

In the Matter of the Compensation of
THERON E. HUTCHINGS, Claimant

WCB Case Nos. 10-03960, 10-03489

ORDER ON REVIEW

Swanson Thomas & Coon, Claimant Attorneys

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Reviewing Panel: Members Langer and Biehl.

Claimant requests review of that portion of Administrative Law Judge (ALJ) Pardington's order that upheld the self-insured employer's denial of claimant's current combined C5-6 and C6-7 spondylosis condition. The employer cross-requests review of those portions of the ALJ's order that: (1) declined to admit an additional "rebuttal" medical report submitted by the employer; (2) set aside its denial of claimant's diagnostic medical services claim; (3) awarded a penalty and attorney fee under ORS 656.262(11)(a) for allegedly unreasonable claim processing; and (4) awarded claimant's counsel a \$4,000 attorney fee under ORS 656.386(1). On review, the issues are evidence, compensability, medical services, penalties, and attorney fees. We affirm in part and reverse in part.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact," with the following summary.

Before his July 29, 2009 work injury, claimant had been diagnosed with cervical spondylotic myelopathy referable to cord compression at the C5-6 and C6-7 levels. An MRI had shown a disc protrusion and osteophytic spurring at the C6-7 level and spondylotic degenerative changes at C3-4 through C5-6. As a result, claimant underwent a cervical discectomy and fusion at C5-6 and C6-7 on April 8, 2009. He recovered well from this procedure.

On July 29, 2009, while claimant was working, the truck that he was driving dropped into a pothole or washout and he struck the top of his head against the roof. Dr. Conklin initially treated claimant on August 25, 2009 for cervical symptoms. He recommended that claimant see a neurosurgeon, Dr. Camp, who had performed the April 2009 surgery. Claimant, however, never saw Dr. Camp. The claim was initially denied on October 8, 2009.

Dr. Conklin continued to recommend that claimant see Dr. Camp. (Ex. 21A). The employer eventually rescinded its denial and accepted a nondisabling cervical strain in January 2010. (Ex. 23).

On May 5, 2010, claimant's attorney requested that the employer authorize Dr. Conklin's referral of claimant to Dr. Camp. (Ex. 25A1). On May 19, 2010, the employer modified its acceptance to include a "nondisabling cervical strain, combined with preexisting spondylosis of the cervical spine at C5-6 and C6-7," effective the date of injury, July 29, 2009. (Ex. 28). The same day, the employer issued a denial, stating that, as of February 9, 2010, the accepted cervical strain ceased to be the major contributing cause of claimant's disability and need for treatment of the combined condition. (Ex. 29).

On June 3, 2010, claimant requested dispute resolution from the Workers' Compensation Division (WCD) regarding Dr. Conklin's referral of claimant to Dr. Camp. The request listed "May 17, 2010" as the date of the services in dispute. (Ex. 31A). In its response to WCD, the employer asserted that the service was not causally related to the accepted condition. (Ex. 32B). WCD transferred the case to the Hearings Division. Claimant also requested a hearing regarding the "combined condition denial." The cases were consolidated.

CONCLUSIONS OF LAW AND OPINION

At the hearing, claimant requested that the record be left open for an additional medical report. (Tr. 4). The employer then requested that it be allowed to obtain rebuttal evidence. (*Id.*) The ALJ granted both motions. (Tr. 4-5).

After the hearing, claimant submitted a report from Dr. Gritzka, a consulting physician. (Ex. 37). The employer then submitted a report from Dr. Berselli, an employer-arranged medical examiner, and a recorded statement by Dr. Gripekoven, an employer-arranged medical record reviewer. (Exs. 38, 39). Claimant objected to the submission of both exhibits, asserting that the ALJ had allowed only one rebuttal report.

The ALJ ruled that the record had only been left open for the submission of one rebuttal report, and allowed the employer to decide which exhibit to submit in rebuttal. The employer chose to submit Dr. Gripekoven's recorded statement, which was admitted as Exhibit 39.

The ALJ also reasoned that the otherwise compensable cervical strain had combined with the preexisting C5-6 and C6-7 spondylosis and fusion, and that the otherwise compensable injury had ceased to be the major contributing cause of the disability or need for treatment of the combined condition. Accordingly, the ALJ upheld the “combined condition” denial.

However, the ALJ set aside the medical services denial, finding that the referral to Dr. Camp was for diagnostic services to determine the cause or extent of a compensable injury. Applying ORS 656.386(1), the ALJ awarded a \$4,000 employer-paid attorney fee. Finally, determining that the medical services denial was unreasonable, the ALJ awarded a penalty and attorney fee under ORS 656.262(11)(a).

Combined Condition

On review, claimant contends that the employer did not satisfy its burden of proving that a statutory “preexisting condition” combined with the otherwise compensable cervical strain. *See Dezi Meza*, 63 Van Natta 67 (2011) (where the conditions described by the carrier’s acceptance as “preexisting conditions” were not “preexisting conditions” under ORS 656.005(24), the carrier’s denial of the accepted “combined condition” was set aside because there was no valid “combined condition”). Specifically, claimant asserts that the non-work related cervical fusion eliminated the alleged preexisting spondylosis and that the fusion could not qualify as a preexisting condition because it merely rendered claimant susceptible to injury. Based on the following reasoning, we disagree.

If an “otherwise compensable injury” combines with a “preexisting condition” to cause or prolong disability or a need for treatment, the combined condition is compensable only insofar as the “otherwise compensable injury” is the major contributing cause of the disability or need for treatment of the combined condition. ORS 656.005(7)(a)(B). If the carrier asserts that a claimant suffers from a “combined condition,” the carrier bears the burden to establish a “combined condition” by proving that the claimant suffers from a preexisting condition, as defined by ORS 656.005(24), and that the claimant’s condition is a combined condition. ORS 656.005(7)(a)(B); ORS 656.266(2)(a); *SAIF v. Kollias*, 233 Or App 499, 505 (2010); *Peter L. Busby*, 64 Van Natta 396, 397 (2012). For injury claims, a “preexisting condition” must be an injury, disease, congenital abnormality, personality disorder, or similar condition that contributes to disability or need for treatment. ORS 656.005(24)(a).

After the carrier accepts a combined condition, it may deny the combined condition if the otherwise compensable injury ceases to be the major contributing cause of the combined condition. ORS 656.262(6)(c), (7)(b). In combined condition injury claims, the carrier bears the burden to prove such a cessation. ORS 656.266(2)(a); *Washington County-Risk v. Jansen*, 248 Or App 335 (2012); *Wal-Mart Stores, Inc. v. Young*, 219 Or App 410, 419 (2008).

We first address claimant's contention that the "spondylosis" at C5-6 and C6-7, which the employer's May 19, 2010 acceptance identified as the "preexisting condition" component of the accepted combined condition, was not a "preexisting condition" under ORS 656.005(24) because it had resolved, as a result of the C5-6 and C6-7 fusion, before the date of the work injury. In support of his contention, claimant relies on Dr. Gritzka, who opined that he "underwent surgery for his spondylosis at those two levels and does not have that condition at those levels anymore." (Ex. 34-3). Additionally, claimant refers to Dr. Gripekoven's statements that the degenerative disc disease, bone spurs, myelopathy, "and things that led to the fusion" had, "in large part" resolved by the time of the injury, and that "[a]t the time of the injury he had what appeared to be a solid fusion." (Exs. 39-7-8, -14).

On the other hand, Dr. Berselli noted that claimant's spondylosis had been treated by the fusion, but also identified the spondylosis as the preexisting condition with which claimant's otherwise compensable injury combined. (Ex. 24-8). He based that opinion on a thorough review of the imaging studies, as well as his examination of claimant and consideration of the mechanism of injury. (Ex. 24-5, -7).

Even if we accepted claimant's assertion that the spondylosis had been resolved by the fusion, we would find that the "preexisting condition" component of the accepted combined condition satisfied the requirements of ORS 656.005(24)(a). We reason as follows.

In *Judith K. Burch*, 62 Van Natta 1713 (2010), the carrier had accepted a combined condition that included an otherwise compensable anterior cruciate ligament (ACL) tear and preexisting degenerative joint disease. The claimant underwent knee replacement surgery that removed the ACL, and thus eliminated any need for treatment of the ACL tear. Nevertheless, the medical record indicated that the claimant would continue to require treatment for the knee replacement. Reasoning that the ACL tear had been the cause of the knee replacement, we conclude that the ACL tear was also the cause of treatment for the knee

replacement. *Id.* at 1715. Thus, although the ACL tear itself had been resolved, we determined that it continued to be the major contributing cause of the claimant's need for treatment of the combined condition. *Id.*

Turning to the present case, Drs. Gritzka, Berselli, and Gripekoven all agreed that the fusion surgery was performed to treat claimant's spondylosis condition. (Exs. 24-8, 34-3, 39-7-8). Thus, insofar as the cause of claimant's disability or need for treatment can be attributed to the fusion, the cause of claimant's disability or need for treatment can also be attributed to the spondylosis. Therefore, even if the spondylosis condition had been treated by the fusion, it nevertheless "contributes to disability or need for treatment" if the fusion "contributes to disability or need for treatment."

Thus, we turn to claimant's contention that the preexisting spondylosis/fusion did not "contribute[] to disability or need for treatment," but merely rendered him more susceptible to injury. Dr. Gritzka stated that claimant's preexisting spondylosis and fusion did not combine with the cervical strain because the fusion would have protected against injury at the fused levels. (Ex. 34-2). However, Dr. Gritzka further opined that the work injury aggravated or caused further damage to the C6-7 area. (Ex. 34-3). Dr. Gritzka also characterized the injury as "buckling" causing tearing or stretching to the ligaments, causing a sprain. (Ex. 34-2). He explained that Dr. Camp's surgical observations indicated that claimant was susceptible to such a "buckling" injury. (Ex. 34-4).

Dr. Gripekoven responded to Dr. Gritzka's opinion. Noting that Dr. Gritzka stated both that the fusion would have protected against further injury and that further injury occurred at a fused level, Dr. Gripekoven considered such an opinion to be logically inconsistent. (Ex. 39-20-21). Moreover, Dr. Gripekoven observed that Dr. Gritzka's opinion indicated that, although the fusion stabilized the conditions that existed before the fusion, it also created susceptibility to further injury. (Ex. 39-21). Dr. Gripekoven agreed that the fusion created susceptibility to further injury. (*Id.*) Dr. Gripekoven also explained that the fusion caused abnormal forces to the areas adjacent to the fusion, as well as possible postoperative scarring and residuals. (Ex. 39-16, -20). Thus, Dr. Gripekoven's opinion considered Dr. Gritzka's explanation and explained how the fusion actually caused, rather than merely created a susceptibility to, further injury.¹ Therefore, Dr. Gripekoven opined that the preexisting condition combined with the cervical strain. (Ex. 39-9).

¹ We recognize that Dr. Gripekoven used the term "susceptibility" when explaining the consequences of a fusion on adjacent discs. Nevertheless, Dr. Gripekoven further explained that claimant's fusion resulted in a progressive breakdown of the disc facet complexes above and below

Accordingly, we conclude that the employer's acceptance of a combined condition consisting of the cervical strain and preexisting spondylosis at C5-6 and C6-7 was valid. Additionally, the medical evidence establishes that the otherwise compensable injury (the cervical strain) ceased to be the major contributing cause of the combined condition.

Specifically, Dr. Berselli opined that claimant's cervical strain had resolved by November 2009. (Ex. 31-2). Dr. Gripekoven opined that any strain or sprain resolved within six months of the July 2009 work injury. (Ex. 39-14). Dr. Gritzka opined that another condition resulted from the work injury, but agreed that any strain had resolved.² (Ex. 34-2). Dr. Conklin did not persuasively opine otherwise.³

Under such circumstances, we conclude that the otherwise compensable cervical strain resolved. Thus, on this record, the "otherwise compensable injury" ceased to be the major contributing cause of the combined condition. *Gary D. Sather*, 63 Van Natta 1727, 1730 (2011) (resolution of otherwise compensable injury sufficient to establish that it ceased to be the major contributing cause of the combined condition). Accordingly, we affirm that portion of the ALJ's order that upheld the employer's denial of claimant's current combined condition.⁴

Medical Services

The employer contends that the disputed medical services are not causally related to the accepted condition. As explained below, we agree.

the fusion that amounted to the major contributing cause of the disability and need for treatment of the combined condition. In light of such circumstances, we disagree with claimant's contention that his spondylosis and fusion were merely a susceptibility, rather than a cause, of his disability and need for treatment. *See* ORS 656.005(24)(c).

² Claimant may file a claim for a new or omitted medical condition at any time. ORS 656.267(1).

³ Dr. Conklin continued to diagnose a work-related cervical strain. (Ex. 26-1, 32D). However, he did not address the contrary opinions that claimant's continued symptoms were related to a different condition. *See Janet Benedict*, 59 Van Natta 2406, 2409 (2007), *aff'd without opinion*, 227 Or App 289 (2009) (medical opinion unpersuasive when it did not address contrary opinions).

⁴ The employer also contends that Dr. Berselli's "post-hearing" report should have been admitted into the record as Exhibit 38. Because we have reinstated the employer's "combined condition" denial without consideration of Dr. Berselli's "post-hearing" report (as well as the employer's arguments based on that excluded report), we need not resolve this evidentiary issue.

ORS 656.245(1)(a) provides:

“For every compensable injury, the insurer or the self-insured employer shall cause to be provided medical services for conditions caused in material part by the injury for such period as the nature of the injury or the process of the recovery requires, subject to the limitations in ORS 656.225, including such medical services as may be required after a determination of permanent disability. In addition, for consequential and combined conditions described in ORS 656.005(7), the insurer or the self-insured employer shall cause to be provided only those medical services directed to medical conditions caused in major part by the injury.”

If the claimed medical service is “for” an “ordinary” condition, the first sentence of ORS 656.245(1)(a) governs the compensability of medical services. *SAIF v. Sprague*, 346 Or 661, 672 (2009); *Cameron J. Horner*, 62 Van Natta 2904, 2905 (2010). If the claimed medical service is “directed to” a consequential or combined condition, the second sentence of ORS 656.245(1)(a) applies. *Sprague*, 346 Or at 673; *Horner*, 62 Van Natta at 2905.

As discussed above, the accepted condition is a “combined” condition. Therefore, insofar as the referral to Dr. Camp is directed to the accepted condition, it would only be compensable if the accepted combined condition were caused, in major part, by the injury. *See* ORS 656.245(1)(a); *Sprague*, 346 Or at 674. However, as explained above, we have affirmed that portion of the ALJ’s order that upheld the employer’s denial, which stated that, as of February 9, 2010, the accepted combined condition was no longer compensable. Accordingly, Dr. Conklin’s referral of claimant to Dr. Camp is not compensable under the second sentence of ORS 656.245(1)(a).⁵

Citing *Billie J. Allen*, 60 Van Natta 2471 (2008), claimant contends that the referral to Dr. Camp is nevertheless a compensable diagnostic service under the first sentence of ORS 656.245(1)(a). In *Allen*, we upheld a carrier’s denial

⁵ In reaching this conclusion, we acknowledge that Dr. Conklin first recommended that claimant see Dr. Camp in August 2009, which was before the effective date of the combined condition denial (February 9, 2010). Nevertheless, the initial claim was denied and not accepted until January 21, 2010. Furthermore, claimant did not request that the employer approve the referral until May 5, 2010, which was after the effective date of the combined condition denial.

of a previously accepted combined condition because the otherwise compensable injury ceased to be the major contributing cause of the combined condition. *Id.* at 2474. Nevertheless, we found the disputed medical service (arthroscopic surgery) compensable because it was medically necessary to determine the cause and extent of the claimant's compensable injury. *Id.* at 2472. In reaching that conclusion, we noted that if diagnostic services are necessary to determine the cause or extent of a compensable injury, those services are compensable whether or not the condition that is discovered as a result of them is compensable. *Id.* (citing *Counts v. Int'l Paper Co.*, 146 Or App 768, 771 (1997)). We further noted that the condition for which treatment is sought need not be the accepted condition. *Id.* (citing *SAIF v. Martinez*, 219 Or App 182, 191 (2008)).

However, the "compensable injury" to which ORS 656.245(1)(a) refers is the condition previously accepted. *Martinez*, 219 Or App 182, 191 (2008). Therefore, although diagnostic services may be compensable even if the condition that is discovered as a result of them is not compensable, they must be necessitated in material part by the previously accepted condition. *SAIF v. Swartz*, 247 Or App 515, 525 (2011); *Martinez*, 219 Or App at 191.

As discussed above, we have found that the accepted cervical strain has resolved. Thus, in contrast to *Allen*, where a material causal relationship was established with regard to the disputed diagnostic medical services, here, the referral to Dr. Camp was not necessitated in material part by the accepted cervical strain. Therefore, the diagnostic medical services claim is not compensable.⁶ *Swartz*, 247 Or App at 526-27.

⁶ Citing *Francisco M. Carlos-Macias*, 63 Van Natta 2184 (2011), *recons*, 64 Van Natta 307 (2012), claimant contends that diagnostic medical services may be compensable even if the accepted condition is no longer compensable. There, we upheld a carrier's denials of the claimant's current left shoulder condition, but found diagnostic medical services compensable because they were necessary to determine the extent of the accepted condition. *Id.* at 2189.

On reconsideration, we addressed the effect of *Swartz*, which had issued after our Order on Review. We explained that, unlike in *Swartz*, where the accepted condition had resolved, the medical evidence indicated that the accepted left shoulder conditions were a material contributing cause of the diagnostic testing. *Carlos-Macias*, 64 Van Natta at 309.

Here, as explained above, the accepted cervical strain has resolved. Therefore, the diagnostic medical services would not be materially related to claimant's accepted cervical strain. Accordingly, this case is distinguishable from *Carlos-Macias*, and the diagnostic medical services are not compensable.

Finally, given our disposition of this claim, it follows that the employer's medical services denial was not unreasonable. Therefore we also reverse the ALJ's penalty and attorney fee awards related to the medical services claim.⁷

ORDER

The ALJ's order dated March 16, 2011, as reconsidered on April 22, 2011, is reversed in part and affirmed in part. That portion of the ALJ's order that set aside the employer's denial of claimant's medical services claim is reversed. The employer's denial is reinstated and upheld. The ALJ's awards of a penalty, attorney fees (\$4,000 and \$1,000), and costs are reversed. The remainder of the ALJ's order is affirmed.

Entered at Salem, Oregon on May 18, 2012

⁷ The employer also contends that the ALJ's \$4,000 assessed attorney fee award under ORS 656.386(1) for claimant's attorney's services at hearing regarding the medical services issue was excessive. Because we have reinstated the medical services denial and reversed the ALJ's attorney fee award, further consideration of the attorney fee issue is unnecessary.