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In the Matter of the Compensation of  
**JOSEPH M. COUSINS, Claimant**  
WCB Case No. 06-04227  
ORDER ON REVIEW  
Hooton Wold & Okrent LLP, Claimant Attorneys  
Terrall & Terrall, Defense Attorneys

Reviewing Panel: Members Lowell and Biehl.

Claimant requests review of Administrative Law Judge (ALJ) Lipton's order that: (1) declined to address claimant's evidentiary argument regarding the self-insured employer's "Notice of Voluntary Reopening Own Motion Claim;" (2) rejected claimant's argument that his L4-5 fusion was performed for previously accepted conditions; and (3) upheld the employer's denial of his consequential condition claim for L3-4 and L5-S1 degenerative disc disease. On review, the issues are evidence/administrative notice, scope of acceptance, and compensability. We affirm.

FINDINGS OF FACT

We accept the ALJ's findings of fact with the following changes. In the first paragraph on page 3, we change the first date to "September 2, 1988." In the last paragraph on page 3, we change the date in the first sentence to "May 10, 2004." In the second paragraph on page 4, we replace the second sentence with the following: "On March 23, 2006, the employer issued a Notice of Closure: Own Motion Claim." On page 4, we delete the last two paragraphs of the findings of fact.

We provide the following summary. Claimant was compensably injured on April 26, 1984. The 801 form listed the body part affected as "lwr back" and referred to the nature of the injury as a "back strain." (Ex. 3). At the bottom of the 801 form, the insurer checked a box on the form indicating that the claim was accepted. (*Id.*) A February 25, 1986 Determination Order awarded 20 percent unscheduled permanent disability. (Ex. 43A).

On July 7, 1986, Dr. Carr performed an L4-5 fusion. (Ex. 63). A September 10, 1987 Determination Order awarded an additional 5 percent unscheduled permanent disability for claimant's back condition. (Ex. 84A).

In November 1987, Dr. Carr reported that claimant's back condition was progressively worsening. (Ex. 87). On February 26, 1988, the employer accepted a claim for "aggravation of lumbar strain." (Ex. 97A). In October 1989, the employer closed the claim. (Ex. 171A).

A Disputed Claim Settlement (DCS) approved in October 1989 resolved issues involving, among other issues, claims for hearing loss and psychological conditions. (Ex. 171A).

In May 2004, claimant began treating with Dr. Kuether, neurosurgeon. (Ex. 187). On September 20, 2004, Dr. Kuether performed an L3 decompressive laminectomy. (Ex. 194). Claimant initially reported improvement after the surgery, but by January 2005, his back and leg pain had increased. On June 2, 2005, Dr. Kuether performed an L3-4 and L5-S1 anterior fusion. (Ex. 217).

By September 2005, claimant had increasing back and leg problems. (Ex. 233). Dr. Kuether recommended a bilateral L3-4 and L5-S1 foraminotomy. (Ex. 238).

On December 1, 2005, claimant was examined by Drs. Fuller and Williams on behalf of the employer. (Ex. 239).

On March 23, 2006, the employer issued a "Notice of Closure: Own Motion Claim," which indicated that the claim had been reopened for a "post-aggravation rights" worsened condition. (Ex. 244).

By letter dated March 31, 2006, claimant requested acceptance of several conditions, including lumbar stenosis and degenerative disc disease at L3-4 and L5-S1. (Ex. 245). Claimant subsequently requested a hearing regarding a *de facto* denial.

### CONCLUSIONS OF LAW AND OPINION

#### Evidence/Administrative Notice

Claimant argues that the ALJ did not address his request to admit the employer's October 8, 2004 "Notice of Voluntary Reopening Own Motion Claim." Claimant asserts that document was not provided before the hearing, and he variously contends that his attorney requested a copy of that document from the Board or the Workers' Compensation Division, which was not received until the afternoon of the day scheduled for hearing. Claimant included a copy of that document with his written argument to the ALJ, and requested that the ALJ admit that exhibit. The ALJ did not address the evidentiary request.

On review, claimant contends that the October 8, 2004 “Notice of Voluntary Reopening Own Motion Claim” should be admitted or, alternatively, he requests that we take “judicial notice” of that document. We are not inclined to take administrative notice of that document. *Patricia L. Hodges*, 48 Van Natta 1833 (1996); *Rodney J. Thurman*, 44 Van Natta 1572, 1573-74 (1992) (Board declined to take administrative notice of a carrier-prepared document (form 1502)). In any event, even if we considered the document, it would not alter our ultimate conclusions regarding the scope of acceptance and compensability issues, as explained below.<sup>1</sup>

### Scope of Acceptance

The ALJ rejected claimant’s argument that the July 1986 L4-5 fusion was performed for accepted conditions. The ALJ reasoned that the medical evidence did not establish that the L4-5 fusion was for an accepted condition or that the claimed conditions were a consequence of that surgery.

On review, claimant contends that the employer’s processing actions, including surgical authorizations, are “akin to acceptance.” He asserts that the accepted condition at the time of claim closure in February 1986 was a lower back strain because that was the nature of the condition identified on the 801 form. Claimant explains that the claim was subsequently reopened and reclosed in September 1987, but the aggravation reopening was not accompanied by an acceptance or other documentation describing the condition(s) for which the claim was being reopened. He contends, however, that the act of reopening and formally closing an aggravation claim established an accepted and compensable aggravation claim. According to claimant, because the contemporaneous medical evidence establishes that the claim was reopened for spondylosis at L4-5, the employer accepted that condition. Claimant also argues that the employer’s voluntary reopening of the Own Motion claim was “essentially the same as an acceptance.”

The scope of the employer’s acceptance is a question of fact. *E.g.*, *SAIF v. Dobbs*, 172 Or App 446, 451, *on recons.*, 173 Or App 599 (2001); *SAIF v. Tull*, 113 Or App 449, 454 (1992). If there is no written acceptance, determining the scope of acceptance requires examination of the medical records contemporaneous with the injury. *Gilbert v. Cavenham Forest Industries Div.*, 179 Or App 341,

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<sup>1</sup> In light of our conclusion that consideration of this document would not change the result, it is not necessary to address claimant’s arguments regarding remand to the ALJ for the taking of additional evidence.

344 (2002). Here, however, the employer issued a written acceptance. When there is a written acceptance of a condition, the conclusion as to what has been accepted is based on an interpretation of the writing. *City of Grants Pass v. Hamelin*, 212 Or App 414, 419 (2007).

On May 1, 1984, claimant signed a form 801 regarding an April 26, 1984 injury. The 801 form listed the “body part affected” as “lwr back” and referred to the nature of the injury as a “back strain.” (Ex. 3). At the bottom of the 801 form, the employer checked a box indicating that the claim was accepted as a disabling injury. (*Id.*) Under these circumstances, we find that the employer accepted a lower back strain resulting from the April 26, 1984 injury.

In reaching our conclusion, we find that claimant’s reliance on *Klutsenbeker v. Jackson County*, 185 Or App 96 (2002), is misplaced. Claimant argues that it is appropriate to look at the medical and processing record to determine what condition the employer actually accepted.

In *Klutsenbeker*, the claimant’s 801 form regarding a 1986 claim referred to a “lower back injury” and indicated that the cause was “not known at this time.” The carrier accepted the claim in that form. Later examinations revealed disc herniations at L2-3 and L4-5 and disc bulges at L3-4 and L4-5. The claimant argued that acceptance of that claim was broad enough to encompass the disc herniations. On judicial review, the court determined that the carrier’s signature on the 801 form constituted a written acceptance. The court explained that the function of the rule in *Georgia-Pacific v. Piwowar*, 305 Or 494 (1988), was to determine the scope of ambiguous or vague acceptances such as “sore back” or “low back pain.” The court reasoned that, if the claimant’s “lower back injury” of “unknown” cause was the result of degenerative spine disease or disc herniations, then those herniations were accepted. 185 Or App at 101. The court remanded the case to the Board to determine whether the claimant’s 1986 “low back injury” of the then-unknown cause resulted from disc herniations.

Here, in contrast, the 801 form referred to a specific diagnosis, *i.e.*, “back strain,” rather than an “unknown” cause, as in *Klutsenbeker*. The rule in *Piwowar* does not apply. Under these circumstances, the record supports the conclusion that the employer accepted a lower back strain resulting from the April 26, 1984 injury.

Next, claimant contends that the act of reopening and formally closing an aggravation claim established an accepted aggravation claim. According to claimant, the contemporaneous medical evidence establishes that the claim was reopened for spondylosis at L4-5 and, therefore, the employer accepted that condition.

An acceptance of an aggravation claim is generally a concession that the compensable condition has actually worsened. *Matthew P. Ligatich*, 55 Van Natta 3411, 3415 (2003) (on remand); *see* ORS 656.273(1); *SAIF v. Walker*, 330 Or 102 (2000). An aggravation claim must be for a compensable condition that has been accepted and processed in accordance with ORS 656.262 and ORS 656.268. *Evelyn R. Crossman*, 56 Van Natta 1076, 1078 (2004).

Here, the record establishes that after the initial claim was closed in February 1986 (Ex. 43A), the claim was reopened (*see* Ex. 171A-1), and again closed in September 1987 with additional permanent disability. (Ex. 84A). According to the parties' 1989 DCS, the claim was again reopened for time loss benefits in 1988 and 1989. (Ex. 171A). On February 26, 1988, the employer accepted the claim for "aggravation of lumbar strain." (Ex. 97A). In October 1989, the employer again closed the claim. (Ex. 171A).

The only written acceptance of an aggravation claim states that the aggravation claim was accepted for an "aggravation of lumbar strain." (Ex. 97A). The record does not include written notice of a formal acceptance of a condition other than a lower back strain. Under these circumstances, we are not persuaded that the accepted aggravation claims pertained to any accepted lumbar disc conditions. *See Crossman*, 56 Van Natta at 1078 (an aggravation claim must be for a compensable condition that has been accepted).

We acknowledge that claimant was apparently awarded permanent disability for the 1986 fusion at L4-5. (Exs. 84, 84A). However, the employer's payment for claimant's surgery or payment of a permanent disability award did not constitute an acceptance of the conditions involved in that surgery. *E.g., Maurice Thorne*, 53 Van Natta 1087, 1089 (2001) (carrier's payment of the claimant's surgeries and preauthorization of surgery did not constitute an acceptance); *Timothy A. Vinton*, 53 Van Natta 979 (2001), *aff'd without opinion*, 182 Or App 291 (2002) (carrier's prior authorizations of surgeries for a low back degenerative condition and payment of a permanent disability award did not constitute an acceptance beyond the expressly accepted lumbar strain). Moreover, a carrier's agreement to pay for a surgery does not preclude the carrier from subsequently denying the condition that required the surgery. *Robyn D. Summers*, 59 Van Natta 2074, 2076 (2007) (carrier's payment for the lumbar surgery did not mean that the carrier accepted the condition that necessitated the surgery); *Lonny D. Clark*, 58 Van Natta 1536, 1540 (2006).

Claimant also contends that the employer's October 8, 2004 voluntary reopening of the Own Motion claim was "essentially the same as an acceptance." (Claimant's br. at 10). Claimant asserts that, during the open period on this Own Motion claim, the employer received requests for pre-authorization for decompressive laminectomy at L3-4 and interbody fusion at L3-4 and L5-S1, which it authorized. (Ex. 246).

The employer's October 8, 2004 "Notice of Voluntary Reopening Own Motion Claim" indicated that the claim had been reopened for a "worsened condition" claim submitted after expiration of aggravation rights. The form required the employer to "[l]ist previously accepted medical condition(s) that has/have worsened." The employer listed "Fusion at L4-5. Segment above has now required surgery." Likewise, the employer's March 23, 2006 Own Motion Notice of Closure listed the "'post-aggravation rights' worsened condition(s) for which claim was reopened" as "Fusion at L4-5. Segment above has now required surgery." (Ex. 244).

It is well settled that a carrier's Own Motion recommendation does not meet the requirements for a formal Notice of Acceptance of a claimant's "new medical condition" claim. *E.g. Robyn D. Summers*, 59 Van Natta at 2075; *Robert B. Reese*, 58 Van Natta 1972, 1975, *on recons*, 58 Van Natta 2625 (2006).

In *Summers*, we held that the carrier's processing of a "worsened condition" claim for a 1982 low back injury did not result in an acceptance of the claimant's L4-5 and L5-S1 disc conditions. 59 Van Natta at 2075-76. Specifically, we found that the carrier's acceptance of an L4-5 and L5-S1 surgery and our Own Motion order reopening the claimant's "worsened condition" claim based on the acceptance of that surgery did not constitute acceptance of the underlying conditions that necessitated the surgery. 59 Van Natta at 2075.

In *Reese*, we held that the carrier's processing of a 2001 Own Motion claim for a "worsening" of the accepted right knee medial meniscus tear condition did not result in an acceptance of the osteoarthritis condition. 58 Van Natta at 1976. Furthermore, we held that neither the carrier's 2001 Own Motion recommendation nor our 2001 Own Motion order determined the compensability of, or acceptance of, the claimant's osteoarthritis condition. Instead, we concluded that the insurer's 2001 recommendation only concerned a "worsened condition" and our 2001 order only reopened the claim for a worsening of the compensable right knee medial meniscus tear condition under ORS 656.278(1)(a) (1987). *Id.*

Here, claimant argues that the employer's October 2004 "Notice of Voluntary Reopening Own Motion Claim," and the March 23, 2006 Own Motion Notice of Closure acknowledged compensability of the "L4-5 condition." He also contends that the documents indicate that the purpose of the reopening, and the worsened condition for which the claim was reopened, involved pathology at L3-4.

Even if we assume, without deciding, that the "fusion at L4-5" was an accepted condition, claimant's subsequent March 2006 claim for L3-4 and L5-S1 degenerative disc disease constitutes a claim for new or omitted medical conditions. (Ex. 245). The employer's 2004 voluntary reopening of the Own Motion claim for a "worsening" concerns only the accepted conditions and would not constitute an acceptance of claimant's L3-4 and L5-S1 pathology.

### Compensability

Furthermore, assuming without deciding that the employer accepted a "fusion at L4-5" for L4-5 spondylosis, the claim at issue in this proceeding concerns claimant's L3-4 and L5-S1 degenerative disc disease. Claimant argues that the degenerative changes at L3-4 and L5-S1 are a compensable consequence of the fusion at L4-5. Based on the following reasoning, we disagree.

ORS 656.005(7)(a)(A) provides that no injury or disease is "compensable as a consequence of a compensable injury" unless the compensable injury is the major contributing cause of the consequential condition. Under ORS 656.005(7)(a)(A), a consequential condition is "a separate condition that arises from the compensable injury, for example, when a worker suffers a compensable foot injury that results in an altered gait that, in turn, results in back strain." *Fred Meyer, Inc. v. Crompton*, 150 Or App 531, 536 (1997).

Claimant relies on the opinion of Dr. Kuether to establish compensability of the L3-4 and L5-S1 degenerative disc disease. In a May 2006 concurrence letter, Dr. Kuether was informed by claimant's attorney that the L4-5 fusion was "an element of his compensable 1984 claim[.]" (Ex. 246-2). Dr. Kuether agreed that "while the problem at L3-4 and L5-S1 can be described as degenerative, and wear and tear (or age) related, it is your opinion that the fusion at L4-5 rapidly accelerated the extent of the wear and tear at those levels and represented the major contributing cause of the disability and need for treatment." (*Id.*) Dr. Kuether acknowledged that claimant "may have had some wear and tear as a natural part of the aging process" but, on the other hand, he "may have had little or no wear and tear at all." (Ex. 246-3). Dr. Kuether opined that it was unlikely that claimant

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would have had “sufficient degeneration at those levels to require a fusion had it not been for the prior fusion at L4-5 and the rapid acceleration of the wear and tear at adjacent levels.” (*Id.*)

In a deposition, Dr. Kuether explained that the degenerative process, or “wear and tear” can come from normal activities of daily living, genetic factors, or injury-related factors. (Ex. 249-16, -17, -18). He said that it does not necessarily require excessive strain or stress, and he noted that people who live sedentary lives can get degenerative disc disease. (Ex. 249-18). Dr. Kuether also explained that people have different responses to fusions, depending in part on how degenerated the disc was. For example, in someone with a severely degenerated disc in the back, the simple process of degeneration reduces the movement at that level. A fusion of a previously severely degenerative level may not necessarily affect the adjacent levels that much, because the degenerated level was not moving too much to begin with. (Ex. 249-33).

We are not persuaded by Dr. Kuether’s causation opinion because it is not well-reasoned and lacks adequate explanation. Dr. Kuether had not reviewed claimant’s prior medical records to see whether he had degenerative changes before the original April 1984 injury. (Ex. 249-23, -26). He acknowledged that, in order to determine whether claimant’s degeneration had “rapidly accelerated,” he would need to see what degree of degeneration claimant had previously. (Ex. 249-25). Dr. Kuether testified that, if the 1984 x-rays showed significant multilevel degenerative changes, that could affect his opinion on causation. (Ex. 249-26).

Later in the deposition, the employer’s attorney asked Dr. Kuether whether it was significant that claimant had moderate central canal stenosis at L3 in 1984, when claimant was about age 35. (Ex. 249-37, -38). Dr. Kuether explained that moderate or moderately severe lumbar stenosis is “not normal” in someone who is 35. (Ex. 249-38). He said that type of degenerative process was “definitely early” and was usually a process that he did not see in people until they were age 60. (Ex. 249-39).

The employer’s attorney asked Dr. Kuether to review claimant’s December 1984 CT scan of L2 through S-1. (*Id.*, see Ex. 12). The employer’s attorney explained that the CT scan referred to the L3 vertebral body with moderate central canal stenosis, as well as calcification of the overlying capsular ligaments at L3-4. Dr. Kuether testified that showed a degenerative process and early evidence of some “wear-and-tear type process[,]” particularly at L3-4. (Ex. 249-40, -41).

Thus, although Dr. Kuether agreed that the L4-5 fusion “rapidly accelerated” the “wear and tear” at L3-4 and L5-S1 (Ex. 246), he had not reviewed claimant’s prior medical records to see whether he had degenerative changes before the original April 1984 injury. (Ex. 249-23, -26). In particular, when he signed the May 2006 concurrence letter, Dr. Kuether was not aware that a 1984 CT scan showed “moderate” stenosis at L3-4. He testified that type of stenosis was “not normal” for claimant’s age at that time and was usually a process that he did not see in people until they were age 60. (Ex. 249-38). Because Dr. Kuether did not have an accurate understanding of claimant’s previous degenerative changes, we are not persuaded by his opinion that the L4-5 fusion was the “major contributing cause” of the disability and need for treatment at L3-4 and L5-S1.

In contrast, the report from Drs. Williams and Fuller specifically discussed the 1984 CT scan findings, which included moderate central canal stenosis at L3. (Ex. 239-1). They did not believe that the recommended L3-4 and L5-S1 foraminotomy would provide long-term reduction in claimant’s chronic back and bilateral leg complaints. They explained that the recommended surgery was “not directly related to his industrial injury” and was instead “related to degenerative changes and natural aging.” (Ex. 239-7). In a deposition, Dr. Fuller testified that he did not believe the fusion at L4-5 had a subsequent impact on the L3-4 or L5-S1 level because both of those levels showed preexisting degenerative change in the December 1984 CT scan. (Ex. 248-11, -30).

Furthermore, Dr. Fuller explained that the MRI findings did *not* support the theory that the L4-5 fusion resulted in accelerated degeneration because claimant had more degeneration at the disc level that was *not* affected by the fusion. (Ex. 248-13). He explained that, between 1986 and 2004, there was no indication that the amount of degenerative disc disease at the adjacent segments deteriorated in an accelerated fashion attributable to the L4-5 fusion. (Ex. 248-13, -15). Dr. Fuller explained that the February 2004 MRI showed moderate narrowing and degenerative disease at L2-3 (not adjacent to the L4-5 fusion), whereas the L3-4 level (adjacent to the L4-5 fusion) showed only mild narrowing. (Ex. 248-13). Dr. Fuller said that later imaging studies showed that claimant’s lumbar spine had deteriorated considerably at L2-3 and L1-2. (Ex. 248-12).

Dr. Kuether did not address Dr. Fuller’s opinion that claimant had more degeneration at a disc level that was *not* affected by the L4-5 fusion. In the absence of an explanation or a response to Dr. Fuller’s opinion, we are not persuaded by Dr. Kuether’s opinion. *See Mark S. Parrott*, 58 Van Natta 729, 733 (2006) (absence of analysis of opposing causation argument rendered

physician's opinion insufficient to carry burden); *Louise Richards*, 57 Van Natta 80, 81 (2005) (finding doctor's opinion unpersuasive when he did not rebut or respond to contrary opinions in the record).

Moreover, we are unable to reconcile Dr. Kuether's causation opinion in the May 2006 concurrence letter with his previous agreement with Drs. Fuller and Williams that "any potential need for such a surgery [bilateral L3-4 and L5-S1 foraminotomy] would be related to degenerative changes and natural aging rather than the industrial injury of April 26, 1984." (Ex. 240; *see* Ex. 239). Dr. Kuether adhered to that opinion in a deposition. (Ex. 249-20).

According to claimant, Dr. Kuether was only asked about the need for additional surgery, not the cause of the L3-4 and L5-S1 conditions. Nevertheless, we do not understand how the fact that Dr. Kuether attributed the need for surgery at L3-4 and L5-S1 to "degenerative changes and natural aging," rather than the 1984 injury, supports the conclusion that the L4-5 fusion was the major contributing cause of the degenerative changes at L3-4 and L5-S1.

In summary, we conclude that, even if we assume, without deciding, that the employer accepted a "fusion at L4-5" for L4-5 spondylosis, the persuasive medical evidence does not establish that the L4-5 fusion was the major contributing cause of claimant's L3-4 and L5-S1 degenerative disc disease. *See* ORS 656.005(7)(a)(A). We therefore affirm the ALJ's order.

#### ORDER

The ALJ's order dated August 30, 2007 is affirmed.

Entered at Salem, Oregon on July 31, 2008