
In the Matter of the Compensation of
CLARA M. ALLENSWORTH, Claimant
WCB Case No. 01-04883
ORDER ON REVIEW
Black Chapman Et Al, Claimant Attorneys
Hornecker Cowling Et Al, Defense Attorneys

Reviewing Panel: Members Biehl and Lowell.

The insurer requests review of Administrative Law Judge (ALJ) Stephen Brown's order that set aside its partial denial of claimant's current low back condition. Claimant argues that the denial was procedurally improper. On review, the issues are propriety of the denial and compensability. We reverse.¹

FINDINGS OF FACT

We adopt the ALJ's "Findings," except for finding number 10 on page 3, with the following supplementation.

Sometime before the insurer's May 4, 2001 modified acceptance and its May 9, 2001 partial "current condition" denial, claimant's accepted April 28, 2000 lumbar strain combined with preexisting degenerative disc disease to cause and prolong disability and a need for treatment. (*See* Exs. 16, 18, 20, 23, 26, 29). Thereafter, the work injury was not the major contributing cause of claimant's disability or need for treatment for her "combined" low back condition.

CONCLUSIONS OF LAW AND OPINION

Claimant injured her low back at work on April 28, 2000. The insurer accepted a lumbar strain on June 14, 2000. Dr. Fridinger provided conservative treatment and claimant's symptoms continued.

On May 4, 2001, the insurer modified its acceptance to include "Lumbar strain combined with pre-existing, nonindustrial degenerative disc disease of the lumbar spine." (Ex. 21). On May 9, 2001, the insurer partially denied claimant's

¹ The carrier has moved for postponement of Board review until such time as a member representing the concerns of employers is available to participate in the review process. *See* ORS 656.712(1). Because such a member has served on this reviewing panel, the carrier's request is moot.

current low back condition, contending that the accepted injury was no longer the major contributing cause of the “combined condition.” (Ex. 22).

On May 16, 2001, a Notice of Closure closed the claim with an award of temporary, but not permanent disability. Claimant requested reconsideration and Dr. Roberts performed a medical arbiter’s examination.

Claimant requested a hearing regarding the insurer’s denial.

The ALJ found that claimant had preexisting degenerative disc disease. However, after analyzing the medical evidence, the ALJ concluded that claimant did not have a “combined condition” involving preexisting degenerative disc disease. Alternatively (even if claimant’s current low back condition is a combined condition), the ALJ found the current condition compensable, based on a February 28, 2001 opinion from Drs. Marble and Rich, indicating that the work injury was the major contributing cause of claimant’s need for treatment “to the present.” (See Ex. 16-6-8). We reach the opposite result.

As a preliminary matter, we address claimant’s contention that the insurer’s partial denial was procedurally improper under ORS 656.262(6)(c).² Claimant argues that the denial of her “current low back conditions” was procedurally improper, because she did not have a combined condition.

In order for the denial to be procedurally proper under the statute, “the acceptance of a combined condition must precede the denial of a combined condition.” *Blamires v. Clean Pak Systems, Inc.*, 171 Or App 263, 267 (2000) (discussing *Croman v. Serrano*, 163 Or App 136, 140-41); see *Columbia Forest Products v. Woolner*, 177 Or App 639 (2001).

For the reasons set forth below, we find that claimant’s low back condition *was* a combined condition before the insurer issued its May 4, 2001 modified acceptance of a combined low back condition. (See Exs. 20, 23, 26). We also find

² 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.”

that, although claimant's May 4, 2000 work injury was initially the major contributing cause of the disabling or need for treatment of her combined low back condition, it was not so when the insurer issued its May 9, 2001 partial "current condition" denial. Moreover, we conclude that this change in causation constitutes a change in circumstances that supports a procedurally valid denial under ORS 656.262(6)(c). *See SAIF v. Belden*, 155 Or App 568, 573 (1998), *rev den* 328 Or 330 (1999) ("Under ORS 656.262(6)(c), an insurer may now deny an accepted combined condition *at any point* if the 'compensable injury ceases to be the major contributing cause of the combined * * * condition.'") (emphasis in original). Therefore we reject claimant's challenge to the procedural validity of the denial and we proceed to consider the merits. *See Florella E. Connor*, 50 Van Natta 414 (1998).

The medical evidence is essentially undivided.³ Until February 28, 2001, the experts agreed that claimant's preexisting degeneration did not contribute to her need for treatment for her low back. (*See Exs. 6, 7, 10-6; 16-6-8*). Later (without reexamining claimant), Dr. Marble stated that claimant's preexisting degeneration *did* combine with her work injury to prolong her recovery from the injury. (*Ex. 20*). Dr. Fridinger, attending physician, concurred.⁴ (*Exs. 23, 26*).

We do not find these opinions inconsistent with the doctors' prior opinions. It is undisputed that claimant has degenerative disc disease that now contributes to her conditions and her strain should have resolved sooner than it did. Under these circumstances, we are persuaded by the doctors' conclusion that degenerative disc disease *now* combines with claimant's injury. Moreover, to the extent that the opinions could be considered "changed," we find the "change" explained by the doctors' reasoning. *See Kelso v. City of Salem*, 87 Or 630, 634 (1987) (physician's changed opinion persuasive, because change reasonably explained). Accordingly, based on the most recent opinions of Drs. Marble and Fridinger, we conclude that

³ Dr. Gilbertson, osteopath, opined that claimant's degenerative disc disease is "asymptomatic or minimally symptomatic." (*Ex. 28*). We do not find this view particularly persuasive, because it does not address the fact that over a year has passed since the work injury, nor does it rebut the persuasive opinions indicating that claimant's degenerative disc disease has prolonged her recovery.

⁴ The ALJ found Dr. Marble's and Dr. Fridinger's opinions unpersuasive, reasoning that they are "based on an otherwise unidentified apparent statistical norm: she should have recovered from a strain." (*Opinion and Order*, p. 7). Because the opinions do not refer to statistical studies, we decline to interpret them in such a manner. Furthermore, statistical studies can, in some cases, permit the inference of a work-related causal link. *See Seeley v. Sisters of Providence*, 179 Or App 723, 730 (2002). In any event, for the reasons expressed above, we find that the doctors' conclusions are persuasively explained.

claimant's current low back condition is a "combined condition" (and it became a "combined condition" sometime after the examining physicians' February 28, 2001 examination, but before the May 4, 2001 modified acceptance and the May 9, 2001 "current condition" denial).

Consequently, to overcome the denial, claimant must establish that her April 28, 2000 work injury is and remains the major contributing cause of the disability and/or need for treatment for the current combined low back condition. See ORS 656.005(7)(a)(B);⁵ *Jerold D. Glover*, 51 Van Natta 169 (1999) (combined condition compensable only so long as due in major part to work injury); *Danny B. Conner, on remand* 48 Van Natta 1227, 1228 (1996) (same).

We find the medical evidence insufficient to carry claimant's burden. Dr. Fridinger and Dr. Marble agreed that claimant's preexisting degeneration was probably the major contributing cause of claimant's need for treatment—months before the insurer's "current condition" denial. (Exs. 20, 23). Dr. Roberts subsequently reported numerous invalid findings and opined that claimant's findings suggested a "source other than her lumbar spine."⁶ (Ex. 29-5). Dr. Roberts stated, "While it is clear from the history that the reason for initial treatment was the injury of 5/4/2000 [sic], the cause of [claimant's] current limitations are [sic] less clear." (*Id.*). Accordingly, absent persuasive evidence that the work injury "is and remains" the major contributing cause of claimant's low back condition (or disability and/or treatment therefore), we conclude that the claim fails under ORS 656.005(7)(a)(B). See *Glover*, 51 Van Natta at 170; *Conner*, 48 Van Natta at 1228.

ORDER

The ALJ's order dated October 30, 2001 is reversed. The insurer's denial is reinstated and upheld. The ALJ's attorney fee award is reversed.

Entered at Salem, Oregon on August 5, 2002

⁵ ORS 656.005(7)(a)(B) provides: "If an otherwise compensable injury combines at any time with a preexisting condition to cause or prolong disability or a need for treatment, the combined condition is compensable only if, so long as and to the extent that the otherwise compensable injury is the major contributing cause of the disability or the need for treatment of the combined condition."

⁶ We find Dr. Gilbertson's opinion relating claimant's current condition to the April 2000 strain less persuasive than Dr. Roberts' opinion, because only the latter considered and evaluated claimant's specific examination findings. (See also, n. 1, *supra*).