to ORS 656.802(3) and, as a result, non-excluded work exposures are not the major cause of your mental disorder, to the extent that a true disorder actually exists." (Ex. 9-1). Such a statement (which expressly refers to excluded stressors under the applicable statute) indicates that the

employer's denial encompassed a contention that claimant's alleged on-the-job stressors do not "exist in a real and objective sense," and are not "generally inherent in every working situation." See ORS 656.802(3)(a), (b). Moreover, even if the employer's initial denial did not encompass those issues, the record establishes that the employer effectively amended its denial by raising those issues at the hearing without an objection from claimant. We reason as follows.

Pursuant to OAR 438-006-0031, amendments to issues may be allowed, subject to a motion by an adverse party for a postponement under OAR 438-006-0081, or a continuance under OAR 438-006-0091. See *SAIF v. Ledin*, 149 Or App 94 (1997) (a carrier may amend its denial at hearing); *Michael D. Fuller*, 64 Van Natta 627, 630 (2012). In addition, another portion of OAR 438-006-0031 provides: "If during the hearing, the evidence supports an issue or issues not previously raised, the Administrative Law Judge may allow the issue(s) to be raised during the hearing." Where such an amendment is permitted, to afford due process, the responding party must be given an opportunity to respond to the new issues raised. See OAR 436-006-0091(3); *Sandra L. Shumaker*, 51 Van Natta 1981 (1999), *recons*, 52 Van Natta 33 (2000). In other words, a party's remedy for surprise and prejudice created by a late-raised issue is a motion for a continuance. See OAR 438-006-0031; OAR 438-006-0036.

In its opening statement, the employer explained that "a key issue" was going to be "identifying excluded versus non-excluded work factors." (Tr. 3). The employer further noted that the ALJ would have to determine "which of the work stressors" fell within the "non-excluded category as set forth in the Oregon statutes and the *Liberty/Shotthafer* case." (Tr. 4). Then, the employer specifically asserted that claimant's uncomfotableness with a new computer system that she had difficulty learning was a "generally inherent stressor." (*Id.*) Claimant neither objected to those issues expressly raised by the employer at hearing nor did she ask for a postponement or continuance of the hearing.<sup>1</sup>

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<sup>1</sup> In general, a carrier is bound by the express language of its denial. *Tatoo v. Barrett Bus. Serv.*, 118 Or App 348, 351 (1993). However, the parties may by express or implicit agreement try an issue that falls outside the express terms of a denial. See *Weyerhaeuser Co. v. Bryant*, 102 Or App 432, 435 (1990) (when it was apparent from the record that the parties tried a case by agreement with a particular issue in mind, it was improper for the ALJ and Board not to decide the issue); *Judith M. Morley*, 46 Van Natta 882, 883, *recons*, 46 Van Natta 983 (1994) (where the claimant had not relied to his detriment on express language in the carrier's denial and had, through conduct, acquiesced in litigating a causation issue, the causation issue was considered); see also *Maureen Y. Graves*, 57 Van Natta 2380, 2382 (2005) (where the claimant's counsel did not object to the carrier's counsel's description of the issues in opening remarks, the carrier's denial was considered to have been amended to include contention challenging the existence of the claimed condition).

Thus, the record establishes that the employer denied the compensability of claimant's claimed mental disorder on the basis, *inter alia*, that claimant's alleged on-the-job stressors did not exist in a "real and objective sense" or were "generally inherent in every working situation." See ORS 656.802(3)(a), (b). Under such circumstances, we conclude that the employer adequately raised those issues both in its initial denial and at hearing.

Accordingly, for the foregoing reasons, we conclude that the aforementioned issues were raised, litigated, and addressed by the ALJ's order. Consequently, we proceed to the merits. See *Bryant*, 102 Or App at 43; *Carolyn Otey*, 64 Van Natta 2394, 2395 (2012) (where the parties argued causation of the claimed condition to the ALJ, the compensability issue was not limited to whether the disputed condition existed).

For a mental disorder claim to be compensable, there must be a diagnosis of a mental or emotional disorder generally recognized in the medical or psychological community, and the employment conditions producing the mental disorder must exist in a real and objective sense. ORS 656.802(3)(a), (c). The employment conditions producing the mental disorder must be conditions other than conditions generally inherent in every working situation or reasonable disciplinary, corrective, or job performance evaluation actions by the employer, or cessation of employment or employment decisions attendant upon ordinary business or financial cycles. ORS 656.802(3)(b). There must be clear and convincing evidence that the mental disorder arose out of and in the course of employment. ORS 656.802(3)(d).

In the context of a mental disorder claim, both those factors excluded by ORS 656.802(3)(b) and non-work-related factors must be weighed against nonexcluded work-related factors. Only if the nonexcluded work-related causes outweigh all other causes combined is the claim compensable. *Shothhafer*, 169 Or App at 565-66. A medical opinion that does not factor out contributory, but statutorily excluded, factors is insufficient to establish a compensable mental disorder. *Rory S. Lewno*, 66 Van Natta 2075, 2076 (2014). In evaluating the medical evidence, we rely on those opinions that are well reasoned and based on accurate and complete information. *Somers v. SAIF*, 77 Or App 259, 263 (1986).

Claimant asserts that her mental disorder of unspecified anxiety disorder<sup>2</sup> resulted from inadequate or insufficient training on the new pharmacy software system, which led to such stressors as, fear of harming patients, unusual delays

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<sup>2</sup> It is undisputed that such a diagnosis exists and is a mental disorder generally recognized in the medical community. See ORS 656.802(3)(c).

in processing prescriptions, angry customers, and lost prescriptions. Claimant contends that, because she did not have the means to provide “accurate and timely” medications, as a conscientious pharmacist, she worried about providing customers with the right medication in the right dosage.

We begin with the issue of inadequate or insufficient training. The employer presented several witnesses<sup>3</sup> involved in overseeing the transition to the new pharmacy software, who testified that the training claimant received was not inadequate and that the transition had gone well overall. (Tr. 38, 49-50, 56).

Claimant contends that those witnesses were not competent to testify regarding her training because they were not present in the stores while she was being trained on the new software system and, thus, they did not have first-hand knowledge of her actual training. We disagree with that contention. Our review of the record establishes that the witnesses were familiar with the transition to the new pharmacy software system and how that was being implemented in each store, including the availability of on-site “trainers,” multiple computer terminals, and extra technicians. (Tr. 34-38).

The only indications in the record that claimant was insufficiently trained are her own statements in that regard and the opinions of the doctors who based their conclusions on her statements to them.<sup>4</sup> We acknowledge claimant’s stated preference for “off-site” training for technological changes. However, we disagree with claimant’s proposition that only “off-site” training would have been sufficient. On this record, we are unable to conclude that claimant was insufficiently or inadequately trained. Therefore, we agree with the ALJ’s conclusion that claimant’s alleged employment condition of having been inadequately/insufficiently trained did not exist in a real and objective sense.

Furthermore, based on the following reasoning, we are persuaded that the implementation of the new pharmacy software system, which included employee training, was a condition generally inherent in every working situation.

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<sup>3</sup> Those witnesses included the division pharmacy coordinator and two store directors. (Tr. 33, 44, 54).

<sup>4</sup> The record lacks testimony from a coworker or other witness to corroborate claimant’s assertion that she received inadequate training on the new computer system. Moreover, it appears that, even though additional training may have been available, claimant chose not to further proceed with that training. (Tr. 36).

As we have observed in the past, technology is ever-changing and operating within ever-changing technological parameters can be a condition generally inherent in every work place. *Barbara D. Pacheco*, 46 Van Natta 1499, 1500-01 (1994). It is the manner in which an employer handles technological changes that determines whether the situation is a condition generally inherent in every work place. *Id.* For example, an employer who makes technological changes without providing the worker with reasonable training to handle those changes can create a condition that is not generally inherent in every work place. *Id.* In contrast, if reasonable training is provided to implement technological changes, that situation can be a condition that is generally inherent in every work place. *Id.*

As discussed earlier, this record does not establish anything unreasonable or inadequate about the employer's training process for the new pharmacy software system. Thus, we conclude that claimant was faced with a condition that is generally inherent in every work place, *i.e.*, the implementation of a technological change with a reasonable training program.<sup>5</sup> Consequently, although claimant's participation in the software training process may have contributed to her mental disorder, we find that such an employment condition is excluded under ORS 656.802(3)(b).

Moreover, we are not persuaded that claimant's other enumerated work-related stressors, such as unusual delays, angry customers, computer crashes, and her inability to find a prescription, (assuming they were not conditions generally inherent in every working situation) were the major contributing cause of her mental disorder.

Finally, claimant relies on Dr. Henderson's opinion that "non-excluded work-related factors" were the major contributing cause of her mental disorder. (Ex. 13-7). Because Dr. Henderson weighed claimant's "lack of proper and sufficient training on the computer system" (which we have found unsubstantiated) in his "major contributing cause" analysis, his opinion is unpersuasive. *See Lewno*,

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<sup>5</sup> We acknowledge claimant's contention that "changing a computer system" is not a condition generally inherent in every work situation because many jobs do not require the use of computers to complete tasks. *See Whitlock v. Klamath County Sch. Dist.*, 158 Or App 464 (1999) (holding that the claimant's 4-6 hours of off-duty preparation necessary to competently perform his new job was not a condition generally inherent in every work situation because many jobs do not require "extra time and effort" beyond the on-the-job performance of the work itself to attain proficiency). However, as discussed above, we conclude that technological advancements, such as changing a computer system, can be generally inherent in every working situation, depending on how such changes are implemented in the circumstances of each case. *See Pacheco*, 46 Van Natta at 1500-01.

66 Van Natta at 2076 (a medical opinion that does not factor out contributory, but statutorily excluded, factors is insufficient to establish a compensable mental disorder).

Consequently, based on the aforementioned reasoning, as well as those expressed in the ALJ's order, we conclude that claimant's mental disorder claim is not compensable. Thus, we affirm.

ORDER

The ALJ's order dated March 3, 2016 is affirmed.

Entered at Salem, Oregon on September 12, 2016