

In the Matter of the Compensation of
HUGH C. BROWN, Claimant

WCB Case No. 10-00501

ORDER ON REVIEW

Scott M Supperstein PC, Claimant Attorneys
Julie Masters, SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Langer and Biehl.

The SAIF Corporation requests review of Administrative Law Judge (ALJ) Kekauoha's order that set aside its denial of claimant's low back injury claim. On review, the issues are the scope of issues and compensability. We reverse in part and vacate in part.

FINDINGS OF FACT

Claimant felt a twinge and the onset of sharp pain in his low back when he pushed a heavy boulder at work on October 26, 2009. An MRI revealed an L5-S1 disc bulge, among other things. Claimant filed an injury claim.

SAIF denied the claim, asserting that claimant's low back injury was "diagnosed as L5 radiculopathy." (Ex. 12-1). Claimant requested a hearing.

At the outset of the hearing, the ALJ and the parties discussed the scope of the issue to be litigated. SAIF indicated that it was not amending its denial of L5 radiculopathy to include an underlying disc condition. (Tr. 4, 16). The parties then agreed with the ALJ's suggestion that they "proceed on the L5 radiculopathy just as it was originally posed." (*Id.* at 16; *see id.* at 20).

After the aforementioned discussion, the parties discussed their "stipulation" as follows:

"Claimant's counsel: So let's articulate one more time that SAIF's concession is that they concede that the L5 –

ALJ: "I have it, actually, here. I can recite it. It's [that] the October 26, 2009 work incident was a material contributing cause of the need for treatment of the L5 radiculopathy, but the work incident combined with a

qualified preexisting condition, and was never the major contributing cause of the need for treatment of the L5 radiculopathy.

Claimant's counsel: It wasn't material contributing cause on the L5 Radiculopathy, was a combined condition, and was never –

ALJ: The major contributing cause of the need for treatment of the L5 radiculopathy.

Claimant's counsel: So if SAIF makes that concession, then it's their burden of proof.

ALJ: That is correct.

SAIF's counsel: Um-hum (affirmative).

Claimant's counsel: So they would go first.

ALJ: That is correct. But why don't I ask [SAIF's attorney] if she has an opening statement to make?

SAIF's counsel: I think that your recitation that you made was our position, our theory of the case.

* * * * *” (Tr. 17-18).¹

CONCLUSIONS OF LAW AND OPINION

The ALJ set aside SAIF's denial of claimant's “left L5-S1 disc herniation with radiculopathy,” based on the medical evidence. We disagree and reverse, based on the following reasoning.

¹ After this exchange, claimant's counsel delivered his opening statement, arguing that SAIF did not carry its burden of proving that claimant's radiculopathy was a combined condition, or, if it was, that the claimed work incident was not the major contributing cause of claimant's need for treatment for that condition. (Tr. 18-20).

To begin, based on the parties' "pre-hearing" discussion, we find that the issue at hearing was limited to the compensability of L5 radiculopathy. Consequently, the compensability of a "left L5-S1 disc herniation" was beyond the scope of the issues presented to the ALJ.² See *Eleazar Andrade*, 60 Van Natta 3156, 3158 (2008) (issues other than those that the parties agreed to litigate are beyond the scope of issues to be decided); *Robin A. Rohrbacker*, 53 Van Natta 51, 52 (2001) (an ALJ's scope of review is limited to the issues raised by the parties). Accordingly, insofar as the ALJ's order addressed compensability of a disc condition, that portion of the order is vacated. (See Opinion and Order, p 9). See *Mickey Walker*, 61 Van Natta 900, 901 (2009) (vacating portion of Opinion and Order that purported to decide matters not raised at hearing).

In addition, we acknowledge that the ALJ described the parties' "Stipulation" as follows:

"The October 26, 2009 work incident was a material contributing cause of the need for treatment of the L5 radiculopathy, but the work incident combined with a preexisting condition and was never the major contributing cause of the need for treatment of the L5 radiculopathy." (Opinion and Order, p 4).

SAIF argues that the purported stipulation was sufficient to carry *its* burden of proving that the claimed October 26, 2009 work incident was never the major contributing cause of claimant's need for treatment for a combined condition involving L5 radiculopathy. See ORS 656.266(2)(a).

We need not determine the effect of the purported "stipulation," because even without a "stipulation," we would find that SAIF carried its burden of proof. We reason as follows.

Dr. Vessely, an orthopedic surgeon, examined claimant and reviewed his history at SAIF's request. He opined that the claimed work incident precipitated claimant's need for medical treatment for a combined low back condition

² Ordinarily, a specific diagnosis is not at issue in an initial injury claim such as this. E.g., *Boeing Aircraft Co. v. Roy*, 112 Or App 10, 15 (1992) (in an initial claim, the claimant need not prove a specific diagnosis if the symptoms are attributable to work). Here, however, the parties specifically identified the issue as compensability of radiculopathy. Moreover, an L5-S1 disc herniation was neither claimed nor denied.

involving the work incident and a preexisting degenerative arthritic condition.³ (Ex. 10-6-8). According to Dr. Vessely, the work incident caused “an L5 radiculopathy,” but the work incident was never the major contributing cause of the combined condition.⁴ (*Id.* at 8-10).

Dr. Vessely’s opinion *regarding the claimed L5 radiculopathy* condition is unrebutted and we find it persuasive. Accordingly, based on Dr. Vessely’s opinion, we find that SAIF has carried its burden of proving that the claimed work incident was not the major contributing cause of claimant’s combined L5 radiculopathy condition or his disability or need for treatment for that combined condition. *See* ORS 656.266(2)(a); *Angel M. Wyant*, 63 Van Natta 46, 49 (2011) (2011) (persuasive medical opinion carried SAIF’s burden of proving that the otherwise compensable injury was not the major contributing cause of the claimant’s disability or need for treatment for combined conditions); *Scoggins*, 56 Van Natta at 2535. Therefore, we reverse.

ORDER

The ALJ’s order dated September 3, 2010 is reversed in part and vacated in part. That portion of the order that set aside the SAIF Corporation’s denial of claimant’s claim for L5 radiculopathy is reversed. The denial is reinstated and upheld. The ALJ’s \$4,500 attorney fee and costs awards are reversed. That portion of the order that set aside SAIF’s denial of “left L5-S1 disc herniation” is vacated.

Entered at Salem, Oregon on April 21, 2011

³ *See Hopkins v. SAIF*, 349 Or 348 (2010) (for purposes of ORS 656.005(24)(a)(A), preexisting “arthritis” involves inflammation of one or more joints due to infectious, metabolic, or constitutional causes, and resulting in breakdown, degeneration, or structural change); *Michael R. Walters*, 62 Van Natta 3027, 3029 (2010) (“preexisting condition” found where the medical evidence established the existence of arthritic changes characterized by inflammation of one or more joints, resulting from progressive degeneration that manifested in structural changes to the claimant’s spine).

⁴ Dr. Vessely opined, “[T]he work incident basically was the ‘straw that broke the camel’s back’ and caused more irritation of the L5 nerve root, probably in the lateral aspect of the neural foramen at L5-S1.” (Ex. 10-9).