

In the Matter of the Compensation of
MELISSA L. SMITH, Claimant
WCB Case No. 00-09528
ORDER ON REVIEW
Ernest M Jenks, Claimant Attorneys
Meyers Et Al, Defense Attorneys

Reviewing Panel: Members Biehl and Langer.

The insurer requests review of that portion of Administrative Law Judge (ALJ) Kekauoha's order that set aside its partial denials of claimant's current low back condition to the extent that they denied a current combined condition consisting of symptomatic spondylolisthesis with foraminal stenosis at L5-S1. On review, the issue is compensability.

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

Relying on the medical opinions of claimant's treating physicians, particularly Dr. Zelaya, the ALJ determined that claimant's current low back condition was compensable. The ALJ then ordered the insurer to accept, based on the medical opinion of Dr. Zelaya, "symptomatic spondylolisthesis with foraminal stenosis at L5-S1" under ORS 656.005(7)(a)(B).

On review, the insurer contests the ALJ's analysis of the medical evidence in arguing that claimant's current "combined" low back condition is not compensable under ORS 656.005(7)(a)(B). Alternatively, the insurer requests that we clarify the accepted condition in this case. Noting that Dr. Zelaya did not diagnose "foraminal stenosis" and that it should not be ordered to accept "symptoms," the insurer contends that ALJ's description of the compensable condition was in error.

At the outset, we acknowledge our agreement with the ALJ's evaluation of the medical evidence and with his application of ORS 656.005(7)(a)(B). However, we agree with the insurer that the ALJ's description of the "combined" condition as "symptomatic spondylolisthesis with foraminal stenosis at L5-S1" is not accurate.

In this regard, we note that the insurer previously accepted a combined condition consisting of lumbosacral strain and preexisting spondylolisthesis at L5-S1. (Ex. 30). It later denied the current low back condition on the ground that the accepted injury was no longer the major contributing cause of the combined

conditions. (Ex. 32-1). Numerous other underlying/preexisting conditions were denied as well. The ALJ upheld the insurer's denials with respect to all denied conditions with the exception of the above-described combined condition.

Based on our review of the medical evidence, particularly that of Dr. Zelaya and Thomas, the "combined" condition consists of a low back strain resulting from the compensable injury and preexisting spondylolisthesis. (Exs. 52-32, 52-39, 53-10, 53-13). While that condition was previously accepted, we interpret the insurer's denial as alleging that the "combined condition" no longer remains compensable. However, as previously noted, we agree with the ALJ's reasoning and conclusion that the current combined condition is compensable. Therefore, the accepted "combined" condition (the low back strain and the preexisting spondylolisthesis) continues to be compensable under ORS 656.005(7)(a)(B).

Claimant's attorney is entitled to an assessed fee for services on review. ORS 656.382(2). After considering the factors set forth in OAR 438-015-0010(4) and applying them to this case, we find that a reasonable fee for claimant's attorney's services on review is \$2,808, payable by the insurer. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by claimant's respondent's brief, counsel's representation of time spent on the brief), the complexity of the issue, and the value of the interest involved.

ORDER

The ALJ's order dated November 29, 2001, as reconsidered on December 14, 2001, is affirmed. For services on review, claimant's attorney is awarded an assessed fee of \$2,808, to paid by the insurer.

Entered at Salem, Oregon on July 24, 2002