

**FILED: February 29, 2012**

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of  
Barbara L. Jansen, Claimant.

WASHINGTON COUNTY - RISK,  
Petitioner,

v.

BARBARA L. JANSEN,  
Respondent.

Workers' Compensation Board  
0702346

A144114

Argued and submitted on April 12, 2011.

George W. Goodman argued the cause for petitioner. With him on the briefs were Andrew H. Graham and Cummins, Goodman, Fish, Denley & Vickers, P.C.

Edward J. Harri argued the cause for respondent. With him on the brief was J. Michael Casey.

Before Haselton, Presiding Judge, and Armstrong, Judge, and Duncan, Judge.

ARMSTRONG, J.

Reversed and remanded for reconsideration.

1                   ARMSTRONG, J.

2                   Employer seeks review of an order of the Workers' Compensation Board,  
3                   contending that the board erred in setting aside employer's denial of claimant's combined  
4                   condition claim. Employer contends that the board erred by improperly allocating the  
5                   burden of proof. Because we conclude that ORS 656.266 allocates to claimants the  
6                   burden of proving that a compensable occupational disease remains the major  
7                   contributing cause of a combined condition and the board assigned that burden to  
8                   employer, we reverse and remand.

9                   We take the pertinent facts from the board's undisputed findings. Claimant  
10                  has a history of psychological conditions, including panic attacks and anxiety. While  
11                  working for employer, claimant complained in January 2005 of tingling on the right side  
12                  of her face down to her right hand. A March 2005 nerve conduction study indicated that  
13                  claimant had mild right median neuropathy at the wrist region and mild to moderate left  
14                  median neuropathy at the wrist region. Claimant eventually filed a claim in January 2006  
15                  for bilateral carpal tunnel syndrome, which employer accepted in February 2006.

16                  Claimant underwent a right carpal tunnel release procedure in March 2006,  
17                  and, following that surgery, her pain and tingling on the right side of her body had  
18                  markedly improved. A July 2006 nerve conduction study indicated that claimant had  
19                  only a "very slight degree of residual focal sensory dysfunction" after the surgery. The  
20                  report from that study concluded that claimant's right focal sensory dysfunction was  
21                  much improved from the presurgery nerve conduction study, but the report also noted

1 that claimant's left median neuropathy had worsened.

2           Claimant began to complain in July 2006 that her right thumb felt like it  
3 would dislocate and could not support weight. Claimant's attending physician, Dr.  
4 Thomas, referred claimant to Drs. Cober and Van Allen to identify the cause of her  
5 ongoing symptoms. Cober stated that he saw no objective evidence from either his  
6 physical examination of claimant or from the July 2006 nerve conduction study that  
7 indicated motor branch damage and, further, that her symptoms did not relate to the  
8 median nerve.

9           Van Allen, a hand surgeon, concluded that the July 2006 nerve conduction  
10 study for claimant's right hand was within normal limits. Based on the nerve conduction  
11 study, he concluded that claimant's inability or refusal to move her thumb did not appear  
12 to have a neurological or physiological explanation, although he acknowledged that  
13 claimant continued to have left carpal tunnel syndrome.

14           Claimant's attending physician, Thomas, agreed with the medical opinions  
15 of both Cober and Van Allen. Thomas further concluded that claimant's right carpal  
16 tunnel syndrome had resolved without permanent impairment and that, to the extent  
17 claimant had any ongoing disability or need for medical treatment, it was due in major  
18 part to a preexisting psychological or personality disorder.

19           After the physical examinations indicated that claimant's carpal tunnel  
20 syndrome and the release surgery were not the causes of her right thumb symptoms,  
21 claimant underwent multiple psychological evaluations. On February 27, 2007, Dr.  
22 Davies, a psychologist, examined claimant and issued a report in which he concluded that

1 claimant had "significant emotional contributions to her disability behaviors" and that the  
2 "majority of her disability \* \* \* is apparently non-anatomic in nature." Davies further  
3 concluded that claimant had "an abnormal psychological condition that essentially fuels  
4 symptom magnification" and that claimant's "psychological condition is the major cause  
5 of her current disability and pursuit of medical treatment."

6           On March 26, 2007, Davies issued an addendum report based on his review  
7 of medical records for claimant that antedated her carpal tunnel syndrome diagnosis. He  
8 determined that claimant had a preexisting psychological condition that was "playing a  
9 primary role in her disability behaviors." He diagnosed claimant as having a personality  
10 disorder, dysthymia with a primary somatoform presentation, and psychological pain  
11 disorder.

12           Two additional doctors, Dr. Zinsmeister, a neurologist, and Dr. Nolan, a  
13 hand surgeon, also examined claimant. They determined that the July 2006 nerve  
14 conduction study on "the right median nerve showed some objective evidence of  
15 improvement after the surgery" and agreed with Van Allen that claimant was suffering  
16 from psychogenic hand syndrome. They both concluded that claimant's carpal tunnel  
17 syndrome was no longer a material contributing cause of her need for treatment of her  
18 right hand because her carpal tunnel syndrome had improved after the surgery.

19           Based on the reports of Drs. Davies, Zinsmeister, and Nolan, and Thomas's  
20 concurrence with their opinions, employer issued on April 9, 2007, a modified  
21 acceptance of claimant's January 2006 carpal tunnel syndrome claim to include  
22 "personality disorder, dysthymia with chronic somatoform presentation, and

1 psychological pain disorder." The following day, employer issued a claim denial on the  
2 ground that claimant's carpal tunnel syndrome had "ceased to be the major cause of [her]  
3 disability and need for treatment by at least February 27, 2007," the date that Davies had  
4 diagnosed claimant as suffering from a psychological condition.

5           Claimant requested a hearing on employer's denial. After that request,  
6 numerous other physicians and psychologists examined claimant. A summary of those  
7 evaluations will not aid in the reader's understanding of our resolution of this case.

8           An administrative law judge (ALJ) found that there was "no evidence that  
9 claimant [had] a preexisting psychological condition that caused her" carpal tunnel  
10 syndrome and that, "to the extent claimant has a preexisting psychological condition, that  
11 condition did not combine with claimant's occupational disease to cause or prolong her  
12 disability or need for treatment of [her carpal tunnel syndrome]." Thus, the ALJ  
13 concluded that claimant did not have a combined condition and set aside employer's  
14 denial of the claim for it.

15           Employer appealed the ALJ's order to the board, arguing that claimant's  
16 psychological condition was a preexisting condition that had combined with her accepted  
17 carpal tunnel syndrome to prolong her disability and need for treatment. Employer  
18 further contended that claimant had not satisfied her burden of proving that her carpal  
19 tunnel syndrome continued after February 27, 2007, to be the major contributing cause of  
20 her disability and need for treatment.

21           Claimant responded that employer had failed to prove the existence of a  
22 combined condition because employer had failed to establish that claimant suffered from

1 a psychological condition. She further contended that "employer had failed to carry its  
2 burden of proof to show that the alleged psychological problems caused or prolonged  
3 disability or the need for treatment of" claimant's carpal tunnel syndrome.

4           The board affirmed the ALJ by applying ORS 656.262(6)(c) to determine  
5 the ongoing compensability of claimant's combined condition.<sup>1</sup> In doing so, the board  
6 did not address the ALJ's conclusion that claimant did not have a combined condition but,  
7 rather, appears to have assumed for purposes of its decision that claimant's carpal tunnel  
8 syndrome had combined with a preexisting psychological condition to produce a  
9 combined condition. The board explained that, pursuant to ORS 656.262(6)(c), employer  
10 could deny the accepted combined condition only if the compensable injury had ceased to  
11 be the major contributing cause of the combined condition and that, in the absence of  
12 evidence demonstrating that a change in claimant's condition had caused the compensable  
13 injury to cease being the major contributing cause of the combined condition, employer's  
14 denial was procedurally invalid.

15           With regard to the latter conclusion, the board determined that the record  
16 was "insufficient to support the requisite 'change' in condition that the employer must  
17 establish to support its 'ceases' denial pursuant to ORS 656.262(6)(c)" because the board

---

<sup>1</sup> ORS 656.262(6)(c) provides:

"An insurer's or self-insured employer's acceptance of a combined or consequential condition under ORS 656.005(7), whether voluntary or as a result of a judgment or order, shall not preclude the insurer or self-insured employer from later denying the combined or consequential condition if the otherwise compensable injury ceases to be the major contributing cause of the combined or consequential condition."

1 found unpersuasive the medical opinions on which employer had relied to issue its denial.  
2 The board stated that it found Davies's opinion to be unpersuasive because he had not  
3 discussed whether there had been a change in claimant's condition from the effective date  
4 of employer's acceptance of the combined condition. The board further found Nolan's  
5 and Zinsmeister's opinions to be unpersuasive because Nolan and Zinsmeister were not  
6 mental health professionals, and the combined condition included psychological  
7 components.

8           Employer seeks judicial review of the board's order, which we review for  
9 legal error. ORS 656.298(7); ORS 183.482(8)(a). Employer contends that ORS  
10 656.266(1) allocates to claimants the burden of proving the ongoing compensability of a  
11 combined condition involving a claim for an occupational disease. Employer accordingly  
12 contends that the board erred by setting aside employer's denial on the ground that  
13 *employer* had failed to prove that claimant's accepted compensable carpal tunnel  
14 syndrome was no longer the major contributing cause of her combined condition.

15           Conversely, claimant contends that ORS 656.262(6)(c) allocates to insurers  
16 and self-insured employers the burden of proof regarding the procedural validity and  
17 factual sufficiency of a denial issued pursuant to that statute and, therefore, the board did  
18 not err in setting aside the denial for employer's failure to satisfy that burden.

19           The resolution of the parties' competing contentions turns on a correct  
20 understanding of the relationship among ORS 656.005(7)(a)(B), ORS 656.266(2), and  
21 ORS 656.262(6)(c). ORS 656.005(7)(a)(B) establishes the basic policy on the  
22 compensability of combined conditions. It provides:

1 "If an otherwise compensable injury combines at any time with a  
2 preexisting condition to cause or prolong disability or a need for treatment,  
3 the combined condition is compensable only if, so long as and to the extent  
4 that the otherwise compensable injury is the major contributing cause of the  
5 disability of the combined condition or the major contributing cause of the  
6 need for treatment of the combined condition."

7 ORS 656.266, in turn, allocates the burden of proving the compensability of  
8 an injury, occupational disease, or combined condition. It provides, as relevant:

9 "(1) The burden of proving that an injury or occupational disease is  
10 compensable and of proving the nature and extent of any disability  
11 resulting therefrom is upon the worker. \* \* \*

12 "(2) Notwithstanding subsection (1) of this section, for the purpose  
13 of combined condition injury claims under ORS 656.005(7)(a)(B) only:

14 "(a) Once the worker establishes an otherwise compensable injury,  
15 the employer shall bear the burden of proof to establish the otherwise  
16 compensable injury is not, or is no longer, the major contributing cause of  
17 the disability of the combined condition or the major contributing cause of  
18 the need for treatment of the combined condition.

19 "(b) \* \* \* [P]aragraph (a) of this subsection does not apply to any  
20 occupational disease claim."

21 The legislature added subsection (2) to the statute in 2001. Or Laws 2001, ch 865, § 2.

22 As we will explain, the distinction that it makes between injury and occupational disease  
23 claims has a significant bearing on this case.

24 Finally, ORS 656.262(6)(c) authorizes an insurer or self-insured employer  
25 to deny a previously accepted combined or consequential condition "if the otherwise  
26 compensable condition ceases to be the major contributing cause of the combined or  
27 consequential condition." A proper understanding of that statute begins with our  
28 application of it in *State Farm Ins., Co. v. Lyda*, 150 Or App 554, 946 P2d 685 (1997),

1 *rev den*, 327 Or 82 (1998).

2 *Lyda* involved an insurer's denial under ORS 656.262(6)(c) of a previously  
3 accepted combined condition. In overturning the denial, the board appeared to conclude  
4 that the insurer's denial was procedurally invalid:

5 "[W]e are not inclined to find that there has been a change in [the]  
6 claimant's condition or a change in circumstances to warrant the issuance of  
7 a denial under ORS 656.262(6)(c).

8 "In any event, even if the requisite change of circumstances was  
9 present to support the procedural validity of such a denial, the persuasive  
10 medical evidence does not establish that claimant's compensable injury has  
11 "ceased" to be the major contributing cause of his chronic pain disorder."

12 150 Or App at 558.

13 On judicial review, the insurer contended that the board had effectively  
14 assigned to it the burden to prove the procedural validity of its ORS 656.262(6)(c) denial  
15 by establishing that there had been a change of the claimant's condition that would  
16 support issuance of the denial. The insurer argued that the board had erred in doing that  
17 because, pursuant to ORS 656.266, claimants bear the burden of proof on compensability,  
18 which meant that the claimant had to prove that, as of the date of the denial, his  
19 compensable injury continued to be the major contributing cause of his combined  
20 condition.

21 We rejected the insurer's argument, reasoning that the board had expressly,  
22 and correctly, recognized that ORS 656.266 imposed on the claimant the burden to prove  
23 the compensability of his combined condition:

1            "The Board's opinion clearly stated that [the] 'claimant has sustained *his*  
2            *burden* of proving that his compensable 1983 injury remains the major  
3            contributing cause of his chronic pain syndrome."

4            150 Or App at 559 (emphasis in original). We understood the board's statements about  
5            the procedural validity of the insurer's denial, *viz.*, that there "must be a 'requisite change  
6            of circumstances' and that 'the word "ceases" implies that there must be a change of  
7            circumstances,'" to identify circumstances under which an insurer could be subject to  
8            penalties under ORS 656.262(11)(a) for issuing an unreasonable denial. 150 Or App at  
9            559. We thereby rejected the notion that insurers had a burden to prove the procedural  
10           validity of a denial issued under ORS 656.262(6)(c) in a hearing on such a denial.

11                        Significantly, however, the legislature reallocated the burden of proof for  
12           combined condition injury claims when it added subsection (2) to ORS 656.266 in 2001.  
13           Or Laws 2001, ch 865, § 2. The effect of the change was to shift from claimants to  
14           employers the burden to prove that a claimant's otherwise compensable injury "is not, or  
15           is no longer, the major contributing cause of the" claimant's combined condition. ORS  
16           656.266(2)(a). That means that, if a claimant requests a hearing on an employer's denial  
17           under ORS 656.262(6)(c) of a combined condition injury claim, it is the employer that  
18           bears the burden of proving that, as of the date of the denial, the claimant's condition had  
19           ceased to be the major contributing cause of the claimant's combined condition. The  
20           claimant has no burden to prove anything in such a case.

21                        Although we have decided cases since 2001 involving the denial of  
22           combined condition injury claims, we have failed to make clear the import of ORS  
23           656.266(2)(a). We also have failed to consistently apply the principle that we established

1 in *Lyda* that rejected the idea that a denial under ORS 656.262(6)(c) could be set aside for  
2 "procedural invalidity."

3 For example, in [\*Oregon Drywall Systems, Inc. v. Bacon\*](#), 208 Or App 205,  
4 144 P3d 987 (2006), we affirmed a board order that set aside an employer's combined  
5 condition denial under ORS 656.262(6)(c). We noted that the board had concluded that  
6 the

7 "employer's denial was procedurally flawed, because [the] employer had  
8 failed to establish that there had been a change in [the] claimant's medical  
9 condition subsequent to the \* \* \* 'effective date' of the acceptance of the  
10 combined condition."

11 *Id.* at 208. In affirming the board, we concluded that there was substantial evidence to  
12 support the board's findings regarding the date on which the employer had accepted the  
13 combined condition and regarding the lack of "evidence that [the] claimant's condition  
14 [had] changed since that date." *Id.* at 210-11.

15 Under ORS 656.266(2)(a), the employer in *Oregon Drywall* had the burden  
16 to prove that the claimant's condition had changed since the employer's acceptance of the  
17 combined condition to the extent that the claimant's otherwise compensable injury had  
18 ceased to be the major contributing cause of the combined condition. Hence, the result  
19 that the board reached was correct under that statute: the employer had failed to satisfy  
20 the burden imposed on it by ORS 656.266(2)(a).

21 As we now appreciate, we should have corrected the board's  
22 characterization of the employer's denial as procedurally flawed, because it reflected a  
23 continued misunderstanding about the relationship between ORS 656.262(6)(c) and ORS

1 656.266. As we said in *Lyda*, an employer that issues a denial under ORS 656.262(6)(c)  
2 without a reasonable basis to do so may be subject to penalties under ORS  
3 656.262(11)(a). 150 Or App at 559 n 1. However, the fundamental issue at a hearing on  
4 such a denial is the validity of the denial, and the burden to prove its validity or invalidity  
5 is governed by ORS 656.266, not ORS 656.262(6)(c).

6           If, as in *Oregon Drywall*, the combined condition involves an otherwise  
7 compensable *injury*, then the employer has the burden to prove *the validity* of its denial.  
8 *See* ORS 656.266(2)(a). That means that the employer has the burden to submit evidence  
9 at the hearing that persuades the board that the claimant's condition has changed since the  
10 employer accepted the combined condition and that the change has caused the claimant's  
11 compensable injury to cease to be the major contributing cause of the combined  
12 condition. ORS 656.262(6)(c); *see also Oregon Drywall*, 208 Or App at 208-11.

13           However, if, as here, the combined condition involves an otherwise  
14 compensable *occupational disease*, then the claimant has the burden to prove *the*  
15 *invalidity* of the employer's denial. *See* ORS 656.266(1), (2)(b). That means that the  
16 claimant has the burden to submit evidence that persuades the board that the claimant's  
17 condition has not changed since the acceptance of the combined condition to such an  
18 extent that the compensable occupational disease has ceased to be the major contributing  
19 cause of the combined condition. How a claimant might choose to meet that burden  
20 depends on the facts of the case. For example, a claimant could submit evidence that  
21 would support a finding that, as of the effective date of the denial, the compensable  
22 occupational disease was the major contributing cause of the combined condition. If the

1 board made that finding, it would follow that the denial was invalid because the  
2 compensable occupational disease had not ceased to be the major contributing cause of  
3 the combined condition. Alternatively, a claimant might submit evidence that would  
4 support a finding that the claimant's condition had not changed between the effective  
5 dates of the employer's acceptance and its denial of the combined condition or a finding  
6 that, if the claimant's condition had changed, it had not changed enough to cause the  
7 occupational disease to cease to be the major contributing cause of the combined  
8 condition. The board could set aside the employer's denial on the basis of either finding,  
9 given the nature of a denial under ORS 656.262(6)(c).

10           Here, applying its procedural-invalidity principle, the board set aside  
11 employer's combined condition denial because the board concluded that employer had  
12 failed to prove the validity of the denial. The board erred in assigning that burden to  
13 employer. Employer has no burden in this case. Rather, it is claimant's burden to prove  
14 the invalidity of employer's denial of claimant's combined condition occupational disease  
15 claim.<sup>2</sup>

16           Reversed and remanded for reconsideration.

---

<sup>2</sup> As discussed above, claimant could meet her burden by establishing that the combined condition has not changed since its acceptance to such an extent that claimant's occupational disease has ceased to be the major contributing cause of the combined condition or by establishing that, as of the date of the denial, claimant's occupational disease is the major contributing cause of the combined condition. She also could meet her burden by establishing that she does not have the combined condition that employer purported to deny.