

In the Matter of the Compensation of
LILLIAN A. WILKINSON, Claimant

WCB Case No. 08-06396

ORDER ON REVIEW

James W Moller, Claimant Attorneys
Scott H Terrall & Associates, Defense Attorneys

Reviewing Panel: Members Langer and Biehl.

The self-insured employer requests review of that portion of Administrative Law Judge (ALJ) Sencer's order that set aside its denial of claimant's "current conditions involving the left hip and low back" as procedurally invalid. In her reply brief, claimant seeks a penalty and attorney fee for the employer's alleged discovery violation.¹ On review, the issues are scope of acceptance, claim processing, and penalties. We affirm.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact," as supplemented and summarized as follows.

On January 29, 2008, the employer accepted conditions of lumbar/sacroiliac strains and left trochanteric bursitis, in response to claimant's August 29, 2007 injury claim. (Ex. 33). Thereafter, on September 24, 2008, the employer issued a denial, asserting that claimant's August 29, 2007 injury combined with preexisting conditions, and that the "original accepted injury * * * [was] no longer the major contributing cause of any claimed need for treatment or disability." (Ex. 66).

Claimant requested a hearing, at which the employer submitted chart notes from one of claimant's treating physicians, Dr. Megyesi. (Tr. I: 45-58). Claimant's counsel averred that the employer had not previously disclosed these chart notes, despite a discovery request that encompassed such documents. (Tr. I: 48-50, 53-55). The employer, through its counsel, responded that it believed that it had disclosed the chart notes to claimant. (Tr. I: 49-50).

¹ Although claimant requested a penalty at hearing for the employer's alleged discovery violation, she has raised, for the first time on review, the issue of an attorney fee for that purported violation. As a general rule, we do not consider issues that are raised for the first time on review. *See Stevenson v. Blue Cross*, 108 Or App 247, 252 (1991); *Fister v. South Hills Health Care*, 149 Or App 214 (1997) (absent adequate reason, Board should not deviate from its well-established practice of considering only those issues raised by the parties at hearing). Here, we find no reason to deviate from that general rule. In any event, even were we to consider the issue, we would not disturb the ALJ's order, for the reasons set forth below concerning the penalty issue.

Over claimant's objection, the ALJ admitted the chart notes, but also granted a continuance to permit claimant to confer with Dr. Megyesi. (Tr. I: 54-58). Claimant subsequently obtained a report from Dr. Megyesi, after which the doctor was cross-examined by the employer. (Exs. 73, 76).

CONCLUSIONS OF LAW AND OPINION

The ALJ set aside the employer's denial as procedurally invalid because the employer had not first issued a written acceptance of a combined condition. *Catherine Reid*, 60 Van Natta 814, 818-19 (2008) (when the carrier attempted to deny a combined condition under ORS 656.262(6)(c) that had not been accepted, the carrier's denial was procedurally invalid). The ALJ also denied claimant's penalty request concerning the aforementioned alleged discovery violation.

On review, the employer contends that its September 4, 2008, "denial" letter also contained an implied acceptance of a combined condition.² Claimant responds that the ALJ correctly set aside the employer's denial as procedurally invalid, but that the ALJ should have awarded a penalty for the aforementioned alleged discovery violation.³ We affirm, reasoning as follows.

Scope of Acceptance/Claim Processing

We first address the employer's contention that it accepted a combined condition by way of its September 4, 2008 denial letter to claimant. That letter stated, in relevant parts:

"Your injury of August 29, 2007 has been accepted as a disabling lumbar/sacroiliac strains and left trochanteric bursitis.

"Medical evidence indicates that you had pre-existing conditions relating to these body parts and that your injury of August 29, 2007 combined with these pre-existing conditions to require treatment and cause disability. The medical evidence also establishes that

² The employer's denial was issued pursuant to ORS 656.262(6)(c). As such, the employer acknowledges that it must have accepted a "combined condition" before issuing that denial.

³ Claimant does not challenge the ALJ's admission of Dr. Megyesi's chart notes. Additionally, neither party challenges the ALJ's continuance decision.

the original accepted injury has resolved and is no longer the major contributing cause of any claimed need for treatment or disability. * * *

“We are therefore denying the compensability of your current conditions involving the left hip and low back as not being compensably related to your accepted injury and not arising out of and in the course of employment with [the employer].” (Ex. 66-1).

The employer subsequently issued a Notice of Closure and “Updated Notice of Acceptance at Closure,” neither of which stated that the employer had accepted a combined condition. (Exs. 67, 68).

The scope of an acceptance is a question of fact. *Columbia Forest Products v. Woolner*, 177 Or App 639, 643 (2001). Under ORS 656.262(6)(b)(A), a notice of acceptance shall “specify what conditions are compensable.” *Id.* at 647. A notice of acceptance that fails to employ the specific words “combined condition” is not-for that reason alone-insufficient as a matter of law to constitute an acceptance of a combined condition. *Id.*

With respect to a combined condition, the letter does not contain the term “accept” or other like-terms that would establish such a combined condition acceptance. Rather, the employer’s September 4, 2008 letter indicates the acceptance of an initial injury, the *existence* of a “combined condition,” and the *denial* of a combined condition. (See Ex. 66). Acknowledging the existence of a “combined condition,” however, is not equivalent to *accepting* such a condition, as a carrier may, under qualifying circumstances, *deny* the initial compensability of a combined condition. See ORS 656.005(7)(a)(B); ORS 656.266(2)(a). Likewise, other evidence, including the employer’s subsequent claim closure, does not establish that the employer accepted a combined condition. (See Exs. 67, 68).

In arguing for a different result, the employer likens its September 4, 2008 denial letter to “combined condition” acceptances as found in *Michael A. Kelly*, 58 Van Natta 2682 (2006), and *Frances E. Darcy*, 57 Van Natta 2055 (2005). It also contends that the court’s decision in *Woolner* supports its position. We distinguish those cases.

In *Woolner*, the court held that the scope of acceptance is a question of fact, and concluded that a Notice of Acceptance that failed to employ the specific words “combined condition” is not, for that reason alone, insufficient as a matter

of law to constitute an acceptance of a combined condition for purposes of ORS 656.262(7)(a). 177 Or App at 647. In light of that holding, the court remanded the matter to determine the scope of the employer's acceptance.

On remand, we concluded that, as a factual matter, the employer had accepted a combined condition. *Bonnie J. Woolner*, 54 Van Natta 828, 829 (2002) (on remand). We reasoned that the evidence showed that the claimant had a preexisting condition of "multi-directional instability" that "combined with" the accepted injury conditions of right shoulder and cervical strains. *Id.* The employer expressly accepted a claim for "multi-directional instability, right shoulder and cervical strain." *Id.* Under those factual circumstances, we found that the employer had accepted a combined condition. *Id.*

In *Kelly*, the employer's denial letter included a reference to an acceptance of a combined condition that modified the original acceptance of a low back strain relating to the compensable injury. 58 Van Natta at 2685. Specifically, that letter stated that the employer had "accepted" a "low back strain with preexisting non-compensable lumbar disc degenerative disease." *Id.* The employer's letter further referred to the claimant's "combined low back condition" on two occasions and stated that it was issuing a "denial of [the claimant's] combined low back condition" and associated disability and need for treatment. *Id.* Under those circumstances, we concluded that the employer intended to accept a "combined condition." *Id.*

In *Darcy*, the carrier's amended denial referenced an *acceptance* of a combined condition that modified the original acceptance of a lumbar strain. 55 Van Natta at 2057. The denial further stated that the employer had *accepted* the claim for a lumbar strain and that the denial was being amended because the employer was denying that the accepted injury was the major contributing cause of the "*accepted combined condition.*" *Id.* (emphasis added). Moreover, the denial recited that the medical evidence also established that the accepted injury combined with a preexisting degenerative condition and was no longer the major contributing cause of claimant's "combined condition" or its need for treatment. *Id.* Consequently we found, as a factual matter, that the employer intended to "accept a combined condition." *Id.*

Thus, in *Woolner*, *Kelly* and *Darcy*, we found sufficient language to conclude that the respective carriers had both acknowledged and accepted a "combined condition." As set forth above, the employer's September 4, 2008 denial letter contains language that references a "combined condition," as well as

language denying the compensability of such a condition. (Ex. 66). The letter also indicates acceptance of the initial accepted injury conditions (strains and bursitis conditions). The letter does not contain, however, language that informed claimant that the employer had *accepted the combined condition*. The carriers' letters in *Woolner, Kelly and Darcy*, in contrast, contained such language. Therefore, those cases are distinguishable.

In conclusion, based on the foregoing reasoning, we find the employer's denial to be procedurally invalid because it denied a combined condition in the absence of an acceptance of such a condition. Accordingly, we affirm that portion of the ALJ's order that set aside the employer's denial.

Penalty

Claimant contends that she is entitled to a penalty for an alleged discovery violation; namely, for the employer's purported failure to provide the aforementioned chart notes in a timely manner. *See* OAR 438-007-0015. Other than claimant's counsel's unsupported representations, however, the record does not establish that the employer unreasonably or unjustifiably failed to comply with our discovery rules. *See* OAR 438-007-0015(8). Yet, such unsupported representations do not constitute evidence for the proposition advanced by claimant. *See SAIF v. Cruz*, 120 Or App 65, 69 (1993) (attorney's unsupported representations did not constitute evidence). Consequently, for this reason, we affirm that portion of the ALJ's order that did not award a penalty.

Claimant's attorney is entitled to an assessed fee for services on review concerning the employer's denial. 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 \$2,800, payable by the employer. In reaching this conclusion, we have particularly considered the time devoted to the issue (as represented by claimant's respondent's brief and his counsel's uncontested fee submission), the complexity of the issue, and the value of the interest involved.

Finally, claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the denial, to be paid by the employer. *See* ORS 656.386(2); OAR 438-015-0019; *Gary E. Gettman*, 60 Van Natta 2862 (2008). The procedure for recovering this award, if any, is prescribed in OAR 438-015-0019(3).

ORDER

The ALJ's order dated November 18, 2010 is affirmed. For services on review regarding the denial issue, claimant's attorney is awarded an assessed fee of \$2,800 to be paid by the employer. Claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the denial, to be paid by the employer.

Entered at Salem, Oregon on September 21, 2011