
In the Matter of the Compensation of
FRANCIS B. SOLIS, Claimant
WCB Case No. 01-02450, 00-07992
ORDER ON REVIEW
Floyd H Shebley, Claimant Attorneys
Bradley P Avakian, Defense Attorneys
Bruce A Bornholdt, SAIF Legal, Defense Attorneys

Reviewing Panel: Members Phillips Polich and Langer.

Claimant requests review of those portions of Administrative Law Judge (ALJ) Menashe's order that: (1) upheld the SAIF Corporation's denial of claimant's injury claim for a left knee condition; and (2) decline to assess a penalty against SAIF for allegedly unreasonable claim processing. On review, the issues are compensability and penalties.

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

On review, claimant argues that the ALJ erred in applying the major contributing cause standard of ORS 656.005(7)(a)(B), contending that SAIF did not deny a "combined condition" or otherwise raise a "combined condition defense" prior to or during hearing. Because we find that claimant implicitly agreed to litigate the "combined condition" issue, we need not address the scope of SAIF's denial.¹

In her opening statement, claimant identified "compensability" of the left knee injury as the primary issue to be litigated. Claimant did not object to the admission of medical opinions addressing the subjects of preexisting condition, combined condition and causation. In addition, claimant's counsel indicated to the ALJ that new information (a medical opinion describing claimant's preexisting condition as the major contributing cause of her combined condition) had been

¹ Claimant also contends that because SAIF did not "formally accept" a "combined condition" it was not permitted to deny such a condition and was therefore "prohibited from litigating a non-existent combined condition denial." (Appellant's Brief at 3-4). In doing so, claimant relies on *Blamires v. Clean Pak Systems*, 171 Or App 263 (2000) and *John J. Shults*, 53 Van Natta 383 (2001) construing ORS 656.262(6)(c) and ORS 656.262(7)(b). Both statutory provisions address an insurer's pre-closure denial of a previously accepted "combined condition." Because this is an initial claim in which the compensability of claimant's condition has not been accepted or established, neither the underlying statutes, nor the cases construing them, apply here.

produced in a deposition the preceding evening, and that he would like to reserve the right to obtain a rebuttal response from claimant's surgeon. Although that right was later expressly waived, claimant's counsel's comments anticipated that the ALJ would consider the "new" causation information and provided implicit consent to such consideration. Moreover, claimant's counsel did not in any way alert the ALJ that the scope of his consideration of the medical evidence was narrowed by the terms of SAIF's denial.

Claimant was not surprised by the appearance of an ORS 656.005(7)(a)(B) "combined condition" issue and did not detrimentally rely on the express language of SAIF's denial. In a "check the box" letter to SAIF signed on April 3, 2000, almost four months before the hearing, Dr. Fuller, an insurer-arranged medical examiner, indicated that it was probable that claimant had preexisting degenerative joint disease and that, considering the mild mechanism of her injury, it was very unlikely that the work incident was the major cause of the combined condition. (Ex. 12-1). During the course of his deposition on the evening prior to the hearing, Dr. Fuller expressed the opinion that claimant's horizontal meniscus tear preexisted the work event, that the preexisting condition had combined with claimant's work incident to produce the more vertical portion of the meniscus tear and that the preexisting horizontal meniscus tear was the major contributing cause of the condition for which compensation was sought. (Ex. 20-32). Claimant's counsel cross-examined Dr. Fuller on the issue. (Ex. 20-21, 22, 27, 29, 43, 44). Notably, claimant's counsel did not seek a continuance to further prepare the case for hearing following receipt of this evidence, did not object to its admission at hearing and ultimately expressly waived the opportunity to obtain a responsive medical opinion.

Under these circumstances, we find that claimant implicitly consented to, or at the very least acquiesced in the litigation of the causation issue, including consideration of the ORS 656.005(7)(a)(B) issues. *See Judith M. Morley*, 46 Van Natta 882, 883, *on recon* 46 Van Natta 983 (1994); *Jeffrey S. Hunter*, 49 Van Natta 324, 325 (1997) (when the claimant has not relied to his detriment on express language of the employer's denial and has, through conduct, acquiesced in litigation of causation issue, causation issue considered); *Weyerhaeuser v. Bryant*, 102 Or App 432, 435 (1990) (when it is 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 that issue).

Further, even if SAIF's denial was as limiting as claimant contends, the ALJ had an independent obligation to ascertain and apply the appropriate standard of

compensability; *i.e.*, to analyze the facts and apply the correct standard whether or not identified by the parties. See *Michael J. Johnson*, 52 Van Natta 1052 (2000) (consideration of the combined-condition issue required, although issue not raised by the parties); *John M. Miossec*, 50 Van Natta 1677, 1678 (1998). Thus, based on the circumstances described above, the ALJ did not err in considering the application of ORS 656.005(7)(a)(B).

Here, the differing medical opinions of Dr. Fuller and claimant's surgeon, Dr. Irvine, were offered to establish claimant's condition and its causation. We give more weight to those medical opinions that are well reasoned and based on complete and accurate information. See *Somers v. SAIF*, 77 Or App 259, 263 (1986).

In this instance, the "combined condition" analysis presented through Dr Fuller's deposition was more persuasive than that of Dr. Irvine. Dr. Fuller's medical opinion was more complete in that it was the only opinion that addressed the operative findings. It provided a well-reasoned and logical description of claimant's condition and its likely causes. Any inconsistency with Dr. Fuller's previous report was directly and thoroughly explained by Dr. Fuller as attributable to his subsequent review of the surgeon's operative report detailing findings which significantly differed from those anticipated by the earlier MRI. See *Kelso v. City of Salem* 87 Or App 630, 633 (19897) (when reasonable explanation was provided for change in medical opinion, medical opinion was persuasive); *Robert G. Green, Jr.*, 52 Van Natta 1937, 1939 (2000) (physician's subsequent review of additional records sufficient to explain change in medical opinion).

Finally, claimant argues that the ALJ was remiss in referring only to "the walker incident," which occurred in late June, and did not take into account the August "stair-climbing activity" which exacerbated her condition. We disagree. The ALJ included both elements in his factual findings. The ALJ's requirement that claimant demonstrate that "the walker incident" was the major contributing cause of her disability and need for treatment correctly interpreted the opening argument of claimant's counsel and claimant's testimony indicating that the original June injury was exacerbated by the August "stair-climbing activity." (Tr. 12, 29, 32-33). Claimant's "stair-climbing activity," and the exacerbation of symptoms it produced, were simply historical elements for consideration in the diagnosis and causation analyses performed by the medical experts. The record discloses that those physicians who rendered opinions were aware of the "stair-climbing activity" and considered it in their evaluations. (Exs. 6A-6, 11A-1, 20-25, 30, 31, 45).

Because we find Dr. Fuller's opinion to be the most persuasive, for the reasons set forth above and those included in the ALJ's order, we conclude the claimant's left knee condition is not compensable.

ORDER

The ALJ's order dated September 4, 2001 is affirmed.

Entered at Salem, Oregon on June 18, 2002