

In the Matter of the Compensation of
WILLIAM W. HOFFNAGLE, Claimant
WCB Case No. 13-01384
ORDER ON REVIEW
Daniel M Spencer PC, Claimant Attorneys
Gress & Clark LLC, Defense Attorneys
Oregon Workers Comp Institute, Defense Attorneys

Reviewing Panel: Members Lanning and Curey.

Claimant requests review of Administrative Law Judge (ALJ) Pardington's order that: (1) denied claimant's motion to reopen the hearing record for additional evidence from his attending surgeon; (2) upheld the self-insured employer's denial of claimant's new/omitted medical condition claim for an L4-5 and L5-S1 disc condition, left leg radicular symptoms/sciatica, and lumbar strain; (3) upheld the employer's denial of claimant's current combined left hip, gluteal, and low back condition; and (4) upheld the employer's alleged *de facto* denial of claimant's occupational disease claim for a low back condition. On review, the issues are the ALJ's evidentiary ruling, remand, claim processing, and compensability. We affirm in part and reverse in part.

FINDINGS OF FACT

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

On June 7, 2012, claimant slipped and fell at work. The next morning he felt left lower extremity symptoms as well as left gluteal pain and sought treatment from Dr. Karmy, who diagnosed sciatic nerve and left gluteal contusions. (Ex. 2). On July 26, 2012, Dr. Karmy noted symptoms of sciatica with pain radiating up into claimant's back and down the back of his left leg, which was sometimes accompanied by tingling in the foot. He diagnosed sciatic nerve contusion of the left leg. (Ex. 6). On August 1, 2012, the employer accepted a left hip strain. (Ex. 7-1).

On August 27, 2012, Dr. Karmy noted sciatic pain and low back pain, and recommended an MRI of the lumbar spine to investigate a possible disc rupture. (Ex. 9). A July 4, 2012 MRI noted degenerative disc disease; a disc protrusion at L4-5 with no clear nerve root impingement; and a disc protrusion at L5-S1 that, in combination with facet hypertrophic changes, compressed the exiting left L5 nerve root. (Ex. 10-1).

On September 6, 2012, Dr. Karmy noted that claimant had recently fallen after his leg went “numb and gave out.” (Ex. 11a). Dr. Karmy opined that claimant’s symptoms correlated with the nerve compression from the L5-S1 disc condition. (*Id.*)

Claimant felt a pop and sharp pain in his lower back when he reached up to grab a belt at work on September 10, 2012. (Exs. 12, 12a). When he sought emergency room treatment that day, he had lower back pain, muscle spasms, sensory/motor loss, and “numbness in legs/feet (weakness in left leg).” (Ex. 13-1). Upon discharge from the emergency room, the “impressions” included “acute exacerbation lumbar pain,” “L4-5 and L5-S1 protruding lumbar discs,” and “existing open state industrial claim.” (Ex. 14-2-3). He filed a form 827 reporting an aggravation of his June 7, 2012 injury, and a form 801 reporting a September 10, 2012 lower back strain. (Exs. 12, 12a).

On September 25, 2012, Dr. Groner, a consulting physician, noted claimant’s history of the June 2012 work incident resulting in low back and left lower extremity symptoms, and a September 2012 work incident resulting in worsened symptoms. (Ex. 17-1). He diagnosed degenerative spondylolisthesis, lumbar radiculopathy, muscle pain, facet joint osteoarthritis, and low back pain. (Ex. 17-3). He opined that the September 2012 incident could have caused worsening spondylolisthesis, worsening disc herniations, fractures, or other problems. (*Id.*)

In late September 2012, claimant had a conversation with the employer’s claims adjuster. (Tr. 30). The claims adjuster told claimant that there would be a denial, but that it would not matter because claimant would receive benefits for his back injury, including his disc conditions. (Tr. 30-31).

On October 1, 2012, the employer sent claimant a letter that stated, in capital letters in the middle of the top of the page, “THIS IS A NOTICE OF ACCEPTANCE FOR A ‘LOWER BACK INJURY.’” (Ex. 20). The document then stated:

“You filed a claim for a lower back injury that occurred on 9/10/12 while you were employed with [the employer]. After careful review of the information in our file, it does not appear that you sustained a new injury on that date. Rather, the current condition appears to relate to your prior injury that occurred 6/12. Thus, we hereby issue a denial of the new injury. All benefits will be paid on your prior claim.” (*Id.*)

The document included a statement of hearing rights. (*Id.*) Claimant did not request a hearing regarding the denial because, based on his conversation with the claims adjuster, he believed that his back conditions would be accepted. (Tr. 31).

On March 13, 2013, claimant filed a new/omitted medical condition claim for “L4-5 and L5-S1 disc protrusion/bulge/herniation with left leg radicular symptoms and sciatica; and lumbar strain.” (Ex. 41). On March 20, 2013, the employer denied the claim, asserting that the conditions were not due to the June 7, 2012 injury. (Ex. 42). Claimant requested a hearing.

On June 28, 2013, Dr. Raslan, a neurosurgeon, operated at L4-5 and L5-S1. (Ex. 51A).

On July 2, 2013, the employer issued an Amended Notice of Acceptance, which identified the accepted condition as “left hip contusion/strain and left gluteal soft tissue contusion, combined with preexisting, noncompensable, lumbar spondylosis (effective 6/7/12).” (Ex. 53-1). On July 3, 2013, the employer denied the accepted combined condition, asserting that the otherwise compensable condition had ceased to be the major contributing cause of the disability and need for treatment. (Ex. 54-1).

At the August 22, 2013 hearing, claimant’s attorney asserted that, in addition to contesting the March 20, 2013 and July 3, 2013 denials on their merits, the March 20, 2013 denial was an improper “back-up” denial because the employer’s October 1, 2012 document/letter accepted claimant’s current back conditions. (Tr. 1-2). Claimant’s attorney also asserted equitable estoppel and an occupational disease theory. (Tr. 2). The employer’s attorney disputed the existence of an occupational disease claim. (Ex. 6).

Also at hearing, claimant’s attorney represented that he had attempted to obtain a report from Dr. Raslan before the hearing, but could not do so, despite his best efforts, because of circumstances beyond his control. (Tr. 9-10). Specifically, Dr. Raslan had left the United States and his return date was unknown, but probably “sometime in 2014.” (Tr. 10). Claimant’s attorney elected to go forward with the hearing because the opinions of Dr. Groner and Dr. Crum, who had become claimant’s attending physician on November 2, 2012, were sufficient. (*Id.*)

CONCLUSIONS OF LAW AND OPINION

The ALJ reasoned that the October 1, 2012 letter was solely a denial of a September 10, 2012 injury, and did not accept any conditions as related to the June 7, 2012 claim. Accordingly, the ALJ reasoned that it did not preclude the employer's subsequent denial of claimant's low back conditions. The ALJ also declined to apply equitable estoppel based on the above letter or an earlier conversation between claimant and the claims examiner.

The ALJ concluded that the June 7, 2012 work incident had caused "otherwise compensable" low back conditions that had combined with a preexisting condition, and that the "otherwise compensable injury" was not the major contributing cause of claimant's disability or need for treatment of the combined condition. Accordingly, the ALJ upheld the employer's new/omitted medical condition denial. Regarding the combined left hip/gluteal/low back condition, the ALJ reasoned that the "otherwise compensable injury" had ceased to be the major contributing cause of the accepted combined condition. Therefore the ALJ upheld the employer's current combined condition denial. Finally, concluding that the evidence did not establish that claimant's work activities in general were the major contributing cause of any low back condition, the ALJ upheld a *de facto* denial of the occupational disease claim.

After the ALJ's Opinion and Order issued, claimant moved to reopen the record. Claimant's attorney represented that Dr. Raslan had returned to the United States, and requested that the record be reopened to allow claimant to obtain Dr. Raslan's opinion. The ALJ denied claimant's request to reopen the record.

On review, claimant requests remand so that he may obtain Dr. Raslan's opinion and renews his contentions regarding the compensability issues. We address each issue in turn.

Remand

Our review is limited to the record developed by the ALJ. We may remand to the ALJ if we find that the case has been "improperly, incompletely or otherwise insufficiently developed." ORS 656.295(5).

Under OAR 438-007-0025, the ALJ may reopen the record before a request for review is filed or, if none is filed, before the time for requesting review expires. *See Jeffrey C. Bach*, 61 Van Natta 477 (2009). An ALJ is not bound by common

law or statutory rules of evidence or by technical or formal rules of procedure, and may conduct a hearing in any manner that will achieve substantial justice. ORS 656.283(6). The ALJ's decision regarding the reopening of the record is discretionary, and we review such a decision for an abuse of discretion. *Bach*, 61 Van Natta at 481.

In declining to reopen the record, the ALJ explained that claimant had made the reasonable decision to go forward with the hearing without seeking a continuance to attempt to obtain Dr. Raslan's opinion. The ALJ also reasoned that claimant had not truly discovered new evidence, although he had recently discovered that Dr. Raslan was available to provide new evidence.

Based on such circumstances, we find no abuse of discretion in the ALJ's decision not to reopen the record. Accordingly, we deny claimant's request for remand.

New/Omitted Medical Conditions

Claimant asserts that the denied new/omitted medical conditions are compensable because they were accepted by the employer's October 1, 2012 letter. (Ex. 20). He also contends that the employer is equitably estopped from denying those conditions, and that the medical evidence establishes their compensability. Based on the following reasoning, we conclude that the employer accepted the conditions when it issued its October 2013 letter. Because we set aside the new/omitted medical condition denial on that basis, we do not reach claimant's alternative theories.

If the employer had accepted the disputed low back conditions on October 1, 2012, its subsequent denial of those conditions would constitute an impermissible "back-up" denial under ORS 656.262(6)(a).¹ The October 2012 letter identified itself as a "NOTICE OF ACCEPTANCE FOR A 'LOWER BACK INJURY'" and stated that claimant's "current condition" related to his June 7, 2012 injury, under which all benefits would be paid. It also stated that claimant

¹ Under ORS 656.262(6)(a), "Once the claim is accepted, the insurer or self-insured employer shall not revoke acceptance except as provided in this section." A carrier may revoke acceptance and issue a denial for fraud, misrepresentation, or other illegal activity by the worker, or in certain circumstances involving later-obtained evidence. *Id.* Additionally, a carrier may deny an accepted combined or consequential condition if the otherwise compensable injury ceases to be the major contributing cause of the combined or consequential condition. ORS 656.262(6)(c).

had not sustained a new injury on September 10, 2012, and that it was denying the new injury. It included the statement of hearing rights required for a denial under OAR 438-005-0055(1), but not the information required for notices of acceptance under ORS 656.262(6)(b)(B)-(E) and OAR 436-060-0140(5)(b)-(h).

A single document may function as both an acceptance and a denial. *See Stockdale v. SAIF*, 192 Or App 289 (2004) (carrier may accept a combined condition and deny the compensability of the same condition under ORS 656.262(6)(c) and (7)(b) in the same document). The employer argues, however, that neither the text nor the format of the October 2012 letter convey that it actually accepted the low back conditions. Nevertheless, the employer offers no alternative interpretation of that letter's prominent identification of itself as a Notice of Acceptance of a "lower back injury." (Ex. 20). Further, the letter explained that its denial of a new injury, dated September 10, 2012, was based on the fact that claimant's "current condition" was related to the accepted June 7, 2012 injury. We agree with claimant's interpretation of this document as accepting his then-current lower back conditions under the June 7, 2012 injury.

Citing *TriMet v. Wilkinson*, 257 Or App 80 (2013), the employer argues that the letter did not satisfy pertinent legal requirements for a Notice of Acceptance. Specifically, the employer argues that, regardless of whether it had intended to accept any conditions, the omission of the information required by ORS 656.262(6)(b)(B)-(E) and OAR 436-060-0140(5)(b)-(h) defeated any such intended acceptance.

In *Wilkinson*, the carrier denied a combined condition on the ground that the otherwise compensable injury had ceased to be the major contributing cause of the combined condition. *Id.* at 83. The court reviewed our conclusion, based on the absence of the term "accept" or the like, that the carrier had not accepted and denied the combined condition in the same document.² *Id.* at 84. The court explained that whether an acceptance occurs is an issue of fact, and that our conclusion with regard to such a fact is reviewed for substantial evidence. *Id.* at 85 (citing *SAIF v. Tull*, 113 Or App 449, 454 (1992)).

² A carrier may not deny a combined condition under ORS 656.262(6)(c), on the ground that the otherwise compensable injury ceased to be the major contributing cause of the combined condition, before first accepting the combined condition. *Croman Corp. v. Serrano*, 163 Or App 136, 141 (1999); *Blamires v. Clean Pak. Systems, Inc.*, 171 Or App 263, 267 (2000). The acceptance and denial of the combined condition can occur in the same document, provided that the effective date of the denial is later than the effective date of the acceptance. *Stockdale*, 192 Or App at 295. Thus, language regarding when a combined condition arose or became compensable would have additional significance in the context of a combined condition acceptance.

In affirming our order, the court reasoned the denial's "deficiency [was] not limited to its failure to use 'magic words' to convey its purported acceptance of [the] claimant's combined condition." *Id.* at 86. Specifically, the court noted that the denial had not specified the particular combined condition being accepted or the preexisting condition, had not specified when the work injury combined with the preexisting condition or when the combined condition became compensable, and had not stated that it was modifying the earlier notice of acceptance. *Id.* at 87.

Thus, the court reasoned that "in addition to lacking any language ('specific' or otherwise) indicating acceptance of a combined condition, the letter as a whole did not contain any indication that the [carrier] was accepting a combined condition failing to state even the nature of the combined condition or when it arose." *Id.* Accordingly, the court found that our conclusion, that the denial did not simultaneously accept a combined condition, was supported by substantial evidence. *Id.*

Wilkinson does not hold that a Notice of Acceptance cannot accept a claim if it fails to include all required information. Rather, it held that a combined condition had not been accepted by a document that lacked "any language" indicating acceptance.³

Here, by contrast, the disputed letter included specific language identifying itself as a Notice of Acceptance of a "lower back injury," as well as language indicating that claimant's current condition related to the June 7, 2012 injury, and that all benefits would be paid on that claim. Despite the absence of certain required information, this October 1, 2012 Notice of Acceptance of a "lower back injury" unambiguously accepted claimant's lower back injury.

³ We employed similar reasoning in *Mary A. Bernard*, 65 Van Natta 1918 (2013), where a carrier's denial did not explicitly concede the existence of a combined condition, did not specify when the work injury would have combined with the preexisting condition or when the combined condition would have become compensable, or modify the earlier notice of acceptance. We did not hold that an attempted acceptance is necessarily ineffective if it fails to comply with all legal requirements. Instead, we found that the denial did not indicate that the condition was accepted.

Further, in *Kyle J. Hoppe*, 65 Van Natta 621 (2013), we held that where a carrier's acceptance of a new medical condition did not satisfy all legal requirements (specifically, the holding of *Johansen v. SAIF*, 158 Or App 672 (1999), that a new medical condition claim is entitled to its own classification of disabling or nondisabling), we required the carrier to issue a Modified Notice of Acceptance compliant with such requirements.

The scope of an acceptance is a question of fact. *Columbia Forest Products v. Woolner*, 177 Or App 639, 643 (2001). When a carrier accepts a specific condition, it is not necessary to resort to contemporaneous medical records to determine what condition was accepted. See *Jerry W. Gabbard*, 54 Van Natta 1022 (2002); *Kim D. Wood*, 48 Van Natta 482, 484 (1996), *aff'd without opinion*, 144 Or App 496 (1996) (because there was a specific acceptance of a “left knee strain,” it was not necessary to examine the contemporaneous medical evidence to determine what condition was accepted). If the specific acceptance is ambiguous or vague, however, we examine the contemporaneous medical evidence to determine what was accepted. *Gilbert v. Cavenham Forest Indus. Div.*, 179 Or App 341, 344 (2002); *Jack L. Kruger*, 52 Van Natta 627, 628 (2000). Further, if a carrier accepts a symptom of an underlying condition, it is precluded from later denying the underlying condition, regardless of its cause. *Georgia-Pacific v. Piwowar*, 305 Or 494, 501-02 (1988).

Here, the Notice of Acceptance stated that it was for claimant’s “lower back injury” and that his “current condition” was related to the June 7, 2012 injury, but did not specifically identify the compensable condition. At the time the employer accepted claimant’s lower back injury, claimant had filed a claim for a lower back strain and the medical record had identified an L4-5 and L5-S1 disc conditions. (Exs. 10, 12a, 14, 17). The medical records also included symptoms of radiating left leg pain that were consistent with the L5-S1 disc condition. (Exs. 6, 11a).

Under such circumstances, we conclude that the October 1, 2012 “lower back injury” acceptance included claimant’s lumbar strain and his L4-5 and L5-S1 disc conditions with left leg radicular symptoms and sciatica. Accordingly, we reverse that portion of the ALJ’s order that upheld the employer’s March 20, 2013 denial of those new/omitted medical conditions.

Combined Condition Denial

ORS 656.262(6)(c) authorizes a carrier to deny an accepted combined condition if the otherwise compensable injury ceases to be the major contributing cause of the combined condition. The employer bears the burden to show a change in circumstances or a change in condition such that claimant’s otherwise compensable injury ceased to be the major contributing cause of the disability or need for treatment of the combined condition. ORS 656.266(2)(a); *Wal-Mart Stores, Inc. v. Young*, 219 Or App 41, 4190 (2008).

The “otherwise compensable injury” is not defined by the carrier’s acceptance, but rather “the work injury resulting from the work accident that caused the disability or need for treatment.” *Brown v. SAIF*, 262 Or App 640, 651 (2014). In determining major causation of the combined condition, only statutory preexisting conditions may be weighed against the otherwise compensable injury. *Vigor Indus., LLC v. Ayres*, 257 Or App 795, 806 (2013).

To carry its burden, the employer relies on the opinions of Drs. Bergquist and Rosenbaum, who examined claimant on its behalf. Both doctors believed that claimant’s L4-5 and L5-S1 disc conditions were not related to the June 7, 2012 work injury. (Exs. 40-8, 51-7).

As discussed above, the employer accepted L4-5 and L5-S1 disc conditions. Accordingly, the “otherwise compensable injury” necessarily included L4-5 and L5-S1 disc conditions.

Because Drs. Bergquist and Rosenbaum did not consider the full extent of the “otherwise compensable injury” in addressing the major contributing cause of claimant’s disability and need for treatment, their opinions do not persuasively support the employer’s burden of proof. *See Roxie J. Bartell-Fudge*, 66 Van Natta 1009, 1016 (2014). Therefore, we reverse that portion of the ALJ’s order that upheld the employer’s combined condition denial.

Occupational Disease

Claimant bears the burden to establish the compensability of an occupational disease by proving that employment conditions were the major contributing cause of the disease. ORS 656.802(2)(a). We adopt the ALJ’s reasoning with the following supplementation.

Claimant relies on medical evidence attributing his back condition to his June 6, 2012 and September 10, 2012 work incidents to support his occupational disease claim. Claimant cites ORS 656.802(1)(a)(C), which provides that an occupational disease can include “[a]ny series of traumatic events or occurrences which requires medical services or results in disability or death,” and contends that the work injuries were “employment conditions” that can support an occupational disease claim.

Work injuries may be considered among “employment conditions” when evaluating the major contributing cause of an occupational disease. *See Hunter v. SAIF*, 246 Or App 755, 760 (2011); *Kepford v. Weyerhaeuser Co.*, 77 Or App 363,

366, *rev den*, 300 Or 722 (1986). However, we have held that a condition that was attributable to two distinct injuries, without contribution from work activities in general, was not compensable as an occupational disease. *Michael G. O'Connor*, 58 Van Natta 689, 692 (2006). Further, a condition that arises suddenly, rather than gradually, is an injury, not an occupational disease. *Mathel v. Josephine County*, 319 Or 235, 240 (1994).

Claimant relies primarily on Dr. Groner's opinion. However, Dr. Groner's description of claimant's back condition indicates that it involved injuries that arose suddenly as a result of the work incidents, and did not attribute causation to other employment conditions. (Ex. 58). Dr. Groner's opinion is supported the contemporaneous medical record, discussed above, as well as by Dr. Crum's opinion. (Ex. 60).

Accordingly, we conclude that claimant has not established that employment conditions were the major contributing cause of an occupational disease. Therefore, we affirm that portion of the ALJ's order that upheld the employer's alleged *de facto* denial of the occupational disease claim.

Claimant's attorney is entitled to an assessed fee for services at hearing and on review regarding the new/omitted medical condition denial and the combined condition denial. ORS 656.386(1). 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 at hearing and on review regarding the new/omitted medical condition denial and the combined condition denial is \$15,000, payable by the employer. In reaching this conclusion, we have particularly considered the time devoted to the issues (as represented by the record, claimant's appellate briefs, claimants' attorney fee request, and the employer's objection), the complexity of the issues, the value of the interest involved, and the risk that counsel may go uncompensated.

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; *Nina Schmidt*, 60 Van Natta 169 (2008); *Barbara Lee*, 60 Van Natta 1, *recons*, 60 Van Natta 139 (2008). The procedure for recovering this award, if any, is prescribed in OAR 438-015-0019(3).

ORDER

The ALJ's order dated November 6, 2013, as reconsidered on December 13, 2013, is affirmed in part and reversed in part. Those portions of the ALJ's order that upheld the employer's new/omitted medical condition and combined condition denials are reversed. The new/omitted medical condition and combined condition denials are set aside and the claim is remanded to the employer for processing according to law. The remainder of the ALJ's order is affirmed. For services at hearing and on review regarding the new/omitted medical condition and combined condition denials, claimant's attorney is awarded an assessed fee of \$15,000, 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 those denials, to be paid by the employer.

Entered at Salem, Oregon on August 26, 2014